

Jayanta Kumar Mitra Vs. Union of India (Uoi) and ors.

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Court : Central Administrative Tribunal CAT Kolkata

Decided On : Jan-18-2008

Reported in : (2008)(98)SLJ362CAT

Judge : K Sachidanandan, C A P.K.

Appellant : Jayanta Kumar Mitra

Respondent : Union of India (Uoi) and ors.

Judgement :

1. The dispute brought for adjudication in this O.A. is how the applicant, a Member of Indian Railway Traffic Service, 1974 Batch was not promoted from the level of Senior Administrative Grade to Higher Administrative Grade in the selection for the year 2006 although he had no adverse entry in the confidential records throughout his career. The applicant got his promotion upto the level of the SAG without any hindrance. He got his promotion in the SAG in 1994. He was considered for promotion to the next higher level i.e. Rs. 22,400/24,500/- in the year 2006 along with other officers within the zone of consideration.

However, he was not promoted although some of his juniors in service got promotion to the HAG superceding him. The applicant says that such supercession was unfair and illegal as no adverse entry was ever communicated to him by the respondents at any stage of his working career.

2. The applicant further says that in July, 2006 it was stated by one of the senior officers in the Railway Board that the applicant's supercession was due to adverse entries in his CR. After this the applicant addressed a letter to the Secretary, Railway Board for its confirmation and details. The applicant, however, got neither any confirmation nor any reply to the letter. In the O.A. the applicant has given details of his achievements as a Railway Officer during his various assignments. He has stated that his performance and achievement were lauded by his superiors in different stages. Obviously there should have been a reflection of this in his CR. No adverse entry was ever communicated to him. So the applicant was expecting that like his previous promotions at the level of HAG also he would not face any hindrance. However, the fact became different.

3. In the original application the applicant has also hinted that the denial of promotion may be due to his differences with the General Manager of the concerned Railway at that time. Being a man of principle the applicant had to contradict his General Manager on several issues in which the applicant felt that the direction was not given in the interest of the service and in conformity with the rules. He could not make any compromise on matters of principle. The applicant apprehends that he might have incurred the wrath of his boss and might have lost his promotion in consequence.

4. The applicant has stated that if the denial of promotion is based on mere gradation in the CR it was unconstitutional when such gradation was not based on any specific record on objective basis relating to any shortcoming. If he was denied promotion on the basis of such gradation, it was incumbent on the authorities to effect prior and timely communication of such gradation to the petitioner. With the above submission the applicant has prayed for quashing/setting aside of the office order dated 27.12.2006 (Annexure A-11) in which the name of the applicant did not figure in the list of officers promoted as HAG. The applicant has requested for further direction to include the applicant's name in the panel for promotion in the HAG.5. Before the case was taken up for final disposal the respondents conducted the selection for the year 2007 as well. The applicant's name figure at Sl. No. 2 in the zone of consideration of 18 officials.

However, when the list of promoted officials was notified the applicant's name did not figure in the list. One Misc. Application was brought before this Tribunal praying for staying the operation of this list. Upon considering the Misc. Application the Tribunal directed that one post of the HAG may be kept vacant pending finalisation of this O.A. That interim order continues.

6. Today the matter came up for final disposal in which arguments were exchanged by both sides. The respondents have revealed in their reply that not promoting the applicant to HAG was not any consequence of any adverse entry in the CR. It has been confirmed by the respondents that the applicant did not have any adverse entry in the CR. However, for promotion to the level of HAG which was in the top order of the administrative hierarchy selection is made by a High Level Committee after careful scrutiny of the records of the officers. The grading of the officers in their CR, therefore, becomes an important consideration in the matter of promotion. The posts in the scale of Rs. 22,400/24,500/- carry enormous responsibility and accountability. It is stated in Para 4 (iv) of the reply that Railways being a multi-disciplinary organization having interaction with various other departments and with the onus of providing satisfactory operation over a vast network, has to ensure that officers at the top level have the requisite quality and excellence. At the lower echelons of the service a mere satisfactory performance of the officials may be adequate, however, at the top level it is the ability, quality and excellence of the officers which determines the efficiency and reputation of the organization outside. The department, therefore, cannot make any compromise on this issue. That is the reason why a system of selection at the highest level on the basis of certain Bench Mark in the gradation of CRs have been adopted by the Government. This policy has stood the test of time and has been going on in all departments of the Government satisfactorily for a long time.

7. The respondents have explained the process of selection in the Railways which briefly is that the selection of officers at the HAG level is made by a committee comprising Chairman of the Railway Boards, Secretary, Department of Personnel and one Member of the Railway Board.

Their recommendation is further sent for approval of the Cabinet committee. The Bench Mark which is adopted for selection of the officers in the HAG level is Very Good + The respondents have stated in their reply that the applicant fell short of this Bench Mark in a few years and, therefore, the committee did not consider him suitable for promotion at this stage. It is further stated that the respondents have not infringed any statutory provision in the matter of selection. It has been done after observing the due procedure. The selection is not by an individual but by a committee and, therefore, allegations of any bias or prejudice are irrelevant in this matter. With these submissions the respondents have requested the Tribunal to dismiss the petition.

8. During the course of hearing the Ld. Counsel for the applicant has brought to our notice a few decisions of the Hon'ble High Court/Apex Court. It was strongly pleaded by the Ld. Counsel that if the applicant has been denied promotion for grading below the Bench Mark it amounts to an adverse entry for the simple reason that his grading was below the Bench Mark has resulted in adverse consequences for him in his career. Therefore, the practice of selecting officers on the basis of the Bench Mark was improper and unethical. It does not afford the concerned officer any opportunity to know in advance what his position was, therefore, adverse decision, if any, comes to him suddenly out of the blues. He is not afforded any scope for knowing what his deficiencies were for which he was denied promotion. The Ld. Counsel for the applicant drew our attention to a few decision of the Hon'ble High Court/Apex Court.

9. The Ld. Counsel spoke at length about the decision of the Hon'ble High Court, Calcutta in the WPCT No. 573 of 2005 Union of India and Ors. v. Bhabaranjan Roy. This W.P. arose out of a decision of the Tribunal in which it held that denial of promotion to the applicant was irregular as it was based on gradings some of which were the result of a down-gradation at the level of the Review Officer ignoring the entries of the Reporting Officer. Therefore, there was large variation in the grading from year to year which appear to be unreasonable and the Tribunal pointed out that the assessment was not made on very objective criteria. The Hon'ble High Court upheld the decision of the Tribunal and dismissed the writ petition. In its judgment the Hon'ble High Court had referred to the decision of the

Hon'ble Apex Court in the (sic) Jal Nigam case. It would be pertinent to reproduce the relevant portion of the judgment of the Hon'ble High Court: These findings which have been recorded by CAT in the judgment have not been challenged before us. The learned Tribunal relying on the decision of the Supreme Court in the case of U.P. Jal Nigam and Ors.

v. Probhat Chandra Jain 1996 (33) ATC 217 held that when Bhabaranjan was graded below the Bench Mark those remarks were not communicated to him and since those were not communicated to him in view of the ratio in the case of U.P. Jal Nigam, such remarks can not be taken into consideration. The Tribunal held that in the instant case 'Very Good' being the Bench Mark when Bhabaranjan was graded 'Good and Average' his promotional prospect was affected in view of this aforesaid entry. Therefore such remarks should be treated as adverse remarks and should have been communicated to him. The Tribunal has also relied on some other judgments for the aforesaid proposition.

This Court does not find that there was any erroneous exercise of jurisdiction by the Tribunal in coming to the aforesaid finding.

Before us also the learned Counsel for the respondents also relied on another decision of the Supreme Court in the case of State of U.P. v. Yamuna Shankar Misra and Anr. 1997 SCC (L&S) 903, the said decision in the State of U.P. relief on the ratio in Jal Nigam 's case and it was held that object of writing the confidential reports and making entries in them is to give an opportunity to a public servant to improve his performance. Therefore, the Officer concerned in respect of whom adverse report is made should be confronted with the content of the report which is adverse to his interest. The learned Judges have held that the same is a requirement of fairness based on the principles of natural justice. This Court is in respectful agreement with the aforesaid decision. This Court finds that similar views have been taken by a Division Bench of the Bombay High Court in the case of Dr. Binoy Gupta v. Union of India and Ors.

reported in Administrative Law Judgments 2002(3) (sic) 7. In that case the petitioner was not selected for promotion on the basis of down grading in ACR. The Division Bench of the Bombay High Court held that such downgrading was as

a result of noncommunication of the adverse report against the petitioner. As such it was held that the DPC has been vitiated and a direction was given to convene a review DPC for reconsidering the case of the petitioner by ignoring the ACRs which are not communicated to him and it was also made clear by the Division Bench of the Bombay High Court that if on such consideration the petitioner is found suitable for promotion then he should be promoted. This Court finds that similar directions have been given by CAT in the present case. Therefore, this Court does not feel inclined to take any different view.

10. The Ld. Counsel for the applicant also questions the propriety of the selection based on uncommunicated grading below the Bench Mark. The Ld. Counsel said that this has been discouraged in the decision in the case of U.P. Jal Nigam. During the arguments the Ld. Counsel gave the following extract from the judgment of the Jal Nigam: 3. We need to explain these observations of the High Court. The Nigam has rules, whereunder any adverse entry is required to be communicated to the employee concerned, but no 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 it 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 confidential 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, not be reflected in such variations, as otherwise they shall be communicated as such. It may be emphasized 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. Having explained in this manner the case of the first respondent and the system that should prevail in the Jal Nigam, we do not find any difficulty in accepting the ultimate result arrived at by the High Court.

11. The main issue brought before us in the present O.A. is whether it is unfair to adjudge a person on the basis of uncommunicated below Bench Mark grading in his CR which results in either denial/supersession in promotion. We have heard the arguments carefully. We also looked at the pronouncements by the Hon'ble High Court/Apex Court in the aforesaid judgment. Turning our attention to the pronouncement of the Apex Court in the case of Jal Nigam we find what the Hon'ble Apex Court found unreasonable was the practise of denying promotion to an officer on the basis of a grading which was not that of the Reporting Officer but of the Reviewing Officer. The case dealt with by the Apex Court in this S.L.P. was that of an individual in whose case the grading given by the Reporting Officer was drastically watered down by the Reviewing Officer. The observation was that such difference in grading reflects lack of objectivity and creates a doubt of a bias/prejudice in the mind of the Reviewing Officer. Denying promotion to an individual on the basis of such down graded entries was unfair. Such entries tantamount to adverse entries and if not communicated such entries should not become the material for selection. In the other case pronounced by the Hon'ble High Court, Calcutta there has been a reference to the Apex Court judgment in Jal Nigam. This also was an instance of large variation in the grading from year to year. It was in the context of such variation that the Hon'ble Court referred to the judgment of the Apex Court in Jal Nigam case.

12. We appreciate the reasons given by the respondents in defending their action. What the respondents have tried to say is that the higher echelons of management should yield place to persons of exceptional caliber and competence, ability and intelligence superior to the large majority, people having a clear vision of the future and full commitment for excellence. An organizational structure built up without the concept of such refinement at the senior management level will fail to deliver in

trying circumstances. To enable the administration to pick up the team suited to this end Bench Mark is assessment cannot be dispensed with. And the discerning mind would not fail to appreciate the clear distinction that exists between an adverse entry and below Bench Mark grading. People chosen on the basis of such Bench Mark would be such people as would help the organization in realizing its goals and take on the challenges that exists on the way.

13. The applicant has alleged in his application that it was due to his differences with the General Manager of the Railways that he became a victim of poor assessment.

Objectivity in assessment and grading was lost due to prejudice caused by such differences and in consequence he suffered the terrible loss in his due promotion. We have considered this allegation with some concern. However, we are of the view that if the Tribunal looks into such allegations it will be stepping into wrong terrain. Obviously these are issues for which the Tribunal will not be able to provide the answer. The authority in writing the CRs. of SAG Officers within the zone has been vested with the General Manager. We are aware of the likelihood of the authority being misused at times. But such would be cases of an exceptional nature. By and large the entries are supposed to be made in objective assessment and analysis of an officer's capability. Therefore, we are not inclined to bring these allegations to bear upon our decision in this O.A.14. If we look at the decision of the Apex Court in Jal Nigam case carefully we find that the direction of the Hon'ble Apex Court was not to the effect that promotion by an assessment on the basis of uncommunicated below Bench Mark grading was irregular. This practice has been going on in the Government in all departments for a considerable time and promotions are still made on the basis of Bench Mark. During the arguments the Ld. Counsel for the respondents asked a question as to how then the selection at the top level where excellence and quality matter so much, could be made except on the basis of Bench Mark. In our view, this was a very pertinent question. The provision for communicating adverse entries was to identify particular deficiency in the performance of the officials. A positive and pro-active administration which believe in developing skill and excellence and potential of officials in the organization has to be offer a scope to officials in whom such deficiency has been

noticed to improve themselves. This is based on the idea that no person can be condemned for ever and if opportunities are granted an official can develop fully upto his potential in an atmosphere of nurture and encouragement.

15. The issue of selection of officers at the top echelons however is different. In a hierarchical structure the promotion at the higher level has to be made on careful assessment of the quality and excellence of officers. It is true that all officials have the right for consideration but it is not possible to promote all officials at the top-most level of the organization. Such posts at the top level became fewer and fewer higher up the ladder and, therefore, the need to select the best ones from the lot. If uncommunicated below Bench Mark grading has to be communicated as an adverse this will turn the entire established process of selection upside down. Therefore, Bench Mark is in our view an indispensable tool for selection at the high level.

16. Our reason for thinking why the ratio of the Jal Nigam case is not applicable in this O.A. is that in that decision the Hon'ble Apex Court had observed the need to prevent large variation in grading the same individual and to ensure objectivity. The ruling of the Apex Court was not to the effect that all below Bench Mark grading will be construed as adverse making it mandatory for such grading to be communicated to the individual.

We have carefully considered the case of the applicant in this O.A. in the light of the pronouncement of the Hon'ble Court. We have found that the process of selection as laid down by the Government has not been violated. It is not the case of the applicant that the entries in his ACRs were unjust and below what he deserves. Even if he tried to make out a case like this it would not have been open to the Tribunal to go into such issues by encroaching upon the area of execution. What, however, we were anxious to see is whether the respondents have infringed upon any Rule which has been laid down by the Government and which still hold the field. Our observation is that the respondents have not committed any irregularity or impropriety. For these reasons we do not consider that this O.A. has merit and, therefore, we dismiss it. No order as to costs. The interim order passed earlier is vacated.

