(2007) 12 GUJ CK 0006

In the Gujarat High Court

Case No : Special Civil Application No. 8339 of 2007

Union of India (UOI) and Others APPELLANT

Vs

A.P. Srivastava RESPONDENT

Date of Decision : 12-12-2007

Acts Referred:

Constitution of India, 1950 — Article 226, 227, 320

Citation : (2008) 1 GLH 133

Hon'ble Judges : R.R. Tripathi, J;M.S. Shah, J

Bench : Division Bench

Advocate : Mauna M. Bhatt for petitioner 1 and Mr. Manish R. Bhatt for petitioners 1-3, for the Appellant; Paurami B. Sheth for respondent 1, for the Respondent

Final Decision : Dismissed

Judgement

Mohit S. Shah, J.—This petition under Articles 226 and 227 of the Constitution is directed against the judgment and order dated 9.1.2007 of the Central Administrative Tribunal, Ahmedabad Bench by which certain directions were given to the present petitioners, (Union of India in the Finance Ministry and Central Board of Direct Taxes and Member (Personnel), CBDT) to communicate the Annual Confidential Reports for the years 2000-01 and 2001-02. The Tribunal further provided that the applicant before the Tribunal, i.e. the present respondent, should submit a representation within a fortnight of receipt of the remarks and the respondents shall consider and decide the same in accordance with law by a speaking order within two months of the receipt of the order and that if as a result of consideration of these representations, the ACR grading of the original applicant improves, the authorities shall convene a meeting of the review DPC within two months thereafter. The Tribunal also directed ignoring the Annual Confidential Report for the year 2002-03 as the same was recorded by only one Officer and, therefore, treated as incomplete. There is no dispute about the following facts leading to this petition: -

1.1 The present respondent joined as income tax Officer, Class-I in 1971, was promoted as Assistant Commissioner of income tax in 1981 and subsequently promoted as Commissioner of income tax in January 1994. However, when the respondent''s case came up for consideration before the Departmental Promotion Committee (DPC) for promotion to the post of Chief Commissioner of income tax, the DPC which met in 2004 and 2005 did not recommend the respondent''s case. The respondent, therefore, preferred OA No. 673 of 2004 challenging his supersession as his juniors were promoted to the post of Chief Commissioner of income tax.

1.2 The Tribunal called for the records of the DPC and found that in the minutes of the meeting held on 21.7.2004, the Committee had only recorded the assessment "fit/unfit". Nothing was stated as to what combination of grading made an Officer fit/unfit. Out of 36 Officers. DPC prepared a panel of 26 names, five officers were kept in sealed cover and three officers including the present respondent were shown as unfit.

1.3 Since the grievance before the Tribunal also necessitated examination of the respondent''s supersession at the next DPC meeting held on 25.11.2005 (when a panel of 38 officers was prepared, again leaving out the respondent herein), the Tribunal looked into the minutes of the said meeting also. The relevant paragraph of the minutes of the DPC at the said meeting has been extracted by the Tribunal in paragraph 23 of the impugned judgment. The relevant paragraph reads as under: -

"6. The Committee were apprised that taking into account the instructions/ guidelines, issued by DOP & T, as detailed above, the Commission in exercise of their constitutional functions as envisaged in Article 320 of the Constitution took a conscious decision that an officer attaining at least 4 bench mark gradings out of the 5 ACRs, as prescribed by the Government of India in Deptt. of Personnel and Training O.M. No. 22011/9/98-Estt (D) dated 8.9.1998 read with subsequent O.M. of even number dated 16.6.2000, should be assessed as "fit" for promotion and that this decision should be applicable to all DPCs pertaining to the vacancy year 2003-2004 and subsequent years. "

(Emphasis supplied)

Para 51 of the judgment reads, inter alia, as under: -

"51.....The Department of Personnel has taken a policy decision in March 2002 to avoid supersession in promotion. The concept of zone of consideration and outstanding ranking higher than "very good" has been given up. Persons meeting the bench mark of "very good" will be promoted in order of seniority. Pursuant to this policy decision UPSC has taken a policy decision that a person must meet the bench mark for 4 of the 5 years to be assessed as fit."

(Emphasis supplied.)

There is no dispute about the fact that the respondent was not recommended for promotion on the ground that the respondent did not have four "very good" gradings.

1.4 Para 27 of the Tribunal''s judgment contains the following chart showing the gradings in the Annual Confidential Reports of the respondent: -

Year

Remarks of assessment of reporting officer

Assessment of reviewing officer

1997-98

Very good

Very good*

1998-99

Done very well

Very good*

1999-2000

Done well

Very good*

2000-2001

Good

Good**

2001-2002

Very good

Good*

2002-2003

Good

No review certificate, as reviewing officer has voluntarily retired.

2003-2004

Good

Very Good

* Reviewed by Chairman. **Reviewed by Member

In the Annual Confidential Report for the year 1999-2000, the respondent was granted "very good" grading, but in the ACR for the subsequent year 2000-01, the respondent was granted only "good" grading. The Tribunal treated "good" grading in 2000-01 as downgrading from "very good" in the previous year. In the ACR for the next year i.e. 2001-02, the reporting officer granted "very good" grading but the reviewing officer downgraded it to "good". The Tribunal considered this also downgrading and directed the respondent herein to make representations against such downgrading and directed the authorities (the petitioners herein) to consider and decide the representations.

2. Pursuant to the directions of the Tribunal, the respondent herein did make representations against downgrading of his ACRs for the years 2000-01 and 2001-02 and the said representations have been accepted and the respondent is now given "very good" grading for both the above years. There is also no dispute about the fact that since no interim stay was granted against the directions of the Tribunal, the review DPC was convened and on account of the aforesaid two "very good" gradings in the respondent''s ACRs for the relevant period the DPC has now found the respondent to be fit for promotion to the post of Chief Commissioner of income tax. The matter is, however, pending as the final decision has not yet been taken at the highest level. The fact remains that on account of down grading of the respondent from "very good" in the year 1999-2000 to "good" for years 2000-01 and 2001-02 which downgrading was not communicated to the respondent, the respondent did suffer prejudice resulting into his supersession. As many as 26 persons were included in the panel by the DPC which met on 21.7.2004 and another panel of 38 persons was drawn when the DPC met on 25.11.2005.

3. The contention urged by the learned counsel for the petitioner-authorities is that "good" cannot be said to be an adverse remark and was, therefore, not communicated to the respondent, still the Tribunal erred in directing the authorities to communicate such grading to the respondent. Strong reliance is placed on the decisions of the Apex Court in Union of India (UOI) and Another Vs. S.K. Goel and Others, and Union of India (UOI) and Another Vs. Major Bahadur Singh, in support of the contention that downgrading is not required to be communicated to the concerned officer. It is also submitted that the Tribunal erred in relying upon the decision in U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and others, .

4. On the other hand, Ms. Sheth, learned counsel for the respondent-Officer has supported the decision of the Tribunal and submitted that the ratio in UP Jal Nigam''s case (supra) was very much applicable in the present case also.

5. In U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and others, , the Apex Court considered the question in a similar factual context where the rules of UP Jal Nigam case required the Corporation to communicate adverse entries in a Confidential Report, but did not require the Corporation to communicate the downgrading in ACRs, but still the Apex Court made the following pertinent observations and laid down the important legal principle: -

"The Nigam has rules, where under an adverse entry is required to be communicated to the employee concerned, but not downgrading of an entry. It has been urged on behalf of the Nigam that when the nature of the entry does not reflect any adverseness that is not required to be communicated. As we view the extreme illustration given by the High Court may reflect an adverse element compulsorily communicable, but 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. All that is required by the Authority recording confidentials in the situation is to record reasons for such downgrading on the personal file of the officer concerned, and inform him of the change in the form of an advice. If the variation warranted be not permissible, then the very purpose of writing annual confidential reports would be frustrated. Having achieved an optimum level the employee on his part may slacken in his work, relaxing secure by his one time achievement. This would be an undesirable situation. All the same the sting of adverseness must, in all events, be not reflected in such variations, as otherwise they shall be communicated as such. It may be emphasised that even a positive confidential entry in a given case can perilously be adverse and to say that an adverse entry should always be qualitatively damaging may not be true. In the instant case we have seen the service record of the first respondent. No reason for the change is mentioned. The downgrading is reflected by comparison. This cannot sustain. "

(Emphasis supplied.)

6. Having heard the learned counsel for the parties, we find considerable force in the submission made by Ms Sheth on behalf of respondent-Officer that the decision in UP Jal Nigam still holds the field. In Major Bahadur Singh''s case (supra) and SK Goel''s case (supra) the two Judge Benches of the Apex Court have merely distinguished UP Jal Nigam''s case. In SK Goel''s case (2007), the concerned Officer was meeting the bench mark even after downgrading and, therefore, the Apex Court specifically observed as under: -

"23. In the instant case, respondent No. 1 had received no adverse remarks and had rather been graded at the level of the prescribed bench mark of ''above average'', therefore, as rightly pointed out by the learned Additional Solicitor General, there was neither any onus nor requirement upon the appellant(authority) to have communicated the ACR entry to respondent No. 1.

...

25....... In the instant case, the downgrading still meets the bench mark and therefore, merely because certain persons have been assessed by the DPC to be better than the respondent, did not imply that he should have been communicated his grading. "

(Emphasis supplied.)

Similarly, Major Bahadur Singh''s case was decided by the Apex Court in the facts of that case and on the basis of the instructions applicable there and the Court took the view that the decision in UP Jal Nigam''s case was not applicable to the facts in Major Bahadur Singh''s case. It appears that nothing was shown in the latter case to show that downgrading resulted into the Officer not meeting with the bench mark prescribed in that case.

7. On the other hand, the facts in the instant case as noted by the Tribunal, the elaborate reasoning given by the Tribunal and the subsequent facts after the judgment of the Tribunal - that the respondent''s representations against downgrading in the ACR from "very good" in 1999-2000 to "good" in 2000-01 and 2001-02 have already been considered by the authority and the representations have been accepted and that consequently the respondent has been given "very good" gradings for the years 2000-01 and 2001-02 and that on the basis of such grading of "very good" for the above two years and the previous three years, the respondent''s case has been positively considered by the DPC -- all support the respondent''s case that prejudice was caused to the respondent by non-communication of the downgrading for the years 2000-01 and 2001-02.

8. The other question which was raised before the Tribunal was the efficacy of the ACR for the year 2002-03 because the Officer who was supposed to be the reviewing authority for a substantial part of that year had voluntarily retired before the reviewing officer filled in the ACR for that year. By order dated 30.3.2005, the Tribunal had earlier directed that the Chairman, CBDT shall review the respondent''s ACR for the year 2002-03. However, in respect of that order, a review application was filed and ultimately the matter was carried before this Court in Special Civil Application No. 19543 of 2005. Since this Court remanded the matter to the Tribunal to decide the matter on merits, the Tribunal allowed the review application and framed the following questions: -

"(i) Once we hold that Chairman CBDT need not review the ACR, can the ACR recorded by only the Reporting Officer be treated as a complete ACR ?

(ii) In case 2002-2003 is an incomplete ACR were the respondents required to consider the ACRs for the five-year period 1997-98 to 2001-02 in case of the applicant for vacancies of 2003-04 ?

(iii) Was the ACR of 2000-01 also required to be communicated as it is a fall from last year in addition to ACR for 2001-02 where the reviewing officer has downgraded him and whether the consideration of the same has vitiated the recommendations ?"

9. The Tribunal held that since the ACR for the year 2002-03 was an incomplete ACR, it could not be acted upon as the Reviewing Officer had not made his remarks. In fact, the Reviewing Officer had retired before the reporting officer made the remarks for the year 2002-03.

10. The next question that the Tribunal considered was whether the authorities

were required to consider the ACRs for the five-year period from 1997-98 to 2001-02 in case of the applicant before the Tribunal (the respondent herein) when the DPC was considering the cases for the vacancies of the year 2003-04. The Tribunal found that the relevant Office Memorandum dated 10.4.1989 of the Department of Personnel and Training provided that the DPC shall consider ACRs for equal number of years in respect of officers considered for promotion subject to the rider that where one or more ACRs have not been written for any reason during the relevant period the DPC shall consider the ACRs for the years preceding the period in question. The Tribunal also found that Office Memorandum dated 6.10.2000 of the Department of Personnel and Training also provides that the DPC should assess the suitability of the employee for promotion on the basis of their service records and with particular reference to the ACRs for five preceding years irrespective of the qualifying service prescribed in the Service/Recruitment Rules. In light of the above instructions, the Tribunal came to the conclusion that the case of the applicant before the Tribunal (the respondent herein) was required to be considered by taking into account the ACRs by going back by one year.

11. Mrs. Mauna Bhatt, learned counsel for the petitioner authorities submitted that when the DPC was required to take into consideration ACRs of five preceding years, the Tribunal could not have directed the DPC to go back by one year.

12. We do not find any substance in the submission because the instructions contained in OM dated 6.10.2000 are couched in the following language: -

"The DPC should assess the suitability of the employee for promotion on the basis of their service records and with particular reference to the CRs for five preceding years irrespective of the qualifying service prescribed in the Service/ Recruitment Rules. "

It is necessary to note that these instructions have to be read in light of the other existing instructions including those contained in the OM dated 10.4.1989 which are not superseded and which very much hold the field. The instructions contained in the OM dated 10.4.1989 clearly provide that the DPC should consider ACRs for equal number of years in respect of all officers considered for promotion subject to the rider that where one or more ACRs have not been written for any reason during the relevant period, the DPC should consider the ACRs of the years preceding the period in question. The Tribunal was, therefore, well within its jurisdiction in issuing the direction that the DPC shall consider the case of the applicant before the Tribunal (respondent herein) by treating the ACR for the year 2002-03 as incomplete and, therefore, take into consideration the ACR for one previous year. That is to say, the Tribunal was right in directing that the ACR for the five year period 1997-98 and 2001-02 shall be taken into consideration and that the ACR for the year 2003-04 being incomplete were not to be taken into consideration.

13. Even otherwise, on a perusal of the chart contained in para 2.4 hereinabove

read with the acceptance of the petitioner''s representations for the years 2000-01 and 2001-02 even without going back by one year i.e. without considering the ACRs for the year 1997-98, the respondent did meet the bench mark of "very good" for four out of the five years to be assessed as fit (Ref. Para 2.3 hereinabove).

14. Since the representations made by the respondent against the downgrading for the year 2000-01 and 2001-02 have already been accepted and the Review DPC has also considered the respondent''s case in light of the directions given by the Tribunal, we direct that the authorities (the petitioners herein) shall take the necessary further steps in light of the above developments within two months from the date of receipt of a certified copy of this judgment.

15. Subject to the above directions, the petition is dismissed and Rule is discharged. A certified copy of this judgment shall be made available to the learned counsel for the petitioners at the earliest for early compliance of the above directions read with the directions given by Central Administrative Tribunal in the judgment and order dated 9.1.2007 in Original Application No. 673 of 2004.