
(2015) 1 GLD 197 : (2014) 3 GLT 622

Gauhati High Court (Kohima Bench)

Case No: Writ Petition (Civil) No. 154(K) of 2011

S.C. Padhi

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision: April 23, 2014

Acts Referred:

Constitution of India, 1950 – Article 14, 226

Citation: (2015) 1 GLD 197 : (2014) 3 GLT 622

Hon'ble Judges: Prasanta Kumar Saikia, J

Bench: Single Bench

Advocate: C.T. Jamir, Sr. Advocate, Wati Jamir and N. Longkumar, Advocate for the Appellant;
Yangerwati, Learned Counsel, Advocate for the Respondent

Judgement

Prasanta Kumar Saikia, J.

Heard Mr. C.T. Jamir, learned senior counsel appearing for the petitioner and also Mr. Yangerwati, learned

counsel, appearing for the respondents. This proceeding has been initiated seeking the following relief:-

In the premises aforesaid, it is most respectfully prayed that your Lordship may be pleased to admit this petition, call for the records, issue Rule

calling upon the respondents to show cause as to why a writ as prayed for should not be issued calling upon the respondents to show cause as to

why the impugned-order dated 13.06.11 (Annexure-N to the writ petition) should not be set aside and quashed and upon cause or causes being

shown and after perusing the records and hearing the parties. Your Lordship may be pleased to set aside and quashed the impugned order dated

13.06.11 (Annexure-N to the writ petition) and further direct the respondent authorities to constitute a review DPC and consider the case of the

petitioner for promotion to the post of Jt. Director (Admn.) w.e.f. 13.07.07 i.e. the date when his juniors were given promotion to the rank of Jt.

Director (Admn.) with all consequential benefits. And/or be further pleased to pass such other order or orders as your Lordship may deem fit and

proper.

2. The facts which are stated in the petitioner under Article 226 of the Constitution of India and which are necessary for disposal of the present

proceeding, in brief, are that the petitioner herein was initially appointed as Civilian Officer Grade-II (Group A Gazetted) in Border Road

Organisation, (in short, BRO) in the year 1990 and 1997, he was promoted to the rank of Sr. Administrative Officer, (in short, SAO). The next

promotional post for the officer working as SAO is Joint Director (Administration).

3. It has been stated that the petitioner has all along been discharging his duties sincerely, with dedication and to the best of his ability. On

03.07.2007, a Departmental Promotion Committee, (in short, DPC) was constituted to consider the promotion of officers in the rank of SAO to

the post of Jt. Director (Administration) and all the officers in the zone of consideration including the petitioner were considered for promotion.

4. However, the DPC did not recommend the petitioner for promotion to the post aforesaid on the ground that the petitioner did not have required

bench mark in the ACR for the period pertaining 2002 to 2003 and 2003 to 2004. But then, the DPC had recommended officers junior to the

petitioner for promotion to the post of Joint Director (Administration) and in that connection, letter dated 13.07.07 was issued promoting the

officers junior to the petitioner.

5. The petitioner came to know that criteria for promotion to the post of Joint Director (Administration) adopted by the DPC was that officers

must have bench mark for 5 years. Since the grading of the petitioner was not communicated to him he was not aware of the adverse grading

awarded to him for the period aforesaid for which he could not make necessary representation seeking up-gradation in the ACR although under

the law the authority concerned is bound to communicate to the officer commented upon, the remarks made in the ACR.

6. However, on coming to know about the adverse entries in the ACR, he submitted a representation to the authority on 10.08.07 seeking up-

gradation of his ACR for the year 2002 to 2003 and 2003 to 2004. The authorities considered his representation and vide letter dated 31.08.08, it

was communicated that his grading was upgraded and same was forwarded to the appropriate authorities for doing further needful. After up-

gradation of his ACR vide letter 31.01.08, the petitioner submitted an appeal to the Secretary BRDB informing him that his ACR has been

upgraded.

7. By the letter dated 31.01.2008, the petitioner further requested the Secretary BRDB to constitute a review DPC to consider his case for

promotion to the next higher grade. But instead of taking action as prayed for by him, the authorities concerned continued to promote more and

more officers junior to him to the higher post. Being aggrieved, the petitioner approached this Court by way of filing WP (C) 94/2010 seeking a

direction requiring the authorities concerned to address his grievance.

8. However, during the pendency of such proceeding, he was made to know that his case for promotion to higher grade would be considered

favourably. On such assurance, the petitioner found it necessary to withdraw the proceeding stated above and made necessary prayer in that

regard. This Court had allowed him to withdraw the case, however, with liberty to file afresh if so advised.

9. In the meantime, the petitioner vide order dated 12.11.10 was promoted to the rank of Joint Director (Administration) w.e.f. the date of taking

charge of the post. He was not given promotion from the date on his immediate juniors were promoted to the post of Jt. Director (Administration),

such a date being 13.07.07.

10. According to the petitioner, such his ACR for the period aforesaid had been upgraded, the infirmities he suffered from for the period between

2003 to 2004 stood removed completely and on such removal of the adverse entries in the ACR, it needs to be construed that his ACR was

always up to the mark as far as his promotion to higher grade is concerned and as such, his promotion ought to have been made effective--not

from the date of taking charge--but--from 13.07.07 when his juniors were promoted to the next higher grade.

11. Since the grievance was not attended to, the petitioner once again submitted a representation to the authorities concerned on 14.12.2010

highlighting all his grievances seeking redress thereto. The reliefs, he sought for, was that in view of subsequent up-gradation of his ACR, his

promotion to the post of Joint Director (Administration) was to be made effective from 13.07.07. However, the authorities did not address his

grievance despite a long period being over.

12. Once again being let down, by the authorities for not addressing his grievances, the petitioner was forced to approach this Court by filing WP

(C) 14(K)/2011 seeking a direction requiring the respondent authorities to hold review DPC and to consider the case of the petitioner to settle

seniority position in the grade of Joint Director (Administration) in the light of letter dated 31.01.2008. This Court on taking cognizance of such

application and on hearing the parties thereto accepted the prayer. The relevant part of the order is reproduce below:

In view of the above and since the representation of the petitioner dated 14th December, 2010 has not been disposed of till date by Secretary,

Border Roads Development Board, the present writ petition is disposed of with a direction to the Secretary, Border Roads Development Board,

to consider the same and pass necessary order relating to the claim of the petitioner for promotion to the rank, of Joint Director (Administration)

with effect from 13th July, 2007, i.e. the date when his juniors were promoted to the said rank and in the event if it is found that the petitioner is

entitled to such relief, the same shall be given to the petitioner, if necessary, after holding the review DPC. The said exercise is directed to be

completed within a period of 6(six) weeks from today, since the petitioner is due to retire from service on attaining the age of superannuation on

30th June, 2011.

13. In pursuance to the directions rendered by this Court in WP (C) 14(K)/2011 on 03.05.2011, the respondent authorities had taken up the

representation, so filed by the petitioner on 14.12.10. However, without taking consideration the letter dated 31.01.08, the direction rendered in

the order aforementioned as well as the law, laid down by the Hon"ble Supreme Court, in the case of Dev Dutt Vs. Union of India (UOI) and

Others, as well as in Abhijit Ghosh Dastidar Vs. Union of India (UOI) and Others, , the respondent authorities rejected the representation, the

petitioner once again approached this Court seeking relief aforementioned.

14. Notice of this proceeding was served on the respondents. The respondents entered appearance and having filed common affidavit contested

the claims, made by the petitioner in this proceeding. It has been submitted that under the DOP & T, there is no arrangement for communicating

adverse remark to the officer communicating upon. More importantly, there is no provision in DOP & T requiring authorities to review the

recommendation of DPC. In other words, the recommendation once made by the DPC becomes final and unsusceptible to any kind of review.

Therefore, the officer, who was ignored by DPC in matter of promotion, cannot validly apply seeking review of recommendation already made by

DPC.

15. In the connection, it has been stated that in recommending or not recommending promotion, the DPC basically acted on the recommendation

of the accepting authority. But once reporting and accepting authority rendered their remarks on the performance of the officer/staff concerned,

they become functus officio and as such, there is no scope whatsoever reviewing the recommendation made the DPC under which the petitioner"s

case for promotion to the higher grade was ignored.

16. It is also the case of the respondents that even if the petitioner earned in 2003 and 2004 the remark which he earned only after making an

appeal to reconsider his remark, such upgraded remarks no way change the overall assessment of the officer concerned as far as his performance

during the period in question is concerned. In other words, such remark could not make out any case for promoting the petitioner to higher grade.

17. It is also the case of the respondents that the direction, rendered by this Court in WP (C) 14(K)/2012, was followed in letter and spirit having

regard to the letter dated 31.01.08 and the relevant law holding the field in question. In support of such contention, it has been stated that while

rejecting the representation, submitted by the petitioner on 14.11.10, the authorities had taken into account not only the letter dated 31.01.2008

but also the direction rendered in the case aforementioned as well as the law which hold the filed in question.

18. In view of above, the respondent authorities committed no wrong whatsoever in rejecting the representation submitted by the petitioner seeking

promotion to the rank of Joint Director (Administration) retrospectively from 13.7.07, the date when his immediate juniors were promoted to

higher grade. Therefore, the respondents prayed dismissal of the proceeding.

19. I have considered the rival submissions having regard to the averments made in the pleadings and documents attached therewith and the

decisions relied upon. Before one proceeds further, one need to know to what extent, the contention of the respondents that under law, they were

not required to communicate adverse entry made in the ACR of its officers/staff is found tenable in law. It may be stated that such a stand has also

been taken by the authorities concerned in the order which is impugned in this proceeding.

20. In that connection, one needs to go through the direction rendered by the Hon'ble Supreme Court in the case of Dev Dutt (supra). The

relevant part of the judgment is reproduced below:-

33. In our opinion, fair play required that the respondent should have communicated the ""good"" entry of 1993-1994 to the appellant so that he

could have an opportunity of making a representation praying for upgrading the same so that he could be eligible for promotion. Non

communication of the said entry, in our opinion, was hence unfair on the part of the respondent and hence violative in natural justice.

36. In the present case, we are developing the principle of natural justice by holding that fairness and transparency in public administration requires

that all entries (whether poor, fair, average good or very good) in the annual confidential report of a public servant, whether in civil judicial, police

or any State service (except the military), must be communicated to him within a reasonable period so that he can make a representation for its up-

gradation.

21. The view so expressed in Dev Dutt (supra) has also been reiterated in the case of Abhijit Ghosh Dastidar (supra). A reading of the aforesaid

provisions of law makes it more than clear that remarks of almost all kinds in the ACR are to be communicated to the officers so that the officers

always get an opportunity to try for better recommendation by improving their performance which ultimately help them to climb more and more the

ladder of service career.

22. Therefore, non-communication of remarks made in the ACR of public servant is violative of provisions incorporated in Article 14 of the

Constitution of India. That being so, the contention of the respondents that they are under no obligation to communicate the remarks in the ACR

even if such remark happens to be quite adverse to the officer concerned is found to be not in tune with law laid down by Apex Court of the

country and as such, such contention becomes unsustainable in law.

23. It may be stated that recruitment rules of most of the departments were silent on the matter regarding necessity of communicating adverse entry

in the ACR to the officer concerned. But that does not mean that the service rules never permit authorities concerned to communicate the public

servant the relevant entry in the ACR, more particularly, when such remarks affects adversely the future prospect of such public servants.

24. However, the situation on that count has gone sea change with the announcement of the decisions in the cases aforementioned. Being so, law,

as it is today, requires the authorities to communicate almost all kinds of remarks in the ACR and the duty, so cast on the authorities, is quite

mandatory in nature. Equally important, law also recognizes the right of the officers, who harbors a feeling of not being let down for improper

assessment of his performance, to prefer appeal seeking up-gradation of remark in the ACR.

25. Since the law makes it obligatory on the authority concerned to communicate the remark in the ACR, since law also allows the officer/staff to

make representation seeking review of assessment of his performance as public servant and since the authority concerned is duty bound to review

the performance of such officer/staff, it naturally follows from above revelations that the authority is to act on such reassessment provided such

reassessment upgrades the performance for a particular period which was earlier assessed at a lower grade.

26. It also follows from above revelations that once the performance of an officer, who was given lower grade than he expected, is upgraded, the

department needs to give him all benefits which he would have earned had he been properly assessed at earlier round of assessment since the

disability he suffers from, from the earlier round of assessment stood removed inasmuch as the subsequent assessment completely substituted

earlier appraisal under which such an officer stood assessed at a grade lower than he actually deserves. Any other conclusion invariably set at

naught the very decisive law laid down in Dev Dutt (supra) and Abhijit Ghosh Dastidar (supra).

27. One may note here that the decisions in Dev Dutt (supra) and Abhijit Ghosh Dastidar (supra) are so commanding, so imposing and so

assertive that Hon"ble Apex Court of the country had gone to the extent of saying that any arrangement in any service law which runs counter to

the decisions in Dev Dutt (supra) and Abhijit Ghosh Dastidar (supra) are to be ignored since such arrangement also violate the principle

incorporated in Article 14 of the Constitution. The relevant portion of the judgment is reproduced below:-

This is our opinion is the correct legal position even though there may be no rules/G.O. requiring communication of the entry, or even if there is a

rule G.O. prohibiting it, because the principle of non-arbitrariness in State action as envisaged by Article 14 of the Constitution in our opinion

requires such communication. Article 14 will override all rules or Government orders.

28. Therefore, plea of the respondents that there is no provision in DOP & T for communicating adverse entry in the ACR, that there is no

provision for up-gradation of remarks in the ACR and that there is no provision or review of DPC recommendation even if the ACR is upgraded in

the meantime are all found to be untenable in law in view of the decision rendered in the case of Dev Dutt (supra) and Abhijit Ghosh Dastidar

(supra) and such plea cannot be allowed to be raised to deny what is legally dues to the petitioner which he was deprived of.....not for his own

fault but.....owing to wrong assessment of his performance by the authority concerned.

29. The falsity of the some claims of the respondents, such as, there is no provision in the DOP & T for communicating the entry made in the

ACRs of the officers and employees of the department concerned, the grading once awarded by the accepting authority in regard to performance

of the public servants cannot be reconsidered as well as the claim that the recommendation made by DPC cannot be reviewed, once again, for

want of necessary provisions in the DOP & T becomes quite apparent from some contradictory stances taken by the respondents in this

proceeding.

30. Though the respondents stated in their counter affidavit that DOP & T does not allow the respondents to communicate the remarks in the ACR

or reassess the recommendation in the ACR or review the recommendation of the DPC, yet the record reveals that the Entry in the ACR of the

petitioner was communicated to the petitioner enabling him to prefer an appeal leading to reassessment of his ACR which his performance for the

year 2003 and 2004 was upgraded. This is no uncertain term states that some of the stances taken by the respondents in this proceeding having

huge" bearing on the outcome of the present proceeding have no factual basis.

31. So situated, let us see whether the respondents have ever complied with the direction rendered in judgment dated 03.05.2011 passed in WP

(C) 14(K)/2011. Here, it may be stated that the order dated 03.05.2011, passed in WP (C) 14(K)/2011 have never been questioned in any

forum whatsoever meaning thereby that the directions rendered therein becomes final and as such, the respondents are bound to carry out

directions in such order.

32. One may note here that under the judgment dated 03.05.2011 the respondents were asked to carry out following directions:-

(a) to consider the respondents dated 14.12.2010 and pass necessary order relating to the claim of the petitioner for promotion to the rank of Joint

Director (Administration) with effect from 13th July, 2007, i.e. the date when his juniors were promoted to the said rank, and in the event if it is

found that the petitioner is entitled to such relief.

(b) to give the petitioner, if necessary, after holding the review DPC all the benefits, he entitled to.

33. But then, the respondents claim that they have considered the representation as required under the judgment aforesaid and for that purpose

they even considered the recommendations, made in letter dated 31.01.2008. Does such a stance stand to reason? A suave perusal of the order

reveals that in considering the representation in question, the authorities aforementioned took a too technical view, as is evident from the aforesaid

order, more particularly, the averment made in paragraph 6, 7 and 8 of such order.

34. A perusal of the order aforesaid reveals that the respondents refused to consider the case of the petitioner on the ground that the review of

recommendation of DPC held in 2007 is not permissible under the DOP & T and basically on such finding, the respondents were pleased to reject

the petitioner's representation. This speaks loud and clear that the respondents never considered the representation in the terms of the direction

rendered in the order aforementioned.

35. It is worth noting here that the respondents claim that they considered the remarks in the letter dated 31.01.2008 and found that the remarks

upgrading the performance of the petitioner for the year of 2003 and 2004 did not make any fundamental changes in the overall performance of the

officer during the period aforesaid. But the respondents did not assign any reason as to why they come to the conclusion that despite upgrading the

ACR of the petitioner, his overall performance for the year 2003 and 2004 remains the same. This only shows the hollowness of the aforesaid

claim of the respondents.

36. The above claim of the respondents gets further battering for the reason that although the respondents claim that the petitioner's overall

performance for the year 2003 and 2004 remains the same despite the up-gradation of the remarks in the ACR of year 2003 and 2004, yet, on

the basis of such up-gradation, he was given promotion to the higher grade in 2008 with effect from the date on which he assumed charge if such

office.

37. This is one testimony of the representation dated 14.12.2010 not being considered in the light of direction rendered in WP (C) 14(K)/2011.

This is also one more evidence of reasoning assigned for rejecting the representation dated 14.12.2010 far from being satisfactory.

38. In view of above, I am of the opinion that respondents did not consider the representation dated 14.12.10 in terms of the direction rendered in

WP (C) 14(K)/2011 on 03.05.2012.

39. Therefore, I have no other option but to reiterate the directions rendered by this Court in its order dated 03.05.2012 passed in WP (C) No.

14(K)/2011 on quashing the order impugned in the proceeding.

40. Consequently, the order dated 13.06.2011 stands quashed and set aside.

41. The respondents are directed to carry out the order passed in order dated 03.05.2012 passed in WP (C) 14(K)/2011 in letter and spirit in the

light of observations made hereinbefore. Such exercise needs to be completed as early as possible but in no case beyond 6(six) months from the

date of receipt of copy of this order.

42. If on considering the representation as stated above, the respondents come to the conclusion that the petitioner deserved to be promoted then,

his promotion should be made effective from the date on which his immediate juniors were promoted to the next higher grade from the first time,

same being 13.07.2007 and his pay should be fixed in the promotional grade with effect from 13.07.2007.

43. However, since the petitioner has already retired from the post of Joint Director (Administration) in 2010 on attaining the age of

superannuation, the benefit of such fixation of pay shall be confined to pension and pensionary benefits only.

44. With the above observations and directions, this proceeding is allowed however without any cost. No cost.