

(2011) 08 SHI CK 0013

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition (T) No. 16133 of 2008

Roop Lal

APPELLANT

Vs

State of Himachal Pradesh and Others

RESPONDENT

Date of Decision : 26-08-2011

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2012) 1 ShimLC 291

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Rajiv Sharma, J.—Petitioner was appointed as Agriculture Inspector on 15.1.1988. He was confirmed on 12.12.1994. Respondent No. 4 was appointed on 21.1.1988. Petitioner is at Sr. No. 200 of the seniority list of Officers of H.P. Agriculture Services Class-I (Gazetted), as it stood on 1.1.2006. Respondent No. 4 is at Sr. No. 199. The promotion to the post of Block Development Officer is governed under the Recruitment and Promotion Rules called "The Himachal Pradesh Rural Development Department, Block Development Officer, Class-I (Gazetted) Recruitment and Promotion Rules, 2003 (hereinafter referred to as "Rules" for brevity sake). The post of Block Development Officer is a "selection post" as per Rules. The process for filling up the post of Block Development Officer by way of promotion was initiated by the respondent-State. The Departmental Promotion Committee was convened by respondent No. 3 on 14.8.2007. Petitioner, respondent No. 4 and one Sh. Khem Chand Sharma were considered for promotion to the post of Block Development Officer. Name of respondent No. 4 was recommended for promotion to the post of Block Development Officer pursuant to notification dated 9.10.2007.

2. Mr. Trilok Jamwal has strenuously argued that respondent-State has not considered the case of the petitioner and respondent No. 4 strictly in accordance with law for promotion to the post of Block Development Officer. According to

him, since the post was "selection post", the merit should have prevailed instead of seniority. He finally contended that the Departmental Promotion Committee was required to look into the entire service record of the petitioner and respondent No. 4 instead of only looking at the Annual Confidential Reports preceding five years commencing from 2001-2002 to 2005-2006.

3. Mr. Vikas Rathore, learned Deputy Advocate General and Mr. D.K. Khanna have strenuously argued that respondent No. 4 was senior to the petitioner and on the basis of average grading, respondent No. 4 has rightly been promoted to the post of Block Development Officer.

4. Respondent No. 4 though duly served neither present nor represented by any Advocate.

5. I have heard the learned Counsel for the parties and have perused the pleadings as well as records carefully.

6. Respondent No. 3 was directed to produce the records of Departmental Promotion Committee held on 14.8.2007. The same has been produced.

7. It is not in dispute that as per Rules issued, vide Annexure A-4, the post in question is a "selection post". The criteria for filling up the selection post is merit. The principle of merit-cum-seniority puts greater emphasis on merit and ability and where promotion is governed by this principle seniority plays a less significant role. The seniority is given weightage when merit and ability more or less are equal. The tone and tenor of the reply filed by respondent No. 1 is that respondent No. 4 was senior to the petitioner and he has rightly been promoted. It was a selection post, as noticed above, and overall merit was to be seen by the Departmental Promotion Committee. The Departmental Promotion Committee, in its meeting held on 14.8.2007, has taken into consideration the final seniority list and list of eligible Extension Officers (Agriculture) supplied by the Department. The Departmental Promotion Committee has considered the Annual Confidential Reports for five years, i.e. 2001-2002 to 2005-2006 and has assessed them only on seniority basis as under:

1.

Satinder Singh Thakur

very good

2.

Roop Lal Chauhan

very good

3.

Khem Chand Sharma

very good

8. According to the record, the petitioner was assessed "very good" in 2001-2002 to 2004-2005. He was assessed "good" in 2005-2006. Respondent No. 4 has been assessed as "good" in the year 2001-2002, "very good" in the year 2002-2003, "good" in the year 2003-2004 and "very good" in the years 2004-2005 and 2005-2006. In final order of merit, respondent No. 4 was at Sr. No. 1. It is, thus, evident that the Departmental Promotion Committee, in its meeting, held on 14.8.2007, has only seen the seniority of respondent No. 4 vis-a-vis, the Annual Confidential Reports for the preceding five years. According to the benching system adopted by the Himachal Pradesh Public Service Commission, as per norms prescribed, petitioner has secured 19 marks on the basis of his Annual Confidential Reports and respondent No. 4 has secured 18 marks.

9. The criteria for making promotion on selection post is contained in the Hand Book on Personnel Matters Vol-1 (Second Edition) for the period with effect from 4.11.1981 onwards. According to these instructions, the Departmental Promotion Committee has to assess the Confidential Reports of all the eligible officers for three to five years and classify them separately for each year as "outstanding", "very good" and "good" excluding those who are considered unfit. The assessment and classification is to be made by the Departmental Promotion Committee in its own judgment making their independent assessment. The officer assessed as "outstanding" supersedes the officer assessed as "very good" only when the difference of length of service in the feeder grade between the two officers is not more than two years. It is also contained in the instructions that an officer assessed as "very good" will supersede "good" only when difference of length of service in the feeder grade between the two officers is not more than two years. The procedure for assessing classification from 16.11.1973 is also given in the compendium. According to the procedure for assessing classification, each type of assessment shall carry marks as under:

Outstanding

5 marks

Very good

4 marks

Good

3 marks

Fair

2 marks

10. It is further stated therein that after the total evaluation is made, average marks shall be worked out by dividing the total marks by the same number as

the number of years for which confidential reports have been considered.

11. Mr. D.K. Khanna has drawn the attention of the Court to the instructions whereby it has been provided that where the junior official securing average marks and classified as "outstanding" shall not be placed above the senior who is also classified as "outstanding". In other words his submission is that since both respondent No. 4 and petitioner have been assessed "very good" by the Departmental Promotion Committee and though the petitioner had secured average 19 marks, could not steal march over respondent No. 4 who has obtained 18 marks on the basis of assessment of his Annual Confidential Reports. However, in the instant case, the Public Service Commission has not calculated the marks as per the procedure laid down in the Hand Book on Personnel Matters Vol-1 (Second Edition). According to the statement placed on record in tabulated form, only Annual Confidential Reports of the petitioner and respondent No. 4 have been looked into and average "very good" has been given. It was expected from respondent No. 3 to at least after making evaluation divide the total marks by the same number of years. This could not be left to presumption.

12. The Court is of the considered view that since it was a selection post, respondent No. 3 besides looking into the Annual Confidential Reports, should have taken into consideration the entire service record of the petitioner and respondent No. 4. It is stipulated in the instructions issued on the subject that assessment and classification is to be made by the Departmental Promotion Committee in its own judgment making their independent assessment. In the case, the Departmental Promotion Committee has not made its independent assessment. It is reiterated that it has to make its own assessment on the basis of entries made in the Annual Confidential Reports and not to be guided by overall grading. It is also incumbent upon the Departmental Promotion Committee before making overall grading to ensure that whether the officer has been visited with any major or minor penalty or not.

13. Their Lordships of the Hon'ble Supreme Court in *Union of India and another v. S.K. Goel and others*, (2007) 14 SCC 641 that the Departmental Promotion Committee should make its own assessment on the basis of entries and not merely by overall grading. Their Lordships have held as under:

28. It was also argued by the learned senior Counsel appearing for respondent No. 1 that the entries for the period had an element of adverse reflection and for that purpose the seniority of respondent No. 1 was downgraded and, therefore, the ACR ought to have been communicated to respondent No. 1. In our opinion, the observations of the High Court are wholly unjustified inasmuch as the post of Commissioner of Customs and Central Excise is a post required to be filled up on selection made strictly on the basis of merit. No judicial review of DPC proceedings, which are ordinarily conducted in accordance with the standing government instructions and Rules is warranted. The norms and procedure for DPC are prescribed in O.M. dated 10.4.1989. It is thus seen that the decision taken by the appellants has been as per the instructions issued on the subject

that only adverse entries and remarks are to be communicated and there is no provision to communicate the downgrading of ACR to a government employee. The decision of the Central Government is in strict accordance with the prevailing rules and government instructions. In the absence of any violation, the impugned order of the High Court while undertaking a judicial review under Article 226 of the Constitution of India, is wholly unjustified. Since the matter of seniority has been well settled and this Court in a plethora of cases has held that the seniority/promotion granted on the strength of DPC selection should not be unsettled after a lapse of time. Therefore, in the facts and circumstances of the present case, where there is no adverse remarks whatsoever against respondent No. 1, the High Court ought not to have interfered with and passed the impugned direction. This apart, as per the instructions contained in para 6.21 of DOPT Order No. 22011/ 5/86/Estt. D dated 19.4.1981, as amended, the DPC is not required to be guided merely by the overall grading, if any, that may be recorded in the CRs but to make its own assessment on the basis of the entries in the CRs. The DPC enjoyed full discretion to devise its method and procedure for objective assessment of suitability and merit of the candidate being considered by it. Hence, the impugned order of the High Court, in our opinion, is liable to be set aside.

29. Case law on the subject

1. Mrs. Anil Katiyar Vs. Union of India and others, The appellant and respondent No. 4 in this case had joined the Central Agency Section in the Ministry of Law of the Government of India as Assistant Government Advocates. The appellant was junior to respondent No. 4. While considering them for promotion to the post of Deputy Government Advocate, which is a selection post, the DPC graded both of them as "very good" and on the ground of seniority selected respondent No. 4 for the said post. The appellant unsuccessfully challenged the selection of respondent No. 4 before the CAT on the ground that the DPC was not justified in grading her merely as "very good" as in the ACRs for two of the relevant three years the departmental authorities had graded her as "outstanding" and for the third year as "very good" while they had graded respondent No. 4 as "very good" in all the three ACRs. The CAT while refusing relief to the appellant on the ground of want of jurisdiction to scrutinize the recommendations of the DPC, this Court perused the confidential procedure followed by the DPCs in the Union Public Service Commission for giving overall grading, including that of "outstanding" to an officer. Thereafter, refusing to interfere with the selection of respondent No. 4 by the DPC but setting aside the said observation of the CAT, this Court held as under:

Having regard to the confidential procedure which is followed by the Union Public Service Commission, it is not possible to hold that the decision of the DPC in grading the appellant as "very good" instead of "outstanding" was arbitrary. No ground is, therefore, made out for interference with the selection of respondent 4 by the DPC on the basis of which he has been appointed as Deputy Government

Advocate. But, at the same time, it has to be held that the Tribunal was in error in going into the question whether the appellant had been rightly graded as "outstanding" in the ACRs for the years 1990-1991 and 1991-1992. The observations of the Tribunal that out of the two "outstanding" gradings given to the appellant one "outstanding" grading does not flow from various parameters given and the reports entered therein, cannot, therefore, be upheld and are accordingly set aside.

30. Union Public Service Commission Vs. L.P. Tiwari and Others, This case relates to grading in selection list (or promotion to Indian Forest Service. The jurisdiction of Courts to interfere with evaluation made by the expert committee was under consideration. The respondents were serving as State Service Forest Officers in the post of Assistant Conservator of Forests. Both the officers became eligible to be promoted to the Indian Forest Service. On an overall service records, Selection Committee assessed respondent as being "very good" and included his name at S.No.10 in the Select List of 2001. Respondents 4-8 were assessed as "outstanding" by the Selection Committee and were included at S.Nos.3-7 in the selection list. Respondent No. 1 claimed that he ought to have been assessed as "outstanding" and should have been assigned seniority in the Indian Forest Service Cadre over respondents 4-8. The Tribunal came to the conclusion that patent material irregularities had been committed by the Selection Committee for the year 2001. This Court allowed the appeal filed by the UPSC and held that the evaluation made by an expert committee should not be easily interfered with by the Courts which do not have the necessary expertise to undertake the exercise that is necessary for such purpose. Speaking for the Bench, Altamas Kabir, J. in paragraphs 12, 13 and 14 of the judgment held as under:

12. It is now more or less well-settled that the evaluation made by an expert committee should not be easily interfered with by the Courts which do not have the necessary expertise to undertake the exercise that is necessary for such purpose. Such view was reiterated as late as in 2005 in the case U.P.S.C. Vs. K. Rajaiah and Others, , wherein the aforesaid Rules for the purpose of promotion to the I.P.S. Cadre was under consideration. Apart from the above, at no stage of the proceedings, either before the Tribunal or the High Court or even before this Court, has any allegation of mala fides been raised against the Selection Committee and the only grievance is that the Selection Committee erred while making assessment of the comparative merits of the respective candidates. While concluding his submissions, Mr. Rao had pointed out that the direction given by the High Court to the appellant to hold a Review Departmental Promotion Committee was also erroneous since the Regulations provided for selection to be made not by a Departmental Promotion Committee but by a Selection Committee constituted as per the Regulations.

13. Although, on behalf of the respondents it has been urged that there was no bar which precluded the Tribunal from looking into the original ACRs of the respective candidates, what we are required to consider is whether it was at all

prudent on the part of the Tribunal to have adopted such a procedure which would amount to questioning the subjective satisfaction of the Selection Committee in preparing the Select List.

14. From the submissions made and the materials on record, we are satisfied that the methodology which has been evolved and included in the Regulations for grading the eligible officers have been religiously followed by the Selection Committee which did not call for any interference by the Tribunal. The High Court has merely followed the derision of the Tribunal without independently applying its mind to the facts involved.

31. For the foregoing reasons, we hold that the DPC enjoyed full discretion to devise its method and procedure for objective assessment of suitability and merit of the candidate being considered by it. Hence, the interference by the High Court is not called for.

14. It is settled law that judicial review to interfere in proceedings and recommendations of Departmental Promotion Committee is limited. However, it is open to the Courts to interfere in, the proceedings and recommendations of the Departmental Promotion Committee when the same are conducted illegally or in gross violation of standing instructions and rules. In the case in hand, the Departmental Promotion Committee has not taken into consideration the law laid down by the Hon"ble Supreme Court, as noticed hereinabove, as well as the instructions issued on the subject as contained in the Hand Book on Personnel Matters Vol-1 (Second Edition).

15. Their Lordships of the Hon"ble Supreme Court in Haryana State Electronics Development Corporation Ltd. and Others Vs. Seema Sharma and Others, have held that the principle of merit-cum-seniority puts greater emphasis on merit and ability and where promotion is governed by this principle seniority plays a less significant role. Their Lordships have further held that seniority is to be given weightage when merit and ability more or less are equal among the candidates who are to be promoted. Their Lordships have further held that insofar as the principle of seniority-cum-merit is concerned it gives greater importance to seniority and promotion to a senior person cannot be denied unless the person concerned is found totally unfit on merit to discharge the duties of the higher post. Their Lordships have held as under:

7. The Court is of the opinion that the principle of Meritcum- Seniority and that of Seniority- cum-Merit are two totally different principles.

8. The principle of Merit-cum-Seniority puts greater emphasis on merit and ability and where promotion is governed by this principle seniority plays a less significant role. However, seniority is to be given weightage when merit and ability more or less are equal among the candidates who are to be promoted.

9. On the other hand, insofar as the principle of seniority-cum-merit is concerned it gives greater importance to seniority and promotion to a senior person cannot

be denied unless the person concerned is found totally unfit on merit to discharge the duties of the higher post. The totality of the service of the employee has to be considered for promotion on the basis of Seniority-cum-Merit (see AIR 1996 SC 273).

16. The Same principle has been reiterated by their Lordships of the Hon^{ble} Supreme Court in Haryana State Warehousing Corporation and another v. Jagat Ram and another, 2011 (2) SLJ 1. Their Lordships have held as under:

22. Thus it is the settled position that the criterion of seniority-cum-merit is different from the criterion of merit and also the criterion of merit-cum-seniority. Where the promotion is based on seniority-cum-merit, the officer cannot claim promotion as a matter of right by virtue of his seniority alone. If he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted. Seniority-cum-merit means that, given the minimum necessary merit required for efficiency of administration, the senior, though less meritorious, shall have priority in the matter of promotion and there is no question of a further comparative assessment of the merit of those who were found to have the minimum necessary merit required for efficiency of administration. For assessing the minimum necessary merit, the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employees. Such assessment can be made by assigning marks on the basis of appraisal of performance on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be considered for promotion on the basis of seniority-cum-merit. The concept of "seniority-cum-merit" postulates the requirement of certain minimum merit or satisfying a benchmark previously fixed and, subject to fulfilling the said requirement, promotion is based on seniority. There is no further assessment of the comparative merits of those who fulfil such requirement of minimum merit or satisfy the benchmark previously fixed. On the other hand, the principle of "merit-cum-seniority" puts greater emphasis on merit and ability and seniority plays a less significant role. Seniority is given weightage only when merit and ability are more or less equal among the candidates considered for promotion.

17. Accordingly, in view of the observations and discussions made hereinabove, the petition is allowed. Annexure A-1 dated 9.10.2007 is quashed and set aside. Respondents No. 1 to 3 are directed to initiate fresh process for making promotion to the post of Block Development Officer in view of the observations made hereinabove within a period of three months from the date of production of certified copy of this judgment by the petitioner. Before parting with the judgment, it is expected that respondent No. 3 will now adopt latest guidelines issued for Departmental Promotion Committee as contained in Chapter-III of Swamy's Compilation on Seniority and Promotion in Central Government Service (Fourteenth Edition-2011) to make the process of selection very objective, fair and transparent. No costs.