(1989) 02 GUJ CK 0024

In the Gujarat High Court

Shankerlal Ramjibhai Dabhi — APPELLANT

Vs

State of Gujarat and Another — RESPONDENT

Date of Decision : 14-02-1989

Acts Referred:
Constitution of India, 1950 — Article 309

Citation : (1989) 2 GLR 1041

Hon'ble Judges : R.C. Mankad, J

Bench : Single Bench

Judgement

R.C. Mankad, J.—Petitioner, a Sales Tax Inspector, has filed this petition challenging the decision of the Government of Gujarat (''State Government'' for short) not to promote him to the post of Sales Tax Officer.

2. Petitioner joined the services of the Sales Tax Department of the State Government as Clerk on July 5, 1956 He was promoted to the post of Sales Tax Inspector on June 1, 1966. Petitioner was allowed to cross efficiency bar in the pay scale applicable to Sales Tax Inspector on January 15, 1982 and he passed the Departmental Examination in December 1983. Petitioner''s case is that on passing the Departmental Examination he became eligible for promotion to the post of Sales Tax Officer. The petitioner has alleged that there was not complaint against him for his work or conduct nor was any adverse remark made in his Confidential Report (C.R. for short). He was included in the panel of Sales Tax Inspectors eligible for promotion to the post of Sales Tax Officer and his name was at Sr. No. 316 in this panel. According to the petitioner H.C. Jani, respondent No. 3 herein was placed junior to him in this panel at Sr. No. 354. Petitioner has alleged that he was given to understand by the concerned authority on his passing Departmental Examination that on vacancy arising in the post of Sales Tax Officer he would be promoted to that post. Respondent No. 3 had also passed the Departmental Examination. The petitioner has further alleged that the post of Sales Tax Officer is to be filled in by seniority from amongst the Sales Tax Inspectors, who have passed the Departmental Examination. The panel of Sales

Tax Inspectors for promotion to the post of Sales Tax Officer is also prepared on the basis of seniority.

3. The Sales Tax Commissioner-respondent No 2 herein however. by Notification dated October 1, 1984 appoinied respondent No. 3 as Sals Tax Officer superseding the petitioner. Petitioner contends that the authority concerned has violated the guarantee of equality and requal treatment enshrined in Articles 14 and 16 of the Constitution by refusing to promote him and promoting respondent No. 3 who was junior to him Petitioner later on joined Miss P.K. Shastri as respondent No. 4. The case of the petitioner appears to be that Miss Shastri was junior IO him in the cadre of Sales Tax Inspectors and she could not have been promoted to the post of Sales Tax Officer before he was promoted to that post. On the above grounds, the petitioner has approached this Court praying to quash and set aside the order passed by respondent No. 2 promoting respondents Nos. 3 and 4 to the post of Sales Tax Officers and for a direction to respondents Nos. 1 and 2 to promote and appoint him to the post of Sales Tax Officer.

4. in the affidavit-in-reply filed on behalf of State Government-respondent No 1 and the Sales Tax Commissioner-respondent No. 2 it is stated that criterion for promotion to the post of Sales Tax Officer is proved merit and efficiency and not seniority as alleged by the petitioner. It is also denied that there was no adverse remarks against the petitioner in his C.R. It is stated that adverse remarks made against the petitioner in his C.R. for the year 1981-82 were communicated to the petitioner by letter dated June 5, 1982. The petitioner had made representation against the adverse remarks. However, this representation was rejected by letter dated October 20, 1984. It is therefore, submitted that though the petitioner knew that there were adverse remarks against him in his C.R. he had attempted to mislead the Court. It is further submitted on behalf of the respondents Nos. 1 and 2 that passing of Departmental Examination did not confer any right on the petitioner to claim promotion to the post of Sales Tax Officer. Unless the petitioner possessed proved merit and efficiency he could not have been promoted to the post of Sales Tax Officer. It is stated that since petitioner was not found to possess proved merits and efficiency, criterion for promotion was not satisfied. There was also adverse remarks against the petitioner in his C.R. for the year 1981-82. It was under these circumstances that Sales Tax Inspector, who were Junior to petitioner were promoted to the post of Sales Tax Officer.

5. The petition is resisted by respondent No, 3 also. He has denied petitioner''s allegation that he was junior to the petitioner. According to respondent No. 3 he was directly recruited as Sales Tax Inspector on December 9, 1963 whereas petitioner was promoted to the post of Sales Tax Inspector from the post of Clerk in 1966. It is further stated that respondent No. 3 had passed the Departmental Examination in July 1972 whereas the petitioner "passed that examination in December 1983. Respondent No. 3 has admitted that he was promoted as Sales Tax Officer in October 1984. He has, however stated that alongwith him 21 other Sales Tax Inspectors were also promoted as Sales Tax Officers and out of these

Sales Tax Officers 17 were junior to him. He has submitted that all the above Sales Tax Inspectors, who were promoted as Sales Tax Officers, were necessary parties to the petition. It is further submitted that criterion for promotion to the post of Sales Tax Officer is merit-cum-seniority.

6. Rules regulating method of recruitment to the post of Sales Tax Officer in Gujarat Sales Tax Service, Class 11 of Sales Tax Department have been framed under Article 309 of the Constitution. One of the methods of recruitment to the post of Sales Tax Officer is by promotion. Rule 1(a) provides that appointment to the post of Sales Tax Officer shall be made by promotion of persons of proved merit and efficiency, who belong to the amalgamated common cadre of Sales Tax Inspectors, Assistant Superintendents and Clerk''s in the Sales Tax Department. It is on the basis of this Rules that it is contended on behalf of the respondents that the criterion for promotion to the post of Sales Tax Officer is proved merit and efficiency. It is now not disputed on behalf of the petitioner also that under the aforesaid Rules criterion for promotion is proved merit and efficiency. The petitioner''s allegation that promotion to the post of Sales Tax Officer is to be made solely on the basis of seniority is, therefore, baseless and untrue.

7. Petitioner''s allegation that his name was included in the panel of Sales Tax Inspectors (found fit for promotion) is also not found to be true. When the petitioner''s learned Counsel was called upon to produce this panel what he produced was the provisional seniority list of Sales Tax Inspectors. Petitioner has not been able to establish that his name was ever included in the panel or select list of Sales Tax Inspectors found fit for promotion to the post of Sales Tax Officers. Petitioner has also made false statement to the effect that there were no adverse remarks made against him, in his C.R. It is not now disputed that adverse remarks were made against the petitioner in his C.R. for the year 1981-82 and these remarks were communicated to him by letter dated June 5, 1982. Petitioner made representation against these adverse remarks on June 10, 1982. It is, therefore, obvious that petitioner knew that there were adverse remarks made against him in his C. R However, inspite of this knowledge the petitioner stated in the petition that no adverse remarks were made against him in his C.R. The only inference which can be drawn is that the above false statements were made to mislead the Court and on that ground alone this petition deserves to be rejected.

8. As pointed out above, petitioner cannot be promoted to the post of Sales Tax Officer unless he is a person of proved merit and efficiency. The C.R. of the petitioner were produced before me. From these C. Rs. it appears that the performance of the petitioner was found to be average for the period from November 26, 1980 to March 2, 1981. In the C.R. for the year 1981-82 adverse remarks were made against the petitioner and these remarks were communicated to him as stated above Petitioner made representation against these adverse remarks, but his representation was not disposed of till October 29, 1984. Persons Junior to petitioner were promoted by order dated October 1,

1984.

9. It is submitted on behalf of the petitioner that since the authority concerned had not rendered its decision on the representation made by the petitioner against the adverse remarks made in the C.R. for the year 1981-82. these adverse remarks could not have been taken into consideration while considering the petitioner for promotion to the post of Sales Tax Officer. In support of this contention reliance is placed on the decision of this Court in Dr. B.R. Kulkarni v. Government of Gujarat [1978] 19 GLR 1021; the decision of the Supreme Court in Gurdia) Singh Fijji v. The State of Punjab 1979 (1) SLR 804; the decision of the Punjab and Haryana High Court in Shri Sansar Chand Sood v. The State of Haryana 1982 (1) SLR 813; the decision of the Punjab and Haryana High Court in Shri Shedi Lal v. The Deputy Commissioner, Gwgaon 1974 (1) SLR 217 and the decision of the Karnataka High Court in R. Veerabhadrappa v. Deputy Commissioner, Raichur 1980 (2) SLR 462.

10. The principle is now well settled that adverse report in C.R. cannot be acted upon to deny promotional opportunity unless it is communicated to the person so that he has an opportunity to improve his work and conduct or to explain the circumstances leading to the report. Such an opportunity is not an empty formality, its object, partially, being to enable the superior authorities to decide on a consideration of the explanation offered by the person concerned, whether the adverse report is justified. This is the principle stated in the decision of the Supreme Court in the case of Gurdial Singh Fijji. This decision of the Supreme Court was followed by the Punjab and Haryana High Court in Sansar Chand Sood''s case and it was held that adverse report made against the employee, which was not communicated, cannot be acted upon while considering him for promotion. In that case the adverse entry made against the petitioner in his C.R. was not communicated to him. He was, however, refused promotion to the higher post on the basis of such adverse entry. The criterion for promotion to the higher post was seniority merit. The Punjab and Haryana High Court held that since the adverse entry was not communicated to the petitioner, the same cannot be acted upon while considering the petitioner for promotion. It, therefore, directed to consider the petitioner for promotion ignoring the adverse entries. In Dr. B.R. Kulkarni''s case also the view which was taken by the Supreme Court that adverse remarks should be communicated to the Government servant concerned and his right of representation should be assured, was followed. If adverse remarks were not communicated to the Government servant and he had no opportunity to make representation against such remarks, the adverse remarks should be set aside. In Shri Shedi Lal''s case the Punjab and Haryana High Court held that the petitioner was denied promotion to the post of Assistant, selection for which was to be made on the basis of seniority-cum-merit. While denying promotion 10 the petitioner adverse entries made against the petitioner prior to November 1, 1964 were taken into consideration. The petitioner was allowed to cross efficiency with effect from November 1, 1964. The Court, therefore, held That adverse entries made against the petitioner prior to November 1, 1964

could not have been taken into consideration while considering the petitioner for promotion to the post of Assistant on the basis of criterion of seniority-cum-merit. In R Veerabhadrappa''s case the Karnataka High Court following the decision of the Supreme Court in Gurdial Singh Fijjl''s case held that non-communication of the adverse remarks in time affording an opportunity to the officer, who has been adversely affected by such report, to improve the quality of his work, cannot enable the higher authorities to use the same to withhold either promotion or what in substance amount to promotion.

11. It is clear from the above decisions that adverse remarks made in the C.R. of the Government employee have to be communicated to him and unless such adverse remarks are communicated to him and he is given an opportunity of making representation against it, such adverse remarks cannot be taken into consideration while giving him promotion. It is also not enough to communicate adverse remarks to the concerned Government servant but it is also necessary to render a decision on representation, if any, made by the concerned Government servant against such adverse remarks. In the instant case adverse remarks made against the petitioner in his C.R. for the year 1981-82 were communicated to him and the petitioner had made representation against such adverse remarks. The authority concerned rejected the representation made by the petitioner only on October 20, 1984. As pointed out above, promotions to the posts of Sales Tax Officer were made on October 1, 1984. Obviously, therefore, while considering the petitioner for promotion to the post of Sales Tax Officer the adverse remarks made against him in his C.R. for the year 1981-82 could not have been taken into consideration. It is, however, submitted on behalf of the respondents that criterion for promotion is proved merit and efficiency and since the petitioner did not possess proved merit and efficiency, he was not promoted to the post of Sales Tax Officer.

12. Now even if the adverse remarks made in the C.R. Of the petitioner for the year 1981-82 are ignored, it would not establish that the petitioner was possessing proved merit and efficiency. As observed above, in the C.R. of the earlier year performance of the petitioner was rated as average. Therefore, considering the over all performance of the petitioner if the authority concerned came to the conclusion that the petitioner did not satisfy the criterion of proved merit and efficiency, there is hardly any justification for this Court to interfere with such a decision. There is no sufficient evidence or material on record to hold that petitioner was denied promotion on account of any mala fide or ulterior motive. The assessment of suitability of the petitioner for promotion to the post of Sales Tax Officer is entirely a matter within the power or jurisdiction of the concerned authority. It may be pointed out That to the post to which the petitioner is claiming promotion is a Class-II Government post. It must therefore, be assured that before promoting petitioner''s juniors to the post of Sales Tax Officer, the Public Service Commission must have been consulted. Unless the Public Service Commission agreed with the view taken by the authority concerned That the petitioner was not suitable for promotion, he could not have

been denied promotion to the post of Sales Tax Officer. Therefore, taking over-all view of the matter even if the adverse remarks made in the C.R. of the petitioner for the year 1981-82 were ignored, it is difficult to hold that the petitioner ought to have been promoted to the post of Sales Tax Officer in October 1984. It was sought to be urged on behalf of the respondents that even on subsequent occasions the petitioner was not found suitable for promotion to the post of Sales Tax Officer and. thereafter, he had not been promoted to that post. It was, however urged on behalf of the petitioner that subsequent events could not be taken into consideration for purpose of deciding the question whether or not petitioner should have been promoted in October 1984. While holding that the petitioner has not succeed in establishing that he should have been promoted to the post of Sales Tax Officer on the basis of the criterion prescribed by the Rules, I have not taken into consideration the subsequent events as urged on behalf of the petitioner. Having regard to the facts and circumstances of the case, 1 do not find any reason to interfere with the decision of the State Government, which is concerned authority, not to promote the petitioner to the post of Sales Tax Officer.

13. In the result this petition fails and it is rejected. Rule discharged with no order as to costs.

