
(2015) 05 TP CK 0013
In the Tripura High Court
Case No : Writ Petition (C) No. 562 of 2010

Tapati Dutta

APPELLANT

Vs

The State of Tripura and Others

RESPONDENT

Date of Decision : 08-05-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 51A(j)

Citation : (2015) 05 TP CK 0013

Hon'ble Judges : S. Talapatra, J

Bench : Single Bench

Advocate : S. Deb, Senior Advocate and M.K. Roy, for the Appellant; P. Dhar, Advocate and S. Chakraborty, Addl. G.A., Advocates for the Respondent

Final Decision : Dismissed

Judgement

S. Talapatra, J.—By means of this petition, the petitioner, working as the Private Secretary, Grade-II, has challenged the action of the respondents in promoting the respondents No. 6 and 7, who were admittedly junior to the petitioner in the grade of Private Secretary-III, to the grade of Private Secretary-II, borne in the scale of pay of Rs. 13,575-37,000, plus the grade pay of Rs. 4,800, by the orders respectively under No. F.12(2)-DJ/W/2008/4690-701 dated 12.05.2008, Annexure-J to the writ petition and under No. F.12(2)-DJ/W/2008/5917-929, dated 30.05.2009, Annexure-L to the writ petition, as well as filed this petition for expunging the observation on assessing her, in the ACRs for the year 2007, as "not yet fit for promotion", Annexure-G to the writ petition.

2. As the petitioner has been promoted to the post of Private Secretary, Grade-II, during pendency of this writ petition, by the Order under No. F.12(2)-DJ/W/2012/12233-47, dated 30.08.2003, Annexure-O to the writ petition, in the scale of pay of Rs. 13,575-37,000 with the grade pay of Rs. 5,600, the petitioner has claimed that the benefit of the said promotion be preponed from the date when the respondent Nos. 6 and 7 were promoted to the said post of the Private Secretary, Grade-II.

3. It is not in dispute in any manner that Shri Himangshu Chanda and Shri Siddhartha Chakraborty, the respondents No. 6 and 7, were junior to the petitioner in the grade of Private Secretary-III, but the Departmental Promotion Committee (the "DPC", in short) recommended the respondents No. 6 and 7 with prior approval from the Gauhati High Court for their appointment on promotion to the post of Private Secretary, Grade-II in the scale of pay of Rs. 10,650-325-15,850 (pre-revised), corresponding to the revised scale of pay of Rs. 13,575-37,000 in the grade pay of Rs. 4,800 (pay band-4) alongwith other admissible allowances. On 12.05.2008 the respondent No. 6 was promoted and the respondent No. 7 was promoted against the vacancy due to retirement of one Parimal Chakraborty, Private Secretary, Grade-II on superannuation w.e.f. 31.05.2009. Accordingly, by virtue of the orders dated 12.05.2008 and 30.05.2009, Annexure-J and Annexure-L to the writ petition, the respondents No. 6 and 7 resumed their duty on the promotional post of Private Secretary, Grade-II.

4. It transpires from the record that, the petitioner was assessed as "not yet fit for promotion" by the District and Sessions Judge, South Tripura, Udaipur, by way of review, for the year 2007 as would be reflected from the Memorandum No. F.4(64)-DJ/S/2005-08/951, dated 29.01.2008, Annexure-G to the writ petition. It is also not in dispute that she had been graded "not yet fit for promotion" in the year 2007. Immediately, she had been communicated of such grading, with the following observation, appended to the said memorandum dated 29.01.2001:

"If she has got any submission to make with regard to the above remarks, she may submit the same in writing to the Office of the undersigned within 7(seven) days from the date of receipt of this Memorandum."

5. The petitioner, on 01.02.2008 made her representation asserting that, her 5(five) years ACRs would prove that she is fit for promotion. Even though she was suffering from ailments but, that did not affect her performance at any matter. She has also imputed the said assessment by stating that at no point of time, her deficiencies were pointed out for improvement. Thus, such assessment was not at all objective. By the Memorandum under No. F.4(64)-DJ/S/2005-08/306, dated 14.02.2008, Annexure-I to the writ petition, the said representation of the petitioner was disposed with the following observations:

"1. That the reporting officer did not mention any date in the ACR on which Smt. Datta expressed her unwillingness to perform extra duty. Hence, the remarks passed in the ACR against col. No. 2 is hereby expunged.

2. On the question of integrity remarks passed against sl No. 1 and 5 appear to be contradictory since integrity of employees is assessed on the matter of taking illegal gratification even though willingly given and since no such remark of taking illegal gratification in the ACR is apparent the entire remarks passed in the ACR against col. No. 5 is hereby expunged.

3. The remarks passed in the ACR against col No. 4 are not wholly accepted for the reason that it is very difficult to anyone other than a medical practitioner to give opinion of ailment and sufferings of patient.

Hence the remarks put in her ACR against col. No. 4 are expunged.

Remarks passed with regard to fitness for promotion to next higher grade against col. No. 3 and with regard to grading against col. No. 4 having been the overall assessment of the presiding officer for promotion are not touched to expunge the same."

Thus, the grading as "not yet fit for promotion" stood un-expunged.

6. When by the Order under No. F.12(2)-DJ/W/2008/4690-701, dated 12.05.2008, Annexure-J to the writ petition, one Shri Himangshu Chanda (respondent No. 6), borne in the grade of Private Secretary, Grade-III, had been promoted to the post of Private Secretary, Grade-II in the pay scale of Rs. 10,650-325-15,850 (pre-revised), the petitioner filed one representation, raising her protest against the supersession and denial of her promotion to the grade of Private Secretary-II, inasmuch as the respondent No. 6 was junior to her in the grade of Private Secretary-III.

7. The said representation dated 28.05.2008, Annexure-K to the writ petition, did not bring any positive result for the petitioner, rather by the order dated 30.05.2009, Annexure-L to the writ petition, another junior, namely Shri Siddhartha Chakraborty, respondent No. 7 had been promoted to the grade of Private Secretary-II, in the revised pay scale of Rs. 13,575-37,000 with the grade pay of Rs. 4,800 w.e.f. 01.06.2004 forenoon. The said order of promotion, Annexure-L to the writ petition, has been challenged by this petition.

8. It is to be further noted that both the respondent No. 6 and respondent No. 7 were subsequently promoted to the post of Special Assistant and Ex-Officio Joint Secretary in the revised pay scale (PB-4) of Rs. 13,575-37,000 with grade pay of Rs. 5,600 alongwith other admissible allowances, by the order dated 09.08.2011, Annexure-N to the writ petition and the order dated 30.08.2013, Annexure-O to the writ petition.

9. The petitioner has not challenged those orders specifically, but expressed her grievance against such orders, perhaps she had contemplated that if the promotion orders to the post of the Private Secretary-II of the respondents No. 6 and 7 are interfered with, as consequences thereof, she would also get the benefit in form of promotion to the post of the Special Assistant and Ex-Officio Joint Secretary from the day when the respondent No. 6 or the respondent No. 7 were promoted to the said grade.

10. Mr. S. Deb, learned senior counsel appearing for the petitioner, has strenuously argued that the process that has been followed for grading the petitioner as "not yet fit for promotion" or for disposing her representation, has belied the principles of reasonableness. Mr. Deb, learned senior counsel, in

support of his contention, has referred to *Dev Dutt Vs. Union of India (UOI) and Others*, (2008) 117 FLR 1024 : (2008) 7 JT 463 : (2008) 7 SCALE 403 : (2008) 8 SCC 725 : (2008) 2 SCC(L&S) 771 : (2008) 3 SLJ 244 and *Abhijit Ghosh Dastidar Vs. Union of India (UOI) and Others*, (2009) 16 SCC 146 . Both the decisions are celebrated for giving eloquence to the transparency procedure in the matter of grading made in the Annual Confidential Reports (ACRs) by observing that:

"It has been held in *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, AIR 1978 SC 597 : (1978) 1 SCC 248 : (1978) 2 SCR 621 that arbitrariness violates Article 14 of the Constitution. In our opinion, the non-communication of an entry in the ACR of a public servant is arbitrary because it deprives the concerned employee from making a representation against it and praying for its up-gradation. In our opinion, every entry in the Annual Confidential Report of every employee under the State, whether he is in civil, judicial, police or other service (except the military) must be communicated to him, so as to enable him to make a representation against it, because non-communication deprives the employee of the opportunity of making a representation against it which may affect his chances of being promoted (or get some other benefits). Moreover, the object of writing the confidential report and making entries in them is to give an opportunity to a public servant to improve his performance, vide *State of U.P. Vs. Yamuna Shanker Misra and another*, AIR 1997 SC 3671 : (1997) 4 JT 1 : (1997) 2 LLJ 1 : (1997) 3 SCALE 80 : (1997) 4 SCC 7 : (1997) SCC(L&S) 903 : (1997) 2 SCR 371 : (1997) AIRSCW 1951 : (1997) 3 Supreme 187 . Hence such non-communication is, in our opinion, arbitrary and hence violative of Article 14 of the Constitution."

[Emphasis supplied]

It has been further observed that:

"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."

[Emphasis supplied]

11. In the case in hand, there is no dispute that this Court is concerned with an adverse entry, assessing the petitioner as "not yet fit for promotion".

12. Mr. Deb, learned senior counsel, for nourishing his submission further, has

referred to State of U.P. Vs. Yamuna Shanker Misra and another, AIR 1997 SC 3671 : (1997) 4 JT 1 : (1997) 2 LLJ 1 : (1997) 3 SCALE 80 : (1997) 4 SCC 7 : (1997) SCC(L&S) 903 : (1997) 2 SCR 371 : (1997) AIRSCW 1951 : (1997) 3 Supreme 187 , where it has been observed by the apex court in Para 7 as under:

7. It would, thus, be clear that the object of writing the confidential reports and making entries in the character rolls is to give an opportunity to a public servant to improve excellence. Article 51A(j) enjoins upon every citizen the primary duty to constantly endeavour to prove excellence, individually and collectively, as a member of the group. Given an opportunity, the individual employee strives to improve excellence and thereby efficiency of administration would be augmented. The officer entrusted with the duty to write confidential reports, has a public responsibility and trust to write the confidential reports objectively, fairly and dispassionately while giving, as accurately as possible, the statement of facts on an overall assessment of the performance of the subordinate officer. It should be founded upon the facts or circumstances. Though sometimes, it may not be part of record, but the conduct, reputation and character acquire public knowledge or notoriety and may be within his knowledge. Before forming an opinion to be adverse, the reporting/officers writing confidentials should share the information which is not a part of the record with the officer concerned, have the information confronted by the officer and then make it part of the record. This amounts to an opportunity given to the erring/corrupt officer to correct the errors of the judgment, conduct, behaviour, integrity or conduct/corrupt proclivity. If, despite giving such an opportunity, the officer fails to perform the duty, correct his conduct or improve himself necessarily, the same may be recorded in the confidential reports and a copy thereof supplied to the affected officer so that he will have an opportunity to know the remarks made against him. If he feels aggrieved, it would be open to him to have it corrected by appropriate representation to the higher authorities or any appropriate judicial forum for redressal. Thereby, honesty, integrity, good conduct and efficiency get improved in the performance of public duties and standards of excellence in services constantly rises to higher levels and it becomes successful tool to manage the services with officers of integrity, honesty, efficiency and devotion.

[Emphasis supplied]

13. Mr. Deb, learned senior counsel, on the basis of the said observation made by the apex court in State of U.P. vs. Yamuna Shanker Misra and Anr., has contended that the reporting officer has failed to produce any record in support of the said impugned assessment, inasmuch as there had been no occasion to complain against performance of the petitioner. Not only that the very purpose of grading the ACRs have been frustrated by the reporting officer. The purpose is to get the performance in the public duties and standards of excellence in services improved and enhanced to higher level.

14. Mr. Deb, learned senior counsel has also referred to Sukhdev Singh Vs. Union of India (UOI) and Others, (2013) 4 ABR 1138 : (2014) 1 AD 227 : AIR 2013 SC

2741 : (2013) 137 FLR 907 : (2013) 8 JT 270 : (2013) LabIC 2925 : (2013) 2 LLN 578 : (2013) 171 PLR 823 : (2013) 6 SCALE 490 : (2013) 9 SCC 566 : (2014) 1 SCC(L&S) 279 : (2013) 4 SCT 129 : (2013) AIRSCW 3801 , where the apex court recorded fundamentally the development of law as regards the communication of the entries recorded in the ACRs of an officer from U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and others, (1996) 1 AD 885 : AIR 1996 SC 1661 : (1996) 1 JT 641 : (1996) 1 SCALE 624 : (1996) 2 SCC 363 : (1996) 1 SCR 1118 : (1996) 1 UJ 636 to the Abhijit Ghosh Dastidar Vs. Union of India (UOI) and Others, (2009) 16 SCC 146 . It is well-known that Sukhdev Singh vs. Union of India is the outcome of a reference made by a two-Judges Bench of the apex court on noticing that Union of India (UOI) and Another Vs. Major Bahadur Singh, (2006) 108 FLR 146 : (2005) 10 JT 127 : (2005) 9 SCALE 459 : (2006) 1 SCC 368 : (2006) SCC(L&S) 959 , were reflecting substantive inconsistency in the decision of the apex court. Finally it has been observed in Sukhdev Singh vs. Union of India that subsequent to the above two decisions, the apex court in Dev Dutt Vs. Union of India had an occasion to consider the purpose and necessity of communication of the entry made in the ACR of a public servant (other than military service).

15. Having regard to the celebrated decisions of the apex court in A.K. Kraipak and Others Vs. Union of India (UOI) and Others, AIR 1970 SC 150 : (1969) 2 SCC 262 : (1970) 1 SCR 457 , Union of India and Another Vs. Tulsiram Patel and Others, AIR 1985 SC 1416 : (1985) 3 CompLJ 45 : (1985) 51 FLR 362 : (1985) 2 LLJ 206 : (1985) 2 SCALE 133 : (1985) 3 SCC 398 : (1985) 2 SCR 131 Supp : (1985) 2 SLJ 145 , Canara Bank Vs. V.K. Awasthy, AIR 2005 SC 2090 : (2005) 4 CompLJ 249 : (2005) 2 ESC 225 : (2005) 105 FLR 630 : (2005) 4 JT 40 : (2005) 2 LLJ 461 : (2005) 6 SCC 321 : (2005) SCC(L&S) 833 : (2005) 61 SCL 144 : (2005) 3 SCR 81 : (2005) 2 SLJ 463 : (2005) AIRSCW 2005 : (2005) 3 Supreme 492 and State of Maharashtra Vs. Public Concern for Governance Trust and Others, (2007) 1 SCALE 72 : (2007) 3 SCC 587 : (2007) 2 SCR 87 : (2007) AIRSCW 474 : (2007) 1 Supreme 8 , it has been culled out in Dev Dutt Vs. Union of India that, every entry in the ACRs 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. The principles as recorded in paras 17 and 18 of Dev Dutt Vs. Union of India have been approvingly stated in Sukhdev Singh vs. Union of India. For reference, paras 17 and 18 of Dev Dutt Vs. Union of India are also reproduced hereunder:

"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 *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, AIR 1978 SC 597 : (1978) 1 SCC 248 : (1978) 2 SCR 621 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."

16. The other purpose is no less highlighted. *Dev Dutt Vs. Union of India* has categorically held that, the communication of entries and giving opportunity to represent against them are particularly important on higher posts. In a pyramidal structure, often the principle of elimination is followed in selection for promotion, and even a single entry can destroy the career of an officer who 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.

17. In *Sukhdev Singh vs. Union of India*, having considered these aspects of the matter, the apex court has finally observed as under, which appears identical to the present circumstances:

"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."

18. In *Sukhdev Singh vs. Union of India*, the apex court has provided liberty to the petitioner Sukhdev Singh to make representation to the authority concerned for retrospective promotion in view of the legal position stated. It has been also held that, if such representation is made by the appellant, the same shall be considered by the authority concerned appropriately in accordance with law.

19. Mr. Deb, learned senior counsel appearing for the petitioner, while rapping up his submission, has emphatically contended that the petitioner has suffered injustice for non-objective consideration of her representation. As consequence thereof, she had suffered supersession by two junior officers, the respondent Nos. 6 and 7.

20. From the other side, Ms. P. Dhar, learned counsel appearing for the respondent Nos. 2 to 5, has submitted that the petitioner had no grievance against the disposal of her representation by the Memorandum dated 14.02.2008, Annexure-I to the writ petition and she did not challenge that memorandum till the promotion order in favour of the respondent No. 7 had been made by the order dated 30.05.2009. Even from this writ petition, as the respondents did not file any counter-affidavit, it would be apparent that the

petitioner had been subsequently appointed as the Private Secretary, Grade-II, by the order dated 09.08.2011, Annexure-N to the writ petition. Merely for her occupying the senior most position in the seniority list in the grade of Private Secretary-III, she cannot claim her promotion unless she is assessed fit for the promotion. As regards the assessment made by the reporting officer, she has pointed out that the impugned entry has been maintained by the reviewing authority while disposing the representation. This court may not, in order to assess the same, invoke the jurisdiction under Article 226 of the Constitution of India.

21. Having regard to the rival contentions, this court has scrutinised the ACRs and the DPC minutes to ascertain the process that has been pursued for assessing the comparative merit of the officers in the zone of consideration during the two exercises whereby on two different dates the respondent No. 6 and respondent No. 7 have been promoted to the post of the Private Secretary, Grade-II, as stated. What appears from the DPC minutes held on 26.01.2008 to 27.01.2008, that the petitioner was considered alongwith two other officers, namely Himangshu Chanda and Arabinda Biswas, and it has been observed by the DPC, on their own assessment that "she is not found suitable for the post". The DPC, as it appears, has assessed the performance of the petitioner of their own on considering the ACRs of the relevant years. Even when the DPC considered the promotion of the respondent No. 7, in their meeting held on 11.04.2009 to 12.04.2009, the petitioner's name was considered alongwith two other officers, namely Arabinda Biswas and Siddhartha Chakraborty (respondent No. 7). Both the petitioner and Arabinda Biswas have been assessed by the DPC independently as "not found fit for promotion", on consideration of their relevant ACRs. The decisions were taken unanimously by the DPC constituted of all the District Judges of the State. Even the DPC had considered the representation and the order of disposal in regard to the grading made in the ACRs of 2007.

22. This Court cannot be called upon to assess the merit of the decision, but to test whether there is any arbitrariness or lack of transparency in the process, as enunciated by *Dev Dutt Vs. Union of India*, approved in a larger bench decision in *Sukhdev Singh vs. Union of India*. This court has already observed that the adverse grading was duly communicated, asking the petitioner to make the representation and on consideration of the representation by the Reviewing Authority, there had been expunction of some comments as noted, but the adverse grading that, the petitioner "is not yet fit for promotion", was not expunged or upgraded. This Court has particularly gone through the assessment made by the Reporting Officer and of the view that the parameters on which the said grading has been made, cannot be held to be totally unreasonable.

23. Having confronted with such circumstances, this court is not persuaded to interfere with the impugned action of the respondent Nos. 1 to 5.

24. In the result, this writ petition stands dismissed. However, there shall be no order as to costs.

Return the records so produced by the respondent Nos. 2 to 5, to Ms. P. Dhar, learned counsel, under a sealed cover forthwith.