

(2023) 08 DEL CK 0097

In the Delhi High Court

Case No : Civil Writ Petition No. 11278 Of 2009

S.S.Yadav

APPELLANT

Vs

Oriental Insurance Co. Ltd

RESPONDENT

Date of Decision : 10-08-2023

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2023) 08 DEL CK 0097

Hon'ble Judges : Mini Pushkarna, J

Bench : Single Bench

Advocate : Bani Dikshit, Ishaan Karki, Rahul Ranjan Verma

Final Decision : Allowed

Judgement

Mini Pushkarna, J

1. Petitioner is aggrieved by his non-promotion to Scale III cadre of respondent in the Supplementary Promotion Exercise of the year 2008-09 and Promotion Exercise (PE) of the year 2009-2010, which as per petitioner was on account of adverse remarks in his Annual Confidential Reports (ACRs), which were not communicated to him. The present petition having been filed in the year 2009, in the interregnum petitioner was promoted and is currently working in Scale V. However, it is the case of petitioner that due to non-grant of promotion to petitioner in the PE of the year 2008-09 and 2009-10, petitioner has consistently served at a lower cadre than other officers who were previously junior to him in the zone of consideration in the PE of the year 2008-09. Thus, petitioner is seeking promotion to Scale VI in parity with his juniors who were promoted in the promotion exercise of the year 2008-09 and 2009-10. Petitioner is further seeking for directions to respondent for consideration of his case for promotion to Scale VII cadre.

2. Petitioner joined the service of respondent in the year 1991 at senior level officer grade on Scale I after passing the entrance test and the Written

Examination as conducted by the General Insurance Corporation of India. Subsequently, he was promoted to Scale II as Assistant Manager.

3. Petitioner was served with a memo dated 06.07.2006 alleging that petitioner refused to attend the hearing before the office of Ombudsman in Delhi scheduled on 06.07.2006. Petitioner replied to the same stating that he was not informed about the purpose for which the hearing was fixed or the details needed for preparing for such hearing. Nothing further was intimated to petitioner qua the said memo.

4. Petitioner appeared for Promotion Exercise in the two years i.e. 2008-09 and 2009-10 to seek promotion from Scale II cadre to Scale III cadre. However, he was denied promotion, despite being declared successful in the Written Examination.

5. Thus, the present writ petition came to be filed. As per the case canvassed on behalf of petitioner, the present petition was filed on the premise that petitioner had scored well in all the four parameters prescribed under the Promotion Policy viz Work Record, Written Examination, Seniority and Insurance Qualifications. Petitioner was aware of the marks allotted to him under the parameters of the Written Examination, Seniority and Insurance Qualifications. Hence, the present petition was filed with a supposition that petitioner had scored well in the ACR, as petitioner had not received any communication with respect to any adverse entry in his ACRs.

6. However, during pendency of the present writ petition, petitioner procured the ACRs under the Right to Information Act, 2005 (RTI Act). The same contained adverse remarks against petitioner. Thus, petitioner raised the plea of non-communication of adverse remarks in the ACRs before this Court.

7. On behalf of petitioner, it is contended that for Promotion Exercise of the year 2008-09, ACRs of the preceding three years were considered viz 2005-06, 2006-07 and 2007-08. Similarly, for the Promotion Exercise of the year 2009-10, the relevant ACRs of the preceding three years were 2006-07, 2007-08, 2008-09.

8. It is submitted that through letter dated 17.01.2017 received from respondent under the RTI Act, petitioner was informed that his ACRs for the year 2004-05 and 2005-06 could not be traced and were missing. It is contended on behalf of petitioner that this is totally arbitrary as the said ACRs were the sole source of allotting marks under the Work Record parameter. Since the ACR of the year 2005-06 was to be considered for the promotion exercise of the year 2008-09, the marks allotted to petitioner under the said parameter were incorrect, since the said ACR was missing. Moreover, petitioner was never informed of the missing ACRs, prior to receiving the letter dated 17.01.2017 under RTI Act.

9. It is further contended on behalf of petitioner that petitioner's ACRs for the years 2006-07, 2007-08 and 2008-09 contain adverse remarks, which were never communicated to him. The ACRs for these three years, obtained through

the RTI process reveal that there were adverse remarks against the character of petitioner by the First Reviewing Officer, labelling him as dishonest, disobedient and not fit for promotion. However, petitioner was never informed of these adverse remarks, which clearly had a direct impact on his promotion to the Scale III cadre. Resultantly, petitioner was unable to rectify these adverse remarks which resulted in petitioner being given low marks in the Work Record parameter of the two Promotion Exercises carried out for the year 2008-09 and 2009-10.

10. It is further contended that non-communication of the ACRs to petitioner were against respondent's own notice dated 23.03.2015, which made it compulsory for disclosure of all ACRs/Appraisal Reports to officers, so that an opportunity could be given to the officers to submit representation.

11. It is further contended that no act of his, whatsoever could have invited adverse remarks, as set out in the ACRs. Thus, the low marks allotted to him in the Work Record parameter, were without any basis whatsoever. The petitioner's ACRs for 2006-07, 2007-08 and 2008-09 were consistently downgraded by the same First Reviewing Officer. This necessarily led to the petitioner getting lesser marks in the Work Record parameter.

12. It is further contended that the ACR of the year 2006-07 has been incorrectly reviewed. The said ACR has not been reviewed by the Second Reviewing Officer and it bears no signature/remarks of the Second Reviewing Officer. Thus, it is contended that the ACR of petitioner for the year 2006-07, has been incorrectly prepared and cannot be relied upon.

13. It is contended that petitioner continues to be prejudiced due to his previous illegal non-promotion and ought to be placed at the same level/cadre as that of his juniors in the PE of 2008-09 and 2009-10. Thus, it is prayed that petitioner be considered for promotion to the Scale VII cadre of the respondent, which is the cadre to which his juniors in the Promotion Exercise of 2008-09 and 2009-10, are currently eligible to be promoted to.

14. In support of her submissions, learned counsel for petitioner has relied upon the following judgments:-

- i. Dev Dutt Vs. Union of India, (2008) 8 SCC 725
- ii. Prabhu Dayal Khandelwal Vs. Chairman, UPSC and Ors., (2015) 14 SCC 427
- iii. Bahadur Singh (Major) Vs. UOI, 2003 (68) DRJ 21 (DB)
- iv. Rajinder Singh Sehrawat Vs. UOI and Ors., ILR (2001) I Del 542
- v. B.N. Sangwan Vs. UOI & Anr., ILR (2013) IV Delhi 3169
- vi. Food Corporation of India Vs. S.N. Nagarkar, (2002) 2 SCC 475

15. On the other hand, on behalf of respondent, it is submitted that the present writ petition is an abuse of process of law. The petition is liable to be dismissed as the same has been filed by suppressing material facts. It is submitted that

petitioner had scored overall 72.60% in the four parameters of the main examination of 2009-10. Whereas, the cut-off of the last successful candidate was 75.22%. Therefore, petitioner was not promoted. Likewise, petitioner had scored overall 71.62% in the supplementary exam of 2008-09, whereas the cut-off total marks of the last successful candidate in the supplementary examination was 77.17%.

16. It is further submitted that petitioner has assumed that Seniority alone is the criteria for promotion, which is totally wrong and baseless. The criteria for promotion is coupled with Performance Appraisal, Insurance Qualification and subject to availability of vacancies.

17. It is submitted on behalf of respondent that there is a weightage of Work Record and on the basis of this, marks of Work Record have been prepared. There is no such entry in the Work Record of petitioner which requires to be communicated.

18. It is further submitted that the copy of the original appraisal form/ACRs for the year 2006-07 filed by petitioner with affidavit dated 12.09.2022 and copy of the self appraisal form of 2006-07 filed by petitioner with affidavit dated 06.04.2023, would show glaring infirmities. It is further submitted that petitioner, even after receipt of the ACRs for the years 2006-07, 2007-08 and 2008-09 through RTI way back in 2016, did not raise any concern regarding the self appraisal of 2006-07. Therefore, petitioner is estopped from raising any question mark over the said document. It is submitted that for the year 2006-07, original self appraisal of ACR was not filled by petitioner. Due to non-filing of Appraisal Form by petitioner, the ratings awarded by the First Reviewing Officer were taken into consideration for Promotion Exercise.

19. It is submitted that no legal grounds have been made out by petitioner and petitioner is not entitled to any relief.

20. I have heard the learned counsel for the parties and have perused the record.

21. The genesis of the dispute as manifest from the pleadings and documents on record is non-communication of the ACRs for the relevant years to petitioner. It is undisputed that for the Promotion Exercise of the year 2008-09, ACRs for the years 2005-06, 2006-07 and 2007-08 were relevant. For the Promotion Exercise of the year 2009-10, ACRs for the years 2006-07, 2007-08 and 2008-09 were relevant. The fact of non-communication of ACRs of the aforesaid years is not disputed by respondent. The same has been justified on the ground that there were no adverse remarks against petitioner, thus, there was no requirement for their communication. The said contention as raised on behalf of the respondent cannot be accepted.

22. The petitioner was graded as B (above average) and C (average) in the ACRs in question for the years 2006-07, 2007-08 and 2008-09. There were remarks against petitioner in the ACR of the year 2006-07 that he was an overall

troublesome, dishonest and non-performing Officer and that he does merit any promotion hereafter. Similarly, in ACR for the year 2007-08, there were adverse remarks against petitioner to the effect that petitioner is generally disobedient and likes to do things his own way, which is not as per Company Rules. Likewise, in ACR for the year 2008-09 there are adverse remarks against petitioner that petitioner is intelligent and has job knowledge, however, he uses the same for his personal benefit rather than benefit of the company. Further, his financial integrity needs to be watched, hence, can wait until he improves.

23. The aforesaid adverse remarks contained in the ACRs of petitioner were never communicated to petitioner, which is an evident illegality having been committed by respondent. Petitioner was never informed of the adverse remarks, which clearly had a direct impact on his promotion to Scale III Cadre. Resultantly, petitioner was given low marks in the Work Record parameter of the two PEs of the year 2008-2009 and 2009-2010.

24. Non-communication of adverse remarks to an employee is arbitrary and illegal. It has been held time and again that every entry relating to an employee must be communicated to him/her within reasonable period, violation of which shall be contrary to Principles of Natural Justice. Rather, Supreme Court has gone ahead and held that all entries, whether poor, fair, average, good or very good in the Annual Confidential Report, must be communicated to the concerned employee within a reasonable period, so that he can make a representation for its upgradation. Thus, in the case of *Dev Dutt Vs. Union of India and Others* (2008) 8 SCC 725, Supreme Court has held as follows:-

"13. In our opinion, every entry (and not merely a poor or adverse entry) relating to an employee under the State or an instrumentality of the State, whether in civil, judicial, police or other service (except the military) must be communicated to him, within a reasonable period, and it makes no difference whether there is a benchmark or not. Even if there is no benchmark, non-communication of an entry may adversely affect the employee's chances of promotion (or getting some other benefit), because when comparative merit is being considered for promotion (or some other benefit) a person having a "good" or "average" or "fair" entry certainly has less chances of being selected than a person having a "very good" or "outstanding" entry.

... ..

17. In our opinion, every entry in the ACR of a public servant must be communicated to him within a reasonable period, whether it is a 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 : (1) 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; (2) he would have an opportunity of making a representation against the entry if he feels it is unjustified, and pray for its upgradation. Hence, non-communication

of an entry is arbitrary, and it has been held by the Constitution Bench decision of this Court in *Maneka Gandhi v. Union of India* [(1978) 1 SCC 248 : AIR 1978 SC 597] that arbitrariness violates Article 14 of the Constitution.

18. Thus, it is not only when there is a benchmark but in all cases that an entry (whether it is poor, fair, average, good or very good) must be communicated to a public servant, otherwise there is violation of the principle of fairness, which is the soul of natural justice. Even an outstanding entry should be communicated since that would boost the morale of the employee and make him work harder.”

25. Therefore, in the present case where the ACRs in question have not been communicated to petitioner, the same has acted to the prejudice and detriment of petitioner herein.

26. As regards the contention on behalf of respondents with respect to the difference in the Appraisal Reports, it has been explained clearly on behalf of petitioner that the Appraisal Report filed along with affidavit dated 06.04.2023 is the one which was received by petitioner in reply to RTI application. The Appraisal Report attached along with affidavit dated 09.09.2022 of petitioner, is copy of the appraisal which was filled by petitioner himself and a copy was retained by petitioner at the time of submitting the same. Thus, the contention raised on behalf of respondent that petitioner had not filled the Appraisal Form for the ACR of the year 2006-2007, in order to justify non-review by the Second Reviewing Officer, cannot be accepted. Further, respondent has not been able to justify or bring on record any Rule in order to support the action of non-review by the Second Reviewing Officer. Moreover, it has categorically been brought forth on behalf of petitioner that the ACRs of petitioner for the other years viz. 2007-2008, 2008-2009, 2009-2010, 2011-2012, 2012-2013 and 2013-2014 have all been reviewed by the Second Reviewing Officer. Thus, the prevalent Rule/Practice was that all the ACRs were to be reviewed by the First Reviewing Officer and then the Second Reviewing Officer, which has not been done in case of the ACR for 2006-2007. Even otherwise, the said ACR for 2006-2007 was not communicated to petitioner, which was a glaring dereliction by respondent.

27. The ACR of petitioner for the year 2004-2005 and 2005-2006 are missing, as informed by respondent in its letter dated 17.01.2017 in reply to RTI application. Since the ACR of 2005-2006 was to be considered for the PE of the year 2008-2009 and the same was missing, there is no basis to ascertain as to how petitioner was assessed for the said year. Thus, the marks awarded to petitioner for Work Record for the Promotion Exercise for the year 2008-2009 as well as for the year 2009-2010, which are based upon the ACRs, cannot be considered to be tenable.

28. In view of the aforesaid, this Court is satisfied that petitioner was wrongly not given the promotion to Scale III in the Promotion Exercise of the aforesaid years, i.e., 2008-2009 and 2009-2010. The ACRs for the years where there were adverse remarks against petitioner which were not communicated to petitioner,

could not have been taken into account by respondent at the time of considering the case of petitioner for promotion. Non-promotion of petitioner to Scale III Cadre of respondent in the Promotion Exercise of 2008-2009 and 2009-2010, is mired with arbitrariness and is in complete contravention of law. The non-communication of adverse remarks and the manner in which marks have been allotted to petitioner in the parameter of Work Record, is completely unacceptable. However, considering the fact that a considerable time has already lapsed and that petitioner has already been granted promotion to Scale V Cadre, no purpose would be served in directing petitioner herein to make representation against the un-communicated ACRs containing adverse remarks or directing respondent herein to consider such representation.

29. Resultantly, it is held that petitioner is entitled to notional promotion to Scale III Cadre of respondent from the date when promotion was granted to other employees in the Promotion Exercise of the year 2009-2010 with all consequential benefits in accordance with law. Petitioner is also held entitled to notional promotion to Scale IV Cadre and Scale V Cadre from the date he would have been entitled to take part in the Promotion Exercise on the basis of his promotion to Scale III Cadre in the promotion exercise of the year 2009-2010, with all consequential benefits in accordance with law.

30. While passing the aforesaid direction, this Court has taken note of the fact that the Promotion Policy of respondent records that criteria for promotion upto Scale V is on the basis of written test and other parameters including Insurance Qualification, Work Record, Seniority and Interview. Petitioner has already cleared the written tests and has been granted promotion to Scale V, though belatedly in view of the adverse entries in his un-communicated ACRs for the relevant period.

31. In the case of Prabhu Dayal Khandelwal Vs. Chairman, Union Public Service Commission and Others (2015) 14 SCC 427, Supreme Court held as follows:-

"8. On the issue, whether the representations filed by the appellant against the reports for the years 1995-1996, 1996-1997 and 1998-1999 need to be taken to their logical conclusion, we are of the view, that since almost two decades have passed by since the aforesaid annual confidential reports were recorded, it would be too late in the day to require the authorities to adjudicate upon the representations made by the appellant as against the uncommunicated annual confidential reports.

9. In the above view of the matter, we are satisfied, that the respondents ought to be directed to reconsider the claim of promotion of the appellant, to the post of Chief Commissioner of Income Tax, for the vacancies which arose during the years 2000-2001 and 2001-2002 on the basis of the communicated reports for the years 1997-1998 and 1999-2000, within a period of three months from today. Ordered accordingly."

32. Perusal of promotion policy of respondent shows that for promotion to the

Cadres of Scale VI and Scale VII, interviews are held by a Screening Committee and thereafter the assessment/recommendations of the Screening Committee are submitted to the Promotion Committee. Thereafter, the case is considered by the Promotion Committee for promotion to Scale VI and Scale VII.

33. Though it has strongly been canvassed on behalf of petitioner that petitioner be considered for promotion to Scale VII Cadre, which is the cadre to which his juniors in the 2008-2009 and 2009-2010 PEs are currently eligible to be promoted, however, the said prayer cannot be granted by this Court. It is pertinent to note here that as per the eligibility criteria for empanelment for consideration to the promotion of cadre of Scale VII, an officer shall have completed two full years of service in the Scale VI cadre. Therefore, in order to be included in the zone of consideration for promotion to Scale VII, petitioner would have to put in continuous service of minimum two years in Scale VI. However, since petitioner is already working in Scale V, he is eligible for empanelment for consideration of promotion to cadre of Scale VI. The petitioner is entitled to undergo the exercise before the Screening Committee, for promotion to the next scale i.e. Scale VI, as petitioner is stated to be currently working in Scale V.

34. In the case of Union of India and Another Vs. Manpreet Singh Poonam & others (2022) 6 SCC 105, Supreme Court held as follows:-

"18. A mere existence of vacancy per se will not create a right in favour of an employee for retrospective promotion when the vacancies in the promotional post are specifically prescribed under the rules, which also mandate the clearance through a selection process. It is also to be borne in mind that when we deal with a case of promotion, there can never be a parity between two separate sets of rules. In other words, a right to promotion and subsequent benefits and seniority would arise only with respect to the rules governing the said promotion, and not a different set of rules which might apply to a promoted post facilitating further promotion which is governed by a different set of rules.

19. In the present case, the authority acting within the rules has rightly granted promotion after clearance of DPC on 17-4-2012 with effect from 1-7-2011, when the actual vacancies arose, which in any case is a benefit granted to the respondent in Civil Appeal No. 518 of 2017. In our view, this exercise of power by the authority of granting retrospective promotion with effect from the date on which actual vacancies arose is based on objective considerations and a valid classification.

20. This Court in Union of India v. K.K. Vadera [Union of India v. K.K. Vadera, 1989 Supp (2) SCC 625 : 1990 SCC (L&S) 127] has clearly laid down that the promotion to a post should only be granted from the date of promotion and not from the date on which vacancy has arisen, and has observed that : (SCC p. 627, para 5)

"5. ... We do not know of any law or any rule under which a promotion is to be

effective from the date of creation of the promotional post after a post falls vacant for any reason whatsoever, a promotion to that post should be from the date the promotion is granted and not from the date on which such post falls vacant. In the same way when additional posts are created, promotions to those posts can be granted only after the Assessment Board has met and made its recommendations for promotions being granted. If on the contrary, promotions are directed to become effective from the date of the creation of additional posts, then it would have the effect of giving promotions even before the Assessment Board has met and assessed the suitability of the candidates for promotion. In the circumstances, it is difficult to sustain the judgment of the Tribunal.”

21. Similarly, this Court in *Ganga Vishan Gujrati v. State of Rajasthan* [*Ganga Vishan Gujrati v. State of Rajasthan*, (2019) 16 SCC 28 : (2021) 1 SCC (L&S) 403] has held that : (SCC pp. 52-53, para 45)

45. A consistent line of precedent of this Court follows the principle that retrospective seniority cannot be granted to an employee from a date when the employee was not borne on a cadre. Seniority amongst members of the same grade has to be counted from the date of initial entry into the grade. This principle emerges from the decision of the Constitution Bench of this Court in *Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra* [*Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra*, (1990) 2 SCC 715 : 1990 SCC (L&S) 339] . The principle was reiterated by this Court in *State of 1070*] and *State of Uttaranchal v. Dinesh Kumar Sharma* [*State of Uttaranchal v. Dinesh Kumar Sharma*, (2007) 1 SCC 683 : (2007) 1 SCC (L&S) 594] . In *Pawan Pratap Singh v. Reevan Singh* [*Pawan Pratap Singh v. Reevan Singh*, (2011) 3 SCC 267 : (2011) 1 SCC (L&S) 481] , this Court revisited the precedents on the subject and observed : (*Pawan Pratap Singh case* [*Lift Irrigation Corpn. Ltd. v. Pravat Kiran Mohanty*, (1991) 2 SCC 295 : 1991 SCC (L&S) 472] , SCC pp. 281-82, para 45)

¶45. ... (i) The effective date of selection has to be understood in the context of the service rules under which the appointment is made. It may mean the date on which the process of selection starts with the issuance of advertisement or the factum of preparation of the select list, as the case may be.

(ii) Inter se seniority in a particular service has to be determined as per the service rules. The date of entry in a particular service or the date of substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between one group of officers and the other recruited from different sources. Any departure therefrom in the statutory rules, executive instructions or otherwise must be consistent with the requirements of Articles 14 and 16 of the Constitution.

(iii) Ordinarily, notional seniority may not be granted from the backdate and if it is done, it must be based on objective considerations and on a valid classification and must be traceable to the statutory rules.

(iv) The seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively unless it is so expressly provided by the relevant service rules. It is so because seniority cannot be given on retrospective basis when an employee has not even been borne in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the meantime."

This view has been re-affirmed by a Bench of three Judges of this Court in P. Sudhakar Rao v. U. Govinda Rao [P. Sudhakar Rao v. U. Govinda Rao, (2013) 8 SCC 693 : (2014) 1 SCC (L&S) 690] ."

35. In view thereof, it is directed that petitioner be considered in the Promotion Exercise for the next scale i.e. Scale VI, as per the policy of respondent for such promotion.

36. The present writ petition is allowed in the aforesaid terms, with costs of Rs. 50,000/- in favour of the petitioner in the facts and circumstances of the present case.