

(2003) 05 GAU CK 0051

In the Gauhati High Court

Case No : W.A. No. 147 of 2000 in WP (C) No. 548 of 2000

Hemam Bihari Singh

APPELLANT

Vs

State of Manipur and Others

RESPONDENT

Date of Decision : 30-05-2003

Acts Referred:

Constitution of India, 1950 — Article 311

Citation : (2003) 2 GLR 671 : (2004) 1 GLT 1

Hon'ble Judges : D. Biswas, J;A.H. Saikia, J

Bench : Division Bench

Advocate : Ashok Patsangbam and S. Nepolean, for the Appellant; Kh. Nemaichand Singh, G.A., for the Respondent

Final Decision : Allowed

Judgement

D. Biswas, J.—Heard Mr. Ashok Potsangbam, learned senior counsel for the appellant and also Mr. Kh. Nemaichand Singh, learned State counsel.

2. The appellant herein as writ petitioner filed W.P.(C) No. 548 of 2000 praying for appropriate directions for review of the D.P.C. proceedings held on 20.11.1999 (Annexure-X/10) with other consequential reliefs. The appellant along with seven other officers were promoted to the post of Superintending Engineer (Electrical on the basis of the recommendation of the D.P.C. held on 12.11.1999 under the auspices of the Manipur Public Service Commission. The appellant, despite promotion, was aggrieved as he was placed below the respondent Nos. 6, 7, 8 and 9 in order of merit.

3. The learned Single Judge dismissed the writ petition primarily on the ground that the respondent authority had made their own assessment, which cannot be termed as arbitrary and discriminatory and the Court in judicial review is not permitted to act as a Court of appeal.

4. Mr. Potsangbam, learned senior counsel argued that the D.P.C. fell in error in the process of assessment of merit by following a method not permissible under

the Rules. There is no dispute that the D.P.C. followed the guidelines prescribed by the Government of Manipur in the department of Personnel & Administrative Reforms vide Office Memorandum dated 20.11.1982 and the said guidelines do not approve of the system of downgrading of the remarks in the A.C.R.

5. Mr. Nimaichand, learned State counsel argued that the D.P.C. under the auspices of the Service Commission considered the respective cases of the officers and, thereafter, assessed their merits. According to the learned State counsel, in the process of assessment and evaluation of respective merit, the D.P.C. is authorised to evolve its own method/ mechanism, and no fault can be found with it.

6. In the Office Memorandum dated 20.11.1982, in para 4, the related provision for preparation of year-wise panel by the D.P.C. is prescribed. We have carefully examined the aforesaid Office Memorandum and we do not find any provision permitting the D.P.C. to re-write the A.C.Rs for the purpose of downgrading.

7. Mr. Potsangbam, learned senior counsel relied upon the decision of the Supreme Court in *Union of India and Another Vs. Tulsiram Patel and Others*, in order to bring home his contention that "when there is express mention of certain things, then anything not mentioned is excluded". It is related to the maxim "*expressum facit cessare taciturn*" which has been dealt with by the Hon'ble Supreme Court in the aforesaid judgment. We may, for better appreciation of the issue urged, quote the relevant part of the judgment which reads as follows :

"The maxim "*expressum facit cessare taciturn*" ("when there is express mention of certain things, then anything not mentioned is excluded") applies to the case. As pointed out by this Court in *B. Shankara Rao Badami v. State of Mysore*, this well-known maxim is a principle of logic and common sense and not merely a technical rule of construction. The second proviso expressly mentions that Clause (2) shall not apply where one of the clauses of that proviso becomes applicable. This express mention excludes everything that Clause (2) contains and there can be no scope for once again introducing the opportunities provided by Clause (2) or any one of them into the second proviso."

Again in para 126 of the said judgment the Supreme Court held as follows :

"126. As pointed out earlier, the source of authority of a particular officer to act as a disciplinary authority and to dispense with the inquiry is derived from the service rules while the source of his power to dispense with the disciplinary inquiry is derived from the second proviso to Article 311(2). There cannot be an exercise of a power unless such power exists in law. If such power does not exist in law, the purported exercise of it would be an exercise of a non-existent power and would be void. The exercise of a power is, therefore, always referable to the source of such power and must be considered in conjunction with it."

8. The ratio available from the judgment in *Tulsiram. Patel* (supra) makes it clear

that an authority exercising a power under certain provisions of law is bound to act within the provisions - express and implicit, and not in a manner not provided therein. Therefore, downgrading of the remarks in the A.C.R. not permitted by the Office Memorandum dated 20.11.1982 ought not to have been restored to by the D.P.C. while evaluating the respective merit of the eight Executive Engineers without recording reasons. It is more so because, downgrading of the remarks in the A.C.R. is adverse and communicable.

9. In *U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and others*, the Supreme Court interpreted the law in the following words:

"3. We need to explain these observations of the High Court. The Nigam has rules, whereunder an adverse entry is required to be communicated to the employee concerned, but not downgrading of an entry. It has been urged on behalf of the Nigam that when the nature of the entry does not reflect any adverseness that is not required to be communicated. As we view it the extreme illustration given by the High Court may reflect an adverse element compulsorily communicable, but if the graded entry is of going a step down, like falling from "Very good" to "good" that may not ordinarily be an adverse entry since both are positive grading. All that is required by the authority recording confidentials in the situation is to record reasons for such downgrading on the personal file of the officer concerned, and inform him of the change in the form of an advice. If the variation warranted be not permissible, then the very purpose of writing annual confidential reports would be frustrated. Having achieved an optimum level the employee on his part may slacken in his work, relaxing secure by his one-time achievement. This would be an undesirable situation. All the same the sting of adverseness must, in all events, not be reflected in such variations, as otherwise they shall be communicated as such. It may be emphasised that even a positive confidential entry in a given case can perilously be adverse and to say that an adverse entry should always be qualitatively damaging may not be true. In the instant case we have seen the service record of the first respondent. No reason for the change is mentioned. The downgrading is reflected by comparison. This cannot sustain. Having explained in this manner the case of the first respondent and the system that should prevail in the Jal Nigam, we do not find any difficulty in accepting the ultimate result arrived at by the High Court."

10. A Division Bench of this Court in *Dr. Th. Rani Devi v. Dr. T. Bilashini Devi & Ors.* (unreported) held as :

"11. In view of the above provision made in the office memorandum, the down grading of the petitioner from "Outstanding" to "Very Good" by the DPC shows that the DPC did not follow the relevant provision of the office memorandum applicable in this case and instead, the DPC preferred to adopt its own procedure while making assessment/selection in the instant case. From the records there is no material to show the basis on which the DPC can adopt its own procedure by down grading the position of the writ petitioner from "Outstanding" to "Very Good". There is also no material on record to show that the DPC can adopt its

own procedure while making the selection, On the other hand, it is found that the DPC instead of following the relevant provision of the office memorandum has gone beyond its scope of selection by not following the procedure laid down by the State respondents. The DPC being a public body is bound to follow the standard and norms prescribed by the State authority and that by not following the said standard and norms, the DPC has exercised its discretion which resulted into arbitrariness. The selection made by the DPC is therefore contrary to the said relevant portion of the office memorandum which in our opinion the DPC has no power to do so."

11. The law is settled. The above decisions lead to the inevitable conclusion that the DPC in the instant case fell in error in downgrading the remarks in the A.C.Rs of the officers in the process of re-evaluating their respective merit at the time of promotion contrary to the provisions of law and, that too, without recording reasons. Hence, placement of the officers in the list recommended by the D.P.C. on merit calls for re-examination.

12. We have also examined the records of the D.P.C. which show that the appellant H. Bihari Singh was graded "Outstanding" for the years 1986-87, 1987-88, 1988-89, 1989-90 and 1990-91. The D.P.C. appears to have downgraded the "Outstanding" remarks for five years and graded the officer as "Very Good". Reasons for such downgrading is also not available on record. An officer who has been graded as "Outstanding" during all the relevant five years ought not to have downgraded as "Very Good" in order to bring him at par with other officers.

13. Initially, on the recommendation of the Manipur Public Service Commission, the appellant along with twelve others were appointed as Assistant Engineer (Elect.) and the appellant was placed at serial No. 1 in the list of appointees. Thereafter, the appellant along with five other Engineers were appointed as Executive Engineer (Elect.) on promotion by the order dated 21st August, 1979 on ad-hoc basis. He was again placed at serial No. 1 in the list of appointees. Subsequently, on the recommendation of the D.P.C. held on 1.10.1994, they were regularly appointed and the appellant was placed at serial No. 5 in order of merit. By the order dated 28th August, 1992, the services of five Executive Engineers including the appellant were regularised with effect from 14.12.1980 and the appellant was placed at serial No. 1. The gradation list dated 12.10.1999 shows that the appellant was at serial No. 7 in the hierarchy of Executive Engineers. His grievance is that had there been no downgrading in the remarks of his ACR, his placement would have been at a higher level and certainly, not at serial No. 5. As we have already observed, the D.P.C. acted beyond its powers and the downgrading was ex-facie perverse for lack of reasons. The appellant appears to have genuine grievances to vindicate and, therefore, his claim for review of the D.P.C. proceedings cannot be rejected outright. When the decision taken by the D.P.C. is based on a procedure not permissible under the law, and the action taken consequently is ex-facie perverse, the Court cannot refuse to

interfere with such a decision on the ground of limited powers in judicial review.

14. We have considered the decisions in Kuldip Chand Vs. State of H.P. and others, and Union of India and Ors. v. Major General U. S. Sidhu 1996 (3) GLT 80 , The judgments have been relied upon by Mr. Nemaichand, learned State counsel in order to appraise the Court about the limitation while exercising the powers of judicial review. For the reasons stated above, we are of the opinion that the ratio available in the aforesaid two judgments are not applicable in the instant case. It is because, the procedure adopted by the D.P.C. in the instant case has been held to be contrary to the provisions of law and beyond the powers of the D.P.C. Downgrading may be permissible in cases for good reason solely for the purpose of evaluation of merit. An officer consistently graded "Outstanding" cannot be downgraded as "Very Good" in order to bring him at par with others, particularly when two of his seniors are mere diploma holders. Downgrading of the remarks, in the A.C.R. of the appellant is the crux of the decision making process and the same, when unfair and unjust, vitiates the selection process.

15. We, therefore, allow the appeal ; set aside the judgment and order dated 2.8.2000 passed by the learned Single Judge in W.P.(C) No. 5487 2000 and direct the respondent authority to take steps for review of the proceedings of the D.P.C. dated 20.11.1999 (Annexure-X/10) within a period of four months from today.

16. The records of the D.P.C. be returned to the learned State counsel.

17. No costs.