
(2019) 03 GAU CK 0020
In the Gauhati High Court
Case No : Writ Petition (C) No. 973 Of 2015

Union Public Service Commission UPSC ccc Nityananda Borkakoty vvv

Date of Decision : 07-03-2019

Acts Referred:

Constitution Of India, 1950 — Article 14

Citation : (2019) 03 GAU CK 0020

Hon'ble Judges : A.S. Bopanna, CJ; Sanjay Kumar Medhi, J

Bench : Division Bench

Advocate : Sr Borah, I Choudhury

Final Decision : Dismissed

Judgement

1. An order dated 02.04.2014, passed by the Central Administrative Tribunal, Guwahati Bench, in OA No. 17/2013 is put to challenge by the Union Public Service Commission (in short 'UPSC') in this writ petition. By the aforesaid order, a direction has been given to constitute a Review DPC for the consideration of the case of the applicant before the learned Tribunal for promotion to the cadre/post of Indian Administrative Service (IAS) for the vacancy year of 2008.

2. The facts of the case can be dilated in the following manner.

3. The respondent No. 1, as applicant, had approached the Central Administrative Tribunal, Guwahati with the grievance of unfair rejection of his case for promotion to the cadre of Indian Administrative Service (IAS). The case projected by the respondent No. 1 before the learned Tribunal was that at the relevant time, he was an ACS Class-I Officer of the State having entered into the service in the year 1980 and was holding the post of Joint Secretary. In the year 2004, a Departmental Proceeding was initiated against the respondent No. 1 which culminated in an order dated 18.05.2009, by which, he was imposed penalty of reduction to the lower post of Deputy Secretary for 2 (two) years.

4. The aforesaid order of penalty was the subject matter of a writ petition instituted before this Court which was numbered as WP(C) 2322/2009 and a learned Single Judge of this Court vide judgment and order dated 09.09.2010,

had set aside the order of penalty. Thereafter, vide an order dated 07.06.2012, the Department had dropped the proceedings against the respondent No. 1. After such exoneration, the respondent No. 1 has submitted a representation for granting of consequential benefits including nomination to the IAS. Though other promotional benefits were given to the respondent, the promotion to the cadre of IAS was denied.

5. It is the further case of the respondent No. 1 that his case for promotion to the cadre of IAS was placed before the Selection Committee (constituted by the UPSC) in its meeting dated 09.12.2008, however, he was not considered and further, unlike few other candidates, respondent no. 1 was not even provisionally selected subject to grant of Integrity Certificate and clearance of disciplinary proceeding in accordance with the proviso to Regulation (5) of the IAS (Appointment by Promotion) Regulations, 1955 (herein after the Regulations). Thereafter, in the subsequent meeting of the selection committee held on 09.12.2011, the case for promotion of the respondent No. 1 was once again rejected classifying him to be "unfit". The respondent No. 1 has emphasised that before the second meeting, the order of the High Court dated 09.09.2010 was already passed by which the penalty order was set aside. Accordingly, the respondent No. 1 had prayed for interfering with the findings of the meetings dated 19.12.2008 and 09.12.2011, with a direction to consider his case for promotion to the cadre of IAS.

6. It is the case of the respondent that the adverse entries in his ACRs were never intimated to him which was mandatorily required as per the direction given by the Hon'ble Supreme Court in the case of DevDutt. In absence of the same, such adverse remarks in the ACRs could not have been relied upon by the selection committee. The challenge to the non-consideration is also on account of taking into consideration non-existing facts and overlooking relevant materials which were available on record. The respondent No. 1 has also alleged that he was treated in a discriminatory manner which was apparent on the face of the records.

7. The present petitioner, who was arrayed as the respondent No. 2, had filed its written statement before the learned Tribunal. The stand of the petitioner before the learned Tribunal was that the Selection Committee had independent powers to make their own assessment and was not solely dependent upon the remarks given in the ACRs of the respondent No. 1. Consequently, the contention of apprising the respondent No. 1 of the remarks in his ACRs are of no consequence as those remarks did not play any role in the selection.

8. The learned Tribunal on consideration of the matter and hearing the parties came to a finding that there was no proper application of mind on the part of the selection committee while deciding the case of the respondent No. 1 qua his scope of being promoted to the cadre of IAS. Accordingly, as stated above, vide the impugned order dated 02.04.2014, a direction has been given to constitute a Review DPC and consider the case of the respondent No. 1 for promotion for the

vacancy of the year 2008.

9. We have heard Ms. R. Borah, learned counsel for the petitioner. We have also heard Shri I. Choudhury, learned Senior Counsel for the respondent No. 1, assisted by Shri S. Biswakarma, learned counsel.

10. Ms. Borah, learned counsel for the petitioner would submit that the functioning of the selection committee constituted by the UPSC are of specialized nature which ordinarily do not call for any interference by the Tribunal or the Court and that the selection is done strictly in accordance with law and the Tribunal does not sit on Appeal over such selection and therefore, the interference is bad in law. The learned counsel has further submitted that the adverse remarks in the ACRs of the respondent No. 1 would not be the sole factor in the process of selection as the Selection Committee can independently discharge its own function of assessing an Officer and for the same purpose, all other relevant materials apart from the ACRs are also taken into consideration. Further, the Departmental Proceeding pending or penalty imposed on earlier occasion are also matters for consideration as well as any meritorious services recognized or Awards obtained are also matters of consideration. Therefore, it is the submission of the learned counsel for the petitioner that the basic submission of the respondent No. 1/applicant before the learned Tribunal regarding violation of the law as mandated in Devdutt's case is fallacious. It has been contended that even if it is assumed that adverse remarks were not informed to the respondent No. 1 that would not have any bearing in the selection process. The learned counsel has relied upon the decision of the Hon'ble Supreme Court rendered in the following cases.

(1) (2008) 2 SCC 119 (M.V. Thimmaiah & Ors-vs-UPSC)

(2) (2015) 12 SCC 600 (UPSC-VS- Arun Kumar Sharma & Ors.)

(3) AIR 2018 SC 2790 (UPSC-vs-M. Sathiya Priya & Ors.)

11. In the case of M.V. Thimmaiah (Supra), the Hon'ble Supreme Court had laid down that the Selection Committee constituted under the Regulation 3 of the Regulation of the 1955 is an expert committee and the selection made, unless actuated with malice or error apparent should not be interfered with.

12. In the case of Arun Kumar (Supra), the Hon'ble Supreme Court by placing reliance upon the case of M.V. Thimmaiah as well as other cases has laid down that Court do not normally sit on an Appeal to assess the ACRs and much less the Tribunal can be given this power to constitute an independent selection committee over the statutory Selection Committee.

13. In the case of M Sathiya Priya (Supra), the Hon'ble Supreme Court had laid down that the selection committee has the power and jurisdiction to independently assess the merit of each candidates and would not be guided merely by the overall grading of the ACRs of an Officer. Relying upon the case of UPSC-vs-K Rajaiah reported in (2005) 10 SCC 15, the Hon'ble Apex Court had

laid down that although the Selection Committee may be guided by the classification adopted by the State government, but for good reasons the selection committee may evolve its own classification which may be at variance with the grading given in the ACRs. Such classification is within the prerogative of the Selection Committee and no reasons are required to be recorded though it would be desirable that reasons be recorded. The learned counsel accordingly submits that the conclusion arrived at by the learned Tribunal is by exercise of jurisdiction not conferred by law and consequentially, the impugned findings are not sustainable.

14. Per contra, Shri I. Choudhury, learned Sr. counsel for the respondent No. 1 submits that grave injustice has been done to his client by denying him promotion to the cadre of IAS by taking into consideration irrelevant and extraneous factors and by overlaying relevant and germane factors. Referring to the first Selection Committee meeting held on 19.12.2008, it has been submitted that the total of 15 vacancies (9+6) were being filled up for the years 2007 & 2008 and the respondent No. 1 was placed amongst the officers against whom disciplinary proceedings were pending and Integrity Certificates were withheld. It is submitted that though the Departmental Proceedings against the respondent No. 1 was initiated in the year 2004, the same was dragged till the year 2009 which had culminated in the order of penalty of reduction to a lower post for 2 years. It is submitted that apart from the fact that the aforesaid order of penalty has been set aside by this Court vide order dated 09.09.2010, the respondent should not be made to suffer because of the long pendency of the DP from 13.02.2004 to 18.05.2009, which has led to placing him against the aforesaid two categories of officers. In the select list of year 2007, two officers have been selected against Serial No.1 & 3, against whom Integrity Certificates and clearance of Disciplinary Proceedings are pending and in case of the second officer, the criminal proceeding was also pending. However, those two officers were shown to be provisionally selected. Similar situation existed in the select list of 2008, wherein, two officers against whom criminal proceeding/ disciplinary proceeding were pending and Integrity Certificate withheld were also provisionally selected. It is the specific case of the respondent No. 1 that the aforesaid facts reflect a discriminatory attitude which is in gross violation of Article 14 of the Constitution of India. In fact, apart from placing the name of the respondent No. 1 against the aforesaid two categories, there is no discussion about his candidature/selection at all and the same has caused grave prejudice to him.

15. Coming to the selection committee meeting dated 09.12.2011, it has been reflected in the minutes that a disciplinary proceeding is pending against the respondent No. 1 and Integrity Certificate is also withheld. The learned Senior Counsel has submitted that such remarks/ observations are ex-facie erroneous as on the date of such meeting, there was no disciplinary proceeding pending against him inasmuch as, this Court vide judgment and order dated 07.09.2010, had set aside the order of penalty of demotion and subsequently the entire

disciplinary proceeding was dropped by the authority. Referring to the select list of 2008-A, it has been submitted that against Sl. No. 0A, an officer was selected provisionally subject to clearance in the criminal case and grant of Integrity Certificate and such inclusion was in addition to the normal size of the select list in terms of the second proviso to Regulation (5).

16. The learned Senior Counsel has submitted that a bare perusal of the minutes of the selection would indicate that they have proceeded with the case of the respondent No. 1 on an erroneous basis which has caused prejudice and illegally denied him from being promoted to the cadre of IAS. Lastly, it is submitted that the respondent No. 1, in the meantime has surpassed the age of superannuation and in case of being promoted pursuant to recommendation by the review DPC, the benefit would be confined to notional and financial benefits only.

17. Rival contentions of the respective parties have been duly considered and the materials placed before us have been carefully examined.

18. There is no dispute to the proposition of law that a Selection Committee does not act as a mechanical body and can make its own assessment of the respective merits of the candidates apart from the ACRs. In our view, a Selection Committee has to be given that much of independence and liberty to make its own assessment based on the relevant materials on record and cannot be bound by the remarks in the ACRs only. If such a narrow view is taken, the Selection Committee would be rendered to a mere mechanical body and there would be no necessity of appointing experts in the same which is not the object of holding the selection. However, at the same time, the assessment has to be made on the basis of the relevant materials before the committee and if the committee relies upon any irrelevant materials or extraneous consideration, such selection would not be in accordance with law. Though the fact of not communicating the adverse remark of 'Unfit' to the respondent No. 1 may not per se have a bearing in the selection committee meeting, the said remark is undoubtedly a relevant factor which had played a role in the minds of the members of the selection committee. Therefore, the submission of the learned counsel for the respondent No. 1 that violation of mandate of law with regard to communication of adverse remarks has vitiated selection process, cannot be brushed aside. However, something more glaring seem to be have played a major role in the selection process. Though in the first selection meeting, the penalty order against the respondent No. 1 dated 18.05.2009 was still pending, in the second meeting held on 09.12.2011 there was no such penalty against the respondent No. 1 and in spite of the same, there is a clear finding that a disciplinary proceeding is pending against the respondent No.1. This finding is a perverse finding which cannot withstand the test of judicial scrutiny. Moreover, even in the earlier meeting held on 19.12.2008, it is seen that officers against whom disciplinary proceeding/criminal proceedings were pending, Integrity Certificates were withheld, were still provisionally selected, whereas, there was no such consideration of the case of the respondent No.1. As a result thereof, the respondent No. 1 has been

deprived of his valuable right for fair consideration for promotion. It is a settled law that though the right of promotion may not be a fundamental right but right to a fair consideration for promotion is indeed a fundamental right. Though the learned counsel for the petitioner has submitted that as on the second meeting held on 09.12.2011, the respondent No. 1 was found over-aged, there is no such observation in the minutes of the meeting and therefore, the said submission cannot be countenanced. In any case, the direction of the learned Tribunal is to consider for the vacancy for the year 2008 only.

19. In view of the above discussions, we do not find the instant case to be one which calls for interference by this Court and since the relief could be confined to only notional benefit, if the respondent No. 1 is selected in the Review DPC as directed, the question of availability of vacancies will also not arise.

20. In view of the above, the writ petition is dismissed. It is directed that the exercise to convene a Review DPC for consideration of the case of the respondent No. 1 be undertaken and completed within a period of 2 (two) months from today in view of the fact that the respondent No. 1 has already retired from the service.

We make no order as to cost(s).