(2011) 01 P&H CK 0434

High Court Of Punjab And Haryana At Chandigarh

Case No: C.W.P. No. 10854-CAT of 2003

Satyendra Jeet Singh		APPELLANT
	Vs	
Union of India (UOI) and Another		RESPONDENT

Date of Decision: Jan. 6, 2011

Acts Referred:

- Constitution of India, 1950 - Article 14, 15, 16(1), 226, 227

Citation: (2011) 162 PLR 355

Hon'ble Judges: T.P.S. Mann, J; M.M. Kumar, J

Bench: Division Bench

Final Decision: Allowed

Judgement

T.P.S. Mann, J.

A substantive question of law that emerges for determination by this Court in these proceedings under Article 226/227 of the Constitution is whether the Union Public Service Commission (for brevity ''the UPSC'') is justified to ignore the request of the Government of India for convening a Review Departmental Promotion Committee (for brevity ''the DPC''), particularly when it is based on additional material in favour of the Petitioner who was earlier rejected as unfit for promotion. The question has been raised by the Petitioner while challenging order dated 07.04.2003 passed by Chandigarh Bench of Central Administrative Tribunal, (for brevity ''the Tribunal''), which has dismissed the claim made by the Petitioner.

2. Few facts may first be set out so as to put the controversy in its proper perspective. The Petitioner was selected in the year 1980, after he succeeded in the Civil Service Examination taken by the UPSC. He was appointed as Assistant Collector in the Customs and Central Excise Group ''A'' Service and was allocated to 1981 batch. It is undisputed that his service conditions are governed by the statutory rules known as Central Excise Service Group ''A'' Rules 1987 (for brevity ''the 1987

Rules''). There was some inter se seniority dispute amongst the officers of the service, which reached upto Hon''ble the Supreme Court. On account of pendency of litigation, some ad hoc promotion at various levels in the hierarchy were made. The Petitioner was promoted as an ad hoc Joint Commissioner and then Additional Commissioner on ad hoc basis. In the month of March, 2002, a DPC was convened for making regular promotion to the post of Joint Commissioner. In respect of those who succeeded before the DPC, a notification dated 03.05.2002 was issued and a number of officers working on ad hoc basic were promoted as Joint Commissioner on regular basis. Unfortunately, the name of the Petitioner did not find place in the notification, although a person junior to him like Shri Mohinder Singh was granted regular promotion. The notification declared that the Petitioner was categorized as ''unfit'' for promotion as he failed to achieve the Bench Mark ''Very Good'' as laid down by various government policies and instructions.

3. The Petitioner made a detailed representation on 21.05.2002 (P-6), and claimed that there could be two basic reasons for denying the promotion to an officer. He suggested that the first reason could have been absence of vigilance clearance and the second reason could have been inability to reach the Bench Mark. In respect of first, the Petitioner claimed that throughout his service career of 20 years, he did not earn even a single adverse entry and no charge-sheet has ever been issued or pending against him and that his performance during the entire period has been appreciated at the highest level. He further claimed to have been decorated by Chairman''s Commendation Committee for outstanding performance in 1985 and in 1990. The Petitioner pointed out that he served during the period of 1985 and 1990-91 in remote parts of the country like Buhl, Jamnagar and Probandhar in Gujrat and performed his duty risking his life, which was duly recognised with Chairman''s Commendation Certificate. The Petitioner also pointed out that as Assistant Collector, he was rewarded with cash award of Rs. 5.50 lacs. In respect of second reason, the Petitioner pointed out that for the year 1990-91, it has been erroneously projected in the ACR of that year that he was absent from duty, which is factually incorrect. He clarified that he was not absent from duty. On the contrary, he did not work under any officer for more than 90 days, which is the minimum prescribed period for writing the ACR. The aforesaid mistake was rectified when his case for promotion as Deputy Commissioner was re-considered by the Review DPC. His seniority was also re-fixed and he was placed senior to Shri Mohinder Singh.

4. With regard to regular DPC for promotion to the post of Joint Commissioner, the Petitioner has claimed that principal reason of debacle is his ACR for the year 1990-91, which has already been declared non-est and the same could not have been taken into account for regularisation of his promotion. He claimed that he has been assessed ''Very Good'' by the Reviewing Officer for the reporting years 1987-88, 1988-89 and 1989-90. and that the Bench Mark for the DPC held in March/ April 2002, was ''Very good''. According to the Petitioner, the norm of three ''Very Good'' reports out of 5 has been achieved by him as he had more than three reports

graded as ''Very Good''. He has further claimed that the DPC was obliged to assess the suitability of the officer for promotion on the basis of service record and also in the light of instructions dated 10.04.1989. He expressed a doubt that his full service record alongwith Chairman''s Commendation Certificate, cash award and outstanding reports were not placed before the DPC.

5. The representation made by the Petitioner on 21.05.2002 was duly considered by the Government of India. In the letter dated 05.06.2007 (P-7), addressed to UPSC, the Government of India reached a conclusion that after consideration of representation made by the Petitioner there is room for re-consideration because his grading for the ACR in respect of the years 1987-88 and 1988-89 is ''Very Good'' and requested the UPSC to examine his representation and ask for a review DPC to regularise his ad hoc promotion to the post of Joint Commissioner. The UPSC did not find any substance in the suggestion made by the Government of India and concluded that there was no material change in the records, which were placed before the DPC and therefore there was no reason to hold a review DPC to re.-determine his eligibility for promotion to the post of Joint Commissioner. The aforesaid decision of the UPSC has been reflected in the letter dated 25.10.2002 sent by the Government of India to the Petitioner. As a result the orders were challenged before the Tribunal by filing OA No. 1117/CH/2002, which has been dismissed on 07.04.2003. The Petitioner claimed that there was no reason for the DPC to declare him unfit for promotion as he has more than 3 reports graded as ''Very Good''. His AC Rs as pleaded in para 4 (xi) of his Original Application are culled out in the following table, which are as under:
i) Year 1985 Very good in the 1st half and ''Good'' in the second half of the year.

ii) 1986 ''Good''.

iii) 1987 ''Very Good''.

iv) 1988-89 ''Very Good''.

v) 1989-90 He was graded Good by the Reporting Officer while Reviewing authority after recording reasons graded him ''Very Good''.

6. The Petitioner asserted before the Tribunal that his report for the year 1989-90 was treated only as ''Good'' whereas it is infact ''Very Good'', it seems that the authority did not forward the report of the Reviewing Authority, which has upgraded the report of the Reporting Officer to ''Very Good''. The Tribunal rejected the arguments raised by the counsel for the Petitioner that the request of the Government of India to UPSC should not have been rejected particularly when there is material change in the ACR, which would result in achieving Bench Mark ''Very Good'' for the Petitioner. On the aforesaid issue the view of the Tribunal is discernible from paras 12 and 13. In essence, the Tribunal in para 12 is at pains to explain that the UPSC is not subservient to the whims and fancy of the Government

of India and the direction issued by the Government of India is not binding on the UPSC. The Tribunal has referred to basic philosophy of the Founding Father by refusing to give any place for "Spoil System" under our Constitution and then proceeded to conclude in para 13 as under:

13. In view of the above discussion, we would be inclined to repel the extreme submission on behalf of the applicant that the Government as the appointing authority wields absolute power to require the U.P.S.C. to convene the review DPC. As a constitutional body, the U.P.S.C. is not supposed to take dictation from the Government though the latter has a final say in the matter of public employment. The commission is an independent constitutional authority and exercise the powers and performs its functions and discharges duties as specified in the Constitution particularly in Article 320 in accordance with its own procedure and the law regulating its functioning. Certainly, the executive Government is not in a position to issue commands to the U.P.S.C. to act in a particular manner.

7. The Tribunal also found that there was no direction issued by the Government of India of a binding nature asking the UPSC to convene a review DPC meeting. In fact in its communication dated 05.06.2002, the Government of India has left it to the sole discretion of the UPSC to examine the representation dated 21.05.2002 (P-6), which was made by the Petitioner and then concluded on facts that there was no material change in the record/ document, which have already been considered by the DPC convened earlier on 07.03.2002/18.03.2002. The Tribunal also examined the case of the Petitioner in the light of para 18.1 of instructions dated 10.04.1989 and proceeded to conclude as under:

The situations which are contemplated for holding the review DPC as mentioned above would be attracted where the material facts placed before the DPC were not correct or where these material facts undergo a change subsequently with retrospective effect or where the procedure followed by the DPC was in violation of relevant rules/ instructions. The case of the applicant does not fall in any one of the above categories. The above instructions do not provide for holding of review DP Cs to re-assess the officers without any valid reason. No technical or factual mistakes have been established and on the basis of the C.R. Dossier of the applicant, his grading would not change. A review DPC could be held only if the mistake was such as would have resulted in the superior grading of the applicant and the turned him "fit" instead of "unfit". The substance of the matter is that review DPC cannot be held for mere asking. Selection by the DPC cannot be throttled or faulted by making certain sweeping and vague allegations to support the request for review DPC. If such a course is allowed to be adopted then every selection made by how-so-ever fair and impartial body comprised of persons of high integrity and merit would come to be assailed. The case of the applicant does not fall within the parameters laid down for convening the review DPC.

8. Another aspect taken into consideration by the Tribunal is that it cannot sit in appeal over the recommendation made by the DPC. In that regard, the Tribunal placed reliance on the observations made by Hon''ble the Supreme Court rendered in the cases of Dalpat Abasdaheb Solunke v. Dr. D.B. Mahajan AIR 1990 SC 434 State of U.P. v. Srikant Chaphekar 2. 1992 (5) S.L.R. 635 and Smt. Nutan Arvind v. Union of India and Anr. 3. 1996 (1) S.L.R. 774 and other judgments.

9. Mr. D.S. Patwalia, learned Counsel for the Petitioner has argued that the Tribunal has incorrectly rejected the submission of the Petitioner that the Government being the appointing authority wields absolute power to require the UPSC to convene the review DPC. Learned Counsel has submitted that the UPSC may be an independent body but once the Government in its communication dated 05.06.2002 (Annexure P-7) has found that the report of the Petitioner for the year 1989-90 was upgraded from ''Good'' to ''Very Good'' then the change in the ACR would have material effect on the consideration of his case for promotion by the DPC. According to the learned Counsel, the record put before the DPC when the case of the Petitioner was considered on 07.03.2002/18.03.2002, his ACR for the year 1989-90 was shown to be ''Good'' as is evident from the reading of two orders passed by this Court on 17.072008 and 24.07.2008.

10. Mr. Patwalia has further urged that the Rule known as Indian Customs and Central Excise Service Group ''A'' Rules, 1987, (for brevity ''the Rules'') which governs the Promotion of the Petitioner to the post of Joint Commissioner, would clearly show that the DPC for considering the case of the Petitioner for promotion is comprised of Chairman or Member of UPSC, Chairman of Central Board of Excise and Customs and two Members of Central Board of Excise and Customs. Therefore, composition of the DPC is such that the UPSC has 25% representation as only one member from UPSC is to chair the DPC meeting whereas three members are to come from the Central Board of Excise and Customs. In support of his submission, learned Counsel has placed reliance on the judgment of Hon''ble the Supreme Court rendered in the case of Union of India (UOI) and Another Vs. T.V. Patel, and has argued that the advice given by the U.P.S.C. under Article 320(3) of the Constitution is advisory/ recommendatory in nature and not binding on the State Government.

11. Mr. Patwalia, has further argued that the Tribunal has committed another grave error by coming to the conclusion in para 17 of its order that the case of the Petitioner did not fall under any of the clauses of the instructions dated 10.04.1989 as amended from time to time. According to the learned Counsel, the opening para 18.1 would itself cover the case of the Petitioner and in the facts and circumstances, the review DFC should have been ordered to be convened. He has referred to opening para 18.1, which postulates that the proceedings of the DPC may be reviewed, inter alia, if the material facts have not been brought to the notice of the DPC. According to the learned Counsel, once the ACR pertaining to year 1989-90 has been upgraded from ''Good'' to ''Very Good'' by the Reviewing Authority, which was

not placed before the DPC on 07.03.1992/18.03.1992, then there is material change in scenario and certain facts were not brought to the notice of the DPC. The DPC has examined the case of the Petitioner only on the basis of report pertaining to the year 1989-90 that it was ''Good''. Therefore, it has been urged that the conclusion reached by the Tribunal that there was no violation of the instructions dated 10.04.1989 was absolutely erroneous. It has further been submitted that the instructions are only illustrative and not exhaustive at the end of the instructions, it has expressly mentioned that some instances which have been mentioned were not exhaustive but only illustrative.

12. Mr. Parveen Chander Goyal, learned Counsel for the Union of India has argued that the advice of the UPSC is ordinarily accepted by the Government unless there are good reasons for disagreeing with the same. According to the learned Counsel, once the UPSC has expressed its opinion for non-convening of review DPC which the Government has accepted then it would not be open to the Court to issue directions of binding nature. Likewise, Mr. Rajeev Sharma, learned Counsel for the UPSC has argued that apart from the ACR, the other factors have also played their part in formation of opinion by the UPSC when DPC was held on 07.03.2002 and 18.03.2002. According to Mr. Sharma, it is not the ACR alone which constitutes the basis for consideration of the case of the Petitioner for promotion to the post of Joint Commissioner but there are many other factOrs. 13. Having heard learned Counsel for the parties and perusing the record with their able assistance, we proceed to examine the substantive question of law posed in the first para of this order. The matter came up for consideration on 17.07.2008 when the Division Bench noticed the fundamental contention of the Petitioner that for the year 1989-90, the Reporting Officer had recorded ACR of the Petitioner as ''Good'' and the DPC had considered the ACR recorded by the Reporting Officer. The DPC did not consider that his grading was changed from ''Good'' to ''Very Good'' by the Reviewing Authority, which met in March 1992 to consider the case of the Petitioner for promotion to the post of Joint Commissioner. The Division Bench directed the Respondents to produce the record concerning the DPC held in the year 1992. On the next date of hearing, the record was produced with sealed cover and it was found that the contention raised by the learned Counsel was meritorious. On 24.072008, the Division Bench passed an order which is self-speaking and reads as under:

Shri Narsing Dev, the Deputy Secretary, UPSC, has produced the record of the Departmental Promotion Committee, which met on five different dates i.e. between 07.03.2002 and 18.03.2002 and has considered the case of the Petitioner for promotion to the rank of Joint Commissioner. A perusal of the record shows that the name of the Petitioner appears at Serial No. 62 and against the year 1989-90, the Petitioner has been graded good. Shri Dev states that the ultimate conclusion of the Reporting Officer or the Reviewing Authority is not the basis for determination of the grading by the UPSC. In fact, the UPSC grades an officer on the basis of various

inputs in the AC Rs record of the officer. It is stated that such grading is permissible in terms of the instructions issued by the Department of Personnel and Training. He seeks some time to produce such instructions.

14. During the course of hearing, Mr. Rajiv Sharma, learned Counsel for UPSC has not been able to produce any instructions, which might have been issued by the Department of Personnel and Training permitting the UPSC to grade an officer on the basis of various inputs in his ACR. Accordingly, we find that in the absence of any such instructions the grading given by the Reviewing Authority has to be considered as final. The net result is that the only confidential report for the year 1989-90 was considered as ''Good'' by the DPC held in March 1992, which in fact has been upgraded to ''Very Good'' by the Reporting Authority. On this ground alone, the case for convening review DPC is made out. It is not understood as to how the UPSC could record a conclusion that there was no material change in the records/ documents, which were placed before the DPC and no case for review DPC meeting to re-consider the case of the Petitioner for promotion on the post of Joint Commissioner was made out. We are of the view that a meritorious cause of the Petitioner is defeated by complete non-application of mind by UPSC despite the fact that the Government of India in its letter dated 05.06.2002 has categorically pointed out to UPSC that there was merit in the representation made by the Petitioner as his AC Rs grading for the year 1987-88, 1988-89 and 1989-90 are ''Very Good''. We are also of the view that the Government of India has committed grave error in law by accepting the view of the UPSC mechanically holding that no case for review DPC meeting to reconsider the case of the Petitioner was made out.

15. It is in view of the aforesaid facts and circumstances that the question concerning the rejection of suggestion made by the Government of India has to be examined. From perusal of the record, this Court has already recorded in categorical terms in its order on 24.07.2008 that for the year 1989-90, the grading of the Petitioner as ''Very Good'' has not been taken into account. It is the claim of the Petitioner that if 3 out of 5 Teports are graded as ''Very Good'' and there is no adverse report then he would meet the Bench Mark of ''Very Good''. A bird''s eye view of his ACR is extracted below:

i) Year 1985 Very good in the 1st half and ''Good'' in the second half of the year.

ii) 1986 ''Good''.

iii) 1987 ''Very Good''.

iv) 1988-89 ''Very Good''.

v) 1989-90 He was graded Good by the Reporting Officer while Reviewing authority after recording reasons graded him ''Very Good''.

16. The aforesaid resume would show that the Petitioner would meet the Bench Mark as his ACR for the year 1987, 1988 and 1989 is ''Very Good'' and even in respect

of year 1985 for the first half it is ''Very Good'' whereas the second half of the year 1985 and full year of 1986 it is graded as ''Good''. Therefore, we find that the view of the UPSC as accepted by Respondents No. 1 and 2 in its communication dated 25.10.2002 (P-8) is not correct as it suffers from complete non-application of mind. Such an action is clearly arbitrary violating the provisions of Articles 14 and 16(1) of the Constitution.

17. The Tribunal appears to have mis-directed itself on two counts. Firstly, the Tribunal opined that the spoil system rejected by the Founding Father should not find ways by ignoring the advice of the UPSC. The aforesaid issue is totally irrelevant in the facts and circumstances of the present case because here an upgraded report, which has been earlier ignored by the DPC held in March 1992 was sought to be placed before the review DPC. Therefore, it was the result of complete non-application of mind that the cause of the officer like Petitioner has suffered. Likewise, the Tribunal stumbled on the issue that it was not to act as an appellate forum over the proceedings held by the DPC. Even that question would not arise because in the facts and circumstances of the case, we are not reexamining the conclusion recorded by the DPC held in March 1992 but we are only ascertaining whether the relevant material was taken into account, which may have significant effect on the result of the recommendation made by the DPC. Certainly, if the Bench Mark of 3 ''Very Good'' reports out of 5 reports has been set up then consideration by the DPC in March 1992 that the Petitioner had one ''Good'' report in the year 1989-90 whereas it was in fact ''Very Good'' would materially effect the results. Therefore, we find that the Tribunal has mis-directed itself by adopting the aforesaid approach.

18. We are further of the view that there is merit in the contention raised by the learned Counsel for the Petitioner when he contended that the instructions dated 10.04.1989 were attracted to the facts of the present case. The first paragraph of the instructions itself would show that in the facts and circumstances of the present case, the case for review DPC is made out. In order to substantiate the aforesaid view, it would be necessary to read the instructions, which are as under:

18.1 The proceedings of any DPC may be reviewed only if the DPC has not taken all material facts into consideration or if material facts have not been brought to the notice of the DPC or if there have been grave errors in the procedure followed by the DPC. Thus, it may be necessary to convene Review DP Cs to rectify certain unintentional mistakes e.g.:

a) where eligible persons were omitted to be considered;

b) where ineligible persons were considered by mistake;

c) where the seniority of a person is revised with retrospective effect resulting in a variance of the seniority list placed before the DPC;

d) where some procedural irregularity as committed by a DPC;

e) where adverse remarks in the C Rs were toned down or expunged after the DPC had considered the case of the officer.

These instances are not exhaustive but only illustrative.

A perusal of opening para 18.1 would show that the proceedings of any DPC have to be reviewed if the DPC has not taken all material facts into account or material facts have not been brought to the notice of the DPC or there was grave error in the procedure followed by it. In Clause (e), it is contemplated that in case adverse remarks in the confidential report are expunged after the DPC then a case for review DPC would be made out.

19. In the present case, the DPC held in March 1992, failed to consider the report concerning the Petitioner as recorded by the Reviewing Officer in respect of the year 1989-90, which upgraded ''Very Good'', whereas material placed before the DPC only showed him ''Good''. Even other record giving Commendation Certificate to the Petitioner alongwith cash award have not been placed before the DPC. Therefore, we are of the view even under the instructions dated 10.04.1989, the Petitioner has become entitled to a review DPC meeting to re-consider his case for promotion to the post of Joint Commissioner with effect from the date when junior to him like Shri Mohinder Singh was considered and promoted.

20. As a sequel to the above discussion, this petition succeeds. The order dated 25.10.2002 (P-8) is set aside. Consequently, order of the Tribunal dated 07.04.2003 (P-12) is also quashed. The question of law posed in the opening para is answered against the UPSC and Government. Accordingly, the Respondents are directed to convene a review DPC meeting within a period of two months from the date of receipt of a copy of this order. Respondent No. 1 is further directed to place correct records concerning the Petitioner before UPSC, which should include his ACR, Commendation Certificate and all other rewards given to the Petitioner ensuring that no error is committed this time. If the Petitioner is found to be meritorious then he should be given promotion as Joint Commissioner with effect from the date person junior to him like Mohinder Singh was promoted. The Petitioner is held entitled to his cost, which is determined at Rs. 25,000/-. The cost shall be paid to the Petitioner by issuing a Demand Draft in his name within two months.