

(2021) 11 SHI CK 0043
In the High Court Of Himachal Pradesh
Case No : Civil Writ Petition No.3675 Of 2020

Roop Singh

APPELLANT

Vs

State Of Himachal Pradesh And Others

RESPONDENT

Date of Decision : 16-11-2021

Acts Referred:

Constitution Of India, 1950 — Article 14

Citation : (2021) 11 SHI CK 0043

Hon'ble Judges : Chander Bhusan Barowalia, J

Bench : Single Bench

Advocate : Kul Bhushan Khajuria, P.K. Bhatti, Bharat Bhushan, Amit Kumar Dhumal, Ranjana Parmar, Karan Singh Parmar

Final Decision : Disposed Of

Judgement

Chander Bhusan Barowalia, J

1. The instant petition has been filed for the grant of following reliefs:

i) That in view of the above mentioned facts and circumstances, the impugned Notification of promotion dated 27.8.2020 may kindly be quashed and set aside.

ii) That the respondent department may kindly be directed to promote the petitioner as Superintendent Grade-I being senior most, with all consequential benefits."

As per the petitioner, he was appointed by the respondent-department as Clerk in the year, 1988 and thereafter in the year 2004, he was promoted as Junior Assistant and subsequently to the post of Senior Assistant. In the final seniority list of Senior Assistant, petitioner was placed at Sr. No.1, thus, he was entitled to be considered for promotion to the post of Superintendent Grade-I. However, impugned Notification dated 27.8.2020, the respondent-department issued order of promotion of respondent No.3 and promoted him as Superintendent Grade-I, despite the fact that he was junior to him. As per the averments made in the

petition, the respondent-department has ignored the Office Memorandum dated 27.2.2016 and 21.6.2016, while holding Departmental Promotion Committee (hereinafter referred to as 'DPC') for selection post, wherein, it has been suggested that the post of Superintendent Grade-I is selection post and the respondent-department while holding DPC has to made selection on the basis of seniority. However, in the present case, the respondent-department has totally ignored the seniority of the petitioner, as well as his ACR(s) performance, which were Very Good.

2. In the reply filed by the respondents-State, it has been averred that the instant petition is not maintainable, as the petitioner has filed a representation against the entries made in his ACR for the year 2019-20 before the Financial Commissioner (Revenue), which is stated to be pending. It has been further averred that the petitioner has not come to the Court with clean hands and suppressed the material facts. It is averred that on 30.6.2020, post of Superintendent Grade-I fell vacant, consequent upon the superannuation of the then Superintendent Grade-I. Consequently, particulars of both the petitioner and respondent No.3 were forwarded to the office of respondent No.1, who was the appointing authority in respect of the post in question. Thereafter, DPC was held on 28.7.2020 under the Chairmanship of Principal Secretary (Revenue) and respondent No.3 was promoted as Superintendent Grade-I, as the performance of the petitioner in the ACRs for the year 2017-18 and 2019-20 was average. It has been further averred in the reply that the petitioner on many occasions shown misconduct in the discharge of his official duties and was found in the state of intoxication during office hours.

3. In reply filed by respondent No.3, it has been averred that in the instant case, the post of Senior Assistant is a feeder post of Superintendent Grade-I and criteria to follow for promotion is merit-cum-seniority. The criteria for making promotion to different categories of post is as under :

- i. Seniority/Rejection to unfitness.
- ii. Promotion on the basis of seniority-cum-merit.
- iii. Merit-cum-Seniority.

In the present case, the promotion which is to the Class-I post, the criteria for seniority-cum-merit has been held to be a valid criteria, therefore, the procedure adopted by the DPC to the merit of the candidate(s) is a valid and legal criteria. The petitioner does not have a vested right of promotion, but has only the right of consideration, which has not been infringed.

4. Mr. Kul Bhushan Khajuria, learned counsel for the petitioner has argued that the petitioner was senior to the private respondent and he should have been promoted to the post of Superintendent Grade-I before the private respondent. He has argued that DPC has considered the ACRs, which were not communicated to him and was made by one Officer due to the malafide intention against him.

He further argued that those ACRs were not communicated to him and cannot be considered by the DPC and his rejection was thus, arbitrary and he should have been promoted by the DPC, as the DPC has failed to discharge its duties, so the instant petition may be allowed. In support of his arguments, he also relied upon the judgment in Hon'ble Apex Court case titled Dev Dutt vs. Union of India (2008) 8 SCC 725, on this aspect.

5. On the other hand, Ms. Ranjana Parmar, learned Senior counsel for respondent No.3 has vehemently argued that the petitioner is claiming his promotion assuming the post of Superintendent Grade-I, as selection post, but in the instant case, it is not a selection post and the instructions, as annexed by the petitioner are not applicable to facts and circumstances of the present case and his promotion is only on the basis of non-selection post i.e. seniority-cum-merit. She has further argued that there was no bench mark to be considered inter se the candidate considered by the DPC and nothing more and which was considered in a case of seniority-cum-merit. The DPC has come to the conclusion that the petitioner was unfit to be promoted, as his ACRs was adverse and is of no consequence.

6. In rebuttal, learned counsel for the petitioner has strenuously argued that the DPC has not come to the conclusion that he is unfit and one of the reason is that his ACRs was adverse.

7. Hon'ble Apex Court in case titled Dev Dutt vs. Union of India (2008) 8 SCC 725, wherein the Hon'ble Apex Court has considered the entire law in detail and held as under:

"It has been held in Maneka Gandhi vs. Union of India & Anr. AIR 1978 SC 597 that arbitrariness violates Article 14 of the Constitution. In our opinion, the non-communication of an entry in the A.C.R. of a public servant is arbitrary because it deprives the concerned employee from making a representation against it and praying for its up-gradation. In our opinion, every entry in the Annual Confidential Report of every employee under the State, whether he is in civil, judicial, police or other service (except the military) must be communicated to him, so as to enable him to make a representation against it, because non-communication deprives the employee of the opportunity of making a representation against it which may affect his chances of being promoted (or get some other benefits). Moreover, the object of writing the confidential report and making entries in them is to give an opportunity to a public servant to improve his performance, vide State of U.P. vs. Yamuna Shankar Misra 1997 (4) SCC.

7. Hence such non-communication is, in our opinion, arbitrary and hence violative of Article 14 of the Constitution.

14. 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

bench mark or not. Even if there is no bench mark, 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.

15. In most services there is a gradation of entries, which is usually as follows:

(i) Outstanding

(ii) Very Good

(iii) Good

(iv) Average

(v) Fair

(vi) Poor

A person getting any of the entries at items (ii) to (vi) should be communicated the entry so that he has an opportunity of making a representation praying for its upgradation, and such a representation must be decided fairly and within a reasonable period by the concerned authority.

16. If we hold that only 'poor' entry is to be communicated, the consequences may be that persons getting 'fair', 'average', 'good' or 'very good' entries will not be able to represent for its upgradation, and this may subsequently adversely affect their chances of promotion (or get some other benefit).

17. In our opinion if the Office Memorandum dated 10/11.09.1987, is interpreted to mean that only adverse entries (i.e. 'poor' entry) need to be communicated and not 'fair', 'average' or 'good' entries, it would become arbitrary (and hence illegal) since it may adversely affect the incumbent's chances of promotion, or get some other benefit.

18. For example, if the bench mark is that an incumbent must have 'very good' entries in the last five years, then if he has 'very good' (or even 'outstanding') entries for four years, a 'good' entry for only one year may yet make him ineligible for promotion. This 'good' entry may be due to the personal pique of his superior, or because the superior asked him to do something wrong which the incumbent refused, or because the incumbent refused to do sycophancy of his superior, or because of caste or communal prejudice, or for some other extraneous consideration.

19. In our opinion, every entry in the A.C.R. of a public servant must be communicated to him within a reasonable period, whether it is a poor, fair, average, good or very good entry. This is because non-communication of such an entry may adversely affect the employee in two ways : (1) Had the entry been communicated to him he would know about the assessment of his work and

conduct by his superiors, which would enable him to improve his work in future (2) He would have an opportunity of making a representation against the entry if he feels it is unjustified, and pray for its upgradation. Hence non-communication of an entry is arbitrary, and it has been held by the Constitution Bench decision of this Court in *Maneka Gandhi vs. Union of India* (supra) that arbitrariness violates Article 14 of the Constitution.

20. Thus it is not only when there is a bench mark but in all cases that an entry (whether it is poor, fair, average, good or very good) must be communicated to a public servant, otherwise there is violation of the principle of fairness, which is the soul of natural justice. Even an outstanding entry should be communicated since that would boost the morale of the employee and make him work harder.

21. Learned counsel for the respondent has relied on the decision of this Court in *U. P. Jal Nigam vs. Prabhat Chandra Jain* AIR 1996 SC 1661. We have perused the said decision, which is cryptic and does not go into details. Moreover it has not noticed the Constitution Bench decision of this Court in *Maneka Gandhi vs. Union of India* (supra) which has held that all State action must be non-arbitrary, otherwise Article 14 of the Constitution will be violated. In our opinion the decision in *U.P. Jal Nigam* (supra) cannot be said to have laid down any legal principle that entries need not be communicated. As observed in *Bharat Petroleum Corporation Ltd. vs. N.R. Vairamani* AIR 2004 SC 4778 (vide para 9):

"Observations of Courts are neither to be read as Euclid's Theorems nor as provisions of the statute, and that too, taken out of their context".

22. In *U.P. Jal Nigam's* case (supra) there is only a stray observation "if the graded entry is of going a step down, like falling from 'very good' to 'good' that may not ordinarily be an adverse entry since both are a positive grading". There is no discussion about the question whether such 'good' grading can also have serious adverse consequences as it may virtually eliminate the chances of promotion of the incumbent if there is a benchmark requiring 'very good' entry. And even when there is no benchmark, such downgrading can have serious adverse effect on an incumbent's chances of promotion where comparative merit of several candidates is considered.

23. Learned counsel for the respondent also relied upon the decision of this Court in *Union of India & Anr. vs. S. K. Goel & Ors.* AIR 2007 SC 1199 and on the strength of the same submitted that only an adverse entry need be communicated to the incumbent. The aforesaid decision is a 2- Judge Bench decision and hence cannot prevail over the 7-Judge Constitution Bench decision of this Court in *Maneka Gandhi vs. Union of India* (supra) in which it has been held that arbitrariness violates Article 14 of the Constitution. Since the aforesaid decision in *Union of India vs. S.K. Goel* (supra) has not considered the aforesaid Constitution Bench decision in *Maneka Gandhi's* case (supra), it cannot be said to have laid down the correct law. Moreover, this decision also cannot be treated as a Euclid's formula since there is no detailed discussion in it about the adverse

consequences of non-communication of the entry, and the consequential denial of making a representation against it.

24. It may be mentioned that communication of entries and giving opportunity to represent against them is particularly important on higher posts which are in a pyramidal structure where often the principle of elimination is followed in selection for promotion, and even a single entry can destroy the career of an officer which has otherwise been outstanding throughout. This often results in grave injustice and heart-burning, and may shatter the morale of many good officers who are superseded due to this arbitrariness, while officers of inferior merit may be promoted.

25. In the present case, the action of the respondents in not communicating the 'good' entry for the year 1993-94 to the appellant is in our opinion arbitrary and violative of natural justice, because in substance the 'good' entry operates as an adverse entry (for the reason given above).

26. What is natural justice? The rules of natural justice are not codified nor are they unvarying in all situations, rather they are flexible. They may, however, be summarized in one word : fairness. In other words, what they require is fairness by the authority concerned. Of course, what is fair would depend on the situation and the context.

27. Lord Esher M.R. in *Voinet vs. Barrett* (1885) 55 L.J. QB 39, 39 observed: "Natural justice is the natural sense of what is right and wrong."

28. In our opinion, our natural sense of what is right and wrong tells us that it was wrong on the part of the respondent in not communicating the 'good' entry to the appellant since he was thereby deprived of the right to make a representation against it, which if allowed would have entitled him to be considered for promotion to the post of Superintending Engineer. One may not have the right to promotion, but one has the right to be considered for promotion, and this right of the appellant was violated in the present case.

29. A large number of decisions of this Court have discussed the principles of natural justice and it is not necessary for us to go into all of them here. However, we may consider a few.

30. Thus, in *A. K. Kraipak & Ors. vs. Union of India & Ors.* AIR 1970 SC 150, a Constitution Bench of this Court held :

"The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules, namely (1) no one shall be a judge in his own cause (*Nemo debet esse iudex propria causa*), and (2) no decision shall be given against a party without affording him a reasonable hearing (*audi alteram partem*). Very soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice".

(emphasis supplied)

31. The aforesaid decision was followed by this Court in *K. I. Shephard & Ors. vs. Union of India & Ors.* AIR 1988 SC 686 (vide paras 12-15). It was held in this decision that even administrative acts have to be in accordance with natural justice if they have civil consequences. It was also held that natural justice has various facets and acting fairly is one of them.

32. In *Kumaon Mandal Vikas Nigam Ltd. vs. Girja Shankar Pant* AIR 2001 SC 24, this Court held (vide para 2):

The doctrine (natural justice) is now termed as a synonym of fairness in the concept of justice and stands as the most accepted methodology of a governmental action".

(emphasis supplied)

33. In the same decision it was also held following the decision of Tucker, LJ in *Russell vs. Duke of Norfolk* (1949) 1 All ER 109:

"The requirement of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth".

34. In *Union of India etc. vs. Tulsiram Patel etc.* AIR 1985 SC 1416 (vide para 97) a Constitution Bench of this Court referred to with approval the following observations of Ormond, L.J. in *Norwest Holst Ltd. vs. Secretary of State for Trade* (1978) 1, Ch. 201 :

"The House of Lords and this court have repeatedly emphasized that the ordinary principles of natural justice must be kept flexible and must be adapted to the circumstances prevailing in any particular case".

(emphasis supplied) Thus, it is well settled that the rules of natural justice are flexible. The question to be asked in every case to determine whether the rules of natural justice have been violated is : have the authorities acted fairly?

35. In *Swadesh Cotton Mills etc. vs. Union of India etc.* AIR 1981 SC 818, this Court following the decision in *Mohinder Singh Gill & Anr. vs. The Chief Election Commissioner & Ors.* AIR 1978 SC 851 held that the soul of the rule (natural justice) is fair play in action.

36. In our opinion, fair play required that the respondent should have communicated the 'good' entry of 1993-94 to the appellant so that he could have an opportunity of making a representation praying for upgrading the same so that he could be eligible for promotion. Non-communication of the said entry, in our opinion, was hence unfair on the part of the respondent and hence violative of natural justice.

37. Originally there were said to be only two principles of natural justice : (1) the rule against bias and (2) the right to be heard (*audi alteram partem*). However,

subsequently, as noted in A.K. Kraipak's case (supra) and K.L. Shephard's case (supra), some more rules came to be added to the rules of natural justice, e.g. the requirement to give reasons vide S.N. Mukherji vs. Union of India AIR 1990 SC 1984. In Maneka Gandhi vs. Union of India (supra) (vide paragraphs 56 to 61) it was held that natural justice is part of Article 14 of the Constitution.

38. Thus natural justice has an expanding content and is not stagnant. It is therefore open to the Court to develop new principles of natural justice in appropriate cases.

39. In the present case, we are developing the principles of natural justice by holding that fairness and transparency in public administration requires that all entries (whether poor, fair, average, good or very good) in the Annual Confidential Report of a public servant, whether in civil, judicial, police or any other State service (except the military), must be communicated to him within a reasonable period so that he can make a representation for its upgradation. This in our opinion is the correct legal position even though there may be no Rule/G.O. requiring communication of the entry, or even if there is a Rule/G.O. prohibiting it, because the principle of non-arbitrariness in State action as envisaged by Article 14 of the Constitution in our opinion requires such communication. Article 14 will override all rules or government orders.

40. We further hold that when the entry is communicated to him the public servant should have a right to make a representation against the entry to the concerned authority, and the concerned authority must decide the representation in a fair manner and within a reasonable period. We also hold that the representation must be decided by an authority higher than the one who gave the entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar to Caesar. All this would be conducive to fairness and transparency in public administration, and would result in fairness to public servants. The State must be a model employer, and must act fairly towards its employees. Only then would good governance be possible.

41. We, however, make it clear that the above directions will not apply to military officers because the position for them is different as clarified by this Court in Union of India vs. Major Bahadur Singh 2006 (1) SCC 368. But they will apply to employees of statutory authorities, public sector corporations and other instrumentalities of the State (in addition to Government servants).

42. In Canara Bank vs. V. K. Awasthy 2005 (6) SCC 321, this Court held that the concept of natural justice has undergone a great deal of change in recent years. As observed in para 8 of the said judgment:

"Natural justice is another name for common-sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common-sense liberal way. Justice is based substantially on natural ideals and human

values".

43. In para 12 of the said judgment it was observed:

"What is meant by the term "principles of natural justice" is not easy to determine. Lord Sumner (then Hamilton, L.J.) in *R. v. Local Govt. Board* (1914) 1 KB 160:83 LJKB 86 described the phrase as sadly lacking in precision. In *General Council of Medical Education & Registration of U.K. v. Spackman* (1943) AC 627: (1943) 2 All ER 337, Lord Wright observed that it was not desirable to attempt "to force it into any Procrustean bed".

44. In *State of Maharashtra vs. Public Concern for Governance Trust & Ors.* 2007 (3) SCC 587, it was observed (vide para 39):

"In our opinion, when an authority takes a decision which may have civil consequences and affects the rights of a person, the principles of natural justice would at once come into play".

45. In our opinion, non-communication of entries in the Annual Confidential Report of a public servant, whether he is in civil, judicial, police or any other service (other than the military), certainly has civil consequences because it may affect his chances for promotion or get other benefits (as already discussed above). Hence, such non-communication would be arbitrary, and as such violative of Article 14 of the Constitution.

46. In view of the above, we are of the opinion that both the learned Single Judge as well as the learned Division Bench erred in law. Hence, we set aside the judgment of the Learned Single Judge as well as the impugned judgment of the learned Division Bench.

8. After hearing the learned counsel for the parties and going through the entire record of this case, the ACRs were recorded against the petitioner in one go, which was against him by one Officer and those ACRs seems to be influencing factor on the DPC, while finding him unsuitable and his junior suitable for the next post. This Court is of the considered view that when those ACRs were placed before the DPC without having been afforded any opportunity to the petitioner to make a representation against those ACRs. The DPC has taken into consideration those ACRs and it was at least influenced by those ACRs, so the proceedings conducted by the DPC, are required to be set aside to meet the ends of justice, as action of the DPC and concerned authority, is arbitrary, capricious, unreasonable and cannot be said to be as per law.

9. Now, when the DPC proceedings are set aside, respondents concerned are directed to constitute afresh DPC, after considering the entire material available on record including the representation against the ACRs and the result on representation and to take a final decision through DPC with regard to the promotion of the petitioner. However, it is made clear that DPC may ignore the ACRs written by respondent No.4, while making the promotion, if none of the previous ACRs are adverse.

10. Accordingly, the instant writ petition is disposed of by directing the respondents concerned to constitute afresh DPC within a period of two months from today and fresh DPC, after considering the entire material available on record pass a reasoned order in accordance with law.

Needless to say that in case the petitioner is still aggrieved, he has a right to agitate his grievance afresh in accordance with law. No order as to costs. Pending application(s), if any, also stands disposed of.