

(1985) 07 BOM CK 0003
In the Bombay High Court
Case No : Writ Petition No. 619 of 1983

P.R. Shendulekar

APPELLANT

Vs

Settlement Commissioner and Director of Land Records

RESPONDENT

Date of Decision : 22-07-1985

Acts Referred:

Constitution of India, 1950 — Article 226, 311

Citation : (1985) 87 BOMLR 683

Hon'ble Judges : R.A. Jahagirdar, J;Khandekar, J

Bench : Division Bench

Final Decision : Allowed

Judgement

R.A. Jahagirdar, J.—The petitioner was holding at the relevant time the post of Senior Clerk in the office of the Chief Settlement Commissioner and the Director of Land Records whose headquarters are at Pune. He came to hold this post after prolonged litigation. He had to approach this Court under Article 226 of the Constitution on more than one occasion. Ultimately, by an order dated March 6, 1981 he came to "be appointed to the post of the Senior Clerk with effect from January 16, 1975. Even this appointment was not strictly in accordance with the directions given by this Court in earlier litigation and subsequently by an order dated May 24, 1982 the petitioner's deemed date of promotion in the post of Senior Clerk was fixed as on February 15, 1971. In the seniority list of the Senior Clerks, the petitioner was at Sr. No. 11, while respondents Nos. 3 and 4 were at Sr. Nos. 14 and 15 respectively.

2. Respondent No. 1 is the Settlement Commissioner and the Director of Land Records, while respondent No. 2 is the State of Maharashtra. In the return filed on their behalf, it has been admitted that the petitioner, succeeded in getting the order dated March 6, 1981 and the order dated May 24, 1982 by resorting to legal action and threat of legal action and even, the threat of prosecution under the Contempt of Courts Act. Respondents Nos. 3 and 4 figure in this petition because by an order dated December 31, 1982 they were promoted to the higher

post of Assistant Consolidation Officer disregarding the seniority of the petitioner in the category of the Senior Clerks. A notice was issued on behalf of the petitioner on March 2, 1983 challenging the supersession of the petitioner while making the appointments to the higher posts of the Consolidation Officer. To this notice the first respondent replied that the name of the petitioner was placed before the Departmental Promotion Committee which

did not find him suitable for promotion to the cadre of District Inspector of Land Records on the basis of his confidential remarks.

3. The action of the first respondent in refusing to promote the petitioner on the post on which respondents Nos. 3 and 4 were promoted OR the basis of his confidential remarks is the subject-matter of challenge in this petition under Article 226 of the Constitution. The petitioner's case is that the confidential remarks on the basis of which the promotion has been denied to him were never communicated to him and he was not given an opportunity of making representation against the same. Mr. Badve has justifiably relied upon the judgment of the Supreme Court in *Gurdial Singh Fijji Vs. State of Punjab and Others*, In particular he has placed reliance on the following to be found in the said judgement which lays down the law relating to the non-communication of the adverse confidential remarks (Para 17 of the Judgment on page 376 of the Report):

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 opportunities 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. Unfortunately, for one reason or another, not arising out of any fault on the part of the appellant, though the adverse report was communicated to him, the Government has not been able to consider his explanation and decide whether the report was justified. In these circumstances, it is difficult to support the non-issuance of the integrity certificate to the appellant. The chain of reaction began with the adverse report and the infirmity in the link of causation is that no one has yet decided whether that report was justified. We cannot speculate, in the absence of a proper pleading, whether the appellant was not found suitable otherwise, that is to say, for reasons other than those connected with the non-issuance of an integrity certificate to him.

4. In the return filed on behalf of the first respondent, it has been specifically admitted that the confidential remarks on the basis of which the Departmental Promotion Committee denied the promotion to the petitioner were not communicated to him. However, it has been contended that such remarks were not required to be communicated if the same were placed before the Departmental Promotion Committee, which was entitled to consider all the

material and assess the suitability of the candidates for promotion to the higher post. Mr. Naik for respondents Nos. 1 and 2 has relied upon a Full Bench judgment of this Court in Y.V. Thatte Vs. State and Maharashtra and another, . According to Mr. Naik, the Full Bench has held that in the case of non-promotion to a higher post, confidential remarks need not be communicated if the said remarks are placed before the Departmental Promotion Committee. According to Mr. Naik, while so holding the Full Bench has relied upon a judgment of the Supreme Court in Prakash Chand Sharma v. O.N.G.C. (1970) S.L.R. 116 (S.C.) and has interpreted Gurdial Singh's case (supra) as well as R.L. Butah Vs. Union of India (UOI) and Others, The question that falls for determination before us is whether Mr. Naik's reading of the Full Bench judgment is correct.

5. In the case before the Full Bench the facts were as follows: The petitioner and one S.B. Yasin had been appointed as stop-gap arrangement to a higher post in Class-I. However, the appointment itself was subject to the following condition:

Special report on the performance of these two officers should be obtained to consider their further continuance in Class I posts.

Subsequently, finding that the performance of the petitioner was not satisfactory, he was reverted to the substantive post though the confidential reports on the basis of which the performance of the petitioner was assessed were not communicated to the petitioner before the Full Bench. The reference to the Full Bench had been made by another Division Bench because the latter thought that there was an apparent conflict between Shankar A tram v. Chief Conservator of Fores (1977) Mh. LJ. 536 and Nathu v. Commissioner, Nagpur Division (1983) Mh. L.J. 1108. It should be noted that the reversion of the petitioner before the Full Bench was from an officiating post to his substantive post. It was not a reversion from a substantive post in which case it would have been a punishment and that could not have been done without following the provisions of Article 311 of the Constitution.

6. The Full Bench, in fact, found:

Strictly, therefore, there cannot be said to be a conflict between the view in Nathu's case and the view taken in Shankar's case.

The Full Bench also noted that both in the case of reversion from an officiating post and in the case of promotion, a claim to a higher post is a common factor but the nature of the action in both cases is entirely different. Proceeding further, the Full Bench said that where a person is not considered for promotion, he can be considered" and if necessary, promotion which has been wrongly denied to him can be restored to him and if a promotion has been wrongly denied to him, the injustice caused by such wrongful denial can be remedied. However, in the course of its judgment, the Full Bench did examine several other judgments reading of which, according to Mr. Naik, leads to the conclusion that the order refusing to promote a person to a higher post need not be set aside and, indeed, cannot be set aside on the ground that the confidential remarks which formed

the foundation of the refusal to promote have not been communicated to the person concerned.

7. It is, therefore, necessary to find out whether the Full Bench has taken the view which is being commended to us by Mr. Naik, As already mentioned above, the Full Bench considered various judgments touching upon the said issue in question. The first of the judgments which was examined by the Full Bench was Prakash Chand Sharma (supra) and the following to be found in the said judgment was noticed by the Full Bench (page 1023 of Mh.L.J. & at p. 289 of 86 Bom. L.R.): -

If the adverse remarks were there in the confidential reports it was the duty of the departmental promotion committee to take note of them and come to a decision on a consideration of them. The Committee could not be expected to make investigation about the confidential reports. It appears to us that in this case there was no discrimination, purposeful or otherwise, and at the best, the Committee's taking into consideration confidential reports with respect to which the petitioner had been given no chance to make a representation was merely fortuitous. In such a state of affairs, we are not satisfied that any interference is called for and the rule will, therefore, be discharged.

From the quoted observations of the Supreme Court., the Full Bench came to the conclusion that the failure to consider for promotion or failure to promote a person cannot become automatically infirm merely by the fact that the adverse remarks were not communicated. This conclusion of the Full Bench was arrived at because the Supreme Court itself in Prakash Chand Sharma's case noticed that the non-communication of the confidential remarks in that case, did not constitute a discrimination, purposeful or otherwise. The Full Bench did not hold that the non-communication of confidential reports, which formed the basis of non-promotion, was of no consequence.

8. In R.L. Entail's case also, adverse confidential remarks had not been communicated to the petitioner. The Full Bench again referred to the following to be found in the judgment in R.L. Butai's case (Page 1024 of Mh.L.J. & at p. 290 of 86 Bom. L.R.): -

These rules abundantly show that a confidential report is intended to be a general assessment of work performed by a Government servant subordinate to the reporting authority, that such reports are maintained for the purpose of serving as data of comparative merit when questions of promotion, confirmation etc. arise. They also show that such reports are not ordinarily to contain specific incidents upon which assessments are made except in cases where as a result of any specific incident a censure or a warning is issued and when such warning is by an order to be kept in the personal file of the Government servant. In such a case the officer making the order has to give a reasonable opportunity to the Government servant to present his case. The contention, therefore, that the adverse remarks did not contain specific instances and were, therefore, contrary

to the rules, cannot be sustained. Equally unsustainable is the corollary that because of that omission the appellant could not make an adequate representation and that therefore the confidential reports are vitiated.

Here also, it was held that the non-communication of adverse remarks by itself will not vitiate the order of the denial of promotion, because, on the facts of that case, when the Court was called upon to give relief, it was noticed that his representation in respect of the adverse entries had been rejected and it was a relevant fact in deciding whether any injustice was caused to the appellant.

9. Supreme Court itself in a recent judgment in *Amar Kant Choudhary Vs. State of Bihar and Others*, has explained the decision in *R.L. Butail's* case. It has been pointed out by the Supreme Court that the appellant before it had contended that the omission to consider his representation before the date of the meeting of the Committee vitiated its decision. The Court held that the omission either to place the said representation before the Committee or its non-consideration before the date of the meeting had no effect on the decision of the Committee as the representation had actually been rejected subsequently with the result that the confidential report for the year in question had remained unchanged.

10. Now, we come to the judgment of the Supreme Court in *Gurdial Singh Fijji's* case. The same has been considered by the Full Bench in paragraph 13 of its judgment and the following law to be found in the said judgment has also been reproduced in the judgment Of the Full Bench and quoted earlier in this judgment [at p. 684].

11. Here again, the Full Bench noticed that non-communication of the adverse confidential report by itself was not fatal to the order of non-promotion. The Full Bench noticed that the effect of *Gurdial Singh's* case was that there has to be a reconsideration of the claim for the promotion. Indeed, if one notices the facts of *Gurdial Singh's* case, it would be seen that it was directed that the case of the appellant before the Supreme Court would have to be considered afresh by the Selection Committee and such a direction was in fact given in paragraph 20 of the judgment in *Gurdial Singh's* case.

12. The review which the Full Bench made of the different judgments of the Supreme Court led it to the conclusion that the non-communication of adverse remarks by itself was not fatal to the action taken if at the time when the Court is called upon to give relief to the petitioner the defect is cured. This view was arrived at on the basis of the judgment in *Prakash Chand Sharma's* case and in *R.L. Butail's* case. In *Gurdial Singh's* case, the non-communication of the adverse remarks was held to be illegal and, therefore, it was directed that the case should be referred back to the Selection Committee. It is a total misreading of the judgment of the Full Bench to say, as Mr. Naik has sought to say, that the confidential reports need not be communicated at all if the same are placed before the Departmental Promotion Committee. It is also a misreading of the judgment of the Full Bench to suggest that the action based upon the non-

communication of the adverse remarks is not vitiated on the ground of non-communication. At no place has the Full Bench taken the view that no relief could be given to a person who has been denied the promotion on the ground of adverse confidential reports, which have not been communicated to him.

13. In fact, the question is no longer *res integra*, because of the Supreme Court decision in Amar Kant Chaudhary's case, to which we have made a reference earlier. The facts of that case disclose that the appellant before the Supreme Court who was a Deputy Superintendent of Police in the State of Bihar had been denied promotion to the higher post on the basis of confidential remarks which had not been communicated to him. The Supreme Court noted as follows Amar Kant Choudhary Vs. State of Bihar and Others,

The main point urged before us is that the Selection Committee had committed an illegality in rejecting the claim of the appellant for being included in the select list in the year 1976 by relying upon the adverse entries which had been in his confidential rolls which had not been either communicated to him or against which he had made representation which had remained undisposed of and which had been subsequently expunged.

Reliance had been placed before us on the judgment of the Supreme Court in R.L. Butail's case (*supra*), which the Supreme Court distinguished from the facts involved in Amar Kant Choudhary's case. As already mentioned earlier in this judgment, the Supreme Court had held in R. L. Butail's case that the omission either to place the representation before the Committee or its non-consideration before the date of the meeting had no effect on the decision of the Committee because the representation which the appellant had made had been actually rejected subsequently with the result that the confidential report for the relevant year remained unchanged. The Supreme Court re-stated the legal position in Gurdial Singh's case, which means that the denial of promotion to a Government servant on the basis of adverse confidential reports which were not communicated was contrary to law. Therefore, appropriate action depending upon the facts of each case had to be taken to remedy the illegality. In Amar Kant Choudhary's case, ultimately the Supreme Court found as follows Amar Kant Choudhary Vs. State of Bihar and Others,

After giving our anxious consideration to the uncontroverted material placed before us we have reached the conclusion that the case of the appellant for promotion to the Indian Police Service Cadre has not been considered by the Committee in a just and fair way and his case has been disposed of contrary to the principles laid down in Gurdial Singh Fijji's case. The decisions of the Selection Committee recorded at its meetings in which the case of the appellant was considered are vitiated by reason of reliance being placed on the adverse remarks which were later on expunged.

14. On an examination of the authorities governing the field, our conclusion is that there is no variation from the law laid down by the Supreme Court in Gurdial

Singh's case. No person can be condemned without being heard. May be in a given case the defect is cured or can be cured. But the basic principle of law that a person cannot be denied promotion on the basis of adverse confidential reports not communicated, stated in Gurdial Singh's case and re-affirmed in Amar Kant Choudhary's case, stands wholly unimpaired. On the facts before us, it is noticed that no opportunity was given to the petitioner to make representation against the adverse confidential report which must, therefore, result in the decision of the Departmental Promotion Committee being vitiated. The position is exactly as was found to be in Amar Kant Choudhary's case. The petition, therefore, must succeed.

15. The petition is accordingly allowed. The order dated December 31, 1982 by which respondents Nos. 3 and 4 were promoted is set aside. The first two respondents shall place the case of the petitioner before the Departmental Promotion Committee without the adverse confidential report. The Departmental Promotion Committee shall promote him, if he is found otherwise fit. Consequent action, if necessary, of reverting either respondent No. 3 or respondent No. 4 may be taken. In view of the fact that the petitioner has been repeatedly subjected to litigation in the past by the action of the first two respondents, we are of the opinion that some time-limit should be fixed for the consideration of the petitioner's case. We direct that the first two respondents shall call for a meeting of the Departmental Promotion Committee as early as possible and, in any case, action on the case of the petitioner shall be taken not later than October 31, 1985. On the facts of this case, it is necessary that respondents Nos. 1 and 2 shall pay the costs of this petition to the petitioner. We accordingly direct that respondents Nos. 1 and 2 shall pay the costs of the petitioner in this petition.