

(2014) 05 DEL CK 0085

In the Delhi High Court

Case No : Review Petition No. 94 of 2012 in W.P.(C) No. 3087 of 1999

Vipin Kumar Mittal

APPELLANT

Vs

Lok Sabha Secretariat

RESPONDENT

Date of Decision : 16-05-2014

Acts Referred:

Citation : (2014) 05 DEL CK 0085

Hon'ble Judges : S. Muralidhar, J

Bench : Single Bench

Advocate : R.K. Saini, Mr. Manish Garg, Mr. Akshay Bhardwaj and Mr. Hitesh Bagai, Advocate for the Appellant; Maninder Acharya, Senior Advocate, Mr. Yashish Chandra, Advocate and Mr. Ashok P., Ex. Officer, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

Dr. S. Muralidhar, J.

Review Petition No. 94 of 2012

1. This review petition has been filed pursuant to the order dated 4th January 2012 passed by the Division Bench in LPA No. 4 of 2012 filed by the Petitioner against the earlier judgment dated 6th September 2011 of this Court dismissing the writ petition.

2. To appreciate the scope of the present writ petition, it is necessary to set out the aforementioned order dated 4th January 2012 of the Division Bench which reads as under:

LPA 4/2012

1. The appellant herein is working in the Lok Sabha Secretariat. He was issued Memorandum dated 7th March, 1990 conveying certain adverse remarks which was followed by another Memorandum dated 23rd November, 1990 with similar adverse remarks. To put it in brief, it was alleged in these Memoranda that the

appellant lacks both in commitment to the task assigned and devotion to duty and that he has yet to show creativity and innovative qualities respectively. The overall grading given to the appellant for the year in question was Fair. The appellant made representation against the aforesaid adverse remarks and requested for expunging the same which representations were turned down. In view of the aforesaid ACR giving him Fair grading which was below the benchmark for promotion to the post of Executive Officer, the appellant was overlooked for promotion as well. Challenging the rejection of representations refusing to expunge the adverse remarks and non-promotion, the appellant filed writ petition in this Court which has been dismissed by the learned Single Judge vide judgment dated 6th September, 2011. Assailing that judgment, present appeal is preferred.

2. Mr. Saini, learned counsel appearing for the appellant has made two-fold submissions. His first submission is predicated on the guidelines that are to be followed for recording the ACRs. These guidelines are contained in Instructional Order No. 1206 dated 9th July, 2001. Mr. Saini has specifically referred to Guideline No. 3 which reads as under:

Adverse remarks in the Confidential Reports should be made with care and responsibility. The Reporting/Reviewing Officer should make every effort to bring to the notice of the officers and staff working under him, their defects, as and when noticed, with a view to remedying them. Ordinarily, it is only when efforts so made prove of little avail, that adverse remarks should be recorded in the Confidential Reports. While doing so, the Reporting/Reviewing Officer should also indicate the efforts made by him to remedy to defects noticed by him and the result. On the basis of the above, submission of Mr. Saini is that while recording the aforesaid adverse entries, the procedure stipulated in the guidelines was not followed inasmuch as neither the appellant was pointed out any defects in the performance of his duties at any time with a view to remedy the same nor it was recorded in the confidential reports while giving the impugned remarks.

3. We find from the impugned judgment that no such contention is taken note of and/or dealt with by the learned Single Judge. Learned counsel for the respondent makes a categorical submission that this argument is advanced for the first time in this appeal and it was never taken up before the learned Single Judge and, therefore, question of considering this submission by the learned Single Judge would not arise. She further submits that the original records concerning the ACR of the appellant were produced before the learned Single Judge which were perused by the Court while dealing with the matter and that fact is specifically recorded in para 13 of the impugned judgment. We also find that no such ground is taken in the memo of appeal that this argument was advanced but has not been dealt with by the learned Single Judge. In these circumstances, we are not sure as to whether this plea was at all taken in the writ proceedings or not. Faced with this situation, Mr. Saini submits that the appellant shall be filing appropriate review petition before the learned Single

Judge.

4. It is next argued that against the aforesaid ACR, the appellant has made representations immediately which was not dealt with for quite some time. He has drawn our attention to D.P. and A.R. OM No. 21011/1/77-EST dated 30th January, 1978 which was reproduced in the writ petition filed by the appellant. As per Mr. Saini, the aforesaid OM categorically stipulates that when the representation is filed, it has to be decided expeditiously and within a period of three months from the date of its submission and in any case, when such representation is pending consideration, adverse remarks recorded in respect of an officer are deemed to be non-operative. Based on the above, he submits that though the representation was made in April, 1990 and still pending when the promotions were made on 15th May, 1991 but the appellant was superseded and his juniors promoted. According to him, at that time the representation was pending and had not been disposed of but still ACRs recorded in the aforesaid Memoranda were taken into consideration which led to his supersession.

5. We find from the impugned order that though this contention is taken note of but has not been specifically dealt with by the learned Single Judge. Since the appellant intends to file review petition, it would be open to the appellant to urge this submission as well in the said review petition.

6. The appeal is disposed of in the aforesaid terms.

3. Mr. R.K. Saini, learned counsel for the Petitioner has confined his submissions in the present petition to the aforementioned two issues. He accordingly prays that the judgment dated 6th September 2011 should be recalled and the Petitioner must be heard on the above two issues.

4. Ms. Maninder Acharya, learned Senior counsel appearing for the Respondent submitted that no liberty as such was granted by the Division Bench to file a review petition and, therefore, the present petition itself was not maintainable. Secondly, she submitted that the review petition is barred by limitation and no application has been filed for condonation of delay.

5. The Court finds that in para 5 of the order dated 4th January 2012, the Division Bench noted that since the Petitioner intended to file a review, it will be open to him to urge in the review petition the submissions noted in its order. It is implicit that the Division Bench did permit the Petitioner to approach this Court again with a review petition.

6. The review petition has been filed on 21st January 2012, a little over two weeks after the order of the Division Bench. Excluding the time during which the appeal was pending before the Division Bench, it cannot be said that the present petition is barred by limitation.

7. Consequently, to the extent that the Petitioner seeks to urge the submissions noted in the order of the Division Bench dated 4th January 2012, the order dated 6th September 2011 of this Court is recalled. The review petition is allowed to

the above extent, the Writ Petition (Civil) No. 3087 of 1999 is restored to file.

Writ Petition (Civil) No. 3087 of 1999

8. Mr. Saini first referred to Rule 9 of the Recruitment and Conditions of Service Rules, 1955 ("R&CS Rules") which set out the terms and conditions of recruitment, promotion etc. of the officers and staff in the Lok Sabha Secretariat ("LSS"). Rule 9 of the R&CS Rules reads as under:

9. Other conditions of service in respect of all other matters regulating the conditions of service of officers for which no provision or insufficient provision has been made in these rules, officers shall be governed by such rules as are applicable to the officers of the corresponding rank in the Central Secretariat, subject to such modifications, variations, or exceptions, if any, in such rules, as the Speaker may, after consultation with the Ministry of Finance, by order, from time to time specify...

9. Mr. Saini then referred to para 3.3 of the Office Memorandum ("OM") dated 20th May 1972 which reads as under:

Officers writing the confidential reports should have carefully observed the work and conduct of those under their control, and have provided the required training and guidance where necessary. The annual confidential reports should be based upon the results of such observation as well as the periodical inspection.

10. He pointed out that in 1974, in exercise of the powers under Rule 4(2) and Rule 5 of the LSS R&CS Rules, 1955 the Speaker issued an order dated 1st December 1974 known as Lok Sabha Secretariat (Methods and Recruitment and Qualification for Appointment) Order, 1974 and an OM dated 30th January 1978 concerning time limits for disposal of representations against adverse remarks in the ACRs. The said OM, inter alia, stated that "all representations against adverse remarks should be decided expeditiously by the competent authority and in any case, within three months from the date of submission of the representation. Adverse remarks should not be deemed to be operative if any representation filed within the prescribed limit is pending". It is pointed out that the above OM is applicable in case of officers of the LSS in terms of Rule 9 of R&CS Rules, 1955.

11. On 15th June 1989, in exercise of the powers conferred by Rules 4(2) and Rule 5 of the R&CS Rules, 1955, the Speaker issued another R&CS Order. In the meanwhile, on 10th April 1989, the Department of Personnel and Training ("DOPT"), Government of India issued an OM which, inter alia, in para 6.2.1 mandated that the valuation of confidential reports should be fair, just and non-discriminatory. It was, therefore, mandated that-

(a) the DPC should consider CRs for equal number of years in respect of all officers considered for promotion subject to (c) below.

(b) The DPC should assess the suitability of the officers for promotion on the

basis of their service record and with particular reference to the CRs for 5 preceding years.

(c) referred to above provides for provisions reg. Writing of more than one report in the same year.

12. In para 12.2, it was stated that "in a case where a decision on the representation of an officer against adverse remarks has not been taken or the time allowed for submission of representation is not over, the DPC may in their discretion defer the consideration of the case until a decision on the representation."

13. Turning to the facts of the present case, Mr. Saini pointed out that on 21st May 1982, the Petitioner was appointed as a Research Assistant in the Library and Research, Reference, Information and Documentation Service ("LARRDIS") in the LSS by way of direct recruitment on merit in the pay scale of Rs. 550-900. In 1985, the Petitioner and other Research Assistants were given subsequent appointments for the post of Research/Reference Assistant. In October, 1988, the Petitioner was posted in the Public Accounts Committee Branch. On 29th May 1989, the Petitioner applied for earned leave for 26 days to attend to certain domestic problem in his home town. His immediate superior officer objected to the leave being granted. The Petitioner then approached the next superior officer who granted leave. In November 1989, the Petitioner was posted back in Larrdis.

14. On 7th March 1990, the Petitioner was issued a memo communicating to him an adverse entry in his ACR for the period dated 30th June 1989. The said memorandum reads as under:

In the Annual Confidential Report for the period ending 30th June 1989 in respect of Shri Vipin Kumar Mittal, Research Assistant it has been stated that his quality of work, judgment, presentation of cases, expression on paper, ability in noting and drafting, promptness in disposal of work have not been good. Shri Mittal seems to possess knowledge of Rules, Manuals, instructions and procedures to an adequate extent. He is quite disciplined and punctual in attendance. His human and public relations have been good.

2. It has also been stated that Shri Vipin Kumar Mittal, Research Assistant lacked both in commitment to the task assigned and devotion to duty. His intellectual honesty, creativity and innovative qualities have not been adequate. He did very little of note and was a highly unwilling worker in the Branch.

3. It has further been stated that Shri Vipin Kumar Mittal, Research Assistant is a well behaved officer. The reports attempted by the officer showed that he is to go a long way in achieving proficiency in drafting. He has not yet been considered fit for promotion.

4. Shri Vipin Kumar Mittal, Research Assistant is advised in his own interest to effect necessary improvement in his performance so as to earn a better report in future.

15. Aggrieved by the aforementioned adverse entry, the Petitioner submitted a representation in April, 1990. It is not in dispute that there was no reply from the Respondent to the said representation. In reply to para 4.17 of the writ petition which set out the details of the aforementioned representation, the Respondent has not stated that the said representation was, in fact, considered. It is only stated that "there was no mala fide intention in making the adverse entries in the ACRs of the Petitioner for the relevant period. There is no reason to believe that an objective view was not taken by the Reporting and Reviewing Officers while writing his ACRs. Accordingly, no guidelines/rules on the subject, or any judgment of the Hon"ble Courts have been violated/flouted".

16. Further, in para 4.18 of the writ petition, the Petitioner made a specific reference to an OM dated 30th January 1997 regarding time limit for disposal of the representation for adverse remarks which had not been observed by the Respondent. It was further averred in para 4.18 of the writ petition that the Deputy Speaker had assured the Petitioner that the adverse remarks in the ACR would not stand in the way of the Petitioner being promoted as Executive Officer ("EO").

17. In reply to the above contention, the Respondent stated in its counter affidavit as under:

That the contents of this paragraph are wrong and therefore denied. All the representations of the Petitioner regarding the adverse remarks contained in his ACRs, were examined and reviewed by the competent authority in the normal course and decisions thereof conveyed at the appropriate time. The orders of the GOI regarding adverse entries in ACRs etc., quoted by the Petitioner, or for that matter any GOI Orders are not automatically applicable to the Lok Sabha Secretariat, unless and until these are specifically adopted by the Secretariat. The claim of the Petitioner, that he had met the Deputy Secretary in charge of Administration, who had purportedly assured him that the remarks in his ACRs would not stand in the way of his promotion, has no substance and is irrelevant as it is for the DPC to decide the matter.

18. Ms. Acharya produced the original record. It appears that the competent authority to deal with the representation at that point in time was at the level of Joint Secretary. By a note dated 14th November 1990, the said authority observed that the performance of the Petitioner may be treated as "Fair" while the remarks of the Reviewing Officer ("RO") should stand. This was approved by the Secretary General, Lok Sabha on 20th November 1990. However, there is nothing to indicate that the Petitioner's representation dated 2nd April 1990, receipt of which is acknowledged in para 3 of the counter affidavit was, in fact, placed before the competent authority and a decision taken thereon. Even the noting of 14th November 1990 makes no mention of this representation. On the other hand, in the note it is observed that the procedure envisaged for passing an adverse entry was not followed by the LSS. This is perhaps a reference to the requirement that if any shortcomings were observed, the officer under whom the

Petitioner worked had to communicate to the Petitioner those shortcomings during the year and also make a note of it contemporaneously in the record. It was also necessary to mention the advice/counseling given to the Petitioner. In any event, the original record does not contain any decision taken on the Petitioner's representation against the adverse entry in his ACR for the period ending 30th June 1989.

19. Therefore, for all practical purposes, the said representation dated 2nd April 1990 of the Petitioner was still pending at the time when his case for further promotion to the post of EO was considered by the Departmental Promotion Committee ("DPC"). In terms of the OM issued by the Government of India and in terms of Rule 9 of the R&CS Rules, the said adverse entry ought not to have been taken into consideration by the Respondent.

20. Significantly, in reply to para 4.7 of the writ petition where a reference has been made to the OM dated 10th April 1989, it was stated by the Respondent as under:

That in reply to the contents of these paragraphs are a matter of record and therefore need no reply. It is however reiterated that all Rules applicable to the Central Government Employees do not become ipso facto applicable to the employees of the Lok Sabha Secretariat unless they are specifically adopted as stated herein above. Notwithstanding this position, the provisions of the DOP&T Office Memorandum dated 10th April 1989 cited by the Petitioner are followed in spirit and in the case of the Petitioner also, no deviation has been made while processing his suitability for promotion.

(emphasis supplied)

21. In the considered view of the Court, the Respondent erred in taking into account "Fair" remark awarded to the Petitioner for the year ending 30th June 1989 while considering his case for promotion to the post of EO at the DPC held in May 1991. On 15th May 1991, four Research/Reference Assistants i.e. Ms. Manmohini Arora, Ms. Kalpana Sharma, Ms. Kanta Pandit and Mr. Ashok Kumar, who were junior to the Petitioner, were promoted as EOs. The Petitioner states that he made a representation against the above supersession on 30th May 1991. In para 4.20, he has further averred that he did not get any reply to the representation dated 30th May 1991. In its counter affidavit, the Respondent has not denied the above contention. The Petitioner made a further representation on 30th December 1992 to the Speaker and this too did not elicit a reply. The Respondent in its counter affidavit did not deny the above contention either.

22. For the year ending 30th June 1990 also the Petitioner was given "Fair" grading in his ACR. On 23rd November 1990, this was communicated to the Petitioner. There is no averment by the Petitioner in his writ petition that he made any representation against this ACR although he does say that he made representations against the promotion of his juniors and those representations not being replied to. The Petitioner was ultimately promoted as EO on 31st

December 1992.

23. Ms. Acharya contended that in so far as the Petitioner had not represented against the second consecutive "Fair" grading in his ACR, there was no illegality committed by the Respondent in considering the said grade at the DPC held on 1st May 1991 for promotion to the post of EO. While Ms. Acharya may be right in her contention that there was no pending representation as regards the second grading, it is not in dispute that while making the said grade, the Respondent did not follow the requirements of the OM dated 10th April 1989 which it claimed in its counter affidavit to be following "in spirit" and that "no deviation has been made" therefrom in case of the Petitioner. Paras 6.2.1 (e) and (f) state:

(e) the DPC should not be guided merely by the overall grading, if any, that may be recorded in the CRs but should make its own assessment on the basis of the entries in the CRs, because it has been noticed that sometimes the overall grading in a CR may be inconsistent with the grading under various parameters or attributes.

(f) If the Reviewing authority or the Accepting authority as the case may be has overruled the Reporting Officer or the Reviewing authority as the case may be, the remarks of the latter authority should be taken as the final remarks for the purposes of relevant entries that the higher authority has come to a different assessment consciously after due application of mind. If the remarks of the Reporting Officer, Reviewing authority and Accepting authority are complementary to each other and one does not have the effect of overruling the other, then the remarks should be read together and the final assessment made by the DPC.

24. A significant aspect of the matter is that OM dated 20th May 1972 required that "officers writing the confidential reports should have carefully observed the work and conduct of those under their control and have provided them required training and guidelines where necessary. The Annual Confidential Reports should be based upon results of such observations as well as the periodical inspection." In its reply to para 4.3 of the writ petition, where the above provision has been expressly referred to, the Respondent has stated "the provisions of the GOI Office Memorandum cited by the Petitioner are followed in spirit and in case of the Petitioner also no deviation has been made while writing his confidential reports". The record produced before the Court does not show that in entering a second consecutive "Fair" grading in his ACR for the year ending 30th June 1990, the above procedure was, in fact, followed. There is no indication as to any advice or counseling provided to the Petitioner upon observation of the conduct of his work. There is no indication that the mandatory requirements spelt out in clauses (e) and (f) of para 6.2.1 of the OM dated 10th April 1989 were complied with. Consequently, the Court is of the view that notwithstanding the fact that the Petitioner may not have made a separate representation against the adverse entry for the period ending June 1990, in view of the fact that the said entry was made without following the applicable procedure in terms of the aforementioned

OMs dated 20th May 1972 and 10th April 1989 read with the R&CS Rules 1955, which were binding on the Respondent, that grading also ought not to be taken into account while considering the case of the Petitioner for promotion to the post of EO.

25. Since the Petitioner was promoted as EO on 31st December 1992, i.e. later than when his juniors were promoted, the question that now remains is whether he ought to be considered for promotion from the date on which his juniors were promoted.

26. The Respondent would have to convene a DPC to consider the case of the Petitioner without taking into account the adverse entries in his ACR for the years ending 30th June 1989 and 30th June 1990. If the Petitioner is found entitled to promotion as EO from the date on which his juniors were so promoted, his seniority in the grade of EO, and the higher grades, will have to be re-fixed accordingly. The Petitioner will, however, not be entitled to any differential pay as a consequence.

27. The next question arises is if, as a result of the review DPC pursuant to the above order, the Petitioner's seniority in the grade of EO is re-fixed, any other person party is likely to be adversely affected. For this purpose, the Court had by an order dated 25th April 2014 granted the parties time to examine the issue and make submissions.

28. Ms. Acharya submitted that in the event the Petitioner succeeds in getting his seniority re-fixed in the grade of EO, and the further grades including that of Director which he is currently holding, he might become eligible for being considered for promotion to the grade of Joint Secretary. There were expected to be four retirements in 2014 in the months of July, October and November and two in 2015. Since the zone of consideration was twice the number of vacancies, and the Petitioner if found eligible in the DPC to be held pursuant to the order of this Court was likely to be placed in the common seniority list of the feeder cadre of Directors at Serial No. 7, above Ms. Kalpana Sharma, she was likely to be placed at Serial No. 8. She submitted that, therefore, it might be necessary to make Ms. Sharma a party to the writ petition and hear her.

29. In the first place it requires to be noted that the challenge by the Petitioner is not to any seniority list. If he succeeds in the DPC in securing promotion as EO from the date his juniors were so promoted, then his seniority in the grade of EO and the higher grades including that of Director will have to be also re-fixed as a consequence. In such a situation, as explained by the Supreme Court in *Union of India (UOI) and Others Vs. Sri Pati Ranjan Biswas and Another*, "the employees likely to be affected as a result of the re-adjustment of the petitioner's seniority...were at the most proper parties and not necessary parties, and their non-joinder could not be fatal to the writ petition." A similar view was expressed in *A. Janardhana Vs. Union of India (UOI) and Others*. The said decisions were followed by this Court in *Mr. S.K. Jain Vs. Mr. P.S. Gupta and Others*.

30. Moreover, in the present case, the Court finds that there is no adverse impact on Ms. Kalpana Sharma even if the Petitioner were to be granted the promotion as EO from the date on which she was granted promotion. In any event, she was junior to him in the cadre of Research Assistant. If in the Review DPC, he is found entitled to his promotion from the date on which she was promoted to that post then as per the next below rule he would have to be placed above her in the seniority list. Further, there is no vested right in Ms. Sharma for promotion to the grade of Joint Secretary. She has only a right to be considered for promotion. Considering that there are to be four vacancies in the cadre of Joint Secretary 2014, and the zone of consideration is twice the number of vacancies, even if she is at Serial No. 8 in the common seniority list, she would be in the zone of consideration and, therefore, her chance of being considered for promotion to the post of Joint Secretary would not be adversely impacted.

31. The writ petition is accordingly disposed of by issuing the following directions:

(a) A Review DPC will be convened by the Respondent within a period of eight weeks from today to consider the case of the Petitioner for promotion as EO with effect from the date on which his juniors were so promoted, without taking into account the adverse entries in his ACRs for the years ending 30th June 1989 and 30th June 1990 and treating the said two adverse entries, viz., "Fair", as cancelled.

(b) The Respondent shall communicate to the Petitioner the decision of the Review DPC within two weeks of its being taken.

(c) In the event of the Review DPC granting the Petitioner promotion as EO from the date his juniors were promoted to that post, the Respondent shall within a further period of four weeks re-fix the seniority of the Petitioner in the said grade and the higher grades. It is, however, clarified that the Petitioner would not be entitled to claim any differential pay as a consequence of such re-fixation of seniority.