
(2010) 07 DEL CK 0293

In the Delhi High Court

Case No : Writ Petition (C) No. 2925 of 1994

Sh. J.K. Pali

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 28-07-2010

Acts Referred:

Constitution of India, 1950 — Article 16, 16(4)

Delhi Higher Judicial Services Rules, 1970 — Rule 12(2), 7

Citation : (2010) 07 DEL CK 0293

Hon'ble Judges : Reva Khetrapal, J;A.K. Sikri, J

Bench : Division Bench

Advocate : O.P. Khadaria, for the Appellant; Viraj R. Datar, Chetan Lokur and Krishanu Adhikary, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sikri, J.—The petitioner herein was a member of Delhi Judicial Service. He was appointed to the said post on his selection after he qualified the written test and interview in the 1972 batch. For his promotion in the cadre to Delhi Higher Judicial Service (for short "DHJS"), the petitioner, as per his seniority, became eligible to be considered for promotion to DHJS in the year 1992. However, he was not given promotion on the ground that he was found "unfit for promotion". In the selection process carried out for the same purpose in the year 1994, the petitioner was again bypassed and certain juniors to him were promoted. In these circumstances, the present writ petition was filed by the petitioner in the year 1994 whereby he has sought quashing of the impugned orders dated 8th December, 1992, 4th April, 1994 and 27th May, 1995 passed by the respondents No. 2 and 3, denying him the promotion to DHJS.

2. The petitioner belongs to the scheduled caste category. The case set up by him is that he was entitled to the promotion to DHJS keeping in view his seniority as well as the Annual Confidential Reports (ACRs).

3. In the seniority list dated 25th October, 1990, the name of the petitioner

appears at serial No. 10. In the exercise which was undertaken for promotion to the DHJS, names of 10 officers belonging to the Delhi Judicial Services were recommended for promotion - superseding the petitioner. How it happened and what is the basis for challenge to the aforesaid action of the respondent in not promoting the petitioner will be considered after we take note of the relevant rules for promotion as well as the ACRs of the petitioner in the relevant years which were the subject matter of consideration.

4. The promotion to DHJS is governed by Rule 7 (which existed at the relevant time) of the DHJS Rules, 1972. This rule is to the following effect:

7. REGULAR RECRUITMENT - Recruitment after the initial recruitment shall be made:

(a) by promotion on the basis of selection from members of the Delhi Judicial Service, who have completed not less than 10 years of service in the Delhi Judicial Service;

(b) by direct recruitment from the Bar.

Provided that not more than 1/3rd of the (*) posts in the Service shall be held by direct recruits.

Provided further that where a member of the Delhi Judicial Service is considered for such appointment under Clause (a) all persons senior to him in the Service shall also be considered, irrespective of the fact whether or not they fulfil the requirements as to the minimum of 10 years service.

5. Since the petitioner is laying claim to DHJS by promotion, he is covered by Clause (a) of Rule 7 of the said Rules. This clause, in no uncertain terms, stipulates that promotion is on the basis of "selection" from the members of the Delhi Judicial Services.

6. The normal procedure which is followed is to take into consideration the ACRs of the preceding five years, relevant to the year in which the promotion process is undertaken. Thus, in the year 1990, the ACRs of the eligible persons, namely, who had completed 10 years of service in the Delhi Judicial Service would be for the period 1985 to 1989. In all these years, the petitioner had earned "B" grading.

7. From 1985 to 1989, the petitioner was given B grading. Learned Counsel for the respondent has produced the original records containing Full Court Minutes and exercise of promotion carried out from time to time for all the period prior to 1990 and even after 1990. Minutes of the Full Court Meetings giving promotions to Judicial Officers in the Higher Judicial Service are also produced. Perusal thereof shows that those Judicial Officers, who had earned at least one B+ at the relevant year are treated as fit for promotion. This can be discerned from the agenda note prepared for the Full Court Meeting held on 29.07.1989. Referring to the earlier proceedings of the Full Court, this note, inter alia, produce as

under:

Since the method of appointment has been changed to "promotion by selection" from amongst the members of Delhi Judicial Service, only one officer, namely Shri S.P. Singh Chaudhary was superseded twice i.e. in 1978 and 1979 when he had ACRs as "B" for the last three years and he was selected as Additional District and Sessions Judge per decision of the Full Court dated 30.04.1979, when he earned one "B+". The promotion by selection provided in the rules has, in fact, been implemented as selection on the basis of seniority-cum-fitness i.e. subject to rejection of unfit.

8. It also follows from the above that method of promotion on the basis of selection is on the basis of seniority-cum-fitness subject to rejection of the unfit. In this very "Note", the yardstick for the promotion of Scheduled Castes candidates is also stipulated. This reads as under:

Regarding promotion by selection of Scheduled Caste candidate, Chapter 9.2(a) of Brochure on Reservation of Scheduled Castes and Scheduled Tribes reads as under:

9.2(a) : Promotions by selection within Group A (Class I).

In promotions by selection to posts within Group A (Class I) which carry an ultimate salary of Rs. 2,000/-per month, or less, (Rs. 2250/- per month or less in the revised scale) there is no reservation, but the Scheduled Castes/Scheduled Tribes Officers, who are senior enough in the zone of consideration for promotion so as to be within the number of vacancies for which the select list has to be drawn up, would be included in that list provided they are not considered unfit for promotion. Their position in the select list would, however, be the same as assigned to them by the Departmental Promotion Committee on the basis of their record of service. They would not be given, for this purpose, one grading higher than the grading otherwise assignable to them on the basis of their record of service.

A perusal of the above said para shows that there is no reservation for the Scheduled Caste and Schedule Tribe candidates for promotion within group "A" (Class I) posts but if a Scheduled Caste and Scheduled Tribe Officer is senior enough in the zone of consideration, so as to be within the number of vacancies for which select list is to be drawn up he would be included in that list provided he is not considered unfit for promotion.

In this case, Shri Shiv Charan is a Scheduled Caste candidate and he comes within the number of vacancies are three.

The Govt. of India instructions having bearing on the question of field of choice contained in the Ministry of Home, Deptt. of Personnel and Administrative Reforms, O.M. dated 24.12.1980 were never made applicable to the selection or/for putting the officers on probation in connection with the matter in Delhi Higher Judicial Service. These instructions regarding placing of officers of Delhi Higher

Judicial Service on probation under Rule 12(2) of Delhi Higher Judicial Service Rules came up for consideration before the Full Court and the Full Court in its meeting held on 6.10.1982 held that the Memorandum issued by the Ministry of Home, Govt. of India, was not applicable. The minutes of the Full Court meeting held on 6.10.82 are reproduced here in extenso for ready reference:

AGENDA MINUTES 2. (Item No. 1 of the Agenda)

To consider the matter regarding placing certain officers on probation under Rule 12(2) of the Delhi Higher Judicial Service Rules alongwith the recommendations of the Special Committee comprising of Hon''ble Mr. Justice S.S. Chadha, Hon''ble Mr. Justice J.D. Jain and Hon''ble Mr. Justice B.N. Kirpal. The discussion of this item was continued from the previous meeting. It was resolved to adopt the following criteria in selecting officers from Delhi Judicial Service for being placed on probation in the Delhi Higher Judicial Service:

- i) Selection will be made for filling each post, whether vacant or whether the vacancy is anticipated by considering eligible persons as detailed hereunder, for one post at a time.
- ii) The zone of consideration for each post will be five senior-most eligible officer of the Delhi Judicial Service.
- iii) The memoranda issued by the Home Ministry of the Govt. of India, it was resolved, was as such not applicable.
- iv) The selection will be made on the basis of confidential reports and other relevant factors.

It was decided that it was not necessary to have regulations framed for this purpose as it was a criteria which is being adopted by the Full Court for its own guidance in selecting officers for appointment on probation.

9. This shows that Clause 9.2(a) of the "Brochure on reservation of Scheduled Castes and Scheduled Tribes" is being followed. It, further, indicates that instructions contained in Office Memorandum dated 24.12.1980 issued by the Department of Personnel and Administrative Reforms on the question of field of choice have not been followed on the ground that these instructions are not applicable. The selection of the officers made from time to time right from 1984 till 2003 were also produced in tabulated form and after scanning through the same, it becomes clear that only those officers who had one B+ in five years ACR were promoted to Higher Judicial Service. It also shows that those officers who could not earn one B+ even when they belong to scheduled castes category were not promoted and got their promotion in subsequent years only when they earn B+ grade.

10. In the wake of the aforesaid factual premise and the practice followed, Mr. Khadaria, Learned Counsel appearing for the petitioner, submitted that it was not proper on the part of the respondents to insist on one grade of B+ for one year

in the case of scheduled castes as well. His submission was that the petitioner who belongs to scheduled caste category was entitled to "concession" and even if he had B grading in all five years, he was entitled to promotion to DJHS. Expanding on this argument, Mr. Khadaria submitted that the relevant consideration was that candidate should not be "unfit" for promotion. That was the yardstick to be applied as laid down by the Supreme Court in the case of National Federation of S.B.I. and Others, etc. Vs. Union of India and Others, Referring to the ACRs of the petitioner, Mr. Khadaria pointed out that the Inspecting Judge(s) in different years had given "B+" grading. While giving those gradings, they had categorically opined that the petitioner had "good knowledge of law and procedure, he was industrious and prompt in disposal of case, his judgments/orders were well written, and he was efficient and honest officer". He, thus, submitted that even if the Full Court did not accept the grading recommended by the Inspecting Judge(s) and the final grading given to him was B, the fact remains that he was rated as a good officer, who not only had the knowledge of the law but his judgments were well written and he was performing his duty honestly and nothing adverse was found against him. On these parameters, it was argued, the petitioner could not be treated as "unfit" for promotion.

11. He also buttressed his submission by arguing that within eight days of rejecting him for promotion, the petitioner was posted as Senior Sub-Judge and in that capacity he was hearing appeals from the orders of Sub-Judge (Civil Judge). This would also show that the petitioner was treated as competent officer by the High Court and thus, could not have been ignored for promotion to the Higher Judicial Services.

12. The aforesaid arguments would not advance the case of the petitioner when considered in the light of the facts of this case. We have already pointed out the criteria for promotion to Higher Judicial Services, which the High Court has consistently followed for more than 30 years, i.e., ever since there was an amendment in Rule 7 of the Delhi Higher Judicial Services Rules vide Notification dated 28.03.1977 and the method of appointment was changed to promotion by selection. As per this, the benchmark which is laid down is that a judicial officer who earns one "B" in the preceding five years is treated as "unfit". It is this yardstick, which is to be applied while considering a candidate for promotion. As pointed out above, not a single case till date where candidate belongs to general category or reserved category was promoted who has earned one "B+". The Supreme Court in the case of Union of India (UOI) and Another Vs. Samar Singh and Others, has clearly held that merely because the minutes of the Committee do not contain the reason for non-selection of the respondent does not mean that there has been no proper consideration of the merits and suitability of the candidate.

13. The criteria for promotion of reserved category candidate would be the same. Higher Judicial Service is a Class-I post. Further, it is "Selection Post". In such a

case, the DOPT has categorically laid down that there would not be any relaxation in the standards even if the candidate belongs to reserved category.

6.3.2 In the case of SC/ST officers. - (i) In promotions by "Selection-cum-Seniority" and "Selection by Merit" to posts/services within Group "A" which carry an ultimate salary of Rs. 5,700 p.m. or less, in the IV PC pay Scale (Rs. 8300, Vth Pay Commission), the SCs/STs senior enough in the zone of consideration for portion so as to be within the number of vacancies for which the select list has to be drawn up, would be included.

14. Recently, the Supreme Court in the case of Union of India (UOI) and Others Vs. Alok Kumar, explained these principles of law, which clearly applies to the present case, in the following terms:

41. It is not opposed to any canons of service jurisprudence that a practice cannot adopt the status of an instruction, provided it is in consonance with law and has been followed for a considerable time. This concept is not an absolute proposition of law but can be applied depending on the facts and circumstances of a given case. This Court in the case of Confederation of Ex-Service Man Associations and Ors. v. Union of India and Ors. (2006) 8 SCC 699 was concerned with providing of Medicare/Medical aid to ex-servicemen and the scheme framed by the Government to provide ex-defence personnel medical services provided they paid "one-time contribution", was held not to be arbitrary and based on the practice followed earlier. In such circumstances, this Court held as under:

In such cases, therefore, the Court may not insist an administrative authority to act judicially but may still insist it to act fairly. The doctrine is based on the principle that good administration demands observance of reasonableness and where it has adopted a particular practice for a long time even in the absence of a provision of law, it should adhere to such practice without depriving its citizens of the benefit enjoyed or privilege exercised.

42. A practice adopted for a considerable time, which is not violative of the Constitution or otherwise bad in law or against public policy can be termed good in law as well. It is a settled principle of law, that practice adopted and followed in the past and within the knowledge of the public at large, can legitimately be treated as good practice acceptable in law. What has been part of the general functioning of the authority concerned can safely be adopted as good practice, particularly, when such practices are clarificatory in nature and have been consistently implemented by the concerned authority, unless it is in conflict with the statutory provisions or principal document. A practice which is uniformly applied and is in the larger public interest may introduce an element of fairness. A good practice of the past can even provide good guidance for future. This accepted principle can safely be applied to a case where the need so arises, keeping in view the facts of that case. This view has been taken by different High Courts and one also finds glimpse of the same in a judgment of this Court in the

case of Deputy Commissioner of Police and Ors. v. Mohd. Khaja Ali 2000 (2) SLR 49.

15. In view of the aforesaid position, the petitioner could not claim promotion to Delhi Higher Judicial Services on the basis of his "B" gradings alone in all the years. Not much importance can be given to the remarks given by the Inspecting Judge(s) in the ACRs of the petitioner on the basis of which strong reliance was placed by Mr. Khadaria. As pointed out above, these are the remarks of Inspecting Judge(s), who had recommended "B+" (Good) grading to the petitioner. However, these recommendations of the Inspecting Judge(s) were not accepted by the Full Court. The Full Court ultimately awarded grading "B" (Average) in all these years. Therefore, the fact remains that for all these years, the petitioner was rated as an "average" for want of one "B+" grading. He was to be treated as "unfit" after applying the criteria laid down by the Full Court in this behalf.

16. In such a situation, whether the judgment of the Supreme Court in National Federation of S.B.I. and Ors. (supra) helps the petitioner? Mr. Khadaria had argued that the Supreme Court in the said case has categorically explained and clarified the term "not found fit" by explaining that it conveys that there is nothing adverse against the candidate. He also argued that the Supreme Court had laid down that persons belonging to reserved category were entitled to "concession", which would mean that all such candidates who are senior enough in zone of consideration for promotion to be included in select list provided they are not considered unfit for promotion. The Supreme Court also expressed that the "concession" is evidently designed and intended to help the Scheduled Castes/Scheduled Tribes officers obtain promotions which they may not otherwise get.

17. In order to appreciate the contention of the petitioner, we may first point out that the Supreme Court was dealing with the case of a public sector bank. No doubt, promotion in that case was also by selection and that too the post within Class - I. However, the observations of the Court are based on letter dated May 09, 1980 issued by the Ministry of Defence, Department of Economic Affairs (Banking Division), Government of India as well as Office Memorandum dated March 26, 1970. This would be clear from reading of Paras 12 and 17 of the judgment which was strongly relied upon by Mr. Khadaria:

12. It would be appropriate at this stage to refer to the letter dated May 9, 1980 from the Ministry of Finance, Department of Economic Affairs (Banking Division), Government of India, addressed to the Chairman, Indian Banks Association, Bombay explaining the meaning of certain expressions occurring in the Office Memorandums refereed to above. They are to the following effect: though according to the New Officers Service Regulations, salary includes basic pay and DA, so far as reservations are concerned, i.e., for the purpose of reservation, "ultimate salary" is meant to convey the basic pay only and does not include the variable DA. It was for this purpose that promotions upto Scale-III have been

covered which carries the scale upto Rs. 2250 which is exclusive of DA". With respect to the expressions "zone of consideration" and "not found unfit", the following clarification was made:

Clarifications have also been sought regarding the term "zone of consideration" and "Not found unfit". Zone of consideration is meant to cover all candidates who satisfy the prescribed conditions which have been laid down for being considered for promotion. This would mean that this zone of consideration would be similarly applicable to the general as well as SC/ST candidates. As regards the term "Not found unfit", it is clarified that this terms is meant to convey that there is nothing adverse against the candidate.

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17. We may now turn to the meaning and nature of the "concession" contained in the Office Memorandum dated March 26, 1970. We have already set out the significant features of the said concession contained in Para 2 of Office Memorandum in Para 5 of this judgment. We shall now explain what exactly does the formula mentioned under (c) in Paragraph 5 of our judgment mean? For the sake of convenience, we shall repeat the formula. "In promotions by selection to posts within Class-I...the Scheduled Castes/Scheduled Tribes officers who are senior enough in the zone of consideration for promotion so as to be within the number of vacancies for which the select list has to be drawn up would be included in the list provided they are not considered unfit for promotion". It is unnecessary to reiterate that the said Office Memorandum does not provide for reservation as contemplated by Article 16(4) of the Constitution of India; it only provides for a concession which the State can always provide under Article 16 as explained in *Indra Sawhney Vs. Union of India (UOI) and Others*, . The concession is evidently designed and intended to help the Scheduled Castes/Scheduled Tribes officers obtain promotions which they may not otherwise get. Towards that purpose, it is provided that those Scheduled Castes/Scheduled Tribes officers who are senior enough in the zone of consideration so as to be within the number of vacancies available shall be included in the select list provided they are not considered unfit for promotion. The said formula has been explained with reference to an illustration in the letter dated November 7, 1983, referred to above. Be that as it may, we shall elaborate and explain it. Take a case where twenty vacancies arise which have to be filled by promotion by selection; according to the relevant rules, thrice the number of vacancies are to be considered - in other words, a list of sixty eligible candidates has to be prepared who alone will be considered for promotion to the said twenty posts, which list is but another name for "the zone of consideration" referred to in the Office Memorandum; (ordinarily, this list is prepared on the basis of seniority-cum-eligibility); if any Scheduled Castes/Scheduled Tribes officer happen to fall within Serial No. 1 to 20 in the said list, they shall be included in the select list without further ado, i.e., without subjecting them to the process of selection and without comparing their merit and grading with the merit and grading of the

other officers within the zone of consideration. But for the said concession, it may be noted, these Scheduled Castes/Scheduled Tribes officers may not get selected even though they may fall within Serial No. 1 to 20 in the zone of consideration for the reason that the candidates below Serial No. 20 may have a better record of service and grading than them. Since the promotion is on the basis of selection, the more meritorious (the officer having better grading) will get selected notwithstanding his position in the zone of consideration. It appears quite obvious that candidates belonging to Scheduled Castes/Scheduled Tribes were not getting selected by following the normal procedure of selection and hence, the said concession was provided. According to it, it is enough if a Scheduled Castes/Scheduled Tribes candidate comes within Serial No. 1 to 20 in the zone of consideration in the illustration given above. He would be automatically included in the select list, even though his grading on the basis of his record and performance may be far inferior to the grading of the other officers below Serial No. 20 in the zone of consideration provided, of course, such Scheduled Castes/Scheduled Tribes officer is not found unfit for promotion. So far as Scheduled Castes/Scheduled Tribes candidates below Serial No. 20 in the zone of consideration are concerned, they will, of course, be not entitled to any such concession and, therefore, have to compete with other candidates within the zone of consideration. It is equally clear that the O.C. candidates between Serial No. 1 to 20 in the zone of consideration will not be entitled to the aforesaid concession; they will have to compete with all others in the zone of consideration (S. No. 1 to 60) for selection to the said vacancies. This, in short, is the concession. Since it is only a concession and not a reservation, the several letters of the Ministry of Finance referred to above, viz., letters dated May 30, 1981, November 7, 1983, March 25, 1987 and the clarificatory Office Memorandum dated November 1, 1990 repeatedly say that while there is no reservation for Scheduled Castes and Scheduled Tribes in this behalf (i.e., in the matter of promotion by selection to posts within Class-I) a concession is provided to them. It is because of this circumstance again that Para 9.2 in the seventh edition of the Brochure on the subject of reservation for Scheduled Castes and Scheduled Tribes in services says that while there is no reservation, the Scheduled Castes/Scheduled Tribes candidates are entitled to the concession mentioned therein.

18. In para 12 where it is noted that "not found unfit" would mean that there is nothing adverse against the candidate, that was as per the clarification issued by the Department in its letter dated May 09, 1980. Likewise, in para 17 where the Supreme Court was dealing with "concession", it was with respect to the Office Memorandum dated March 26, 1970, which is clear from the following:

...For the sake of convenience, we shall repeat the formula. "In promotions by selection to posts within Class-I...the Scheduled Castes/Scheduled Tribes officers who are senior enough in the zone of consideration for promotion so as to be within the number of vacancies for which the select list has to be drawn up would be included in the list provided they are not considered unfit for promotion.

19. Even as per the formula contained in OM dated 26.03.1970, it is clearly provided that those Scheduled Castes candidates, who are considered unfit for promotion would not be included in the select list. No doubt, what is held is that if the reserved category candidates, who are senior enough in the zone of consideration for promotion so as to be within the number of vacancies for which the select list has to be drawn up, would be included in the select list. The assessment is to be made by comparing his merit with other officers. However, at the same time, it is also necessary that he has to be found fit for promotion, i.e., he is not considered "unfit" for promotion. In the present case, the criteria laid down for "unfit" for promotion has to be followed. The criteria stipulated by this Court is that a candidate who has not got even one "B+" is rejected as "unfit" for promotion. Meaning thereby a candidate who becomes fit for promotion has to earn at least one "B+". As a squatter, a candidate who has earned only "B" grade in all five years is to be treated as "unfit" for promotion. That is precisely the position insofar as the petitioner is concerned.

20. It is trite law that it is for the employer to fix criteria of promotion. To put it otherwise, it is employee's prerogative to lay down as to who would be treated as "unfit" for promotion. In the case of *Union of India and Ors. v. Lt. Gen. Rajendra Singh Kadyan and Ors.* (2006) 6 SCC 698, the Supreme Court explained that all the three modes, i.e., (1) Seniority-cum-fitness, (2) Seniority-cum-merit, and (3) Merit-cum-suitability with due regard to seniority - made the following pertinent observations of the process, which are relevant for us:

12. Wherever fitness is stipulated as the basis of selection, it is regarded as a non-selection post to be filled on the basis of seniority subject to rejection of the unfit. Fitness means fitness in all respects. "Seniority cum merit" postulates the requirement of certain minimum merit or satisfying a benchmark previously fixed. Subject to fulfilling this requirement the promotion is based on seniority. There is no requirement of assessment of comparative merit both in the case of seniority cum fitness and seniority cum merit. Merit cum suitability with due regard to seniority as prescribed in the case of promotion to All India Services necessarily involves assessment of comparative merit of all eligible candidates, and selecting the best out of them.

21. In the present case, no comparative merit was assessed either. Insofar as the petitioner is concerned, he could not even cross the threshold, i.e., could not earn one "B+" and therefore found "unfit" for promotion.

22. When the case of the petitioner came up for consideration again in the year 1992, the ACRs of 1990 and 1991 also became relevant. Unfortunately, for the petitioner, his ACRs for these two years are further downgraded, as the CR for the year 1990 was graded as "C" and 1991 "C" (with integrity doubtful). There was no question of giving any promotion to the petitioner with aforesaid ACRs.

23. The upshot of the aforesaid discussion is that there is no substance in the prayers made by the petitioner in this writ petition. For the reasons given by us

above, we are of the opinion that the petitioner was rightly treated as "unfit for promotion" on both the occasions, i.e., in the year 1992 as well as in the year 1994. Therefore, finding no merit in this writ petition, we accordingly dismiss the same. There shall, however, be no orders as to costs.