
(2009) 01 MAD CK 0334

In the Madras High Court

Case No : Writ Petition No. 27045 of 2008 and M.P. No. 1 of 2008

R.K. Singh, Chief General Manager, Postal Life Insurance PLI
Directorate

APPELLANT

Vs

Central Administrative Tribunal and Others

RESPONDENT

Date of Decision : 20-01-2009

Acts Referred:

Citation : (2009) 01 MAD CK 0334

Hon'ble Judges : P.K. Misra, J;K. Chandru, J

Bench : Division Bench

Advocate : M. Sekar, in WP 27045/2008, M. Ravindran, Additional Solicitor General of India and T.S. Sivagnanam, SCGSC, for the Appellant; Karhik Mukundan, for R2, M. Sekar, for R5 in WP 27455/2008, M. Ravindran, A.S.G. of India and T.S. Sivagnanam, SCGSC for RR3 and 4 in WP 27045/2008, for the Respondent

Judgement

P.K. Misra, J.—W.P. No. 27455 of 2008 has been filed by the Union of India challenging the order of the Tribunal in O.A. No. 431 of 2008 which was filed by the present respondent No. 2 Indira Krishnakumar.

2. The grievance of the present respondent No. 2 was to the effect that in the previous years, "very good" had been indicated in the ACR, whereas for the year 2004-2005, in the ACR it was indicated as "good" which amounted to downgrading of the ACR, and therefore, such entry should have been treated as an adverse entry and should have been communicated to the respondent No. 2 (applicant before the Tribunal). The further question raised was that while considering the question of promotion, such uncommunicated adverse entry should not have been taken into account. The stand of the department was to the effect that the entry "good" cannot be considered as an adverse entry and therefore, there was no requirement for communicating such entry, and the DPC which consisted of a Member of the UPSC and the Secretary of the Department, had considered all the entries in proper perspective, and therefore, the denial of

promotion was justified.

3. The Tribunal by placing reliance upon the earlier Full Bench decision of the Tribunal as well as the decision of the Supreme Court reported in *Dev Dutt Vs. Union of India (UOI) and Others*, has allowed the Original Application and directed the department to place the question of promotion of the present respondent No. 2 before the DPC by ignoring the uncommunicated entry of the year 2004-2005. Such decision of the Tribunal is in question at the instance of the department in the above writ petition.

4. The connected writ petition in WP No. 27045 of 2008 has been filed by the respondent No. 5 R.K. Singh before the Tribunal. In such writ petition, the only grievance of the petitioner is that while disposing the matter, the Tribunal should not have passed an order of status-quo till the finalisation of the matter by the review DPC.

5. We have heard Mr. Ravindran, learned Additional Solicitor General for the petitioner in WP 27455/2008, Mr. M. Sekar, Counsel for the petitioner in WP 27045/2008 and Mr. Karthik Mukundan for the second respondent in both the writ petitions. The other private party namely respondent No. 4 S. Samant has not entered appearance in spite of service of notice.

6. At the time of entertaining the writ petition in WP No. 27455/2008, this Court had granted an order of interim stay to the following effect.

In the mean time, without prejudice to the contentions of the parties, there shall be interim stay of the observation of the Tribunal relating to continuance of status quo till then. It is further made clear that any action taken by the Department will be subject to the result of the writ petition.

7. By virtue of such order, the writ petitioner R.K. Singh has been given promotion. The Counsel for the writ petitioner R.K. Singh stated that he would have no further grievance if such interim order is allowed to continue as he has been promoted.

8. The learned Additional Solicitor General on behalf of the Union of India brought to our notice an earlier decision of the Supreme Court reported in *Satya Narain Shukla Vs. Union of India (UOI) and Others*, which was subsequently followed in (2008) 9 SCC 120 in support of the contention that every entry in the ACR need not be communicated to the concerned employee more particularly when the entry was "good" which cannot be considered as an adverse entry.

9. The learned Counsel for the contesting respondent No. 2 who was the applicant before the Tribunal, on the other hand submitted that the Tribunal has placed reliance upon the decision of the Supreme Court in *Dev Dutt Vs. Union of India (UOI) and Others*, which is squarely applicable, and since substantial justice has been rendered by following a decision of the Supreme Court, the order of the Tribunal does not call for any interference.

10. So far as the decision of the Supreme Court in *Satya Narain Shukla Vs. Union of India (UOI) and Others*, is concerned, the main question was relating to the promotion of the appellant, and certain scheme was in challenge. However, incidentally, the appellant had also argued the matter relating to communication of remarks in ACR. This aspect was considered in the following manner:

29. The appellant also argued that the remarks made in the ACR were not communicated to him. It was also urged by the appellant that this Court should direct the authorities to streamline the whole procedure so that even remarks like "good" or "very good" made in ACRs should be made compulsorily communicable to the officers concerned so that an officer may not lose his chance of empanelment at a subsequent point of his service. In our view, it is not our function to issue such directions. It is for the Government to consider how to streamline the procedure for selection. We can only examine if the procedure for selection as adopted by the Government is unconstitutional or otherwise illegal or vitiated by arbitrariness and mala fides.

11. Subsequently, the question as to whether the downgrading of any entry should be communicated or not was directly considered by the Supreme Court in *Dev Dutt Vs. Union of India (UOI) and Others*, . In the said decision, the question raised before the Supreme Court was to the following effect.

6. The grievance of the appellant was that he was not communicated the "good" entry for the year 1993-1994. He submitted that had he been communicated that entry he would have had an opportunity of making a representation for upgrading that entry from "good" to "very good", and if that representation was allowed he would have also become eligible for promotion. Hence he submits that the rules of natural justice have been violated.

12. The contention of the respondent No. 1 in the said case before the Supreme Court was that every entry need not be communicated, and only adverse entry is required to be communicated, and if some entry which was "very good" in the previous year, is made "good" in the subsequent year, such entry need not be communicated. Accepting the contention of the appellant, it was observed by the Supreme Court as follows:

9. In the present case the benchmark (i.e. the essential requirement) laid down by the authorities for promotion to the post of Superintending Engineer was that the candidate should have "very good" entry for the last five years. Thus in this situation the "good" entry in fact is an adverse entry because it eliminates the candidate from being considered for promotion. Thus, nomenclature is not relevant, it is the effect which the entry is having which determines whether it is an adverse entry or not. It is thus the rigours of the entry which is important, not the phraseology. The grant of a "good" entry is of no satisfaction to the incumbent if it in fact makes him ineligible for promotion or has an adverse effect on his chances.

10. Hence, in our opinion, the "good" entry should have been communicated to

the appellant so as to enable him to make a representation praying that the said entry for the year 1993-94 should be upgraded from "good" to "very good". Of course, after considering such a representation it was open to the authority concerned to reject the representation and confirm the "good" entry (though of course in a fair manner), but at least an opportunity of making such a representation should have been given to the appellant, and that would only have been possible had the appellant been communicated the "good" entry, which was not done in this case. Hence, we are of the opinion that the non-communication of the "good" entry was arbitrary and hence illegal, and the decisions relied upon by the learned Counsel for the respondent are distinguishable.

The Supreme Court has further observed to the following effect:

13. In our opinion, every entry (and not merely a poor or adverse entry) relating to an employee under the State or an instrumentality of the State, whether in civil, judicial, police or other service (except the military) must be communicated to him, within a reasonable period, and it makes no difference whether there is a benchmark or not. Even if there is no benchmark, non-communication of an entry may adversely affect the employee's chances of promotion (or getting some other benefit), because when comparative merit is being considered for promotion (or some other benefit) a person having a "good" or "average" or "fair" entry certainly has less chances of being selected than a person having a "very good" or "outstanding" entry.

13. In the aforesaid decision, the Supreme Court had also referred to several earlier decisions including the decision reported in U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and others, . It is of course true that the Supreme Court had observed that the observations were only stray observations. However, the fact remains that in effect, the Supreme Court had followed such earlier decision. The Additional Solicitor General however, submitted that in Dev Dutt's case, the earlier decision of the Supreme Court in Satya Narain Shukla Vs. Union of India (UOI) and Others, had not been noticed. At this stage, we may point out that the observation which was made in Shukla's case in paragraph 13 was only a recommendation, and it cannot be stated that any substantial principle of law had been laid down in the said decision.

14. Be that as it may, the aforesaid observation of the Supreme Court in Shukla's case was construed in a subsequent decision of the Supreme Court in (2008) 9 SCC 120 wherein a similar issue was involved. In the said case, there was a downgrading of the entry from "very good" to "good" for two relevant years. However, such entries had not been communicated. While repelling the contention of the Counsel for the appellant before the Supreme Court that such entries which had the effect of downgrading the previous entry "very good", should have been communicated, the Supreme Court observed to the following effect:

17. Mr Srivastava then submitted that in the preceding years the appellant had "Excellent" ratings and in the year 1995 he had "Very Good". The rating "Good" for the year 1996-1997 was thus a climb-down and it was incumbent upon the authorities to intimate the appellant about his ratings for the two years in question. Since no intimation was given to the appellant, the ratings for those two years should not have been taken into account and instead the ratings for the earlier years should have been considered for the purpose of promotion. We are unable to accept the submission. In *Satya Narain Shukla v. Union of India* it was held and observed as follows SCC p. 81, para 29

29. The appellant also argued that the remarks made in the ACR were not communicated to him. It was also urged by the appellant that this Court should direct the authorities to streamline the whole procedure so that even remarks like "good" or "very good" made in ACRs should be made compulsorily communicable to the officers concerned so that an officer may not lose his chance of empanelment at a subsequent point of his service. In our view, it is not our function to issue such directions. It is for the Government to consider how to streamline the procedure for selection. We can only examine if the procedure for selection as adopted by the Government is unconstitutional or otherwise illegal or vitiated by arbitrariness and mala fides.

15. In other words, paragraph 29 of the Shukla's case was relied upon by the Supreme Court to come to the conclusion that there was no necessity to communicate the downgrading of any entry in the ACR.

16. It is to be pointed out that the above decision was rendered by the Supreme Court on 16.9.2008. But the earlier decision of the Supreme Court in *Dev Dutt's* case was not brought to the notice of the Bench which rendered the decision in (2008) 9 SCC 120. A perusal of the decision in *Dev Dutt's* case as well as in *K.M. Mishra's* case makes it amply clear that there is some conflict in the opinion expressed in these two decisions. However, *Dev Dutt's* case has not been noticed in (2008) 9 SCC 120. Since the Tribunal has placed reliance upon the earlier decisions of the Supreme Court in *U.P. Jal Nigam's* case and in *Dev Dutt's* case, and there is a contrary decision of the Supreme Court of equal strength wherein unfortunately the earlier decision has not been referred to, we do not think it would be appropriate for us to interfere with the order passed by the Tribunal which has followed the earlier decisions of the Supreme Court.

17. In the above context, we may also point out that the learned Additional Solicitor General has fairly brought to our notice that by following the ratio of *Dev Dutt's* case, Civil Appeal No. 7061/2002 was rejected by the Supreme Court by observing as follows:

Heard Mr.Amrendra Sharan, learned Additional Solicitor General, Mr.K.P.Bhat, learned Additional Solicitor General, Mr.S.P.Singh, learned Senior Counsel and respondent-in-person.

In view of the decision of this Court in *Dev Dutt Vs. Union of India (UOI)* and

Others, , this appeal is dismissed.

18. In the above scenario, we do not think we should interfere with the discretionary order passed by the Tribunal.

19. The learned Additional Solicitor General has also contended that before the Tribunal, a question had been raised that UPSC has not been impleaded as a party. In the present case, the question of promotion was considered by the Departmental Promotion Committee which incidentally consisted of one Member of UPSC who was the Chairman of the Committee, and the Secretary of the department. The Department having been represented, we do not think it was necessary to implead either the UPSC or its Member, more particularly in the absence of any specific allegation of factual malafides against them. Moreover, the Tribunal has merely directed the review of the DPC which can be done on the basis of the instructions to be issued by the department. Such contention regarding absence of necessary parties is, therefore, not acceptable.

20. In such view of the matter, we do not think it fit to interfere with the order passed by the Tribunal. Hence WP No. 27455 of 2008 is dismissed. No costs. Consequently, connected MP is closed.

21. So far as WP No. 27045 of 2008 is concerned, in view of the order of stay passed by this Court, the promotion has already been given effect to, and therefore, the petitioner cannot have any further grievance. Such writ petition is, accordingly, disposed of. No costs.