

(1994) 05 GAU CK 0013

Gauhati High Court

Case No: Civil Rule No. 3878 of 1991

Arati Deb Choudhury

APPELLANT

Vs

State of Assam and
Others

RESPONDENT

Date of Decision: May 4, 1994

Acts Referred:

- Constitution of India, 1950 - Article 226
- Income Tax Act, 1961 - Section 35

Citation: (1994) 2 GLR 311

Hon'ble Judges: J.N. Sharma, J

Bench: Single Bench

Advocate: B.K. Das, R.P. Sharma, S. Dutta and K.K. Dey, for the Appellant; N.M. Lahiri, N. Choudhury and H.S. Thangkhiew, for the Respondent

Final Decision: Allowed

Judgement

J.N. Sarma, J.

This application under Article 226 of the Constitution of India has been filed praying the following reliefs:

- (i) to forebear the Respondents from giving effect the order dated 11.1.91 (Annexure-12), order dated 29.1.91 (Annexure-13), order dated 29.1.91 (Annexure-14) and order dated 22.9.87 (Annexure-2).
- (ii) for a direction for notional promotion to the Petitioner with effect from 1.1.1983.

2. The brief facts are as follows:

On 5.2.53 the Petitioner was appointed in the post of L.D.A. in the office of the Director of Food and Civil Supplies. On 12.7.56 the Respondent No. 5 was appointed in the post of L.D.A. On 12.8.74 the Petitioner was promoted to the post of U.D.A. On 1.9.74 both the Petitioner and Respondent No. 5 was confirmed in the post of U.D.A.

On 13.8.84 the Respondent No. 5 was considered less efficient in the post of U.D.A. and she was allotted lighter work usually done by LDA. This is Annexure 10(A) to the writ application. The Annexure 10(A) is an order by the Director. This order will show that Smti, Suchitra Majumdar J.D.A. will attend the despatch and diary table of Central Branch, So the statement that Respondent No. 5 was considered less efficient In the post of U.D.A. is not borne out by Annexure-10(A) and it is incorrect. On 14.8.84 the Petitioner was allowed to work in the past of Superintendent for some days. On 2.3.85 the Petitioner was regularly promoted to the post of Superintendent. On 3.5.85 the Respondent No. 5 was promoted to the post of Superintendent. The Petitioner earned increment in the post of Superintendent with effect from 1.3.87. Although the Petitioner became eligible for promotion to the post of Registrar the Respondent No. 5 who is junior to the Petitioner was promoted to the post of Registrar, The Petitioner approached the authorities with representation against the promotion of Respondent No. 5 to the post of Registrar superseding her just claim. The Respondent No. 2 communicated to the Petitioner the alleged adverse entry in her ACR in respect of the year 1986. This was on 29.9.87. The Petitioner filed a representation before Respondent No, 2 against the adverse entry in her ACR. The Petitioner filed an appeal before the appellate authority. Thereafter the Govt, holding that the Petitioner cannot be deprived of her promotion on the basis of un-communicated ACR, set aside the promotion of Respondent No. 5 to the post of Registrar. The Petitioner earned increment in the post of Superintendent with effect from 1.3.88. On 6.8.88 the Respondent No. 5 was reverted to the post of Petitioner and the Petitioner was promoted to the post of Registrar. The Respondent No. 5 filed an appeal before the Govt, which was rejected. The Respondent No. 5 filed an appeal before the Assam Administrative Tribunal which was registered as Case No. 77ATA/90 and the learned Tribunal came to a finding that the Petitioner did not complete two years of continuous service in the post of Superintendent to be eligible to be promoted to the post of Registrar as required under the Rules, The Tribunal directed that as neither party has completed 2 years of service as Superintendent as required under the Rules the selection for promotion shall be made only on the basis of ACR as Superintendent and before making such selection the representation dated 17.11.87 of the Petitioner against the adverse entry in her ACR shall be disposed of. The Petitioner filed a writ application before this Court being CR No. 1996/90 and the same was disposed of by this Court by remanding the same to the Govt, to consider the matter as directed by the Tribunal. On 11.1.91 the representation dated 17.11.87 was rejected by the authority holding that the reporting authority was not satisfied with the work of the petitioner. On 29.1.91 the selection committee held that although the Petitioner is senior to Respondent No. 5, she cannot be selected due to adverse entry in her ACR. The selection committee selected Respondent No. 5 to the post of Registrar and the Petitioner was reverted on 29.1.91 and promoted Respondent No, 5 to the post of Registrar. The Petitioner filed an appeal before the Governor of Assam, but the Governor rejected the said appeal. In the meantime, the Petitioner has retired from service. Hence this writ

application.

3. I have heard Shri B.K. Das, learned Counsel for the Petitioner and Shri N.M. Lahiri, learned Counsel for Respondent No. 5.

4. Shri Lahiri raises a preliminary objection regarding maintainability of this writ application on the ground that the Petitioner should have approached the Assam Administrative Tribunal and by-passing the Tribunal she has rushed to this court. In connection with this preliminary objection Shri Lahiri places reliance on [Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others](#), (Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Ltd, where in paragraph 3 the Supreme Court pointed out as follows:

In [Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others](#), Sen E.S. Venkataramiah and R.B. Misra, JJ held that where the statute itself provided the Petitioners with an efficacious alternative remedy by way of an appeal to the prescribed authority, a second appeal to the tribunal and thereafter to have the case stated to the High Court it was not for the High Court to exercise its extraordinary jurisdiction under Article 226 of the Constitution ignoring as it were, the complete statutory machinery, That it has become necessary, even how, for us to repeat this admonition is indeed a matter of tragic concern to us, Article 226 is not meant to short circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill suited to meet the demands of extraordinary situations as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Art, 226 of the Constitution. But then the court must have good and sufficient reason to by-pass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters.

5. Shri Lahiri also places reliance in a recent judgment of this Court in Civil Rule No. 77192 (Hem Chandra Duarah v. State of Assam and Ors. date of judgment dated 24.1.94, wherein this Court pointed out as follows:

It is true that if there is alternative and efficacious remedy the party should exhaust it before approaching this Court which the Petitioners have not done. Court has imposed a restraint in its own wisdom on its exercise of jurisdiction under Article 226 where the party invoking the jurisdiction has an effective, adequate alternative remedy. This is a rule of convenience and discretion, rather than a rule of law. But it does not oust the jurisdiction of the court. Where the order complained of is alleged to be illegal or invalid as being contrary to law, a petition at the instance of person adversely affected by it would lie under Article 226 of the Constitution.

On the other band Shri Das appearing for the Petitioner places reliance in [L. Hirday Narain Vs. Income Tax Officer, Bareilly](#), L. Hirday Narain v. Income Tax Officer, Bareilly wherein the Supreme Court pointed out as follows:

We are unable to, hold that because a revision application could have been moved for an order correcting the order of the income tax Officer u/s 35, but was not moved, the High Court would be justified in dismissing as not maintainable the petition, which was entertained and was heard on the merits.

6. That was a case where the Supreme Court found that the order u/s 35 of the Income Tax Act is not appealable. But a revision petition lies before the Commissioner of Income Tax and on the facts and circumstances of the case the Supreme Court held that High Court was not justified in dismissing the petition as not maintainable once it was entertained and was heard on merits.

7. In my opinion, this case does not lay down the law that once an application is entertained it cannot be rejected on the ground of not being maintainable for availability of alternative remedy, So this application appears to be not maintainable in view of the existence of adequate remedy. But I am not inclined to throw out the petition on that ground alone. Let us consider the petition on merit. Annexure-13 to the writ application which is the order regarding promotion of the Petitioner and Respondent Mo. 5 is as follows:

In pursuance of order dated 15.9.90 and dated 24.12.90 of Assam Administrative Tribunal a Selection Committee is constituted to select candidate for promotion to the post of Registrar in the office of the Directorate of Food and Civil Supplies, Guwahati. The Committee vide its minutes dated 24.1.91 selected Smti, S. Majumdar, the second senior-most Superintendent of the Directorate of R & CS. for promotion to the post of Registrar on the basis of seniority-cum-merit. Accordingly Smti S. Majumdar, Superintendent is promoted to the post of Registrar vide Notification No. SDB. 22/90/106 dated 29.1.91. The Committee is of me opinion that although Smti. A. Deb Choudhury is senior to Smti S. Majumdar she is not fit for promotion to the post of Registrar with higher responsibility because of her poor performance recorded in her ACRs. The adverse remarks in the ACR was duly communicated to her and representation received from Smti. A Deb Choudhury against the adverse remarks was rejected through a speaking order communicated vide Memo No. DSE. 87/90/15 dated 11.91 (copy enclosed for ready reference).

8. So it was found by the authority that because of the adverse entry and the poor performance recorded in her ACR, she is not fit for promotion to the post of Registrar with higher responsibility.

9. It has been pointed out by the Supreme Court in [State of Kerala and Another Vs. N.M. Thomas and Others](#), State of Kerala v. N.M. Thomas as follows:

The principle of equality is applicable to employment at all stages and in all respects, namely, initial recruitment promotion, retirement, payment of pension and gratuity. With regard to promotion the normal principles are either merit-cum-seniority or seniority-cum-merit means that given the minimum necessary merit requisite for efficiency of administration, the senior though the less meritorious shall have

priority.

10. In the instant case it was found by the Selection Committee that in order to maintain efficient administration the Petitioner cannot be promoted and further her ACRs were taken into consideration. Shri Das submits that the Petitioner was allowed to cross efficiency bar and in that view of the matter even if there was an adverse entry in the ACRs that is deemed to be wiped out by the action of the authority in allowing the Petitioner to cross the efficiency bar and in this connection Shri Das places reliance of the following three decisions:

(i) [Brij Mohan Singh Chopra Vs. State of Punjab](#), Brij Mohan Singh Chopra v. State of Punjab. In this case the Supreme Court pointed out as follows:

Adverse report in a confidential roll cannot be acted upon to deny promotional opportunities unless it is communicated to the person concerned so that he has an opportunity to improve his work and conduct or to explain the circumstances leading to the report.

(ii) [Baldev Raj Chadha Vs. Union of India \(UOI\) and Others](#), Baladev Raj Chadha v. Union of India where the Supreme Court pointed out as follows:

One wonders how an officer whose continuous service for 14 years crossing the efficiency bar and reaching the maximum salary in the scale and with no adverse entries at least for five years Immediately before the compulsory retirement, could be cashiered on the score that long years ago, his performance had been poor, although his superiors had allowed him to cross the efficiency bar without qualms.

(iii) [The State of Punjab Vs. Dewan Chuni Lal](#), The State of Punjab v. Dewa Chuni Lal. That was a case to set aside the order of dismissal of the Respondent from service as illegal and inoperative and in that connection in paragraph 14, the Supreme Court made a remark that reports earlier to 1944 should not have been considered at all inasmuch as he was allowed to cross efficiency bar in that year.

11. The provisions regarding incremented crossing of efficiency bar are available in Fundamental Rules. Rule 24 and 25 which are quoted below:

F.R 24. An increment shall ordinarily be drawn as matter of course unless it is withheld. An increment may be withheld from a Government servant by the State Government, or by any authority to whom the State Government may delegate this power under Rule 6 if his conduct has not been good or his work has not been satisfactory. In ordering the withholding of an increment, the withholding authority shall state the period for which it is withheld and whether the postponement shall have the effect of postponing future increments.

Note : When the authority passing order to withhold an increment fails to specify clearly for what period the officer is to be deprived of his increment, the deprivation should be held to cease on the expiry of the period during which the officer would

have drawn the increment withheld and shall not affect future increments.

F.R. 25, Where an efficiency bar is prescribed in a time-scale, the increment next above the bar shall not be allowed to a Government servant without the specific sanction of the authority empowered to withhold increments under Rule 24 or relevant disciplinary rules applicable to the Government servant or any other authority whom the Governor may, by general or special order, authorise in this behalf.

Note : On each occasion on which an officer is allowed to pass an efficiency bar which had previously been enforced against him, he should come on to the time-scale at such stage as the authority competent to declare the bar removed may fix for him subject of course to the pay admissible according to his length of service.

12. So the bare reading of Rule 24 and 25 will show, that even after a person is allowed to cross efficiency bar it does not wipe out the adverse confidential report made against him. So this submission of Shri Das has no force. Accordingly, the order by which the Petitioner was denied promotion is found to be valid. On behalf of the Govt, no affidavit-in-opposition has been filed but the records were produced before me. I have perused the original records and I find that the case of the petitioner was considered in the proper manner by the Selection Committee and her case for promotion was rejected by the Selection Committee taking a proper and reasonable view of the whole matter. Accordingly, there is no merit in the writ application and the same is rejected. I leave the parties to bear their own costs.