
(2015) 01 DEL CK 0159
In the Delhi High Court
Case No : Writ Petition(C) 43/2014

Pramod Ramjee Sahare

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 06-01-2015

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2015) 2 SLJ 99

Hon'ble Judges : Vipin Sanghi, J.;S. Ravindra Bhat, J.

Bench : Division Bench

Advocate : Malaya Kumar Chand and Prateek Tushan Mohanty, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Vipin Sanghi, J.

1. The present Writ Petition has been preferred by the Petitioner under Article 226 of the Constitution of India to assail the order dated 18.07.2013 passed in O.A. No. 3551/2011 by Central Administrative Tribunal, Principal Bench, Delhi (CAT/ Tribunal), whereby the Tribunal disallowed his said original application. The Petitioner had sought to assail the adverse entries in his Annual Confidential Report (ACR) for the years 2006-07 and 2007-08 and had sought a direction that these entries be ignored by the Departmental Promotion Committee (DPC) for consideration of his promotion to the Functional Senior Administrative Grade (SA Grade). The Tribunal, while rejecting the Petitioner's plea, returned the finding that the respondents had placed sufficient material on record to indicate that he had been adequately cautioned prior to recording his ACRs and adequate opportunity had been extended to him for improvement. Only thereafter, the ACRs for the years 2006-07 and 2007-08 had been recorded.

2. The petitioner was appointed as an Assistant Divisional Medical Officer on 07.08.1980 in the Indian Railways with MBBS qualification. On 09.10.1987, the

petitioner was promoted as a Divisional Medical Officer (DMO), and on 16.03.1992, he was promoted as Senior DMO and, thereafter, was elevated to Senior DMO Selection Grade on 06.06.2000. He retired on superannuation on 31.07.2011.

3. On 25.06.2007, adverse remarks in the ACR for the year ending 31.03.2007 were communicated to the petitioner by the General Manager (GM), Central Railway (C.Rly.), Mumbai vide letter dated 14.06.2007. The petitioner made a representation against the same to the GM on 17.07.2007. The aforesaid representation was turned down, which was communicated to the Petitioner vide letter no. CON.216/Adv/2006-07 dated 08.07.2008.

4. Thereafter, the Petitioner filed an appeal dated 07.08.2008 to the Chairman Railway Board (CRB), New Delhi on the ground that there was no warning/displeasure/reprimand communicated to him during the period of 2006-07, and, thus, the recording of the Adverse ACR was not justified. The appeal was not accepted by the competent authority as per GM's confidential letter dated 02.03.2009. Subsequently, the petitioner was transferred from Railway Hospital Nagpur to Ajni Health Unit on 21.01.2008.

5. The Petitioner was informed of the adverse remarks recorded in the ACR for the year ending 31.03.2008 (i.e. 2007-08) vide GM's confidential letter no. CON.216/Adv/2007-08 dated 26.08.2008. Subsequently, the petitioner submitted a representation dated 08.10.2008, against the said ACR for the year 2007-08. The said representation was rejected by the GM, Central Railway vide letter dated 04.02.2009. Thereafter, the Petitioner appealed to the CRB, New Delhi on 05.03.2009 through Chief Medical Superintendent, Bhusaval (CMS-BSL). The appeal was also rejected by the competent authority on 05.08.2010.

6. On 18.09.2009, and again on 27.01.2010, the petitioner made a representation to the Chairman, Railway Board, regarding the adverse remarks in ACR for the year 2006-07 and 2007-2008. He further requested for promotion to the SA Grade.

7. Aggrieved by the adverse remarks made in his ACRs, the petitioner filed O.A. No. 540/2010 before the CAT. The Tribunal vide Order dated 06.04.2010 directed the respondents to consider the appeal of the petitioner and pass a reasoned and speaking order. Thereafter, a C.P. No. 487/2010 in O.A. No. 540/2010 was also filed, which was decided vide order dated 18.08.2010. In compliance of the aforesaid orders, the petitioner was communicated the memorandum dated 01.12.2010, after consideration of his representation, wherein the respondent stated that there is no requirement for revision of the ACRs for the year 2006-07 and 2007-08.

8. The petitioner was denied appointment to officiate in the SA Grade. However, 35 of his juniors were appointed to officiate in the SA Grade, w.e.f. 07.01.2009, vide Railway Board letter dated 21.05.2009. Further, he was denied promotion under the Dynamic Assured Career Progression Scheme (DACP Scheme), while

507 of his juniors were promoted in SA Grade vide Railway Board letter dated 14.10.2009. The petitioner had also been denied promotion to functional SA Grade, while 16 of his juniors were posted to SA Grade as CMS/MD etc. - which is a functional SA Grade, vide Railway Board letter 04.05.2010. Being aggrieved, the petitioner preferred the Original Application i.e. O.A. No. 2963/2010.

9. The aforesaid application was disposed of by the Tribunal on 08.04.2011, inter alia, by directing the competent authority to re-consider the representation of the petitioner. The Respondents, in compliance with the order of the CAT, passed a reasoned and speaking order dated 01.07.2011. Subsequently, the Tribunal vide order dated 08.08.2011 disposed of the C.P. 538/2011 in O.A. 2963/2010, as the respondents had already passed an order in compliance of the order in O.A. No. 2963/2010.

10. The petitioner, being aggrieved by the order dated 01.07.2011 of the respondents filed O.A. No. 3551/2011. The Tribunal dismissed the application in limine vide order dated 30.09.2011. He further challenged the order of the Tribunal dated 30.09.2011 in W.P. (C) No. 8972/2011. This Court by its order dated 20.04.2012, remanded back the matter to the Tribunal for re-consideration on two pleas, as they had been raised by the Petitioner but there was no discussion pertaining to the same, in the order of the CAT. The two pleas for consideration were:

(i) In respect of the ACR for the year 2006-07, the adverse remarks were communicated to him, but he was neither warned nor counseled in this regard. Therefore, the ACR could not be taken into consideration for promotion to the post of SA Grade.

(ii) The ACR for the year 2007-08 could not be considered by the DPC held on 31.12.2008 in view of the DOPT letter no. 22011/9/98-Estt(D) dated 16.06.2000.

11. The Tribunal heard the matter on the aforesaid aspects and, vide order dated 18.07.2013, dismissed the O.A. 3551/2011 on the ground that it is devoid of any merit. Aggrieved by the said impugned order of the CAT, the petitioner has preferred the present Writ Petition.

12. The Petitioner, appearing in person, submits that the adverse remarks in the ACRs for the year 2006-07 and 2007-08 are illegal and unjustified and, therefore, could not be given effect to as per Railway Board letter dated 16.09.1998 and DoPandT's O.M. dated 30.01.1978 as well as Item 4.10 and 4.11 of Brochure on Confidential Reports issued by Railway Board. We may note that the petitioner, in the ACR for the year 2006-07, was initially graded as "Very Good" by the reporting authority (Dr. Suhas Nandgave, Chief Medical Superintendent, Nagpur), however, the reviewing authority (Mr. Sunil Kumar Agarwal, Divisional Railway Manager, Nagpur) downgraded his grading to "Good", which was agreed by the second reviewing authority, and accepted by the accepting authority.

13. The Petitioner submits that the ACR grading for the year ending 31.03.2007 was downgraded from "Very Good" to "Good" without any warning to him. Even in the fitness column, the reviewing authority gave a "No" for promotion, unlike earlier, whereas the reporting authority had considered him "fit" for promotion. He further submits that the Tribunal made an erroneous observation to conclude that enough evidence was available on record to hold that the applicant was warned during the period of 2006-07, whereas there is no documentary evidence to that effect.

14. The petitioner relies on Sukhdeo Vs. Commissioner Amravati Division, Amravati and Another, , wherein the Supreme Court observed that it was the obligation on the competent authority to communicate the deficiency or fall in performance, and give prior opportunity in writing to the officer, before recording an adverse remarks.

15. Petitioner submits that the DPC for the year 2008-09 was held on 31.12.2008. For the aforesaid vacancy year, the panel took into consideration, inter alia, the ACR for the year 2007-08, which was not in accordance with DOPT letter no. 22011/9/98-Estt(D) dated 16.06.2000.

16. Learned counsel for the respondent submits that the adverse remarks recorded in the ACR for 2006-07 were communicated to the petitioner on 14.06.2007. Further, the representation of the petitioner dated 17.07.2007 was rejected by the competent authority on 08.07.2008. Even in the appeal made by the petitioner, in this regard, the competent authority retained the grading as "Good". Therefore, the remarks in the ACR for the period 2006-07 were communicated to the petitioner and he was warned about the same. Learned Counsel also pointed out the incident of January, 2007 which led to the downgrading of the Petitioners ACR for the year 2006-07.

17. Learned counsel for the respondent submits that the petitioner was considered for promotion to the SA Grade in DPC held on 31.12.2008 and

15.09.2009, and after considering all the relevant factors, he was considered "unfit" on the basis of his performance. He further submits that the DPC is not guided merely by the Grading recorded in the ACRs, but makes its own assessment on the basis of the entries in the ACRs. Though the petitioner has a right to be considered for promotion, but he has no vested right to be promoted.

18. Having heard learned counsels for the parties and perused the materials placed on record, this Court is of the opinion that contemporaneously i.e. during the year 2006-07, the petitioner was communicated the drop in his performance; the downgrading in the ACR was conveyed to the petitioner after recordal of the same, and; even opportunities were provided to him for representing against them.

19. The petitioner is concerned with his ACRs in the year 2006-07 and 2007-08. In regard to the downgrading in his ACR for the year 2006-07, the petitioner is

aggrieved that he was not warned about the same. In this respect, learned Counsel for the respondent points out an incident relating to the petitioners performance, which occurred in January, 2007. The same has been recorded in the communication dated 04.04.2007 issued by the Chief Medical Superintendent (CMS) to the petitioner. The relevant extract of the letter is as follows:

"Mrs. Saria, aged 30 yrs. wife of Shri Rajendra Shyaamrao was admitted in Ward No. 3 (Gyanec.) for operation on 12.01.2007. The case was postponed after giving Anaesthesia. The issue was raised by recognized unions and also appeared in the Media. DRM has also taken cognizance of the same incidence You will agree with me that to postpone a case after giving anaesthesia to a person will cause anxiety. Railway is a labour oriented Organization and such incidents may cause lot of difficulties to the administration and in this case, same thing is happened."

20. The above shows that the failure of the Petitioner to perform surgery on a patient, after she had been given anesthesia, was contemporaneously raised by the recognized unions and the DRM also took cognizance of the same. Consequently, the petitioner cannot feign ignorance about the incident, or his conduct, and claim that the downgrading in the ACR for 2006-07 had come as a bolt from the blue. The Petitioner was a senior and experienced medical doctor and would have been aware that his aforesaid conduct - in returning a patient from the operating table after she had been given anesthesia, reflected adversely on his commitment to discharge his duties. The petitioner sought to explain his conduct in his reply dated 08.06.2007 by stating that "There was only one trained nurse available in OT and due to which I have postponed the operation. You had sent one nurse, Smt. Rawate who is not trained to assist in major surgery i.e. abdominal Hysterectomy. When I asked you that you had arrange nurse who is not trained to assist major surgery. You said that nurse is Nurse. It indicates that you are being a MBBS Doctor, neither you understand major surgery nor applied your mind."

21. Neither the CAT was, nor are we obliged to go into the allegations and explanation of the Petitioner with regard to his performance. The same was required to be judged by the Petitioners superiors - which they did while rejecting his representation. Though, a subsequent incident of 19.07.2007 involving the Petitioner - which was raised by the CMS, Nagpur vide letter dated 20.07.2007, and the response of the petitioner in his letter 20.07.2007 may not be of immediate relevance to the recording of the petitioners ACR for the year 2006-07, the same is a clear pointer to his uncooperative attitude even in the earlier period i.e. 2006-07. The Chief Medical Superintendent, Nagpur (CMS-NGP) vide letter dated 20.07.2007 reprimanded and, at the same time, advised the petitioner that he should perform his duties, and gave an opportunity to improve his conduct. The letter of the CMS is reproduced below:

"On 19.07.2007, one patient (married daughter of railway employee, Mrs. Pardesi, Mech. Deptt./C.Rly./NGP) who was taking treatment as ANC case at

Central Railway Hospital from Dr.(Mrs.) Hedao, Sr.DMO(Gynaec.). As Dr. Hedao is at Vadodara for training, you were advised to look after the case, you have not examined the case on the plea that it is PNM item at HQrs and no reply is received by you for the letter dated 04.01.2005 addressed to CMD CSTM.

I have personally discussed with you and told that no such PNM item is pending at HQrs in my knowledge. You were advised to act as per IRMM 2000 edition. But you were reluctant to comply with and did not examine the patient.

Administration has taken a serious note of your uncooperative attitude."

22. On the same day, the Petitioner responded as follows:

"I was selected by U.P.S.C through combined medical examination as General Duty Medical Officer and posted in Central Railway as a General Duty Medical Officer designated as ADMO in railway vide Railway Ministry's L. NO. 78E(GR)I/7/34-E(GR)II dated 16.07.1980. I have neither selected as Gynecologist nor in any specialist cadres by UPSC or by Indian Railways.

I have neither been sent for any post graduate degree/ diploma qualification of Gynae from Railway Authority nor I have been given any weightage in service. I am getting only Rs. 500/- as a post graduate degree allowance (out of that 33% tax is paid) like any other General Duty Medical Officer (like MD Physiology which don't have any clinical application for patients)."

Hereafter, I have decided to look after the duties of General Duty Medical Officer, only and not as a specialist and thus, I will not attend any specialist call duty, as I have been selected by U.P.S.C. as General Duty Medical Officer."

23. The stand of the respondent, in its two communications dated 26.07.2007 and 15/16.11.2007 also reflect on the frame of mind and attitude displayed by the petitioner, which appears to be consistent from January, 1997 onwards. These communications read as follows:

Letter dated 26.07.2007

"With reference to the letter under reference, it is stated that a unilateral decision can not be taken by you that you will not work as Specialist (Obst. and Gynae.) as you are having Post Graduate Degree in the (Obst. and Gynae.). Till now you were looking after the work of Obst. and Gynaec. O.P.D. and Ward and all of sudden you can not stop working as Specialist till your request is agreed by Administration.

You will agree with me that we have to work as a team in the interest of patients welfare and therefore, it is mandatory on the part of the doctor to act in the interest of patients.

You are, therefore, advised to look after the Gynae. and Obst. Ward (Ward No. 3) and conduct O.P.D."

Letter dated 15/16.11.2007

"The representation of Dr. P R Sahare has been perused and the remarks are as under:

It was found that whenever the Doctor was deputed for medical examination he was hardly performing other duties including routing operation. This is certainly not expected from a senior Doctor who is under consideration for SAG.

As regards his dogmatic attitude, there was a case in which an operation was postponed after the patient was given anaesthesia on the flimsy excuse of not having trained nurse whereas ground situation was that sufficiently trained nurse was available. Even after the intervention of CMS, Dr. Sahare refused to operate the patient. The Unions raised huge uproar on this issue. This case clearly indicates that Dr. Sahare does not have co-operative bent of mind, which is so much necessary in medical field."

24. In view of these facts and circumstances, the contention of the petitioner that he was not counseled or cautioned during the currency of the year 2006-07 cannot be accepted, as he was aware of the incident of January, 2007 and about his own stand. The remarks that the petitioner - "Lacks commitment tends to avoid work" and "The Doctor is too dogmatic, not very co-operative" appear to have been given on the basis of contemporaneous materials on record. It is apparent that he was provided ample opportunity in terms of making representations and appeal to the respondents with regard to the remarks in his ACR.

25. It was not within the scope of this Tribunal to sit over the ACR grading in judicial review. In this regard, reference may be placed on M.V. Thimmaiah and Others Vs. Union Public Service Commission and Others, , wherein the Supreme Court held as follows:

"Therefore, in view of a catena of cases, courts normally do not sit as a court of appeal to assess ACRs and much less the Tribunal can be given this power to constitute an independent Selection Committee over the statutory Selection Committee. The guidelines have already been given by the Commission as to how ACRs to be assessed and how the marking has to be made. These guidelines take care of the proper scrutiny and not only by the Selection Committee but also the views of the State Government are obtained and ultimately the Commission after scrutiny prepares the final list which is sent to the Central Government for appointment. There also it is not binding on the Central Government to appoint all the persons as recommended and the Central Government can withhold the appointment of some persons so mentioned in the select list for reasons recorded. Therefore, if the assessment of ACRs in respect of Shri S. Daya Shankar and Shri R. Ramapriya should have been made as "outstanding" or "very good" it is within the domain of the Selection Committee and we cannot sit as a court of appeal to assess whether Shri R. Ramapriya has been rightly assessed or Shri Daya Shankar has been wrongly assessed. The overall assessment of ACRs of both the officers were taken; one was found to be

"outstanding" and the second one was found to be "very good". This assessment cannot be made subject of court's or Tribunal's scrutiny unless actuated by mala fide."

(Emphasis Supplied)

26. The petitioner has not alleged any malafide against the competent authority with regard to the ACR grading for the year 2006-07, as well as 2007-08.

27. On the aspect of including the grading in the ACRs of the year 2007-08 while considering the petitioner for promotion to the SA Grade, the petitioner had contended that it is violative of O.M. dated 16.06.2000, which provides that only such ACRs should be considered which immediately precede the vacancy/ panel year.

28. The petitioner's grading for the year 2007-08 is "Average", which according to him, should not be considered for his promotion to the SA Grade by the DPC held on 31.12.2008. As far as the position regarding the consideration of the ACRs in concerned, the Railway Board letter No. 2002/SCC/3/1, dated 03.06.2002, provides for the "Procedure for promotion to administrative grades in Railway Services". The relevant portion is as follows:

"6. Confidential Reports are the basic inputs on the basis of which assessment is to be made by the DPC. The DPC will assess the suitability of the officers for promotion on the basis of their service records and with particular reference to the five preceding years.

12. The benchmark for promotion to various grades shall be as under:-

(Emphasis Supplied)

29. The DPC assesses the suitability of the employees for promotion on the basis of their service records and with particular reference to the five preceding years. Further, the eligibility criteria for promotion to the post of SA Grade is "Very Good" in ACRs for all the years, which are being considered by the DPC. The ACRs of the petitioner for the five preceding years, had to be considered by the DPC for the vacancy year 2008-09. The ACRs under consideration for the promotion of the petitioner were of the years 2002-03, 2003-04, 2004-05, 2005-06 and 2006-07. Although, the petitioner has "Very Good" grading for the period upto 2005-06, he has been graded "Good" in the year 2006-07.

30. Assuming, that the ACR for the year 2007-08 - where he has been graded "Average" is not considered/ ignored by the DPC, he would still not qualify for promotion to the SA Grade, as the grading for the year 2006-07 continues to remain "Good" (the downgrading of which has been considered and upheld by us). Hence, the petitioner would not qualify the criteria/ eligibility of getting promotion to the aforesaid post, as his performance falls below the benchmark.

31. For this reason, the Court finds no purpose in going into the aspect whether the ACR for the year 2007-08, could have been considered by the DPC for

consideration of the Petitioner for promotion to SA Grade. No other submission has been advanced by the petitioner with regard to the recording of his ACR for the year 2007-08.

32. In view of the foregoing discussion, this Court finds no merit in this petition. Consequently, the writ petition is dismissed.