
(2013) 07 MP CK 0414

In the Madhya Pradesh High Court

Case No : Writ Petition No. 1590 of 2005

Tej Pratap Singh Sengar

APPELLANT

Vs

State of Madhya Pradesh and Others

RESPONDENT

Date of Decision : 22-07-2013

Acts Referred:

Citation : (2013) 07 MP CK 0414

Hon'ble Judges : Sujoy Paul, J.

Bench : Single Bench

Final Decision : Disposed off

Judgement

Sujoy Paul, J.—Petitioner is aggrieved by his supersession on the post of Assistant Director (Agriculture). Brief facts necessary for adjudication of this matter are as under:-

Admittedly, the feeder post of Asstt. Director (Agriculture) is Senior Agricultural Development Officer. The petitioner was earlier not assigned proper seniority. He preferred a departmental representation. His departmental representation was allowed and his seniority was upgraded. Because of upgradation of his seniority by order dated 5.8.2000 (Annexure P/7), admittedly, the petitioner came in the zone of consideration. The petitioner filed Writ Petition No. 7907/2003 before this Court, which was decided on 13.5.2004 (Annexure P/13). This Court after taking stock of the event that the petitioner's seniority stood revised and upgraded, coupled with the fact that the respondents in their return have taken a stand that after correction of petitioner's seniority he came within the zone of consideration and a proposal in this regard is pending, disposed of the petition with the direction to the respondents to consider the case of grant of promotion to the petitioner in view of their own stand in the said writ petition. Consequently, the respondents passed the order dated 15.9.2004, Annexure P-1, and opined that the petitioner is not found fit for promotion. This order is under challenge in the present petition.

2. Shri D.K. Katare, learned counsel for the petitioner drew attention of this Court on para 5.7 of the reply wherein the respondents have stated that Annexure P-1 is just, proper and well within jurisdiction after consideration of revised ACRs by the DPC. Criticizing the said stand, it is argued that the DPC had no authority to revise the ACR. Reliance is also placed on Annexure P-14 dated 18.11.1997 with rejoinder, to submit that even if petitioner's grading is "", he was entitled for promotion. Lastly, it is stated that on the strength of the judgments reported in P.C. Pradhan Vs. Union of India and others, and, Jagat Narain Tiwari Vs. State of M.P. and Others, that the ACRs for the relevant period were never communicated to the petitioner and, therefore, the same cannot be taken into account.

3. Per Contra, the stand of the respondents is that the petitioner has only a right of consideration for promotion in accordance with law and not the right of promotion. His case was considered on the basis of existing ACRs without there being any revision by the DPC and on the basis of relevant ACRs which were for the entire period, the petitioner did not touch and cross the benchmark and, therefore, he was rightly not promoted.

4. The relevant photocopies of ACR dossiers and DPC record were produced by Shri Pravin Newaskar for perusal of this Court.

5. This Court way back on 6.4.2010 directed the respondents to produce the ACRs so that the averment of para 5.7 of the return can be examined. I have seen the relevant ACR dossiers and the DPC record. It nowhere reflects that petitioner's ACRs grading was revised or changed at any point of time. Thus, it appears that the return is unhappily worded and there is no ACR in the record in the tune of the stand taken in the return.

6. The review DPC proceedings shows that the criteria for promotion was "seniority-cum-merit", which was as per the "Madhya Pradesh Seva (Padonnatiyon Me Arakshan Vichar Kshetra Ke Vistar Semayen) Niyam, 1997". The DPC fixed a benchmark. As per the benchmark so fixed, the integrity of the candidate must be beyond doubt. The general assessment of relevant ACR must be of "Good" category and ACRs of last two years must be of "Good" category. The DPC has considered the petitioner's grading and found that from the year ending 1995 to the year ending 1999 the petitioner's grading is consistently . Since the petitioner could not touch and cross the benchmark, he was not found fit for promotion.

7. Although Shri Katare heavily relied on the circular dated 18.11.1997 (Annexure P/14) to submit that a person of " (I) " grading is also entitled for promotion, in my opinion, it appears that there is a printing mistake in the said order. If relevant clauses of criteria of "seniority-cum-merit" is examined minutely, it will be crystal clear that the benchmark was "Good". Erroneously in clause (1) against "Good" in bracket is mentioned whereas it should have been , which is clear from clause (2) typed below it. Thus, this contention is without any

substance. Even otherwise, this is settled in law that in the criteria "seniority-cum-suitability", suitability has a role to play. The DPC has a right to fix a reasonable benchmark. This view is taken by this Court in *Ram Bharose Kamal Vs. State of M.P. and Others*, .

8. Now the question is whether the petitioner's supersession without communicating the entries is justifiable?

9. Although Shri Katare relied on the judgments in *P.C. Pradhan and Jagat Narayan Tiwari (supra)*, in the opinion of this Court, this point is decided by the Supreme Court in *Dev Dutt Vs. Union of India (UOI) and Others*, . In *Dev Dutt's* case, the Apex Court opined that any ACR, which takes away the employee out of zone of consideration or the said entry has an adverse impact on the petitioner, has to be treated as an adverse ACR and such adverse ACR should be communicated to the employee. The Apex Court in *Dev Dutt (supra)* opined as under:-

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 (supra)* 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.

19. Learned counsel for the respondent has relied on the decision of this Court in *U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and others*, . We have perused the said decision, which is cryptic and does not go into details. Moreover it has not noticed the Constitution Bench decision of this Court in *Maneka Gandhi vs. Union of India (supra)* which has held that all State action must be non-arbitrary, otherwise Article 14 of the Constitution will be violated. In our opinion the decision in *U.P. Jal Nigam (supra)* cannot be said to have laid down any legal principle that entries need not be communicated. As observed in *Bharat Petroleum Corporation Ltd. and Another Vs. N.R. Vairamani and Another*, .

9..... Observations of Courts are neither to be read as Euclid's Theorems nor as provisions of the statute, and that too, taken out of their context. 20. In *U.P. Jal Nigam's* case (*supra*) there is only a stray observation "if the graded entry is

of going a step down, like falling from "very good" to "good" that may not ordinarily be an adverse entry since both are a positive grading". There is no discussion about the question whether such "good" grading can also have serious adverse consequences as it may virtually eliminate the chances of promotion of the incumbent if there is a bench-mark requiring "very good" entry. And even when there is no benchmark, such downgrading can have serious adverse effect on an incumbent's chances of promotion where comparative merit of several candidates is considered.

21. Learned counsel for the respondent also relied upon the decision of this Court in Union of India (UOI) and Another Vs. S.K. Goel and Others, and on the strength of the same submitted that only an adverse entry need be communicated to the incumbent. The aforesaid decision is a 2-Judge Bench decision and hence cannot prevail over the 7-Judge Constitution Bench decision of this Court in Maneka Gandhi vs. Union of India (supra) in which it has been held that arbitrariness violates Article 14 of the Constitution. Since the aforesaid decision in Union of India vs. S.K. Goel (supra) has not considered the aforesaid Constitution Bench decision in Maneka Gandhi's case (supra), it cannot be said to have laid down the correct law. Moreover, this decision also cannot be treated as a Euclid's formula since there is no detailed discussion in it about the adverse consequences of non-communication of the entry, and the consequential denial of making a representation against it.

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 heartburning, and may shatter the morale of many good officers who are superseded due to this arbitrariness, while officers of inferior merit may be promoted.

23. In the present case, the action of the respondents in not communicating the "good" entry for the year 1993-94 to the appellant is in our opinion arbitrary and violative of natural justice, because in substance the "good" entry operates as an adverse entry (for the reason given above).

24. What is natural justice? The rules of natural justice are not codified nor are they unvarying in all situations, rather they are flexible. They may, however, be summarized in one word: fairness. In other words, what they require is fairness by the authority concerned. Of course, what is fair would depend on the situation and the context.

25. Lord Esher M.R. in Voinet vs. Barrett (1885) 55 L.J. QB 39, observed: "Natural justice is the natural sense of what is right and wrong."

26. In our opinion, our natural sense of what is right and wrong tells us that it was wrong on the part of the respondent in not communicating the "good" entry

to the appellant since he was thereby deprived of the right to make a representation against it, which if allowed would have entitled him to be considered for promotion to the post of Superintending Engineer. One may not have the right to promotion, but one has the right to be considered for promotion, and this right of the appellant was violated in the present case.

27. A large number of decisions of this Court have discussed the principles of natural justice and it is not necessary for us to go into all of them here. However, we may consider a few.

28. Thus, in *A.K. Kraipak and Others Vs. Union of India (UOI) and Others*, , a Constitution Bench of this Court held: (para 20)

20..... The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules, namely (1) no one shall be a judge in his own cause (*Nemo debet esse judex propria causa*), and (2) no decision shall be given against a party without affording him a reasonable hearing (*audi alteram partem*). Very soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice.

(Emphasis supplied)

The aforesaid decision was followed by this Court in *K.I. Shephard and Others Vs. Union of India (UOI) and Others*, . It was held in this decision that even administrative acts have to be in accordance with natural justice if they have civil consequences. It was also held that natural justice has various facets and acting fairly is one of them.

29. In *Kumaon Mandal Vikas Nigam Ltd. Vs. Girja Shankar Pant and Others*, , this Court held (vide para 2):

2..... the doctrine (natural justice) is now termed as a synonym of fairness in the concept of justice and stands as the most accepted methodology of a governmental action.

(Emphasis supplied)

In the same decision it was also held following the decision of Tucker, LJ in *Russell vs. Duke of Norfolk*, (1949) 1 All ER 109:

The requirement of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. 30. In *Union of India and Another Vs. Tulsiram Patel and Others*, a Constitution Bench of this Court referred to with approval the following observations of Ormond, L.J. in *Norwest Holst Ltd. vs. Secretary of State for Trade*, (1978) 1, Ch. 201:

The House of Lords and this court have repeatedly emphasized that the ordinary

principles of natural justice must be kept flexible and must be adapted to the circumstances prevailing in any particular case.

(Emphasis supplied)

31. Thus, it is well settled that the rules of natural justice are flexible. The question to be asked in every case to determine whether the rules of natural justice have been violated is: have the authorities acted fairly?

32. In *Swadeshi Cotton Mills Vs. Union of India (UOI)*, , this Court following the decision in *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, held that the soul of the rule (natural justice) is fair play in action.

33. In our opinion, fair play required that the respondent should have communicated the "good" entry of 1993-94 to the appellant so that he could have an opportunity of making a representation praying for upgrading the same so that he could be eligible for promotion. Non-communication of the said entry, in our opinion, was hence unfair on the part of the respondent and hence violative of natural justice.

34. Originally there were said to be only two principles of natural justice: (1) the rule against bias and (2) the right to be heard (*audi alteram partem*). However, subsequently, as noted in *A.K. Kraipak's case (supra)* and *K.I. Shephard's case (supra)*, some more rules came to be added to the rules of natural justice, e.g. the requirement to give reasons vide *S.N. Mukherjee Vs. Union of India*, . In *Maneka Gandhi vs. Union of India (supra)* (vide paragraphs 56 to 61) it was held that natural justice is part of Article 14 of the Constitution.

35. Thus natural justice has an expanding content and is not stagnant. It is therefore open to the Court to develop new principles of natural justice in appropriate cases.

36. In the present case, we are developing the principles of natural justice by holding that fairness and transparency in public administration requires that all entries (whether poor, fair, average, good or very good) in the Annual Confidential Report of a public servant, whether in civil, judicial, police or any other State service (except the military), must be communicated to him within a reasonable period so that he can make a representation for its upgradation. This in our opinion is the correct legal position even though there may be no Rule/G.O. requiring communication of the entry, or even if there is a Rule/G.O. prohibiting it, because the principle of non-arbitrariness in State action as envisaged by Article 14 of the Constitution in our opinion requires such communication. Article 14 will override all rules or government orders.

37. We further hold that when the entry is communicated to him the public servant should have a right to make a representation against the entry to the concerned authority, and the concerned authority must decide the representation in a fair manner and within a reasonable period. We also hold that the

representation must be decided by an authority higher than the one who gave the entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar to Caesar. All this would be conducive to fairness and transparency in public administration, and would result in fairness to public servants. The State must be a model employer, and must act fairly towards its employees. Only then would good governance be possible.

38. We, however, make it clear that the above directions will not apply to military officers because the position for them is different as clarified by this Court in Union of India (UOI) and Another Vs. Major Bahadur Singh, . But they will apply to employees of statutory authorities, public sector corporations and other instrumentalities of the State (in addition to Government servants).

39. In Canara Bank Vs. V.K. Awasthy, , this Court held that the concept of natural justice has undergone a great deal of change in recent years. As observed in para 8 of the said judgment:

8. Natural justice is another name for common-sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common-sense liberal way. Justice is based substantially on natural ideals and human values. In para 12 of the said judgment it was observed:

12. What is meant by the term "principles of natural justice" is not easy to determine. Lord Sumner (then Hamilton, L.J.) in R. v. Local Govt. Board (1914) 1 KB 160 : 83 LJKB 86 described the phrase as sadly lacking in precision. In General Council of Medical Education and Registration of U.K. v. Spackman (1943) AC 627 : (1943) 2 All ER 337, Lord Wright observed that it was not desirable to attempt "to force it into any Procrustean bed. 40. In State of Maharashtra Vs. Public Concern for Governance Trust and Others, , it was observed (vide para 39):

39. In our opinion, when an authority takes a decision which may have civil consequences and affects the rights of a person, the principles of natural justice would at once come into play. 41. In our opinion, non-communication of entries in the Annual Confidential Report of a public servant, whether he is in civil, judicial, police or any other service (other than the military), certainly has civil consequences because it may affect his chances for promotion or get other benefits (as already discussed above). Hence, such non-communication would be arbitrary, and as such violative of Article 14 of the Constitution.

42. In view of the above, we are of the opinion that both the learned Single Judge as well as the learned Division Bench erred in law. Hence, we set aside the judgment of the Learned Single Judge as well as the impugned judgment of the learned Division Bench.

43. We are informed that the appellant has already retired from service.

However, if his representation for upgradation of the "good" entry is allowed, he may benefit in his pension and get some arrears. Hence we direct that the "good" entry of 1993-94 be communicated to the appellant forthwith and he should be permitted to make a representation against the same praying for its upgradation. If the upgradation is allowed, the appellant should be considered forthwith for promotion as Superintending Engineer retrospectively and if he is promoted he will get the benefit of higher pension and the balance of arrears of pay along with 8% per annum interest.

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.

Division Bench of this Court in Writ Appeal No. 452/2010 (Ramgopal Verma vs. State of MP and others) has followed the aforesaid ratio.

10. In view of the judgment in Dev Dutt (supra), the curtains are finally drawn on the issue and the judgments cited by Shri Katare are of no assistance to him.

11. Thus, as such no arbitrariness can be found in the DPC proceedings and in ACR dossiers. Withstanding the grading, by no stretch of imagination, it can be said that the petitioner was suitable for promotion. The benchmark was rightly fixed by the DPC and it cannot be said to be an unauthorised or arbitrary act on the part of DPC. Thus, petitioner is only entitled to get the relevant ACRs, against which he will have a right to prefer representations.

12. Accordingly, following the ratio of Dev Dutt (supra), this petition is disposed of with following directions:-

(i) The respondents shall communicate the ACRs of the year ending 1995 to the petitioner within 30 days from the date of production of certified copy of this order. In turn, the petitioner shall prefer separate representations within 30 days against these ACRs before the competent authority.

(ii) The competent authority, in turn, will consider and decide the representations of the petitioner within two months therefrom. If the petitioner's ACRs gradings are upgraded and because of that he touches and crosses the benchmark so fixed by the DPC, a review DPC shall be convened within 30 days therefrom to consider the case of the petitioner for promotion. The necessary orders and outcome upon such consideration (if any) be communicated to the petitioner

forthwith.

Petition is disposed of. No costs.