

(2016) 03 GAU CK 0077
In the Gauhati High Court
Case No : WP(C) 5185/2013

The State of Assam

APPELLANT

Vs

Mamat Kalita

RESPONDENT

Date of Decision : 02-03-2016

Acts Referred:

Administrative Tribunals Act, 1985 — Section 19(4)
Indian Forest Service (Cadre) Rules, 1966 — Rule 5(1)
Assam Services (Confidential Rolls) Rules, 1990 — Rule 10
Indian Forest Service (Appointment By Promotion) Regulations, 1966 — Regulation 3

Citation : (2016) 3 GauLJ 525 : (2016) 4 GauLR 339 : (2016) 2 GauLT 940 :
(2016) 2 NEJ 10

Hon'ble Judges : Tinlianthang Vaiphei, Actg. C.J. and Manojit Bhuyan, J.

Bench : Division Bench

Advocate : B.J. Ghosh and P. Roy, for the Appellant; M.K. Choudhury, Senior Advocate, T.N. Srinivasan and H.K. Das, for the Respondent

Final Decision : Disposed of

Judgement

Manojit Bhuyan, J.—1. Heard Mr. BJ Ghosh, learned counsel representing the petitioner. Also heard Mr. MK Choudhury, learned Senior counsel, assisted by Mr. HK Das, Advocate, representing the respondent.

2. The legality and validity of the order dated 14.12.2012 passed by the Central Administrative Tribunal, Guwahati Bench (hereinafter alluded to as the "Tribunal") in OA 351/2012 is put to challenge by the State of Assam.

3. The sole respondent Sri Mamat Kalita is from the batch of officers of the 1978-80 State Forest Service (Assam). The issue primarily revolves round promotion with regard to the members of the State Forest Service to the Assam segment of IFS Joint Cadre of Assam-Meghalaya. OA 351/2013 was instituted by the respondent challenging the Order dated 26.6.2012 of the Principal Secretary to the Government of Assam, Environment & Forest Department declining request for review of the ACRs for the period 24.11.1999 to 31.3.2001.

4. Facts necessary to traverse begins with the meeting of the Selection Committee dated 8.12.2000, so constituted under Regulation 3 of the Indian Forest Service (Appointment by Promotion) Regulations, 1966. The agenda was for preparing a list of the members of the State Forest Service suitable for promotion to the Assam Segment of IFS Joint Cadre of Assam-Meghalaya during the year 2000. The service records of the eligible officers were examined up to the year 1998-99 and on an overall assessment certain officers were selected. The sole respondent i.e. Sri Mamat Kalita was within the zone but not selected. Pertinently, while assessing the suitability of the officers, the Committee did not take into consideration any adverse remarks in the Annual Confidential Reports (in short "ACR") of the officers which were not communicated to them. The selection was made on the basis of the overall assessment of the officers with the bench-mark "Very Good". Appointments of three officers, sans the sole respondent, followed suit. A similar exercise was carried out on 5.11.2001 by examining the service records of the eligible officers up to the year 1999-2000, without taking into consideration any un-communicated adverse remarks in the ACRs. The selection of Sri Mamat Kalita did not come by as his overall assessment did not reach the bench-mark "Very Good". The final selection, for the purpose of this case, was made on 13.6.2005 at the instance of Court's directions. The Selection Committee met and prepared a list of members suitable for promotion during the years 2002, 2003 and 2004. As against the 4 (four) vacancies in the promotion quota of the State Cadre during 2002, the Committee, on an overall relative assessment of the service records of the officers within the zone and those who fulfilled the conditions of eligibility up to the year 2000-2001, made the selection. Sri Mamat Ali did not make it to the selection with an assessment of "Good" in his favour.. Apparently, the minutes of the Committee did not indicate that the earlier procedure of ignoring any un-communicated adverse remarks while making selection, had been adhered to. For the lone vacancy in the promotion quota during 2003, eligibility of officers up to the year 2001-2002 was considered on the same procedural yardstick as in 2002. Sri Mamat Kalita again secured "Good" in the overall assessment. As against the 2 (two) vacancies for preparing the Select List of 2004, eligibility of officers up to the year 2002-2003 fell for consideration. Any adverse remarks not communicated were not considered, as done in the years 2000 and 2001. The overall assessment of Sri Mamat Kalita was adjudged as "Very Good". By Notification dated 7.11.2005 (Annexure-6) all the 7 (seven) officers selected for the years 2002, 2003 and 2004 were appointed and allocated to the Assam-Meghalaya Joint Cadre of the Indian Forest Service under sub-rule (1) of Rule 5 of the Indian Forest Service (Cadre) Rules, 1966.

5. OA 258/2006 was instituted by Sri Mamat Kalita before the Tribunal on 26.9.2006 seeking direction to the State Respondents to consider his case for selection and appointment to IFS for the year 2000 by treating his continuous service w.e.f. 1.11.1978. As this OA 258/2006 has considerable bearing in this case, the primary prayers made therein are reproduced hereunder:

"(i) For a declaration that the entry to and continuance of the Respondent Nos. 5 and 6 in the IFS is illegal, being void ab initio;

(ii) to set aside the appointment of the Respondent Nos. 5 and 6 to the IFS vide the notifications dated 8-2-2001 and 13-02-2001 (Annexures E and E-1) respectively;

(iii) to direct the Respondents to consider the case of the applicant for selection and appointment to the IFS for the year 2000, by treating his continuous service with effect from 1.11.1978.

Alternatively:-

(iv) to direct the Respondents to place the applicant in the select list of 2002 for appointment to the IFS ahead of the Respondent No. 7, by treating his continuous service with effect from 1-11-1978;

(v) to direct the Respondents to a lot the proper and correct year of allotment of the applicant in the IFS treating his continuous service with effect from 1-11-1978."

The Tribunal, while answering the OA 258/2006 by its Order dated 22.5.2009, recorded the submission of the counsels representing the State as well as of Sri Mamat Kalita as follows:

"(4) At the hearing, to a specific question, Mrs. Manjula Das, learned counsel representing the State Govt. of Assam, stated that the final view, on the proposal, could not have been taken (to antedate the year of allotment); because of the pendency of the present Original Application No. 258 of 2006; which was admitted on 30.10.2006 for the reason of the provisions under Section 19 (4) of the Administrative Tribunals Act, 1985.

(5) On the face of the above, Mr. UK Nair, learned counsel appearing for the Applicant, states that the Applicant, who is going to retire from service by end of March 2010, would be satisfied if a direction is given to the State Government, Government of India and UPSC to expedite the matter for antedating the year of allotment in favour of the Applicant by assigning him the year 1996. Mr. UK Nair, learned counsel appearing for the Applicant, proceeded to state that once the year of allotment is antedated to 1996, the Applicant would complete more than 14 years of service before his superannuation retirement and, as a result of the same, the Applicant would be able to get promotion to the rank of Conservator of Forests well before his date of retirement/31.3.2010. With the said sole objective, it is submitted by Mr. Nair, the Applicant who was treated un-justly (by way of taking into consideration some of the un-communicated adverse remarks against him, while considering his case for IFS) has agreed to accept 1996 as his year of allotment."

6. On the basis of the submissions made, the learned Tribunal disposed of the OA with direction to the State Government for expediting the matter with regard to

ante-dating the year of allotment to 1996 in favour of Sri Mamat Kalita and to place the matter before the Government of India by the end of June 2009, whereupon the Government of India and, if necessary, the Union Public Service Commission, would do the needful for issuing consequential orders by the end of August 2009. While parting with the case, the Tribunal also expressed that consequent upon examination of the applicant's case, expeditious steps would be taken towards granting promotion to the applicant to the rank of Conservator of Forests.

7. In keeping with the directions of the Tribunal, an order was issued on 29.7.2009 under the hand of the Under Secretary to the Govt. of India, Ministry of Environment and Forests (MoEF) whereby the year of allotment and seniority of Sri Mamat Kalita was revised to the year 1996, placing him below one Sri Rup Nath Brahma. The matter did not rest there. By two consecutive letters dated 5.2.2011 and 13.6.2011 the Environment and Forests Department, Government of Assam, informed Sri Mamat Kalita regarding the gradings recorded in his ACR for the periods from 24.11.1999 to 31.3.2000 and 1.4.2000 to 31.3.2001 while he worked as Divisional Forest Officer, Social Forestry Division, Bongaigaon as "Average" and "Good" respectively. Reacting to the said letters, Sri Mamat Kalita made two representations dated 8.2.2011 and 19.6.2011 basically complaining of violation of Rule 10 of the Assam Services (Confidential Rolls) Rules, 1990, in that, of the failure to communicate the adverse and critical remarks in time and the denial of opportunity to make effective representation at the relevant time. Request was made to expunge the said remarks in his ACR and to grade him accordingly. Inaction on the part of the State Respondents led to institution of OA 68/2012. On 16.3.2012 the said OA 68/2012 was disposed of with direction to the State Respondent to adjudicate the case of the applicant in the light of the Apex Court decisions indicated at paragraph 3 of the order of the Tribunal.

8. On 25.6.2012 an order was issued by the Chief Conservator of Forests, Social Forestry, Assam, indicating absence of any reason to change the remarks recorded in the ACR including the gradings. This was followed by the order dated 26.6.2012 of the Principal Secretary to the Govt. of Assam, Environment & Forest Department, also holding that there appeared no reasons to change the remarks. Accordingly, the representations of Sri Mamat Kalita were rejected, indicating that the ACRs for the period from 24.11.1999 to 31.3.2001 will remain unchanged. This is the order assailed in OA 351/2012 by Sri Mamat Kalita. The order passed thereon by the Tribunal on 14.12.2012 is the subject matter of challenge before us.

9. Before we proceed further, attention be had to the prayer made in OA 351/2012. The two primary prayers are:

"(i) Set aside and quash the order dated 26.6.2012 issued by the respondent No. 1 bearing No. FRE.41/2012 dated 26.6.2012.

(ii) Consequent thereto this Hon''ble Tribunal may be pleased to expunge the

adverse remarks and adverse gradings against the applicant in his ACR for the period from 24.11.1999 to 31.3.2001 and the applicant be upgraded to the level of bench mark of the relevant period for selection of IFS."

10. The Tribunal set aside the order dated 26.6.2012 by relying upon the Apex Court decisions in *Sukhdeo v. Commissioner, Amravati Division, Amravati*, reported in , (1996) 5 SCC 103; in *ST Ramesh v. State of Karnataka* reported in , (2007) 9 SCC 436; in *MA Rajasekhar v. State of Karnataka*, reported in , (1996) 10 SCC 369, and in *Abhijit Ghosh Dastidar v. Union of India*, reported in , (2009) 16 SCC 146. Recourse was also made to the order of the Tribunal in OA 68/2012. In the light of the Apex Court decisions above pertaining to rendering of opportunity for improvement of performance as well as on the factual aspects with regard to the manner of assessment made by the Reporting Authority without adducing cogent reasoning for the same, the order impugned dated 26.6.2012 was quashed and the adverse remarks in the ACRs of Sri Mamat Kalita for the period from 24.11.1999 to 31.3.2001 was expunged. A further direction was made to upgrade the assessment to the level of bench-mark for the relevant period and to allow all consequential benefits.

11. Mr. BJ Ghosh, learned State counsel representing the petitioner submits that the Tribunal's direction to upgrade the assessment of Sri Mamat Kalita to the level of the bench-mark ("Very Good") for the relevant period (24.11.1999 to 31.3.2001) is non-est in law, in that, the issue was not open for fresh determination in view of the earlier order of the Tribunal dated 22.5.2009 in OA 258/2006, as alluded to above. Mr. Ghosh contends that although in the said OA Sri Mamat Kalita had assailed the validity of the selection made for the year 2000, 2002, 2003 and 2004, however, such challenge was waived and abandoned and the issue for decision was only confined to the claim for antedating his year of allotment to 1996. The matter being foreclosed, Mr. Ghosh submits that Sri Mamat Kalita stood precluded from raising any question on the propriety of the selection made for the aforesaid years including the relative evaluation made by the Selection Committee. Accordingly, no direction for review of the assessment was sustainable. An aspect brought to notice by Mr. Ghosh is that Sri Mamat Kalita did not bring to the knowledge of the Tribunal of the outcome in OA 258/2006.

12. Taking it further, Mr. Ghosh submits that Sri Mamat Kalita was aware of his assessment even in the year 2006, as would be evident from his own admission at paragraph 11 in OA 258/2006. Also, assessment recorded in the minutes of the Selection Committee is within the domain of the authorities, who is best placed to judge relative performance. Situated thus, the Tribunal erred in substituting the assessment made by the Selection Committee by acting as a Court of Appeal. It is contended that evaluation/assessment is dependent on performance under different segments, a factor which was not looked into by the Tribunal. In any case, the assessment recorded as "Good" by the Selection Committee cannot be equated or construed as an adverse entry in the ACR

requiring adherence to Rule 10 of the Assam Services (Confidential Roll) Rules, 1990. Lastly, it is submitted that the direction of the Tribunal to upgrade Sri Mamat Kalita to the level of the bench-mark is repugnant to the pith of the adjudication made in OA 258/2006 as the issue had already been decisively set at rest. For the proposition that the Tribunal erred in assuming the function of the Selection Committee in assessing the service record and order up-gradation to the level of the bench-mark for the relevant period with all consequential benefits, Mr. Ghosh places reliance in *State of Madhya Pradesh v. Srikant Chophekar*, reported in , (1992) 4 SCC 689. Reliance is also placed in the case of *Mir Ghulam Hussan & ors. v. Union of India* rendered by a Constitution Bench of the Apex Court, reported in , (1973) 4 SCC 135 to say that promotion is made on the basis of positive merit and not on the basis of absence of adverse remarks. Also, assuming that some adverse remarks which were not communicated were considered by the Committee, it will not invalidate the promotion in the absence of prejudice. Further, since Sri Mamat Kalita had already been promoted, therefore, nothing more is required to be done, as held in *Sukhdev Singh v. Union of India*, reported in , (2013) 9 SCC 566.

13. Mr. MK Choudhury, learned Senior counsel representing Sri Mamat Kalita, opens his arguments contending that the writ petition is not maintainable on account of non-joinder of necessary parties i.e. the Union of India and the Union Public Service Commission. Referring to the letter dated 13.6.2011 (Annexure-11), it is contended that it was only through that letter that adverse remarks for the period from 24.11.1999 to 31.3.2000 had been communicated for the very first time. To this end, recourse is made to the provisions under the aforesaid Rules, 1990 to attribute statutory non-compliance. Further contention is that although in OA 258/2006, Sri Mamat Kalita had sought for consideration of his case for selection and appointment to IFS for the year 2000 by treating his continuous service with effect from 1.11.1978, the same did not reach its logical conclusion. As such, the issue was open for consideration and the order passed in OA 258/2006 did not operate as a waiver to his rights. According to Mr. Choudhury, the directions in the impugned order of the Tribunal dated 14.12.2012 in OA 351/2012 was passed in strict accordance with law and cannot be faulted. In fact, the Tribunal had reached the conclusion in the light of the Apex Court's decisions recorded therein. Also, the mere fact that Sri Mamat Kalita had accepted promotion way back in the year 2005 without insisting on any change in his gradings in the ACR, would not foreclose the right to pursue his legal remedy in accordance with law. Mr. Choudhury places reliance on the following case-laws for the proposition that fairness and transparency in public administration requires that all entries in the ACR of a public servant must be communicated to him within a reasonable period so that he can make a representation for up-gradation:

"(i) , AIR 2008 SC 2513 (*Dev Dutt v. Union of India*)

(ii) , (1996) 10 SCC 369 (*MA Rajasekhar v. State of Karnataka*)

(iii) , (2009) 16 SCC 146 (Abhijit Ghosh Dastidar v. Union of India)"

14. Parties are heard. At the outset we answer to the objection raised as regards the maintainability of the petition on account of non-joinder of necessary parties. Suffice to say that the writ petition was admitted for hearing vide order dated 12.9.2013. This matter was extensively heard on merits on 17.11.2015 and 1.12.2015, whereupon judgment was reserved. On the date of admission of the case, this Court took note of the petitioner's submission that the issue is covered by an earlier round of litigation in OA 258/2006 and that the second petition was indirectly seeking the same relief, which could not have been entertained. Be that as it may, the case having been heard on merits at length, we hold that non-suiting the petitioner at this stage would be improper.

15. In *Dev Dutt* (supra), the importance of communicating all entries within a reasonable period to the public servant has been highlighted so as to render giving of opportunity to represent if the entry makes him ineligible for promotion or has an adverse effect on his chances. The Apex Court observed that in higher posts which are in a pyramidal structure where often the principle of elimination is followed in making selection for promotion, even a single entry can destroy the career of an officer which has been outstanding throughout. Supersession by officers with inferior merit may result in grave injustice. In *MA Rajasekhar* (supra), the Apex Court took note of the underlined remarks made against the appellant therein that he "does not act dispassionately when faced with dilemma". In that context it was observed that he should be given an opportunity with reference to specific instances where he did not perform duty satisfactorily or objectively, to correct himself of the mistake. As the same had not been done, the adverse remark was held as not being consistent with law. The case in *Abhijit Ghosh Dastidar* (supra) is laid on the same ratio as in the case of *Dev Dutt* (supra). It was observed that the appellant therein had not been informed of the nature of the grading given to him.

16. First and foremost, the entries in the ACR of Sri Mamat Kalita for the relevant period is of no concern, in that, the bench-mark "Very Good" as an indicia for promotion is not relatable to the grading in his respective ACR. It is the overall relative assessment made by the Selection Committee after examination of service records. We are not to confuse gradings in the ACR with that of an objective assessment made by the Selection Committee of the overall performance founded on the service records for the purpose of consideration of promotion to IFS. Sri Mamat Kalita may have a case regarding the entry "Average" recorded in his ACR for the period from 24.11.1999 to 31.3.2000 which, according to him, had not been communicated within a reasonable period of time. The decisions of the Apex Court so relied upon may generally come to his rescue in so far as non-communication of his grading in the ACR is concerned. However, in the present case we are concerned with selection made by a Selection Committee and the relative assessment of merit made by it on the basis of an overall assessment of service records and not on the gradings in the

ACR alone. As held in *Mir Ghulam Husan* (supra), if an officer has no adverse entry against him then this by itself does not entitle him to promotion because "promotion is made on the basis of positive merit and not on the basis of absence of adverse remarks." In the said case it was also observed that even if certain adverse remarks which were not communicated were considered by the Committee, it will not invalidate the promotion in the absence of prejudice.

17. This brings us to two important aspects of the case. Firstly, in the exercise undertaken by the Selection Committee for promotion for the relevant year, the express position was that any adverse remarks in the ACR of the officers which were not communicated to them had not been considered while assessing suitability. Secondly, Sri Mamat Kalita had acquiesced and submitted to the jurisdiction of the Selection Committee by accepting his promotion from the Select List of 2004. Although, a challenge was made in OA 258/2016, the same was abandoned/waived by confining his prayer only to the extent of antedating the year of allotment to 1996.

18. For the purpose of this case and considering the directions of the Tribunal to upgrade the assessment of Sri Mamat Kalita to the level of the bench-mark for the relevant period and to allow all "consequential benefits", the case-laws cited by Mr. Choudhury are out of context.

19. The Tribunal fell into error in assuming the role of the Selection Committee, inasmuch as, it is not the function of the Tribunal to assess the service record of an officer and order his promotion on that basis. It is for the Selection Committee to evaluate the same and make recommendations based on such evaluation. In a given case if a Tribunal reaches a conclusion that a person was not considered for promotion or the consideration was illegal, then the extent of the direction can only be for reconsideration of his case in accordance with law. In the facts of the present case, it was not within the competence of the Tribunal to have ordered deemed promotion of Sri Mamat Kalita. As we are concerned with the interference made with the assessment of the Selection committee for the purpose of selection for the relevant period, the order with regard to expunging of any adverse remarks in the ACR of Sri Mamat Kalita for the period from 24.11.1999 to 31.3.2001 is not disturbed.

20. What goes to the root of the matter is that in OA 258/2006 Sri Mamat Kalita had sought for a direction to the respondents to consider his case for selection and appointment to IFS for the year 2000 by treating his continuous service with effect from 1.11.1978. The said benefit, as prayed for, was however not pressed, thereby confining his relief in the said OA 258/2006 only to ante-dating the year of allotment by assigning him the year 1996. Such benefit was granted by the Tribunal by order dated 22.5.2009. In respect of prayer for selection and appointment for the year 2000 as well as for the year 2002, neither any liberty for re-agitating the issue was sought for nor granted by the Tribunal.

21. As indicated earlier, the Tribunal erred in stepping into the shoes of the

Selection Committee and/or in interfering with the evaluation made by the said Committee. It is not within the competence of the Tribunal to direct upgrading Sri Mamat Kalita to the level of bench-mark for the purpose of selection, not to speak of the inordinate time elapsing between the date of selection and the date of passing of the Tribunal's order under challenge. The direction for allowing all consequential benefits is also not sustainable in the teeth of the proceedings and order passed in OA 258/2006.

22. From the foregoing discussions and findings, the inevitable conclusion is that, to the extent indicated above, the order dated 14.2.2012 passed in OA 351/2012 cannot stand the scrutiny of law and is liable to be set aside, which is accordingly done. In view thereof, this writ petition stands disposed of, however, without any order as to costs.