

(2002) 12 AP CK 0067

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 25176 of 1998 and 17513 of 2001

K.R. Venkoba Rao

APPELLANT

Vs

Central Administrative Tribunal, Hyderabad Bench and Others

RESPONDENT

Date of Decision : 05-12-2002

Acts Referred:

Citation : (2003) 2 ALD 822 : (2003) 1 ALT 773

Hon'ble Judges : D.S.R. Varma, J; Bilal Nazki, J

Bench : Division Bench

Advocate : G. Ramachandra Rao, for the Appellant; R.S. Murthy, SC for Railways for Respondent Nos. 2 and 3, for the Respondent

Final Decision : Dismissed

Judgement

D.S.R. Varma, J.—Since the issue involved in both the writ petitions is interrelated and the parties being one and the same, we are disposing of both the writ petitions by this common order.

2. The writ petitioner in both the writ petitions is the applicant before the Central Administrative Tribunal, Hyderabad (for short "the Tribunal") in OA Nos.874/1996 and 1673/1998.

3. WP No.25176/1998 is filed challenging the judgment dated 11-3-1998 passed by the Tribunal, in OA No.874/1995 and WP No.17513/2001 is filed challenging the judgment dated 14-2-2000 passed by the Tribunal in OA No.1673/1998.

4. The facts leading to the filing of the O.As. and the writ petitions in brief are as follows:-

5. The petitioner was working as Chief Permanent Way Inspector in the South Central Railway. He was eligible and qualified for the next higher post of Assistant Engineer. A notification dated 11-11-1993 proposing to hold selection for formation of the panel in the Civil Engineering Department for promotion to 56 posts of Assistant Engineers, was issued. The said notification indicates that

selection will be by way of written test, followed by viva-voce. Qualifying marks is 90 per cent out of 150 marks, to be eligible for appearing for viva-voce. A list of 191 eligible candidates was prepared. The petitioner appeared in the written test on 12-3-1994 and he was found fit in all areas and was called for viva-voce and accordingly he participated along with other eligible candidates. It is stated that a minimum of 15 marks has to be secured in the record of service to qualify in the viva-voce. After the selection process, a list of 52 candidates for promotion was announced. But the petitioner could not find place in the said list of selected candidates. He made a representation upon his non-selection to the 3rd respondent and the same was rejected on 9-1-1995. Hence, he filed the OA No.874/1995.

6. It was contended by the petitioner before the Tribunal that there were no proper guidelines before the Selection Committee in awarding marks based on record of service and he was denied selection arbitrarily, inasmuch as there was no adverse remarks against him in preceding five years of selection.

7. It was his further contention before the Tribunal that some other ineligible candidates, who were juniors to him, were selected. At this juncture itself we want to point out that the so-called ineligible candidates whose names were specifically referred to by the petitioner both in the OA as well as in the writ petition, were not made as parties either in the OA or in the writ petition.

8. He further contended before the Tribunal that there were no adverse remarks to his knowledge, and even if there were any, the same were not communicated to him and hence he stated that such uncommunicated adverse remarks shall not be taken into account.

9. The Tribunal having considered this specific contention and having perused the records, held that Railway Administration has not communicated the adverse entries entered in the CR of the petitioner for the period ending 31-3-1991 before finalizing the CR. Hence, the Tribunal directed the respondents to communicate the adverse remarks recorded in the year 1991-92 to the petitioner and after obtaining his remarks, the accepting authority should decide whether those adverse remarks should remain in the CR or they should be expunged. The Tribunal further directed that the whole records i.e., the confidential records of the petitioner for the years 1990 to 1994 should be put before the review DPC to assess afresh with regard to grant of marks for the records of service and on that basis if the petitioner gets the minimum marks required in the record of service and qualifies for the empanelment, he should be included in that list prepared for the year 1994 and that all the reliefs should be given to him.

10. In compliance of the above direction of the Tribunal, the official respondents communicated the adverse remarks to the petitioner and the petitioner also answered them. However, since the remarks of the petitioner were not found satisfactory, the adverse remarks were not expunged and the same were placed before the review DPC and hence the petitioner could not obtain the minimum

marks required in the record of services and he was found ineligible and his case was rejected and orders were passed in this regard on 9-4-1998.

11. Challenging the proceedings dated 9-4-1998 communicating the adverse remarks for the year ending 31-3-1991 and 1992 the petitioner filed another application in OA No.1673/1998 before the Tribunal and the same was dismissed by the Tribunal on the ground that the contentions raised in the latter OA were not raised in the earlier OA/.e., OA No.874/1995 and the contentions raised in the subsequent OA were totally in deviation to his earlier contentions. It was further held that had these contentions been raised in the earlier OA., the issue would have been considered in a different way. Aggrieved by the orders of dismissal the other writ in WP No. 17513 of 2001 is filed.

12. From the counter-affidavit filed by the official respondents it is clear that pursuant to the directions of the Tribunal in OA No.874/1995, 3rd respondent communicated the adverse remarks pertaining to the period from 31-3-1991 to 31-3-1992 and the petitioner offered his remarks and considering the remarks offered by the petitioner, the competent authority did not choose to expunge the adverse remarks. Further as directed by the Tribunal the entire record of the petitioner pertaining to the years 1990 to 1994 were placed before the review DPC along with the remarks of the accepting authority and in spite of which the petitioner was found unfit and later in the year 1999 in normal course, the petitioner was promoted.

13. From the above, the point that falls for consideration is what is the effect of consideration of un-communicated adverse remarks to the petitioner, in the process of selection by DPC?

14. Hence it is necessary to consider the decisions cited by the petitioner in this regard. In the decision reported in *Gurudial Singh Fijji v. State of Punjab* 1979 (1) SLR 804, the Supreme Court held that adverse entries cannot be acted upon, unless communicated to the person concerned. Here it is necessary to extract the relevant portion of the judgment of the Supreme Court at paragraph No. 16 as under:

"The principle is well-settled that in accordance with the rules of natural justice, an adverse report in a confidential roll cannot be acted upon to deny promotional opportunity unless it is communicated to the person concerned so that he has an opportunity to improve his work and conduct or to explain the circumstances leading to the report. Such an opportunity is not an empty formality, its object, partially, being to enable the superior authorities to decide on a consideration of the explanation offered by the person concerned, whether the adverse report is justified."

15. In the said case also non-selection was challenged and the High Court after verification of the records found that there were some adverse remarks in the C.Rs of the appellant therein and also found that they were not communicated to the appellant. It also appears that the appellant therein in respect of adverse

entries made in his C.Rs, made some representation, but the same was not disposed of. Therefore, the Supreme Court after elaborate discussion, directed the State Government to consider and dispose of the representation made by the appellant as regards the adverse entries made in his confidential report within a period of two months from the date of judgment. The Apex Court further directed the Selection Committee to decide within three months thereafter whether the applicant should be included in the Select List and such question has to be decided in accordance with the relevant regulations by applying test of merit and suitability-cum-seniority. It was further held that if the Committee decides that he is not suitable for inclusion in the Select List and should therefore be superseded, it shall record its reasons for the proposed supersession and in case the Committee decides to include his name in the Select List, he shall be entitled to rank in that list in accordance with seniority as on the date of original selection.

16. Further in the decision reported in *Amar Kant v. State of Bihar* 1984 (1) SLR 471, in similar circumstances, the Apex Court considering its earlier decision in *Gurudial Singh Fijji Case*, (supra) held that un-communicated adverse remarks shall not be taken into consideration by the Selection Committee. In the said case, it appears that in respect of adverse remarks, the petitioner therein made a representation, but the same was not disposed of. Further it appears that the State Government later expunged the said adverse remarks. But the favourable remarks were not placed before the Selection Committee. In these circumstances, the Apex Court directed . the Selection Committee to reconsider the case of the appellant therein in the light of the orders passed by the State Government and held that if the appellant is selected, he shall be entitled to the seniority and all other consequential benefits flowing therefrom, from the date of original selection.

17. The principles laid down by the Supreme Court are well established as regards the effect of non-communication of the adverse remarks to the individuals in the process of selection. The effect is that the non-selection basing on such un-communicated adverse entries, should not be permitted to operate against the individual, if he is found to be fit otherwise.

18. Further from the above two judgments of the Supreme Court two points are also clear viz., (1) that the whole selection will not be vitiated and (2) such noncommunication of adverse remarks to an individual will not create a right of his automatic selection.

19. Further the categorical indication is that the injustice caused to the individual because of consideration of his un-communicated adverse remarks, can be corrected by directing the authorities to give an opportunity to the individual to offer his representation/explanation to such adverse entries in his service records and after considering the same, the adverse entries shall either be retained in the records or be expunged and the entire record with reasons for either retaining or expunging such remarks shall be placed before the Selection Committee and upon the same, the Selection Committee shall re-consider the

case of the individual about his entitlement for selection.

20. Coming to the case on hand, it is on record that the Tribunal after verification of the records found that there were some adverse entries in his records of service for the period between 1991 and 1992. But it also noticed that the said adverse entries were not communicated to the petitioner. Therefore, in order to eliminate or cure the injustice caused to the petitioner, the Tribunal issued the following directions:--

"In view of what is stated above, we are of the opinion that now the adverse remarks entered in the CRs of the applicant for the year ending 31-3-1991 and 31-3-1992 should be informed to the applicant and his remarks obtained thereon and on the basis of the remarks submitted by him, the accepting authority should decide whether those adverse remarks should remain in the CR or they should be expunged. The clear remarks of the accepting authority should be entered in the CRs of the applicant for the years ending 31-3-1991 and 31-3-1992. Then the whole records i.e., the CRs of the applicant for the years 1990 to 1994 (both the years inclusive) should be put up before the review DPC to assess afresh in regard to grant of marks for the records of services. If on that basis the applicant gets the minimum marks required in the record of service and qualifies for the empanelment, he should be included in that empanelment list. If the applicant is empanelled in pursuance of the above direction, the applicant is entitled for all consequential benefits such as seniority and pay on par with his juniors who were promoted from the empanelment list of Asst. Engineer which was issued on 30-9-1994."

21. Accordingly we answer the issue framed in affirmative. We are also of the view that considering the over-all circumstances, the Tribunal had rightly issued above directions and we are in complete agreement with the Tribunal in this regard inasmuch as they are in consonance with the directions of the Supreme Court in the decisions cited supra and accordingly we are of the view that the WP No.25176 of 1998 filed challenging the orders of the Tribunal in OA No.874/1995 is liable to be dismissed.

22. Coming to the second OA No. 1673/ 1998, the contention of the petitioner appears that un-communicated adverse remarks should totally be ignored. At the outset we are of the view that this contention cannot be accepted.

23. Before advertng to the above contention, we would like to consider the decision of the Supreme Court in State Bank of India and others Vs. Mohd. Mynuddin, , wherein it was held that assessment made by the Selection Committee shall not be interfered with by the Courts. The relevant portion at paragraph No.5 is extracted as under for better appreciation :-

"..... The Court is not by its very nature competent to appreciate the abilities, qualities or attributes necessary for the task, office or duty of every kind of post in the modern world and it would be hazardous for it to undertake the responsibility of assessing whether a person is fit for being promoted to a higher

post which is to be filled up by selection. The duties of such posts may need skills of different kinds -scientific, technical, financial, industrial, commercial, administrative, educational etc., the methods of evaluation of the abilities or the competence of persons to be selected for such posts have also become now-a-days very much refined and sophisticated and such evaluation should, therefore, in the public interest ordinarily be left to be done by the individual or a Committee consisting of persons who have the knowledge of the requirements of a given post to be nominated by the employer."

24. The following would emerge for a combined reading of the above three judgments of the Supreme Court:--

1. Communication of adverse remarks entered in the confidential reports is imperatively mandatory;

2. The selection committee shall not place any reliance on any un-communicated adverse remarks;

3. And even if any reliance is placed by the Selection Committee, the whole selection process would not get vitiated and only those individual or individuals whose promotions are denied based on such consideration of un-communicated remarks, should be examined afresh. For considering their cases afresh, the individual should be communicated such adverse remarks which are in their confidential reports and after calling for their explanation, the competent authority should either allow such adverse remarks to remain on record or expunge them and in either case, with reasons recorded. As stated above, such re-consideration should be in the light of above records in a justice and unbiased manner;

4. After such re-consideration, if the individual is found fit, he shall be entitled to all the attendant benefits including seniority right from the date of original selection and on the other hand, if the individual is found unfit, his case shall be rejected by recording reasons; and

5. The assessment made by the Selection Committee in selecting or rejecting an individual shall not be interfered with by the Courts in normal course.

25. Coming to the case on hand, it is to be noted that pursuant to the directions of the Tribunal as extracted above, the adverse entries were communicated to the petitioner and the petitioner offered his remarks/ explanation and after considering the same by the competent authority, it declined to expunge such adverse remarks from the service records of the petitioner and for doing so, it had recorded reasons and further as directed by the Tribunal, the preceding five years service records from the year 1994 along with the reasons for non-expunging of adverse remarks, were placed before the review DPC and despite which the petitioner could not secure the minimum required marks in the records of service and as a result, he was denied promotion by such review DPC.

26. Further, the claim of the petitioner in the earlier OA No.874/1995 is that

there were no adverse remarks at all and even if there was any, the same were not communicated to him. The Tribunal after verification of the records, agreed with the contention of the petitioner and passed the above directions and in spite of compliance of the directions of the Tribunal, the petitioner was found unfit and accordingly it passed the orders. Challenging those orders, he filed the other OA No.1673/1998 contending that un-communicated adverse remarks should totally be ignored. Having regard to the above judgments of the Supreme Court we are of the view that this plea is not available to the petitioner. It is to be further noticed that the hardship or disadvantage caused to the petitioner at the time of initial selection was rectified by the directions of the Tribunal in OA No.874/1995.

27. Further it is also to be noticed that had the petitioner been found fit in the review DPC, he would have got all the benefits from the date of initial Selection. Nextly as per the observations of the Supreme Court, it is not for this Court to substitute its view with that of DPC.

28. Hence, in view of the above reasons, the second writ petition in WP No.17513/2001 is also liable to be dismissed.

29. For the foregoing reasons, we pass the order as under:--

30. The impugned orders of the Tribunal are confirmed and both the writ petitions are dismissed. No costs.