

(1995) 09 CAL CK 0009
In the Calcutta High Court
Case No : C.O. No. 158 (W) of 1995

S.K. Dogra

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 20-09-1995

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 311(2)
Navy Order, 1968 — Order 190
Navy Regulations — Regulation 234, 234(1)

Citation : (1996) 1 CALLT 73

Hon'ble Judges : Satyabrata Sinha, J

Bench : Single Bench

Advocate : Santosh Kumar Mondal, for the Appellant; R.S. Saroop, for the Respondent

Final Decision : Allowed

Judgement

Satyabrata Sinha, J.—This application is directed against the orders dated 21.11.94 and 19.12.94 as contained in Annexures "F" and "G" to the writ application as also Gen. form No. 3322/S dated 9.2.95 as contained in Annexure "H" thereto.

2. The fact of the matter lies in a very narrow compass. The petitioner Joined the Indian Navy as Artificer Apprentice on 30.7.83. He underwent training as an apprentice ERA for 4 years, whereafter he was promoted to the post of Engineroom Artificer-5 in 1987, and to the post of Acting Engineroom Artificer-4 on 9th April 1988. It is not in dispute that before an officer can be promoted to the higher post he is to pass a departmental examination, the syllabus whereof is contained in Annexure "E" to the affidavit in opposition which provides qualifying marks as 40%. However, a note has been appended thereto to the following effect :

"Failure to qualify in the oral examination Involves failure in the whole examination here."

3. The respondents contended that the petitioner appeared at the said examination and although he secured 40% marks, his performance and practical knowledge had been assessed poor by the Board, and thus, he was declared failed in the examination by the constituted board on 8.1.89. On 2.3.90, the petitioner again applied for the second time for the said examination, whereupon he obtained 44.5% marks, but he was again declared failed due to poor professional and practical knowledge. He again applied on 7th June 1990, but although recommended for appearance in the said examination did not appear in the examination for the third time. On 9th April 1989, the petitioner was, however, promoted to the grade ERA-4 with effect from 9th April 1989 by the respondent No. 6 allegedly misreading a signal issued by the respondent No. 5, wherein Headquarters, Western Naval Command was merely requested to issue necessary directives. The petitioner thereafter appeared in Board examination for the post of ERA-3 and secured 56% marks, and by an order dated 3.9.92, he was promoted to the post of ERA-3 with retrospective effect from 9th April 1990, as he had been working in the said post since 1990. The petitioner went on leave in October 1994 and when he reached Port Blair on 5.2.95 and joined duty on 6.2.95, he was asked to wear uniform of Acting ERA--4 where upon he made an enquiry and collected the impugned orders.

4. Mr. Mondal, learned counsel appearing on behalf of the petitioner submitted that the impugned orders are wholly arbitrary and violative of the principles of natural Justice. Learned counsel in support of his aforementioned contention has relied on a decision of the Supreme Court of India in the case of Bhagwan Shukla Vs. Union of India and others, .

5. Mr. Saroop, on the other hand, submitted that in terms of a signal Issued in the year 1988, pass percentage for all higher rank course/boards was enhanced to 55% and passing in oral examination is mandatory to clear board. Although the said point had not been taken in the affidavit in opposition, a copy of the said signal has been produced before me. Learned counsel contended that the petitioner having failed in two examinations and having applied for and recommended for sitting in the 3rd examination, must be held to have been promoted by mistake by the respondent No. 5. Learned counsel urged that the respondents are entitled to rectify their mistake. In any event, contended the learned counsel, the petitioner has an alternative remedy by filing a representation in terms of Regulation 234.

6. The case at hand raises a peculiar problem. It is no doubt true that the petitioner failed in the examination held by the Board so as to entitle him to be promoted as ERA-4. There is no dispute that he was promoted by mistake, in view of the fact that Navy Order No. 190 of 1968 postulates pass percentage for confirmation board as 40%, however, it is difficult to accept the submission of Mr. Saroop to the effect that the petitioner was promoted by mistake by the respondent No. 5, and the said mistake could not to be detected for a period of 6 years. However, a copy or a letter issued by the Civilian Gazetted Officer Staff

Officer (Promotion) for Commodore, dated 9.9.91 has been annexed to the affidavit in opposition, which reads thus:

"Since the sailor's performance and practical knowledge have been assessed as "Poor" by the Board, it is regretted that the sailor can not be treated as qualified irrespective of marks obtained by him. In case, however, If the sailor is required to be treated as qualified, it is requested that his fresh IN 483 may be initiated and forwarded accordingly."

7. It is not, therefore, understandable as to why an immediate action was not taken in the matter. It is, therefore, not correct to contend that the petitioner was promoted erroneously by the respondent No. 5 while he was no board INS Vikrant, and the matter came to the knowledge of the concerned authorities when he was transferred to a different ship. The Bureau in its letter dated 21.11.1994, has also stated that it had insisted on cancelling the promotion of the petitioner by letters of even No. dated 20th November, 23rd April 1993 and 21st July 1993. It opined:

"As all sailors who appeared the Board with the above-named sailor subsequently passed the Board, making exception for him is considered not correct.

8. However, the petitioner was recommended for Board and passed Unit Board in June 1991, and subsequently promoted to the post of ERA-3.

9. Mr. Saroop, when questioned, very candidly admitted that the Unit Examination hold for the purpose of promoting an officer to ERA-3 is stiffer than Board-Examination held for the promotion to ERA-4. There cannot be any doubt that the respondents could rectify their mistake, but in my opinion, keeping in view the fact that the petitioner had been working as Acting ERA-4 since 1988, and in the post of regular ERA-4 with effect from 9.4.89, the least that could be done was to afford him an opportunity of being heard. The submission of Mr. Saroop to the effect that principles of natural Justice are not required to be complied with in view of Navy Regulations, is stated to be rejected, in as much as, it is now well known that if an employee suffers civil or evil consequences by reason of an administrative order, the principles of natural justice are required to be complied with unless excluded expressly or by necessary implication by a statute. Learned counsel has failed to point out provision of any such statute in terms whereof the principles of natural Justice expressly or by necessary Implication have been excluded. It is now well settled that non-affording an opportunity of hearing itself causes a prejudice,

10. In fact, by reason of the decisions of the Supreme Court of India, principles of natural Justice are encompassed within the purview of Article 14 of the Constitution of India. Any action taken in violation of the principles of natural Justice must be held to be arbitrary. Furthermore, the aforementioned letter dated 21.11.94 issued by the Bureau to the Office-in-Charge, Naval Ship Repair Yard, Floating Dock, Navy-I clearly suggest that in the case of the petitioner no exception should be made. The Bureau, therefore, by necessary implication

accepts the fact, that in a given case, an exception can be made by the competent authorities. In Bhagwan Shukla case (supra), the Apex Court in a case where basic pay had been reduced with retrospective effect on the ground that the same had been wrongly fixed initially and that the position had continued due to administrative lapses for over 20 years, when it was decided to rectify the mistake, held:

"Fairplay in action warrants that no such order which has the effect of an employee suffering civil consequences should be passed without putting the concerned to notice and giving him a bearing in the matter."

11. For the purpose of rectification of mistake apparent on the face of records, principles of natural Justice may not be required to be complied with, but as indicated hereinbefore, the same should have been complied with in the instant case for the reasons:

1. The mistake had been detected after a long lapse of 6 years.
2. From the Bureau's letter, it appears that the authorities could make an exception to the case of the petitioner.
3. The petitioner had been promoted to ERA-3 after passing a stiffer examination in relation where to no mistake has been committed.
4. The administrative direction with regard to pass marks of 55% may be found to be illegal in view of the aforementioned order No. 190 of 1968. For the said purpose, the authorities are required to consider the source of power both for the purpose of issuing the said order No. 190 of 1968 vis-a-vis the power of the authorities to enhance the percentage of pass marks.
5. The respondents have not made it clear as to under what jurisdiction the signal enhancing the pass marks had been issued.
6. There is nothing on record to show as to whether the petitioner was marked as "failed", because of his poor performance in professional and practical knowledge, or because of the reason he failed to secure 55% marks. The possibility of the petitioner having been declared failed as he had not secured 55% marks, despite Navy Order No. 190 of 1968, and consequent seeking clarification by the concerned authorities with reference to order No. 190 of 1968 cannot also be ruled out.

12. Admittedly, in the instant case, principles of natural justice have not been complied with. Had such an opportunity been given to the petitioner, he could have shown that the respondents have the power to relax the rigours of passing the said examination, and in any event, an exception should be made in his case, as he has passed a stiffer examination, and since been promoted to ERA-3 grade. If the performance of the petitioner in the said capacity is not satisfactory, or he is otherwise unsuitable therefore, an appropriate action in accordance with law could have been taken against him, but it is not necessary to consider that

aspect of the matter in this writ application, as such a question has not been raised in this writ application. The respondents also have not disclosed as to whether any action has been taken against the respondent No. 5 for committing the said mistake. No. allegation has been made that the petitioner has committed any fraud, or such a mistake has been committed due to his machination. It is also not the case of the respondents that the petitioner was guilty of misrepresentation as regards his promotion. On the aforementioned ground alone, in my opinion, this writ petition must succeed, inasmuch as, I am of the considered view that in the peculiar facts and circumstances of this case, a post decisional hearing would not serve the purpose. The submission of Mr. Saroop to the effect that the petitioner has an alternative remedy is also misplaced. Regulation 234(1) states thus:

"Any sailor who wishes to make a representation affecting his welfare or who has any suggestion to make connected with the service, shall bring the subject to the notice of his Divisional Officer through his Divisional Petty officer."

13. This writ application has been admitted to hearing, and thus, the question of dismissing the writ application on the ground of availability of an alternative remedy at this stage does not arise, particularly in case where principles of natural justice have not been complied with. Reference in this connection may be made to the case reported in *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, . Moreover, Regulation 234 does not provide for a statutory remedy. There may be cases where despite non-compliance with the principles of natural justice this court may decline to exercise its jurisdiction under Article 226 of the Constitution of India, but in my opinion, keeping in view the fact that by reason of the impugned orders, the petitioner has been placed at a position where he was prior 1989, meaning thereby when he was posted merely as an Acting ERA-4 officer, I am of the view that justice demands that at least an opportunity of hearing should be given to him. The Supreme Court in the case of *State of Karnataka Vs. L. Muniswamy and Others*, observed: "The ends of Justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature." The authorities giving an opportunity of hearing to the petitioner may keep the aforementioned dictum of the Apex Court in mind, and may further consider as to whether the case of the petitioner merits and equitable consideration.

14. The application is allowed, and the impugned orders are set aside with the aforementioned observations, but in the facts and circumstances, there will be no order as to costs.