

(2004) 03 BOM CK 0070

In the Bombay High Court

Case No : Writ Petition No. 2551 of 1999

Shri Sadashiv Virtuji Petkar

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 25-03-2004

Acts Referred:

Citation : (2004) 4 ALLMR 809 : (2004) 102 FLR 450 : (2004) 3 MhLj 131

Hon'ble Judges : S.R. Sathe, J;F.I. Rebello, J

Bench : Division Bench

Advocate : J.S. Chandnani, for the Appellant; C.R. Sonawane, A.G.P. for respondent Nos. 1 and 2, for the Respondent

Final Decision : Dismissed

Judgement

Rebello, J.—The Petitioner by the present petition, impugns the order dated 3.3.1999 passed in Original Application No. 263 of 1993.

2. The Petitioner had filed Original Application challenging the order dated 21.1.1991 by which Respondent Nos. 3 and 6 herein were promoted as Director of Education and the petitioner was denied promotion. The case of the Petitioner as argued before the Respondent Tribunal was that the adverse entries were never communicated to him and consequently his down grading by Respondent No. 4 herein was illegal. As the adverse entries were taken into consideration he was denied promotion. The second challenge was that Respondent No. 2 ought not to have been a member of the Establishment Board which considered the promotion in question as the Respondent No. 2 was the Reviewing officer for the annual confidential reports of the Respondent No. 6. Apart from that it was also contended that the constitution of the Board was also contrary to the provisions of the Government resolution dated 17.1.1985 as there was no member from the S.C. community on the board.

3. Dealing with the contentions in so far as communication of adverse remarks, the Tribunal after perusing the records, recorded a finding that the contention of

the Petitioner that he was down graded by Respondent No. 4 is not borne by the record and factually Respondent No. 4 did not down grade the petitioner herein. The Tribunal also noted that they have perused the records of the Petitioner for not only five years as considered by the Establishment Board but also his confidential reports for the previous years. The Tribunal held that the Petitioner was assessed as good officer through out except for one year when he was considered as very good officer. The tribunal had noted that as per the rules, in order to give promotion from Class I Post to another post in Class I, the benchmark should be "an outstanding worker". The Petitioner was having an assessment that of being "Good". Selection of the officers was done from amongst those who had been assessed as A i.e. outstanding and out of them one belonged to the backward community. It was also noted the fact that the Petitioner belonged to SC was taken note of by the Selection Board but in spite of that they were not in a position to make his selection as he was not assessed as outstanding. On that count, the first challenge was rejected. Dealing with the second contention that the Respondent No. 2 ought not to have been a member of the establishment board, it is noted that the Respondent No. 2 was invited by the Board at the time of making selection as she happened to be the secretary of the Education Department. It is then noted that from the minutes of the Board, it cannot be said that the presence of the said officer had any effect on the selection and merely because she happened to be reviewing officer of one of the candidate, it was not possible to hold that she ought not to have been a member of the Committee and in fact she was not a member of the committee but only an invitee. That contention was also rejected. The Constitution of the Board was the next challenge which was considered and the tribunal held that the inference can be drawn that no schedule caste member was available and in these circumstances held that there was no member of the scheduled caste on the board and that the petitioner had not discharged the burden that a member was available. For all the aforesaid reasons, the Original Application was rejected.

4. It is this order which is the subject matter of the present challenge. It may be noted that the petition against Respondent Nos. 4, 5 and 9 stands dismissed. The learned counsel however, paints out that the challenge to the selection of Respondent No. 6 still survives. The Petitioner at the time of filing petition was aged 56 years and has subsequently during the pendency of the petition retired. Even then we have heard learned counsel for the Petitioner. The contentions as urged on behalf of the Petitioner are as under :

(a) That when the Bench mark consideration was outstanding, if the officers are graded as good or very good, the said entries are adverse and consequently could have been considered only if they had been communicated to the Petitioner. In the instant case, they were not so communicated and as such the Board could not have taken them into consideration.

(b) It is then contended that the Board was not properly constituted considering the Government notification as a member of S.C. was not on the board. The

selection that done by a Board not properly constituted is liable to be set aside.

In support of the first contention on behalf of the Petitioner, their learned counsel has relied on the judgment of the Central Administrative Tribunal in the case of *G. Chenkamalam v. Union of India and Ors.* (1998) 37 ATC 354.

It is not necessary for us to go into that judgment at length. No judgment of this court or any of the High Court or the Apex Court has been brought to our attention to enable us to consider the contention as raised. In our opinion the writing of C.R.s and fixation of Benchmarks are two different aspects. The consideration of the Bench marks for promotion from a lower post to a higher post. C.R.s are written to assess annually the performance of the Government employees. Based on the assessment the employee is rated. An employee can be rated as very good and another may be rated as outstanding. The rating of Very good and outstanding cannot be said to be adverse. The only question as in the instant case, the promotion is from Class I post to higher post in Class I itself. The Government had taken decision by a notification that it is only officers who have outstanding performance who should be considered for the next higher promotion. Can it be said that merely because of the Bench Marks the Petitioner who was given ratings of "Good" or "Very Good" can contend that such ratings are adverse to the petitioner. If by Administrative instructions, ratings are to be given by the Reporting Officer, then such officer is bound to give the rating in terms of the instructions and communicate only such rating which would be adverse in terms of the ratings. Merely because by someone others instructions, the bench marks fixed is "outstanding" will not result in the rating given by the Reporting Officer becoming adverse. If the petitioners' contention is to be accepted, then every time the bench mark changes, the C.R.s which do not fit into the bench mark will have to be treated as adverse and not considered. This by itself would be arbitrary and it will result in injustice to the officers who have been given the higher rating. Those who were not so rated will have to be considered along with them. Considering that we do not find that the order of the tribunal suffers from any jurisdictional error or error apparent on the face of the record.

5. In so far as second contention is concerned, an affidavit has been filed by Mr. R.R. Tendulkar, Desk Officer, School Education Department, Mantralaya, Mumbai. In Paragraph 12 of the said affidavit it is pointed out that application of roster points for promotion is applicable only upto the first promotion in Class I Officer. As such it is not necessary that the member belonging to the Backward class should be member on the Establishment Board. In other words what is sought to be contended is that inclusion of the member of the S.C. on the Board arises when the roster point involves consideration of a member of the backward class. In the instant case, promotion is from Class I officer to another higher post of Class I officer where there is no roster point on reservation. The learned tribunal has proceeded on the footing that no member must have been available and the petitioner has not discharged the burden cast on him to show that though person

of S.C. was available yet he was not considered. On the facts of the present case and considering the findings by the tribunal and Paragraph 12 of the affidavit of Mr. Tendulkar and further considering that for promotion from Class I to higher post in Class I, there is no reservation the order of the tribunal therefore, does not suffer from any error apparent on the face of the record.

6. Lastly we may point out that the Petitioner has since retired, challenge in so far as Respondent No. 5 is rejected. At the highest, challenge was therefore, to appointment of Respondent No. 6. We are not inclined to interfere with the order impugned in the exercise of our extra ordinary jurisdiction. Hence, petition rejected. Rule discharged. There shall be no order as to costs.