

(2019) 02 DEL CK 0025

In the Delhi High Court

Case No : Civil Writ Petition No. 7325 Of 2018, Civil Miscellaneous Application
Nos. 49313, 27941 Of 2018

S K Kardam

APPELLANT

Vs

Punjab National Bank & Anr

RESPONDENT

Date of Decision : 06-02-2019

Acts Referred:

Constitution of India, 1950 — Article 14
Banking Companies (A & T of Undertakings) Act, 1970 — Section 19
Punjab National Bank Officers' Service Regulations, 1979 — Regulation 17(1)

Citation : (2019) 257 DLT 696 : (2019) 4 AD(Delhi) 501

Hon'ble Judges : Suresh Kumar Kait, J

Bench : Single Bench

Advocate : Raman Gandhi, Harsha Sharma, Rajesh Kumar Gautam, Khushboo Aggarwal, Debayan Banerjee

Final Decision : Allowed

Judgement

1. Vide the present petition, the petitioner seeks direction thereby quashing the Performance Appraisal (PAF) Reports for the year 2010-11 and 2015-16 and the Promotion Process and the list of Promoted Candidates w.e.f. 25.04.2015 and 27.05.2016 and subsequent promotions out of the list of empanelled executives and also the list of wait listed executives and further promotions in the year 2017-18 and 2018-19, regarding promotions from Senior Management Scale IV to Scale V, selected and promoted by officers of the respondents. He further seeks direction thereby commanding the respondents to promote the petitioner in Senior Management Scale V, with all consequential benefits from retrospective effect from 25.04.2015. He also seeks direction thereby commanding the respondents to promote the petitioner in Senior Management Scale V, with all consequential benefits.

2. The brief facts of the case are that the petitioner was initially appointed as Clerk-cum-Cashier on 12.02.1981, promoted to the post of Scale I Officer on

17.10.1988, Scale II Officer on 20.08.1998, Scale III Officer on 13.07.2004 and to Scale IV Officer on 30.08.2010. The petitioner has outstanding record of service to his credit throughout the service of 36 years. As per the promotion policy circular no.252 dated 11.03.2015 (Annexure P-5), the promotion policy for 2014-15 was allowed to be continued for the promotion process for the year 2015-16 and onwards, according to which selection process from Scale IV to Scale V was proceeded. There shall be only one channel of promotion of officers from SMG Scale IV to SMG Scale V, namely Merit Channel. Accordingly, minimum experience-3 years of service in Scale IV, with minimum length of service 12 years and in addition, the experience as Branch Head at least 3 years in any Scale is required for the promotion from Scale IV to Scale V.

3. Selection parameters for the promotion process 2015-16 were as under:

Performance

50

Interview (minimum qualifying Marks

30

30%)

Group Discussions

20

Total

100

i. From amongst the applicants, the number of candidates to be called for group discussion and interview shall be determined in terms of the procedure given in clause 11 of the Policy. The eligible candidates will be called in the order of seniority.

ii. The marks for performance of the 5 preceding years would be reckoned. The weightage for Performance Appraisal Form (PAF) parameters shall be assigned as illustrated in para 4(a) in the policy.

4. As the petitioner was called for the Written Test, Interview and Group Discussion, the relevance of Clause 11 of the policy, becomes immaterial in the present petition. However, as per promotion policy circulated vide circular No.741 dated 30.03.2016 (Annexure P-6) promotion from Scale IV to Scale V for the promotion process 2016-17 also required the average of marks obtained as per Performance Appraisal Form-Annual Performance Appraisal Report (PAF-APAR) for the previous 5 years, as a contributory factor for promotion. As per policy, vacancies in SMG Scale V were to be filled up by promotion from SMG-IV, through merit channel only. The marks under various selection parameters were as under:

ANNUAL PERFORMANCE APPRAISAL REPORT(APAR)

50

WRITTEN TEST

20

INTERVIEW

25

GROUP DISCUSSION

05

TOTAL

100

Minimum Qualifying Marks For Written Test

30%

Minimum Qualifying Marks For Interview

50%

5. Accordingly, the petitioner appeared in the written test, interview and group discussion for the process of 2015-16.

6. Learned counsel appearing on behalf of the petitioner submits that the focus shifts to Annual Performance Appraisal Report (APAR) for the last five years i.e. from 2009- to 2014 for the promotion process 2015-16 and 2010 to 2015 for the promotion process 2016-17, however, the marks allotted for these years were never intimated to the petitioner as per the judgment of Hon'ble Supreme Court in the case of Dev Dutt vs. Union of India: AIR 2008 SC 2513, due to which the petitioner has been deprived of his right to represent and right to improve performance for future in violation of Article 14 of the Constitution. The promotion process for promotion from Scale IV to Scale V for the year 2015-16 was held and the list of executives approved for promotion w.e.f. 25.04.2015 along with the list of empanelled and waitlisted executives selected and promoted by officers of the respondents were declared (Annexure P-3).

7. Learned counsel further submitted that the Performance Appraisal Form-Annual Performance Appraisal Report (PAF-APAR) score of the petitioner, for the previous five years for promotion in the year 2015, as obtained through RTI (Annexure P-9) were as under:

2009-2010

81

2010-2011

65

2011-2012

87

2012-2013

80

2013-2014

81

Total

394

Average out of 100 marks

Average out of 50 marks

8. It is further submitted that the reasons for awarding an abnormally low score of 65 in 2010-11 in extreme contrast to average score of all other years and also performance for the related year, are known only to the Reporting/Reviewing/ Accepting Authorities. But, the fact remains that the petitioner was never intimated about his marks depriving of his right to represent and right to improve performance for future.

9. It is further submitted that the score of 65 in 2010-11 rated by respondents is not only very low but is in total mismatch to the performance of the petitioner and the appreciations showered on him during the period. Even this is against the own comments of the reporting authority, recorded in the same Performance Appraisal Form-Annual Performance Appraisal Report (PAF-APAR). A critical analysis of the Performance Appraisal Form will divulge that the marks awarded by the reporting authority and confirmed by the reviewing and accepting authorities have no relevance to the petitioner and the appreciations showered on the petitioner during the period 2010-11. Besides, the general guidelines and principles to be observed on the part of the aforesaid authorities have been intentionally over ruled to ensure that the Will of the Prejudiced Reporting Authority reigns supreme. Had it been so, there was no need for creating the multi tiers of assessing the performance. The marks allotted by the reporting authority and ritually followed and repeated by reviewing authority as obtained through RTI (Annexure P-1) under each head are as under:

a.

4.1 to 4.3 Deposits and other Business Areas Credit, Foreign Exchange and Recovery Performance/NPA Management.

12 of 20

b.

4.4 Financial management

6 of 10

c.

4.5 Customer Service

6 of 10

d.

4.6 House-keeping

8 of 10

Total

32 of 50

10. Learned counsel for the petitioner further submitted that this is against the directions to the Reporting/Reviewing/Accepting Authorities while assessing and assigning marks under this parameter due consideration should be given to the customers and business profile, NPA mix and availability of staff and other peculiar and special feature.

11. However, the authorities mentioned above were biased to the petitioner for the reasons stated as under:

"13. The Business Figures of the Branch for the Period 2010-2011, (Annexure P-1) have been quoted by the Appraiser under part ii of the PAF (Annexure P-1) as:

Growth in Savings Deposit

4.02%

Growth in Current Deposit

656.55%

Growth in Term Deposits

28.10%

Growth in Aggregate Deposits

70.19%

Mobilisation of low cost Deposit Growth

55.79%

in Advances

Reduction in NPA

63.00%

Financial Efficiency:

Revenue

256%

Total income

258%

Interest income

83%

Non-interest income

227%

Profit

236.07%

Business per employee increased from 21.52 to 50.43 Cr. House keeping Up to date in all respects. Keeping in view the Banking Industry Growth of not more than 20% for overall Business, the above growth figures are phenomenal and when coupled with the comments of the Reporting Authority, as to how and why, so, low marks have been awarded only in this year and as to why the Reviewing Authority has simply endorsed the Marks of the Reporting Authority, as appears apparently, instead of judicially reviewing the same. Why the Reviewing Authority's mind did not stir at such a low score, in view of the Performance Record given in the same Performance Appraisal Form (PAF). The marks given by the Reporting and Reviewing Authority have been given without giving any consideration to the Guidelines framed for the same and just to keep them reminded of the same. The overlooking, if any, has to be and should be deemed as intentional.

14. Similar is the case with 33 marks out of 50 on page 14 and total 65 of 100 Marks given on page 16 of the Performance Appraisal Form-2010-11 (PAF) (Annexure P-1).

15. A close scrutiny of the Marks given by the Field General Manager (FGM), Sh. A. K. VERMA, would reveal that the Marks have not been given by him in his own handwriting and appear to have been written by the Reporting Authority. Besides, the same have not even been signed by the Reviewing Authority. Still further, no marks have been given by the Reviewing Authority at the place meant for him, clearly evidencing that the exercise has not been undertaken as per Guidelines or has been undertaken by the Reporting Authority on behalf of the Reviewing Authority. This is not only against the principles of natural justice that

each appraising Authority has to assess and award marks independently but also smacks of bias, prejudice and collusion against the Petitioner of the Reporting and Reviewing Authority. All this has been done intentionally, throwing into background all the norms for the Purpose and playing with the career of the Petitioner, who has performed excellently for the Bank just because he is a Schedule Caste (SC) Candidate and the Reporting Authority is biased against the Category (Annexure P-1).

16. With the Growth shown in para 13, pertaining Deposits and other Business and Financial efficiency, coupled with up-to-date House Keeping, the Marks awarded do not bear any nexus/rational with the Performance under these Parameters and so are based on certain other hidden agenda instead of the Guidelines meant for the purpose. The Performance of this magnitude cannot be achieved without providing excellent service to the Customers, highlighting that the Marks even under that Head "House Keeping" have not been correctly awarded (Annexure P-1)."

12. Learned counsel for the petitioner submits that in view of above, the present petition deserves to be allowed.

13. On the other hand, learned counsel appearing on behalf of the respondents Bank submits that the petitioner has challenged his non selection to the post of SMG Scale V in the selection process which was held in the year 2015-16, wherein the petitioner had participated and the present petition has been filed only after he was declared unsuccessful in the promotion process. Thus as per the settled law in the case of K.A. Nagamani vs. Indian Airlines & Ors.: (2009) 5 SCC 515 whereby the Supreme Court has held that once the candidate participated in the process without any demur or protest cannot be allowed to turn round and question the very same process having failed to qualify for the promotion. Learned counsel submits that thus the present petition deserves to be dismissed on this ground alone.

14. It is further submitted that the petitioner has raised grievance with regard to the assessment of his performance for the year 2010-11 after delay of about 7 years. Therefore such delay accrued third party rights because meanwhile, other employees were promoted. The petitioner himself has admitted that he was aware in the year 2014 with regard to awarding of 65 marks in the performance appraisal in the year 2010-11, thus, there is no merit in the present petition. He further submitted that though the petitioner has prayed for quashing of the promotion process and the list of promoted candidates w.e.f. 25.04.2015 and 27.05.2016, however, the petitioner has not impleaded such candidates who have been promoted to the post of SMG Scale V w.e.f. 25.04.2015 and 27.05.2016 in the present petition.

15. It is further submitted that the service conditions of the officers, like the petitioner herein, are governed by Punjab National Bank (Officers') Service Regulation, 1979 which are statutory in nature having been framed by the Board

of Directors of respondent bank in consultation with the Reserve Bank of India and with the previous sanction of Central Government in exercise of its powers under section 19 of Banking Companies (A & T of Undertakings) Act, 1970.

16. That Regulation 17(1) of the Officers' Service Regulations, 1979, inter alia, provides as under:

"Promotions to all grades of officers in the Bank shall be made in accordance with the policy laid down by the Board from time to time having regard to the guidelines of the Government, if any."

17. The promotion policy, in terms of above provisions and which is in issue in the present petition, had been framed by the Board of Directors of the respondent Bank in the meeting held on 29.03.2016 and has been circulated vide circular No.741 dated 30.03.2016. Thus, it is settled law that an employee only has a right to be considered for promotion from one grade/ cadre to another grade/cadre and has no right to be promoted. In the present case, the petitioner has admittedly been considered for promotion in the process of selection held for the year 2015-16, however, as the marks obtained (total marks obtained were 73.80) by him in the different parameters prescribed in the promotion policy were less than the total marks (75.70) obtained by the last candidate who was promoted to SMG Scale V in the selection process which was held in the year 2015-16.

18. Learned counsel further submitted that as per policy guidelines applicable in case of officers in Scale IV and above for the year 2010-11, the officers were informed about their rating awarded by the Moderation Committee only in case rating is 'below average'. In the present case, the rating of the petitioner for the year 2010-11 was not 'below average' hence, the same was not communicated to him.

19. It is further submitted that the marks for performance have been given to the petitioner based on his performance for the said year by Appraising Authority and Reviewing Authority. The fact that different tier has been provided, same would not mean that the higher authority cannot accept the assessment made by the lower authority or the higher authority must necessarily make changes (up or down) in the assessment done by the lower authority. The authorities have taken into consideration all aspect and not only the guidelines of the respondent bank for promotion. Thus, the present petition deserves to be dismissed.

20. I have heard learned counsel for the parties in length and perused the material on record.

21. The Hon'ble Supreme Court in case of Dev Dutt (supra) has observed that every entry in the ACR, of a public servant must be communicated within a reasonable period, whether it is 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:

i. 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,

ii. He would have an opportunity of making a representation against the entry, if he feels it is unjustified, and pray for its upgradation.

22. In view of above, it is further observed that communication of entries and giving opportunity to represent against it is particularly important on higher posts which are in paramedical 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. While framing opinion, every entry must be communicated within reasonable time.

23. The petitioner has made allegation of bias against the respondents for the reason that the petitioner belongs to Scheduled Caste category. In addition to performance of 2010 and 2011, for the year 2016, the officer of the respondent instead of giving specific marks to the petitioner have put an alphabet (Y) against the remarks 'very good' which has a rank of 75-89 marks. Thus, this is a casual manner of assessment of the petitioner for the year 2016 against the range of 75 to 89 marks and if fluctuated by 14 marks which can make a lot of differences in the overall placement in the merit list.

24. As stated by the counsel for petitioner that if the performance of the petitioner is compared with any of the other years coming under review i.e. 2009-10, 2011-12, 2012-13 and 2013-14 (Annexure P-8(colly)) with that of the marks awarded by other reporting authorities i.e. marks awarded vis-a-vis his achievements under those very parameters, it would be observed that marks awarded are much higher and so more appropriate for almost identical or parallel performance in these years. This concludes the prejudice of the particular reporting authority against the petitioner. Moreover, the reviewing authority and accepting authority without assigning reason accepted the report made by reporting officer. On comparing his performance with the very next year i.e. 2011-12 (Annexure P-8) in which the petitioner has worked in the same branch for over 9 months, before being transferred to Audit Department on 06.01.2012, it was observed that his score has gone up from 65 to 87 i.e. a phenomenal increase of 22 marks i.e. 22%. It goes without saying that this increase is only because of the reason that the reporting and reviewing authorities had been different and dispassionate executives, otherwise his performance was no better in these 9 months than the year 2010-11 and also that the petitioner did not make any miracle during his working of less than 3 months, in the Audit Department to garner such a high score.

25. It would be appropriate to highlight that this is appropriate score as it

matches when compared to other years except 2010-11 (Annexure P-1). The scores under all parameters have come in line with the scores for other years except 2010-11. This clinchingly concludes that score in 2010-11 has been a biased score against the petitioner.

26. If the marks to be awarded are genuinely linked to the performance in comparison to other years, the same would certainly fall in the range of above 95%, thereby increasing the average to $81+95+87+80+81=424/5$ i.e. 84.8% or 42.40 of 50.

27. As per the petitioner's evaluation sheet received from Senior Management Grade (SMG) Scale IV to Senior Management Grade Scale V, held at Field General Manager Office (FGMO) Delhi and obtained through RTI, total marks obtained by him are 76.40 and if the above evaluation as mentioned above is considered, same would rise to 79.40 as against the marks 76.70 of the last candidate promoted, thereby making the petitioner eligible for promotion (Annexure P-9).

28. Alternatively, even if I consider the average of 4 years excluding 2010-11, i.e. $81+87+80+81=329/4$ i.e. 82.25, as the marks for the year 2010-2011 and calculate the average for last 5 years on the basis of the same i.e. $81+82.5+87+80+81=411/5$ i.e. 82.3 out of 100 and marks out of 50 would come to 41.15 and the total would be increased by 1.75 i.e. to 78.15 as against the marks 76.70 of the last candidate promoted, thereby still making the petitioner eligible for promotion (Annexure P-8). Thus by all stretch of imagination, the petitioner would have secured more marks than the last candidate promoted and so would have been promoted. Thus, this single entry has ruined the career of the petitioner and he continues to remain in the same scale for the last 8 years and may remain so as he has now acted as whistle blower and so may have to bear the onslaught of the management in future.

29. Even if the average marks obtained by the petitioner over the years are compared which are in the range of more than 80, the award of 65 marks as against better performance in 2010-11 sounds prejudicial and deserves upward revision (Annexure P-1) on the following appreciation:

- i. Letter dated 09.02.2011, for recovery under NPA for which a cash award of ☐ 7,059/- was conferred on the Petitioner (Annexure P-10).
- ii. Letter dated 28.02.2011, for Mobilising LIC Business (Annexure P-11).
- iii. Letter dated 29.04.2011, for achieving the Targets (Annexure P-12).
- iv. Letter dated 03.06.2011, for recovery under NPA for which a cash award of ☐ 15,258/- was conferred on the Petitioner (Annexure P-13).

30. Thus it is established from the above list and events that there is plethora of such letters, maintaining the consistency in appreciation being bestowed on him but the same have not been given due weightage.

31. It is pertinent to mention here that the petitioner is shown at serial no. 109

in the list of selected candidates for the selection process of 2015 (page 123 of the petition), whereas, the candidate at Serial No. 99 was the last one to have been promoted to MMGS-V. The petitioner secured 76.40 marks whereas, the last candidate who had been promoted was given 76.70 marks. Thus, if the PAF of 2010-2011 of the petitioner is ignored, then the petitioner climbs up in the list to a rank of 69 from Serial No. 109; if the petitioner is assessed and given marks on the basis of average for four years i.e. 82.25 marks instead of 65, then, petitioner climbs up to a rank at Serial No. 69 from Serial No. 109.

32. In AIR 1997 SC 2110, Raj Kumar Vs. Shakti Raj, the Hon'ble Supreme Court propounded that the principle of estoppel does not apply against irregularities committed in the selection process and a candidate cannot be barred from questioning the selection process, though he has participated in the same.

33. In case of Sukhdev Singh Vs. Union of India & Others: (2013) 9 SCC 566, which is decided by Full Bench of the Supreme Court and their Lordships were in complete agreement with view taken in Dev Dutt (Supra).

34. It is important to note that in Sukhdev Singh (Supra), the Hon'ble Supreme Court considered the case of Abhijit Ghosh Dastidar Vs. Union of India (UOI) and Ors: (2009) 16 SCC 146, wherein held that the entries could if at all granted to the employee, the same should not have been taken into consideration for being considered promotion to the higher grade, if the entry in the ACR has not communicated to the employee.

35. The similar issue came before this Court in case of Union of India Vs. V S Arora: 2012 (8) AD (Delhi) 365. The issue before this Court in the said case was with regard to the below benchmark ACRs, which were not communicated to the employee. The question was whether when the DPC meets, what does it have to do with regard to those below benchmark and non-communicated ACRs? Does it consider those ACRs or is it the requirement of law that the ACRs should be communicated to the concerned employees even at that stage and that they be given an opportunity to move representation against the same and after the representation are disposed of, the DPC should be reconvened to consider the case of the employees for promotion ?

36. The said issue has answered by this Court in para 14 as under :

"however, the Supreme Court in Abhijit Ghosh Dastidar (supra) went further and observed categorically that, therefore, the entries "good", if at all granted to the appellant, ought not to have been taken into consideration for being considered for promotion to the higher grade. What this meant was that the below benchmark ACRs, which had not been communicated to an employee, ought not to be taken into consideration for the purposes of considering the promotion of that employee to a higher grade. We must also distinguish between the stage when ACRs are written and the stage when they are considered by the DPC. What Dev Dutt (supra) and, indeed, Abhijit Ghosh Dastidar (supra) hold in unison is that the ACRs must be communicated to the concerned employee/

officer soon after it is written. Because, its non-communication is contrary to the provisions of article 14 of the Constitution. But, this is at the stage when the ACRs are recorded or shortly thereafter. The objective of communicating the ACRs is two-fold. In the first place, as an element of natural justice, the officer concerned gets an opportunity of representing against the ACR before it is too late. Secondly, it also informs and warns the officer concerned that his performance is not upto the mark so that he may improve himself in the next year. However, at the stage of the DPC, the ACRs already stand crystallized and their communication then may not serve any fruitful purpose apart from informing the concerned employee/officer and, perhaps, enabling him to represent against it. But, the second aspect of improvement is lost. Consequently, at the stage of the DPC meeting the practical approach would be to not consider the un-communicated ACRs as held in *Abhijit Ghosh Dastidar (Supra)*."

37. Admittedly, the entries made in ACR of 2009-10 and 2010-11 have not been communicated to the petitioner before holding DPC for the promotion in question. Therefore, there is no necessity to discuss that who was Reporting Officer and Reviewing Officer of the petitioner for the year 2009-2010. However, for the sake of repetition, from the period from 1.4.2009 to 11.12.2009 his ACR was Average, but from 12.12.2009 to 31.03.2010 was good. So for the period 2.6.2010 to 31.03.2011, 'Average' and 1.04.2010 to 20.10.2010 was good. Undisputedly, both the ACR not communicated to the petitioner.

38. In case of *Sukhdev Singh (supra)*, it is held that the entries not be taken into consideration if not communicated to the employee. In the case in hand, the entries of the year 2009-2010 and 2010-11 have not been communicated but considered for promotion, which is against the settled law.

39. In view of above discussion and settled law, the petitioner is entitled for the promotion in question in the year 2015. Consequently, the respondents are directed to promote the petitioner with all consequential benefits w.e.f. the date other officers were promoted pursuant to DPC held in 2015. To this effect, an order for promotion shall be issued within four weeks from the receipt of this order.

40. The writ petition is, accordingly, allowed.

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In view of the order passed in the present writ petition, these applications have been rendered infructuous and are accordingly, disposed of such.