
(1995) 01 BOM CK 0052
In the Bombay High Court
Case No : W. P. No. 1136 of 1987

Vilas Shankar Joshi

APPELLANT

Vs

Maharashtra State Seed Corporation Ltd. and Others

RESPONDENT

Date of Decision : 18-01-1995

Acts Referred:

Trade Unions Act, 1926 — Section 28

Citation : (1995) 71 FLR 372 : (1996) 3 LLJ 546

Hon'ble Judges : B.N. Srikrishna, J

Bench : Single Bench

Judgement

1. This writ petition under Article 227 of the Constitution of India is directed against the order of the Industrial Court, Kholapur, dated 10th November, 1986, dismissing a Complaint (ULP) No. 152 of 1985 under the provisions of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter referred to as "the Act").

2. The Petitioner had been working with the First Respondent Corporation since the year 1976. Four other employees. J. B. Pardeshi, R. J. Kalgonde, D. J. Bhartiya and G. M. Sakharkar, were also doing the work of similar nature and were appointed in the years 1977, 1979, 1979 and 1979 respectively. They were admittedly junior to the Petitioner in service. There were five vacancies of the post of Accountants for which the Petitioner and his co-employees were interviewed.

3. Rule 12 of the Staff Rules dealing with promotion provides that promotion shall be made on the basis of merit and that when merit of two or more employees is equal, seniority shall be the criterion for promotion. It also provides that in filling up a post by promotion the following criteria are to be adopted :

(a) Prescribed qualification and experience for the post.

(b) Competence and satisfactory service record.

(c) Merit of the candidate and his possessing the traits of maturity, adaptability and aptitude required for the post.

The rule also provides that promotion cannot be carried made subject the above criteria, at the discretion of the Management.

4. Prior to the year 1985, the promotions were by direct recruitment. This led to a persistent demand from the Union of employees that the vacancies of posts of Accountants should be filled in by internal promotions from amongst the employees holding the post of Assistant Accountant. The First Respondent, Therefore, decided to fill up five vacancies by considering the eligible candidates from the post of Assistant. The cases of five seniormost Assistant Accountants were considered for promotion by the Departmental Promotion Committee comprising of (1) Subodh Kumar, Managing Director - (2) Soundararajan, Finance Manager, and (3) K. G. Bijwal,. Administration Manager. The Departmental Promotion Committee decided to take into consideration Confidential Reports of employees for the period 1978-79 to December 1984, as the basis for assessing merit. In the case of the petitioner, though he was a seniormost of the incumbent to be considered, the only Confidential Report placed on record before the Departmental Promotion Committee was the Confidential Report for 1978-79, which die not appear to be satisfactory. For the years 1980-81, 1981-82, 1982-83, the Confidential Reports were not at all available, as they had not been written. The Departmental Promotion Committee requested I. Nicholas, Chief (Processing) and G. Soundararajan, Finance Manager, to write down the Petitioner's Confidential Reports for the aforesaid periods and submit them to the Committee for consideration. Since, in the Petitioner's case there was only one Confidential Report available in respect of the period January 1, 1994 to December 31, 1984, which was not countersigned by the Finance Manager, the Committee felt that it was desirable that the Confidential Reports of the Petitioner for the intervening period should be obtained, after which only his case would be considered and, if found fit for promotion, his promotion would be made effective from the date on which the other incumbents were promoted. The other four employees, J. B. Pardeshi, J. N. Sakharkar, D. J. Bhartiya and R. J. Kalgonde, though admittedly junior in service, were more fortunate in that their Confidential Reports were upto date. Upon consideration of those Confidential Reports, the Departmental Promotion Committee recommended that they be appointed as Accountants with effect from November 1, 1984. The case of the Petitioner was, however, sidelined and he was given no promotion.

5. The Petitioner being aggrieved with his not being considered for promotion moved Complaint (ULP) No. 152 of 1985 before the Industrial Court, Kholapur, u/ s 28 read with Items 4(c), (d) (e) of Schedule II and Item 5 of Schedule IV of the Act. The gist of the case made out in the complaint was that he had been denied the promotion because he was actively organising the Union of employees, which activities were not liked by the First Respondent, resulted in

frequent harassment to him, culminating of promotion.

6. Before the Industrial Court the Petitioner examined himself and his evidence asserted that he was the organiser of the Maharashtra State Seed Corporation Ltd. Karmachari Sanghattana, that he was being harassed on account thereof and that he was not promoted mainly because he was the organiser of the said Union. He also asserted that though he had completed his self assessment forms every year, he was kept back because he was organiser of the Union and that he had objected for promotions out of seniority. Curiously, there does not appear to be any challenge in cross-examination to the assertion of the Petitioner that he was instrumental in organising the Union or that he took a leading part in the Union activities.

7. When the matter was pending before the Industrial Court, it appears that the Confidential Reports of the Petitioner for the missing periods were written down and presented to the Industrial Court for persuading the Industrial Court to take the view that there was no case for promotion of the Petitioner.

8. The Industrial Court was of the view that although it was true that some Juniors to the Petitioners had been promoted, there was no material on record to show that he was kept back for his Union activities and that the Petitioner was not promoted for want of his Confidential Reports. The Industrial Court adversely commented on the entries made in the Petitioner's Confidential Reports for the years 1980-81, 1981-82, 1982-83 and 1983-84 and held that these were not written in due course and that it would not be proper to rely on them. Since the report of the Departmental Promotion Committee indicated that the case of the Petitioner for promotion was still under consideration, the Industrial Court directed the Promotion Committee to reconsider the case of the Petitioner for promotion without taking into consideration the subsequently written Confidential Reports for the period 1980-81, 1981-82, 1982-83 and 1983-84. With these directions the Industrial Court dismissed the complaint. Being aggrieved by the impugned order the Petitioner is before this Court.

9. Though the Industrial Court by its order dated November 10, 1986 had directed the First Respondent to constitute a Promotion Committee to reconsider the case of the Petitioner for promotion, the First Respondent has done nothing in the matter till today. When the First Respondent's learned Advocate was queried about it, I was informed that, because the Promotion Committee had to consider Confidential Reports for at least three years, and if the Confidential Reports for the period 1981-82, 1982-83 and 1983-84 were not to be considered, there being only one Confidential Report of the Petitioner for consideration, it was not possible to consider the case of the Petitioner. A further contention was advanced that in October 1994 the establishment pattern was changed and six posts of Accountants were abolished as a result of which there is no post available today to which the Petitioner could be considered for promotion. For these reasons, it was contended that the petition was infructuous and must be dismissed. It was also contended on merits that no case had been

made out for victimisation of the Petitioner and the finding of the Industrial Court was strongly supported.

10. In order to do complete Justice between the parties, I had called for the original Confidential Reports of the Petitioner and the other concerned employees, not only for the period upto 1985, but even for subsequent periods. A perusal of the said Confidential Reports discloses the following peculiar features :-

(a) In the Confidential Report of the year 1980-81 (which does not bear the date on which the report was made) appears to have been countersigned by the Countersigning Officer on September 9, 1985. The assessment appears to be consistently "good" or "very good". However, in the column 12, pertaining to the Petitioner's relations with the public, the remarks is "Being organiser of Union, had strained relation with Company Secretary". In column 13, ("Recommendations") against the column (a), (continuance in the present post") the remark is yes. Against the column (b) ("Promotion"), the remark was "yes" which has been scored out and the words "Not fit yet" over-written. The general assessment however appears to be "good".

(b) In the Confidential Report for the year 1981-82 the assessment is not good and there are several adverse remarks.

(c) In the Confidential Report for the year December 1, 1981 to December 31, 1982, in the is column "Recommendations", against column (b) "Promotion" the remarks is "No" and the general assessment is that "he can be continued in the present post. Not fit for promotion."

(d) In the Confidential Report for 1984, the remarks appear to be fairly good and the recommendations for promotion is kept blank. The general assessment is that he is sincere and good worker. Strangely, the Reviewing Officer (G. Soundararajan) who was himself member of the earlier Departmental Promotion Committee remarks."I do not think that the above remarks are true. He needs to be tried further to assess about improvement in his work, if any". It may be mentioned here that the Confidential Report was made by the Regional Manager Nicholas.

(e) In the Confidential Report for the year April 1, 1984 to September 30, 1984 the remarks are generally good, though the recommendation for promotion is kept blank.

(f) In the Confidential Report for January 1, 1985 to July 31, 1985, again the remarks are good and the general assessment is that the Petitioner does the allotted work with interest. Interestingly. the Reviewing Officer, Subodh Kumar, Collector Amravati, (at the material time Subodh Kumar was the Managing Director of the First Respondent and also the Chairman of earlier Departmental Promotion Committee) has made a remark that the Petitioner is a good worker.

(g) In the Confidential Report for August 1, 1985 to December 31, 1985, the

remarks are good and the column of recommendation for promotion is blank, though Subodh Kumar, Reviewing Officer, has made a remark that the petitioner is a good worker.

(h) In the Confidential Report for 1986 the remarks are generally good. The general assessment is that the Petitioner is a good worker if properly motivated to work with which remarks the Reviewing Officer agreed. In another part of 1986 Confidential Report, it shows that the Petitioner is an average worker, but needs to divert his energy for constructive work. The general assessment is "considering his involvement in work, he is fit for the same post. Can be promoted if gives results according to the expectations/ requirements of the organisation. He is fit to work at head office level where there are no contacts of consumers". The Reviewing Officer made his remarks."He is an average worker. Needs improvement and should concentrate only his work".

(i) In the Confidential Report for the period January 1, 1987 to March 31, 1988, the assessment is mostly "average" and "fair" and the recommendation is that he may be continued in the present post. The Reviewing Officer also remarked that the Petitioner was an average worker.

(j) The Confidential Report for 1988-89 shows that almost all remarks are "average". The recommendation for promotion is that he may be continued in the present post. The general assessment is that he is average worker. The Reviewing Officer remarked "he is an average worker. Needs improvement in his behaviour and nature".

(k) In the Confidential Reports for the period 1989-90, the remarks are mostly "average" and the recommendations for promotion is that the Petitioner be continued in the present post. The Reviewing Officer remarked "the Petitioner is an average worker and needs lot of improvement in his behaviour and nature of working".

(l) In the Confidential Report for the period April 1, 1990 to March 31, 1991, the remarks show that the Petitioner is an average worker. However, there is a note in the Confidential Report that the Confidential Report for the year 1990-91 is expunged as per Review Committee's order dated March 24, 1993.

(m) The Confidential Report for the period April 1, 1991 to March 31, 1992 shows in column General Assessment "fit for continuation in the present post". This also appears to have been expunged as a result of the Reviewing Committee's order dated February 21, 1994.

11. An assessment of the material on record and the upto date Confidential Reports made available to the Court by the First Respondent, would suggest that for some inexplicable reasons the Confidential Reports for the three years prior to 1985 were not entered and placed before the Departmental Promotion Committee, although the Petitioner had completed his self assessment for the said three years. It was this lacuna of non-availability of the Confidential Reports

for three years which constrained the Departmental Promotion Committee to defer consideration of Petitioner's case for promotion. When the matter was pending before the Industrial Court, an attempt was made to persuade the Industrial Court that the Petitioner did not deserve promotion on merits as his Confidential Reports were not good. The Industrial Court, having scrutinised the Confidential Reports, specifically directed that the adverse remarks in Confidential Reports for the period 1980-81, 1981-82 and 1982-83 and the Reviewing Officer's remarks for the year 1982-83 and 1983-84 were improper and were not to be considered. Despite a clear direction given by the Industrial Court that the Petitioner's case should be reconsidered by constituting a fresh Departmental Promotion Committee, the First Respondent did not do so at any time till today. The explanation given for failure to constitute a Departmental Promotion Committee to consider the Petitioner's case for promotion is that, because of the Industrial Court's order the Confidential Reports for three years were available, and that soon after the Industrial Court's order, the Petitioner approached this Court. The explanations do not ring true.

12. The explanation for inability to consider the case of the petitioner for promotion currently is that the post itself has been abolished. In my view, this is again an attempt to render infructuous any decision that was likely to be given in this Writ Petition. In the first place, when this Writ Petition was admitted, interim relief was granted in terms of prayer (c) by which the First Respondent was directed to keep one post vacant pending the hearing and disposal of the Writ Petition. At one stage, the petition was dismissed for default on October 30, 1990. The Petitioner's learned Advocate moved for restoration of the writ petition on October 31, 1990 and was directed to take out civil application for restoration. The Civil Application No. 3053 of 1991 was taken out, was beard and the petition was restored on July 19, 1993. The First Respondent's contention is that pursuant to a report made by the World Bank for modernisation of its plant and machinery, the World Bank appointed a consultant through the Government of India, who made a detailed study of the working and submitted a report recommending abolition of excess posts. Pursuant the said report, nearly 250 posts including excess posts of Accountants were abolished by Resolution No. 1016 of 1994. In view of this, the First Respondent contends that there is no post of Accountant today on which the Petitioner can be promoted and, since the Petitioner does not impugn the promotion of the other four employees, the petition has become infructuous and the Petitioner can be given no relief. The contention, in my view, is erroneous. It may be that the experts appointed to study the establishment pattern might have taken the view that the vacant posts of Accountants be abolished as they were redundant to requirement. It was the duty of the First Respondent to point out to them that one of the posts had been kept vacant pursuant to the order of the Court as the case of promotion of the Petitioner was squarely in issue before this Court in the present writ petition. Secondly, the substantive prayer (a) made in Civil Application No. 3053 of 1991 was, "That this Honourable Court be pleased to restore Writ Petition No. 1136 of

1987. The stay granted by, this Honourable Court on March 3, 1987 in the aforesaid writ petition". While allowing the civil application this Court observed, "Heard counsel, Restored", on July 19, 1993. It is, therefore, difficult to accept the contention that only the writ petition was restored without restoration of the interim order granted by this Court on March 3, 1987. Looked at from either point of view, the First Respondent was obliged to keep one post of the Accountant vacant. The fact that it has chosen to abolish even the said vacant post cannot be taken advantage of by the First respondent for defeating the just and legitimate claim of the Petitioner in the petition.

13. Turning to the merits of the case, it appears to me that the Industrial Court has not appreciated the evidence in a proper perspective, leading to a misdirection in law. The question to be tried by the Industrial Court was whether there was an Unfair Labour Practice within the meaning of Item 4(d) or (e) of Schedule II of the Act. Item 4 (d) provides that it would be an Unfair Labour Practice on the part of the Employer to encourage or discourage membership in any union by discriminating against any employee by refusing to promote an employee to higher post on account of union activities. That the Petitioner was an organiser of the Union and took leading part in union activities is not in dispute. In fact, the remarks in column 12 of the Confidential Report for the period September 18, 1980 to November 30, 1981 are tell-tale. In respect of column 12, "Relations with public", the Officer writing the Confidential Report remarked, "Being organiser of Union had strained relation with Company Secretary". The significance of this remark was obviously totally lost on the Industrial Court. In the instant case, there are several significant factors to show that this was not a stray remark without significance. First, though the Petitioner filled the Self Assessment forms for the period 1980 to 1984, significantly it is only the Petitioner's Confidential Report which was not completed and placed before the Departmental Promotion Committee. Secondly, the manner in which the Confidential Report was completed hurriedly and placed before the Industrial Court suggested, even to the Industrial Court that it was unreliable as a result of which the Industrial Court directed that the remarks in the Confidential Reports of the years 1980-81, 1981-82 and 1982-83 and the remarks of the Reviewing Officer for the period 1982-83 and 1983-84 could not be relied upon and that they should be ignored. Thirdly, despite the petitioner's assertion that he was denied promotion because of his union activities, there does not appear to be any cross-examination or challenge to his assertion on oath in evidence. The Industrial Court seems to have completely overlooked this crucial fact. Fourthly, the fact that there was conspicuous failure on the part of the First Respondent to reconstitute the Departmental Promotion Committee, even after the Industrial Court's direction, indicates malafides on the part of the First Respondent. Fifthly, it is not as if the confidential Reports of all other four promoted junior employees were extraordinary. Fortunately, I have had an opportunity of perusing Confidential Reports of others and in respect of some of them also there had been no recommendation made for promotion by the reporting officer in the

Confidential Reports. Upon consideration of the cumulative effect of all these circumstances, it would appear that there was a persistent attempt by the First Respondent to ensure that the Petitioner did not get any promotion-first, by not putting up his confidential Reports before the Departmental Promotion Committee and thereafter, by ensuring that the remarks in the Confidential Reports would spoil his chance for promotion. Taken in conjunction with the fact that the petitioner was an organiser of the union, took a leading part in the union activities and, hence, had strained relations with the Company Secretary, it should have been clear to the Industrial Court that the Petitioner was being denied his promotion on account of his union activities and that this was nothing but an attempt to encourage or discourage membership in the Union. The Industrial Court's assessment of the evidence was superficial, without focusing upon the crucial issue which had to be tried in the complaint. On the material on record, the conclusion was irresistible that the Petitioner's case had been deliberately over-looked for promotion or that he had been denied promotion because of his union activities which was indirect way of discouraging membership of the union. In the face of this material, the Industrial Court erred in dismissing the complaint merely on the ground that the Petitioner's case was yet to be considered by the Departmental Promotion Committee and by concluding that there was no material on record to support the case of his being punished for the Union activities by denying him promotion. Normally a finding of fact made by the Industrial Court is not to be interfered with by this Court in writ jurisdiction. However, where the conclusion rests not upon appreciation of evidence, but arises out of failure to look at all the material on record and is perverse, if the judicial conscience of this Court satisfied that injustice has been done, then it is the duty of this Court to interfere even with a finding of fact in writ jurisdiction. In my considered view, this is such a case where this Court must exercise its jurisdiction under Article 227 of the Constitution of India.

14. The question then needs to be considered is what should be the relief to be given in the petition. Because I am of the view that the material on record did overwhelmingly show that the Petitioner's promotion had been denied because of his union activities and, because I am of the view that the First Respondent was not justified in not retaining one vacant post of Accountant, and considering the peculiar manner in which the Petitioner's case was not even considered for promotion even after a clear direction of the Industrial Court, it is inevitable that First Respondent should be directed to promote the Petitioner to the post of Accountant from the date on which his other four colleagues were promoted by the Departmental Promotion Committee, i.e. from November 1, 1984.

15. Mr. Naidu contends that the First Respondent was hampered on account of the allegations as to Unfair Labour Practice being vague in the complaint. It is not possible to accept this contention. The allegations made in the complaint are specific and, if at all there was any vagueness in them, nothing prevented the First Respondent from seeking better and further particulars. In any event, there being no cross-examination of the First Respondent on the issue of union

activities, this contention loses its force.

16. In the result, the petition is allowed. Rule made absolute. The impugned order of the Industrial Court dated November 10, 1985 is quashed and set aside. It is held that the First Respondent indulged in Unfair Labour Practice within the meaning of Item 4(d) of Sch. II of the Act by not giving promotion to the Petitioner only on account of his union activities. The First Respondent is directed to promote the Petitioner as an Accountant with effect from November 1, 1984 and to pay him all consequential benefits. This order to be carried into effect within eight weeks from today.

17. There would, however, be no order as to costs.

Certified copy to be expedited.