

(2010) 12 DEL CK 0185

In the Delhi High Court

Case No : Writ Petition (C) 5562 of 2010

Union of India (UOI) and Others

APPELLANT

Vs

V. Pitchandi

RESPONDENT

Date of Decision : 02-12-2010

Acts Referred:

Constitution of India, 1950 — Article 310, 311

Citation : (2011) 1 ILR Delhi 835

Hon'ble Judges : Siddharth Mridul, J; Pradeep Nandrajog, J

Bench : Division Bench

Advocate : Indira Jaising, ASG, Satyakam, Samridhi Sinha and A.K. Bhardwaj, for the Appellant; Padma Kumar S., for the Respondent

Judgement

Pradeep Nandrajog, J.—A search on the internet would reveal that two decisions of the Supreme Court have proved to be a lawyers' delight and a Judges' despair. They are the decisions in Adalat Prasad's case pertaining to the power of a Magistrate to recall a summon of appearance and the second is the decision in Dev Dutt's case. The two decisions have generated enormous litigation, to the happiness of the lawyers and the despair of the Judges.

2. Instant writ petition concerns the applicability of law declared by the Supreme Court in the decision reported as Dev Dutt Vs. Union of India (UOI) and Others, .

3. The concept of an ACR grading which was adverse to the employee concerned; adverse being as understood in common parlance was held to be of a kind which requires the same to be communicated to the employee concerned with a right to make a representation and the representation to be decided. This was the law declared by the Supreme Court in the decision U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and others, What happens if the ACR grading is not adverse as understood in common English language but has an adverse consequence on the promotion of the Government Servant concerned with reference to the benchmark. For example, if the benchmark is "Very Good" and an employee is graded "Good"; notwithstanding the grade "Good" would not be

adverse in English language, but with reference to the benchmark to be achieved, the ACR grading "Good" would certainly have an adverse impact.

4. In Dev Dutt's case (supra), the Supreme Court held that the law declared in UP Jal Nigam's case needs to be expanded in harmony with the growth of law where principles of natural justice were expanded. Noting that the concept of natural justice has an expanding content and is not stagnant, the Supreme Court observed in Para 37 of the decision in Dev Dutt's case, as under:

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 authority concerned, and the authority concerned 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.

5. Final directions issued by the Supreme Court were as in para 43 and 44. The same reads as under:

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 1993-1994 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.

6. Reverting to the facts of the instant case, it may be noted that the DPC pertaining to consideration of persons holding post of Senior Field Officer (Telecommunication) to be promoted as Under Secretary considered

Respondent's ACR gradings for the years 2003-04 till the year 2007-08 i.e. the preceding 5 years" ACR. Promotion order was issued on 23.06.2009. Respondent did not find his name in the promotion list.

7. Indisputably, for the promotion to the post of Under Secretary, benchmark prescribed was "Good" till 01.06.2008 and only with effect from 02.06.2008 the benchmark was enhanced to "Very Good".

8. Marching to the Central Administrative Tribunal with the grievance that he was denied a promotion on unjustifiable grounds, Respondent met with success when, vide order dated 12.04.2010, the Tribunal allowed OA No. 3763/2009 filed by the Respondent. The reasoning of the Tribunal is to be found in para 4 of the impugned order, where after noting the law declared by the Supreme Court in Dev Dutt's case (supra) and the fact that till 01.06.2008 benchmark for promotion was "Good" and only on 02.06.2008 the benchmark was enhanced to "Very Good", the Tribunal held that in its considered view the same would be applicable from the date the decision was taken i.e. the enhanced benchmark would be applicable from the date of the decision.

9. Of course, the Tribunal is correct that the higher benchmark has to be applied prospectively but this would only mean that based on the office order dated 02.06.2008 previous DP Cs cannot be reviewed. However, the problem lies in the next conclusion drawn by the Tribunal where the Tribunal has held that the decision pertaining to the enhanced benchmark cannot be made applicable to AC Rs that may have come into existence prior to the said date. The Tribunal has thereafter held that law being that below benchmark entry is required to be conveyed to the employees with a right to file a representation and such AC Rs which were not adverse and were upto the benchmark for promotion, will be automatically adverse if the decision taken in 2008 is to relate to the earlier AC Rs, and thus this would be impermissible. As a result of so holding in para 4 of the impugned decision, the Tribunal has directed that review DPC be held to reconsider the case of the Respondent for promotion in light of the observations made by the Tribunal.

10. It is apparent that the observations of the Tribunal would require that review DPC to consider the record of the Respondent with reference to the benchmark "Good".

11. It is urged by learned Additional Solicitor General that the Tribunal has ignored the well settled distinction in service jurisprudence between an interest in promotion and the right in promotion. Learned Additional Solicitor General urges that in service jurisprudence concepts of legitimate expectations and contract have no role. Once a Government Servant enters into service the same becomes a matter of status and his status would be subject to such rules which may be framed by the Government from time to time pertaining to the service urges the learned Additional Solicitor General.

12. The submission urged is well merited and for which we may note the decision

of the Supreme Court *Roshan Lal Tandon Vs. Union of India (UOI)*, wherein in para 6 the Supreme Court had observed as under:

6. We pass on to consider the next contention of the Petitioner that there was a contractual right as regards the condition of service applicable to the Petitioner at the time he entered Grade "D" and the condition of services could not be altered to his disadvantage afterwards by the notification issued by the Railway Board. It was said that the order of the Railway Board dated January 25, 1958, Annexure "B", laid down that promotion to Grade "C" from Grade "D" was to be based on seniority-cum-suitability and this condition of service was contractual and could not be altered thereafter to the prejudice of the Petitioner. In our opinion, there is no warrant for this argument. It is true that the origin of Government service is contractual. There is an offer and acceptance in every case. But once appointed to his post or office the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by the Government. In other words, the legal position of a Government servant is more one of a status than of contract. The hallmark of status is the attachment to a legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties. The emolument of the Government servant and his terms of service are governed by statute or statutory rules which may be unilaterally altered by the Government without the consent of the employee. It is true that Article 311 imposes constitutional restrictions upon the power of removal granted to the President and the Governor of India under Article 310. But it is obvious that the relationship between the Government and its servant is not like an ordinary contract of service between a master and servant. The legal relationship is something entirely different, something in the nature of status. It is much more than a purely contractual relationship voluntarily entered into between the parties. The duties of status are fixed by the law and in the enforcement of these duties society has an interest. In the language of jurisprudence status is a condition of membership of a group of which powers and duties are exclusively determined by law and not by agreement between the parties concerned. The matter is clearly stated by Salmond and Williams on Contracts as follows:

"So we may find both contractual and status-obligations produced by the same transaction. The one transaction may result in the creation not only of obligations defined by the parties and so pertaining to the sphere of contract but also and concurrently of obligation defined by the law itself, and so pertaining to the sphere of status. A contract of service between employer and employee, while for the most part pertaining exclusively to the sphere of contract, pertains also to that of status so far as the law itself has seen fit to attach to this relation compulsory incidents, such as liability to pay compensation for accidents. The extent to which the law is content to leave matters within the domain of contract to be determined by the exercise of the autonomous authority of the parties themselves, or thinks fit to bring the matter within the sphere of status by

authoritatively determining for itself the contents of the relationship, is a matter depending on considerations of public policy. In such contracts as those of service the tendency in modern times is to withdraw the matter more and more from the domain of contract into that of status."

(Salmond and Williams on Contracts, 2nd Edition, p.12)

13. With respect to the distinction between a right to promotion and an interest in promotion we may refer to a decision penned by this Bench being the decision dated 12.11.2010 in C.K. Sinha v. Union of India W.P.(C) 6211/2010 in which decision in para 47 and 48 it was observed as under:

47. Suffice would it be to state that it is within the domain of the executive to prescribe benchmarks. An introduction of a higher benchmark, by amending the existing policy guidelines, would not be a case where the interest in promotion is being affected. Nobody has a vested right to a promotion. The only vested right is to a fair consideration to be promoted. Illustratively, we may note that pertaining to seniority positions, since they affect promotion, issues of seniority have always been interpreted as akin to interest in promotion. Right to earn a promotion with reference to higher or lower benchmark is always treated as akin to abolishing promotional posts or merger of cadres i.e. affecting the right/chance to be promoted.

48. Thus, it cannot be said that the executive had no right to prescribe higher benchmark or that by a sudden lifting of the benchmark for promotion, a vested right of any candidate has been affected.

14. None can deny the right to the executive to revise the pending instructions relating to guidelines on the issue of benchmark. With higher salaries being paid to Government Servants after implementation of the 6th Central Pay Commission, we see no reason to deny the Government the right to enhance the benchmark and require better quality of service from the Government servants.

15. Needless to state when a benchmark is enhanced it is bound to have a retroactive operation for the simple reason the preceding 5 year AC Rs have to be considered. Now, retroactivity and retrospectivity are different concepts. Thus, the Tribunal is completely wrong in directing that notwithstanding the benchmark being enhanced and DPC being convened after the date when the enhanced benchmark was notified, the department has to consider the entitlement of the Respondent with reference to the lower benchmark.

16. The writ petition is accordingly disposed of modifying the directions issued by the Tribunal and we dispose of the petition by issuing directions in harmony with the one which was issued by the Supreme Court in Dev Dutt's case.

17. The writ petition as also OA No. 376/2009 stands disposed of with a direction that within two weeks from today below benchmark ACR gradings for the year 2003-04 till 2007-08 shall be conveyed to the Respondent who would have a right to file a representation within two weeks thereafter. The representation

shall be considered within 3 weeks and disposed of. If ACR gradings are enhanced a review DPC shall be constituted within 6 weeks thereafter and if found fit for promotion consequence shall flow in terms of the directions issued by the Supreme Court as per para 43 of the decision in Dev Dutt's case save and except no interest would be paid on arrears to be paid. Needless to state if the representation is rejected no review DPC would be held but in said circumstance the decision taken shall be conveyed to the Respondent. Needless to state the representation shall be considered by an authority as contemplated in paragraph 37 of the decision in Dev Dutt's case.

18. No costs.