

(2018) 12 MAN CK 0003
In the Manipur High Court
Case No : Writ Appeal No. 23, 24 Of 2017

State Of Manipur And Others

APPELLANT

Vs

Khumanthem Dilip Singh And Others

RESPONDENT

Date of Decision : 18-12-2018

Acts Referred:

Constitution Of India, 1950 — Article 14
Right To Information Act, 2005 — Section 6(1)

Citation : (2018) 12 MAN CK 0003

Hon'ble Judges : Ramalingam Sudhakar, CJ; Lanusungkum Jamir, J

Bench : Division Bench

Advocate : S.Nepolean, H.S.Paonam, N.Bipin

Final Decision : Allowed

Judgement

Heard Mr. H.S. Paonam, learned senior counsel for the appellant in W.A. No.24 of 2017 and Mr.S.Nepolean, learned Government Advocate for the appellant in W.A. No.23 of 2017. In both the case, the contesting respondent is represented by Mr.Kh.Tarunkumar, learned counsel.

Brief facts, in respect of the present appeals, are as follows:-According to the appellants, the respondent/petitioner was appointed as a Geologist on regular basis on the recommendation of the Manipur Public Service Commission hereinafter referred to as MPSC vide order dated 24.5.1986 issued by the Under Secretary (Industries), Govt. of Manipur. On 23.11.2012, the Principal Secretary (Com. & Ind.), Govt. of Manipur issued a notification publishing the final seniority list of Geologist and it is pleaded by the respondent herein before the learned Single Judge that he was Sl.No.1 and the private appellant in W.A. No.24 of 2017, Sl.No.2.

On 15-09-1979, the Under Secretary (DP), Govt. of Manipur had issued a notification notifying the Recruitment Rules for the post of Joint Director of Industries (Geology) and as per the said Recruitment Rules, the post of Joint

Director is a Class-I (Gazetted) Selection Post. On 27-12-2013, the Deputy Secretary (Com. & Ind.), Government of Manipur issued a notification stating that a meeting of a Departmental Promotion Committee (DPC) would be held on 28-12-2013 in the office chamber of the Hon'ble Member, MPSC to consider the eligible persons for appointment on promotion to the post of Joint Director (G & M) in the Department of Commerce & Industries, Manipur. Being suspicious of some foul play in the proceedings of the DPC, the respondent filed an application under Section 6(1) of the Right to Information Act, 2005 seeking information as regards (i) Name of the eligible persons considered by the DPC on 28-12-2013; (ii) Copies of Annual Confidential Reports (ACRs) of five years of every candidate considered by the DPC; (iii) Copy of the proceedings of the DPC held on 28-12-2013 and (iv) Provisions of law empowering the member of the MPSC to chair the DPC of a Class-I Gazetted post in the absence of the Chairman of the MPSC.

On the recommendation of the said DPC, the Deputy Secretary (Com. & Ind.), Government of Manipur issued an order dated 01-02-2014 whereby the appellant in W.A. No.24 of 2017 was appointed on promotion to the post of the Joint Director of Industries (G & M) in the Department of Commerce & Industries, Manipur. After the appellant in W.A. No.24 of 2017 having been appointed, the Additional Secretary, MPSC furnished a copy of the proceedings of the DPC meeting held on 14-02-2014 and in respect of the ACRs, the Deputy Secretary (Com. & Ind.), Manipur informed the Director (Com. & Ind.) on 13-03-2014 that copies of the ACRs need not be furnished to the respondent herein. As the concerned authorities failed to furnish the information as regards the grading of the ACRs from the official respondents and being aggrieved by the inaction on the part of the State Appellant, the writ petition was filed by the respondent.

The stand of the MPSC as indicated in its affidavit in the writ proceedings is that there was no irregularity on the part of the DPC, as the DPC had considered the relative merits of the eligible persons and in particular, the assessment chart wherein the ACRs grading in respect of the respondent and the appellant was "very good" and "outstanding" respectively. The appellant in WA No.24 of 2017 having higher ACRs grading, was recommended for promotion to the post of Joint Director (G & M). The stand of the State Government is similar to that of the MPSC and in addition thereto, it has been stated that the ACRs grading of the respondent ought to be communicated to him only when there is adverse remark against him in his ACR. The appellant in WA No.24 of 2017 also filed an affidavit-in-opposition supporting the stances of both the State Government and the MPSC.

The learned Single Judge considered the above factor on the basis of the decision of the Hon'ble Supreme Court in the case of Dev Dutt vs. Union of India & ors. reported in (2008) 8 SCC 725 and the judgment and order in the case of Sukhdev Singh vs. Union of India, reported in (2013) 9 SCC 566 in which case, the decision of Dev Dutt's case has been affirmed by a three Judges Bench of the Hon'ble Supreme Court.

The learned Single Judge relying upon para Nos. 12, 13, 14 and 17 of the Dev Dutt's case ruled that the non-communication of the ACRs has affected the right of the writ petitioner/respondent herein and therefore, the DPC proceeding was erroneous. The learned Single Judge held as follows at para No.7, relevant part of which are quoted as under:-

".....Since the petitioner was not communicated the entries in respect of the first three years, he did not get the opportunity to make a representation and therefore, the inaction on the part of the authorities was arbitrary being violative of Article 14 of the Constitution and the un-communicated entries would not have been made the foundation for consideration of promotion. Having heard the learned counsels appearing for the parties, this court is of the view that the issue involved herein is squarely covered by the decision rendered in Dev Dutt case and affirmed in Sukhdev Singh case with the result that the proceedings of the DPC and the order dated 01-02-2014 issued in consequence thereof, are not sustainable in law."

As a result, the writ petition was allowed. The proceedings of the DPC was set aside and the promotion granted to the appellant in WA No.24 of 2017 was set aside. Aggrieved by this, the private respondent/ appellant has filed this appeal, WA No.24 of 2017 and the State has filed an appeal stating that the learned Single Judge erred in interfering with the DPC proceedings having not taken into consideration para No.44 of the Dev Dutt's case where a procedure has been laid in such circumstances. It applies to the present case.

This plea is made on the premise that even if the entries "very good" and "good" is not communicated to him, at best, he should have been given opportunity to make a representation so as to reconsider his claim for upgrading the entries and if it is positively considered, then the question of reconsideration in the Departmental Promotion Committee would arise.

The learned Single Judge without following the procedure prescribed in para No.44 in Dev Dutt's case has simply set aside the DPC proceedings and the promotion order granted to appellant in WA No.24 of 2017. On this premise, the appeal is canvass.

Heard Mr. H.S.Paonam, learned senior counsel for the appellant in WA No.24 of 2017 supported by Mr.S.Nepolean, learned Government Advocate for the State appellant in WA No.23 of 2017 who were at pains to point out that while it is admitted that in terms of Dev Dutt's case and Sukhdev Singh's case, every entry in ACR should be communicated to the officer concerned, the non-communication of the same cannot be the sole ground to set aside the DPC proceedings, because the objective behind communicating the same to the officer is to enable him to make a representation to accord consideration to his claim.

In the case of Dev Dutt's case, it was held that every entry should be communicated to the officer concerned. In para Nos.13, 14 and 17, the Hon'ble

Supreme Court observed 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 bench mark or not. Even if there is no bench mark, 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.

14. In most services there is a gradation of entries, which is usually as follows:

- (i) Outstanding
- (ii) Very Good
- (iii) Good
- (iv) Average
- (v) Fair
- (vi) Poor

A person getting any of the entries at items (ii) to (vi) should be communicated the entry so that he has an opportunity of making a representation praying for its upgradation, and such a representation must be decided fairly and within a reasonable period by the concerned authority.

.....

.....

17. In our opinion, every entry in the A.C.R. 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 vs. Union of India*³ (supra) that arbitrariness violates Article 14 of the Constitution."

3 : (1978) 1 SCC 248 : AIR 1978 SC 597 Thereafter, in para No.44 , the Hon'ble Supreme Court observed as follows:-

"44. We, therefore, direct that the 'good' entry be communicated to the appellant within a period of two months from the date of receipt of the copy of this judgment. On being communicated, the appellant may make the representation, if he so chooses, against the said entry within two months thereafter and the said representation will be decided within two months thereafter. If his entry is upgraded the appellant shall be considered for promotion retrospectively by the Departmental Promotion Committee (DPC) within three months thereafter and if the appellant gets selected for promotion retrospectively, he should be given higher pension with arrears of pay and interest @ 8% per annum till the date of payment."

The objective behind communication of the entry was highlighted in para No.22 of Dev Dutt's case as follows :-

"22. It may be mentioned that communication of entries and giving opportunity to represent against them is particularly important on higher posts which are in a pyramidal structure where often the principle of elimination is followed in selection for promotion, and even a single entry can destroy the career of an officer which has otherwise been outstanding throughout. This often results in grave injustice and heart-burning, and may shatter the morale of many good officers who are superseded due to this arbitrariness, while officers of inferior merit may be promoted."

The objective behind communication of entry in the ACRs was reiterated very succinctly in the case of Sukhdev Singh vs. Union of India, reported in (2013) 9 SCC 566 in para No.8 and the same is follows:-

"8. In our opinion, the view taken in Dev Dutt that every entry in ACR of a public servant must be communicated to him/her within a reasonable period is legally sound and helps in achieving threefold objectives. First, the communication of every entry in the ACR to a public servant helps him/her to work harder and achieve more that helps him in improving his work and give better results. Second and equally important, on being made aware of the entry in the ACR, the public servant may feel dissatisfied with the same. Communication of the entry enables him/her to make representation for upgradation of the remarks entered in the ACR. Third, communication of every entry in the ACR brings transparency in recording the remarks relating to a public servant and the system becomes more conforming to the principles of natural justice. We, accordingly, hold that every entry in ACR - poor, fair, average, good or very good - must be communicated to him/her within a reasonable period."

Similar to the direction given in para No.44 in Dev Dutt's case, in para No.10 of the Sukhdev Singh's case, there is a specific direction that the appellant in the case should be allowed to make a representation. Para No.10 of the Sukhdev Singh's case reads as under:-

"10. Insofar as the present case is concerned, we are informed that the appellant has already been promoted. In view thereof, nothing more is required to be

done. Civil Appeal is disposed of with no order as to costs. However, it will be open to the appellant to make a representation to the concerned authorities for retrospective promotion in view of the legal position stated by us. If such a representation is made by the appellant, the same shall be considered by the concerned authorities appropriately in accordance with law."

In the present case, there is no dispute that the appellant in WA No.24 of 2017 and the private respondent in these appeals were eligible and considered in the DPC on rival merits. As against the claim of the respondent herein, the appellant in WA No.24 of 2017 was considered as more meritorious and DPC was approved in his favour and promotion was granted.

The only issue in dispute is that the non-communication of the entries of "Very good" and "Good" in the ACRs of the private respondent. This fact is not disputed by the State appellant. In that above factual situation, the learned Single Judge was of the view that the entire DPC proceeding should be set aside and the promotion order should be quashed.

In the cases of Dev Dutt and Sukhdev Singh, as extracted earlier where entries or adverse entries were not communicated to the concerned person, it was held that the same should be communicated and a right to make representation was also given. The department was asked to consider such representation on a time frame and thereafter, if the officer is able to improve his gradation, then his case can be considered in a review DPC.

In the present case also, the said method should have been adopted by the learned Single Judge, after holding that entry in the ACRs has not been communicated to the respondent/writ petitioner as indicated in Dev Dutt's case and Sukhdev Singh's case referred to (*supra*).

The Hon'ble Supreme Court in both cases has clearly indicated the manner in which such issue should be dealt with by the State giving a right of making a representation to the person aggrieved.

Since the respondent/writ petitioner as well as the appellant in WA No.24 of 2017 are in service, the other reliefs granted in Dev Dutt's does not arise for the present. The direction for interest also does not apply.

In view of the above legal position, the order of the learned Single Judge quashing the DPC proceedings and promotion of the appellant in WA No. 24 of 2017 is set aside. In so far as non communication of the ACRs entry and resultant non consideration of respondents claim in DPC proceedings requires modification in the light of judgment of the Hon'ble Supreme Court in the above cited cases. The appeals stand partially allowed as above in the light of the direction given in para No.44 in Dev Dutt's case and para No.10 of Sukhdev Singh's cases.

In this case following the dicta of the Hon'ble Supreme Court, the State is directed to communicate the ACR entry of the respondent/writ petitioner within a

period of one month from the date of receipt of this order. Thereafter, the respondent/writ petitioner is at liberty to make a representation, if he so chooses, against such entry within one month after receipt of the ACR entry. The representation, if any, will be decided by the Government within two months from the date of receipt of such representation. If the representation is accepted and entry is upgraded, the respondent/writ petitioner claim will be considered in a review DPC, which shall be completed within three months after the claim has been considered favourably. Interim order passed in this appeal to continue till the issue is finally concluded by the official respondent on the time line as indicated above.

Both the appeals stand allowed accordingly.