
(1977) 09 MP CK 0001

Madhya Pradesh High Court

Case No: Miscellaneous Petition No. 720 of 1972

S.R. Kesharwani

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision: Sept. 1, 1977

Acts Referred:

- Constitution of India, 1950 - Article 16, 226, 227

Hon'ble Judges: K.K. Dube, J; J.P. Bajpai, J

Bench: Division Bench

Advocate: B.K. Pandey with P.V. Pandit, for the Appellant; Saxena, Government Advocate, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

J.P. Bajpai, J.

By this petition under Articles 226/227 of the Constitution of India, the petitioner, employed as Food Inspector in the Food and Civil Supplies Department of the State of Madhya Pradesh, seeks to challenge the promotion of respondents Nos. 4 to 13 and 15 by superseding his claim for promotion.

2. It was contended on behalf of the respondent-State that the case of the petitioner was duly considered by the departmental promotion committee in May, 1968, but since the petitioner was found unfit, the other respondents, though junior to him, were promoted. It was also stated on behalf of the State that the reason for superseding the petitioner was that there were adverse entries in his character roll for the years 1963 and 1964-65 and in view of these two adverse entries, which were placed before the departmental promotion committee, the petitioner was not found fit (page 37 of the paper book in reply to the application for amendment).

3. On behalf of the petitioner, it was asserted that since no such adverse entries were ever communicated to him, there is no truth in the allegation made by the State. On being asked by this Court to produce those confidential remarks, which have been relied by the departmental promotion committee, the reply of the State was that the aforesaid confidential files were missing and, therefore, it was not possible to procure them. It was, however, contended that from the proceedings of the departmental promotion committee, it can be very well inferred that such a record of adverse entries was in fact before the committee at the time of selection. It was further contended that necessary departmental action was being taken against the clerk in-charge of the custody of the record for the loss of the relevant confidential file.

4. In the back ground of the aforesaid facts and circumstances, the following points arise for determination:

(i) Whether uncommunicated adverse remarks in the character roll of the petitioner could be taken note of by the departmental promotion committee for superseding his claim for promotion?

(ii) Whether the selection made by the departmental promotion committee and accepted by the State Government in consultation with the Public Service Commission and already implemented is invalid on the ground that certain uncommunicated adverse remarks entered in the confidential file of the petitioner were taken note by the committee while holding that the petitioner was not found fit for promotion?

5. It was not disputed that the subject matter of writing confidential reports in connection with certain adverse remarks and representation by the employee against the same is a matter governed by executive instructions as contained in General Book Circular (Part I Serial No. 7). These circulars have been, time to time, amended by memoranda issued by the General Administration Department of the State Government. In this respect, it will be relevant to quote the following instructions:--

4. A confidential report must be written with the utmost care since on it will depend the promotion and often the career of the officer. Reporting Officers must avoid vague remarks and opinions or conclusions based on insufficient data or on hearsay. Care should be taken not to import personal likes and dislikes. Reporting Officers should not make observations, which may tend to constitute a reflection or comment on an authority other than the officer on whom the report is written.

(Italics is ours)

9. (i) Supervisory officers should maintain a confidential diary in which instances which create suspicion about the integrity of a subordinate should be noted from time to time and action to verify the truth of such suspicion should be taken

expeditiously by making confidential enquiries departmentally or by referring the matter to the Special Police Establishment of the State Vigilance Commission. This diary should be consulted while writing the annual confidential report particularly if a reference about the integrity and honesty of the Government servant is to be made in the report. If the suspicions are unconfirmed, further action as detailed below should be taken:

(a) Reference pertaining to integrity in the confidential report should not be made and a separate secret note about the doubts and suspicions regarding the officer's integrity should be recorded simultaneously and followed up.

(b) A copy of the secret note should be sent together with the confidential report to the next superior officer, who should ensure that the follow up action is taken with due expedition.

(c) If, as a result of the follow up action, an officer is exonerated, his integrity should be certified and an entry to that effect made in the confidential report. If suspicions regarding his Integrity are confirmed, this fact should also be recorded and then be duly communicated to the officer concerned.

(ii)

12 (i) When a report is built up on individual opinion recorded by different departmental superiors, it is only the opinion accepted by the competent authority indicated in column 7 of the Appendix, which should, if necessary, be communicated to the officer concerned. The competent authority will decide whether remarks made by other recording officers should be communicated. Before a decision is taken to make a communication to the officer not only the report for one year, but also reports for the preceding years may have to be examined.

(ii) Only those remarks, which can be remedied, need be communicated, but while doing so, the substance of the entire report, including that may have been said in praise of the officer should be communicated. Where the report of an officer shows that he had made efforts to remedy or overcome defects mentioned in the preceding report, the fact should be communicated to the officer.

(iii) A self-contained demi-official letter should be sent by the appointing authority to the officer whose failing it is considered necessary to bring to his notice.

(iv) If the adverse remarks are trivial or of a nature not to justify a formal communication to the officer, it would suffice if the competent authority is asked to convey the remarks orally to the officer concerned so that he may make endeavors to remedy the defects.

(v) When an officer is on deputation, adverse remarks may be communicated and the representations against such communications disposed of by the authority under whom the officer is on deputation. If, however, an officer returns from

deputation before this can be done, the State Government will communicate the adverse remarks to the officer concerned, and on receipt of his representation, if any, send the same to the authority, to which the officer was deputed, for disposal without any comments. The final views of that authority should be kept in the officer's personal confidential file.

REPRESENTATION AGAINST ADVERSE REMARKS

13 (i) It is open to an officer to represent to Government against the adverse remarks communicated to him. Representations, against adverse entries should be made within three months of the date of communication. However, the competent authority may, at its discretion, entertain a representation made beyond the time specified above, if there is satisfactory explanation for the delay.

(ii) Confidential reports are based on the general impression of the conduct, character and the quality work of the officer reported on, created in the mind of the reporting officer over a long period of observation and for this reason it may not always be possible for him to cite categorical instances in support of the remarks. Even when some categorical instances are cited, it is not necessary except in very exceptional circumstances, that the instances should be communicated to the officer reported on, as it is not intended that representations should be allowed to develop into regular trials. While it is necessary to protect officers against biased or prejudiced remarks, the interests of administration and the necessity of maintaining discipline must also be kept in view. Therefore, when a representation against adverse remarks is made, it should suffice to ask the reporting officer to give the basis for such remarks. On receipt of his report, Government will satisfy themselves by referring to relevant documents and records whether the remarks on the whole are justified or not. In case, Government are satisfied that the remarks were justified, the officer should be told accordingly and his representation rejected. Where, however, it is noticed that the representation against the adverse remarks indicate the officer's unwillingness to correct himself and that he did not take the correction pointed out to him in good spirit, he should be informed accordingly. A copy of this communication should be placed in the Confidential Personal File. If, however, the competent authority on scrutiny of the report of the representation comes to the conclusion that the adverse remarks were not justified, were inspired of malice or were entirely incorrect or unfounded, or unauthorised and, therefore, deserve expunction, he should score through the remarks, paste it over, or obliterate it otherwise, and should put his signature and date, stating that he had done so.

(iii) (Regarding report to be submitted within one month.)

(iv) Representations or explanations against adverse entries should not be added to the confidential reports. If the representation was well founded, it would have resulted in the competent authority making a note to that effect on the report; if the

representation was without substance, it must have been rejected. In either case, no useful purpose would be served by adding the representation itself to the confidential report.

(Italics is ours)

Thus from the perusal of the aforesaid instructions, it is apparent that the administration has been always aware of the fact that the confidential reports have a far reaching effect on the career of a Government servant since his future promotion and very often the entire career of the officer depends upon such remarks.

6. In order to avoid any injustice in this respect, it has been observed in Rule 4 that the reporting officers must avoid making vague remarks and forming opinion based on insufficient data or hearsay allegations. Officer making the entries in the confidential report should also take care that personal likes and dislikes are not to be imported. As regards the opinion of the superior officer about the integrity of an employee, instruction No. 9 is self-contained code. Adverse remarks relating to integrity should be made only on the basis of sufficient data which should be collected. In cases of suspicion and doubt about the integrity of an officer, a follow up action has been advised to confirm the reports pertaining to the integrity of the Government servant. When as a result of the follow up action, it is found that the reports about the integrity are confirmed, the said fact is then to be recorded in the confidential file of the employee and is thereafter to be communicated to him as provided in sub clause (c) of Clause 9 (i). Similarly the competent authority has been given authority to decide whether other adverse entries need communication or not. But so far as the reports relating to integrity of an employee are concerned, they have to be first confirmed and then if found to be correct, are to be entered and these communicated. Generally, the basic guide line in respect of communication of adverse remarks is contained in Rule 12 (i) and (ii) and only those remarks which can be remedied need to be communicated. Rule 13 further provides for a representation against such remarks communicated to the employee and it has also been provided that after considering the representation, they will either be expunged or modified.

7. Thus, on going through the scheme contemplated by the aforesaid instructions, it is apparent that these instructions are based on the principles of fair play and natural justice. The instructions require special care to be taken before recording any adverse remark in respect of integrity of a Government servant. It has been rightly advised that follow up action should be taken to confirm the doubts about the integrity. Such remarks should not be based on mere hearsay reports or vague allegations. Since by such remarks, the case of the Government servant is liable to be prejudiced to a large extent, it has been provided that the same be communicated to him, so that he may avail of the opportunity of making a representation. There is always a possibility that various persons whose intents

clash may be displeased with a Government servant who honestly discharges his duties, without fear or favour. It is always easy to make such wild allegations by saying that integrity is reported to be doubtful.

8. In the present case, it was not in dispute that the adverse entries referred above were never communicated to the petitioner at any time. From the abstract of the proceedings of the departmental promotion committee filed by the State, we find that two adverse entries relating to the period 1963 to 1965 disclosed that the integrity of the petitioner was reported to be doubtful. As is evident from the circular quoted above, these remarks were required to be communicated after confirming the truth of the same by a proper follow up action. The only material before us is in the shape of the following observations made by the departmental promotion committee.

17. S.R. Kesharwani-He has been reported satisfactory. His integrity reported doubtful in 1963 and repeated in 1964-65. He needs to be watched carefully and a special report obtained. He is not considered suitable for inclusion in the list at present.

9. Now the question arises whether the departmental promotion committee, while considering the case of the eligible candidates on the basis of their service records placed before it, is expected also to investigate whether certain adverse entries have been communicated to the employee concerned or not.

10. This question came up for consideration before their Lordships of the Supreme Court in *Prakash Chand Sharma v. The Oil and Natural Gas Commission and others* 1970 S L R 116 and therein it was held that it was none of the duties of the departmental promotion committee to do so. The committee could very well take note of the good or bad entries as may be in the service record of an employee and unless the proceedings are found to be mala fide, there will be no scope for interference merely for the reason that certain adverse entries were not communicated. In view of these observations made by their Lordships of the Supreme Court, as reproduced below, it is clear that merely on the ground that certain uncommunicated adverse remarks were taken note of while making the selection, the proceedings of selection and the promotion made in pursuance of the same will not become invalid or liable for interference:

It was not disputed that the instructions as to confidential reports have not been properly observed in this case. It is not suggested that the departmental promotion committee acted mala fide. If the adverse remarks were there in the confidential reports, it was the duty of the departmental promotion committee to take note of them and come to a decision on a consideration of them. The Committee could not be expected to make investigation about the confidential reports. It appears to us that in this case there was no discrimination, purposeful or otherwise and at the best, the Committee's taking into consideration confidential report with respect to

which the petitioner had been given no chance to make a representation was merely fortuitous. In such a state of affairs, we are not satisfied that any interference is called for and the rule will, therefore, be discharged. There will be no order as to costs.

11. On behalf of the petitioner, reliance was placed on a decision reported in "Privy council Federal Court and Supreme Court Service Laws Judgments" Vol. 3, page 371 Gurnam Singh v. State of Rajasthan and Others in support of the contention that uncommunicated adverse remarks, if considered by the promotion committee, rendered the selection invalid. On going through the aforesaid judgment, I find that there is nothing in it so as to infer that any contrary view has been taken to the view expressed by their Lordships of the Supreme Court in Prakashchand Sharma's case (supra). In Gurnam Singh's case, it is true that direction were given for reconsideration of the case of the petitioner after ignoring certain adverse entries which were ultimately expunged on the representation made by the employee. The order for reviewing the recommendations earlier made by the selection committee was actually made for the other reason i.e. on holding certain instructions to be invalid. Under these circumstances, since the matter was already being recommended and the remarks were also subsequently expunged, the aforesaid directions were made with the following observations in para 56:

The allegation of the appellant in his writ petition that the promotion committee had taken into consideration the adverse remarks, when it met in September, 1966, does not appear to be unfounded, however, as we are giving directions for reconsideration of the appellants claims for promotion, if otherwise he is eligible under the Rules, we do not express any opinion on this aspect as facts have to be investigated.

12. Another case cited before us [R.L. Butah Vs. Union of India \(UOI\) and Others](#), . In this case, it has been clearly laid down that the entries made in the confidential file, even if adverse, do not amount to a penalty and as such there was no question of giving the employee an opportunity of being heard before making such entries. But still certain observations in para 17 of the judgment as reproduced below indicate that there was neither any question of injustice having been done nor any occasion of breach of the principles of natural justice arise in view of the practice followed by the promotion committee. The practice followed by the promotion committee in that case was that if any employee has been found unfit due to certain entries and if ultimately on communication the representation made by the employee was accepted and the remarks were expunged or modified, the promotion committee was required to review its recommendations in the light of such result:

17. The confidential report for 1965 was prepared in 1966. Therefore, the report for 1965 would not be before that committee when it declined to recommend the appellant in 1965. This time the report for 1964 would be before it and that too without his representation against it as that report had been conveyed to the

appellant in September, 1965. This fact, however, cannot make any difference. The representation made by the appellant, though made subsequently, was actually rejected with the result that the confidential report for 1964 remained unchanged. The practice followed by the promotion committee was that if in such a case a representation were to be accepted and in consequence the confidential report was altered or expunged, the promotion committee would have to review its recommendation in the light of such a result. In the present case, however, no question of such a review arose as reports for 1964-1965 were, in spite of representations by the appellant, neither altered nor set aside. There was, therefore, no question of any injustice having been done to the appellant despite the fact that the committee had before it the confidential report without there being along with it any representation made by the appellant. Nor did the question of a breach of natural justice arise in view of the aforesaid practice followed by the promotion committee.

In our case, the facts are otherwise. Undisputedly the uncommunicated adverse entries for two years were the only reason for not finding the petitioner fit for promotion. In the absence of communication he could not make any representation and as such it cannot be said that there was no injustice caused or there was no breach of the principles of natural justice.

13. A Division Bench decision of the Delhi High Court reported in *Mallinath Jain v. Municipal Corporation of Delhi and others* 1973 (1) S L R 413 was also cited. In this case, both the aforesaid decisions of the Supreme Court have been referred. An order was made by the Court in this case also directing a review of the recommendation of the promotion committee on the ground that the earlier recommendation was based on uncommunicated adverse entries, which were afterwards modified on the representation made by the employee.

14. In a decision of a Division Bench of this Court *V. K Singh v. State of M.P.* 1975 M P L J 45, all the cases cited above have been referred. However, in that case, it was found that from the material on record, it could be inferred that the adverse entries were communicated and no representation was made at any time afterwards.

15. The learned counsels appearing for the petitioner cited a recent decision of the Supreme Court in the [The Regional Manager and Another Vs. Pawan Kumar Dubey](#). The learned Government Advocate contended that it was a case of reversion and not applicable to the present case. It is true that it was a case of reversion, but the observations in para 16 of the judgment are helpful for the purposes of our case. In that case, there were certain adverse entries in the confidential file of the employee alleging disrespect, disobedience and aspersions said to have been cast by the employee against the conduct of his superior officer. On the basis of these remarks, the employee was not found fit for regular promotion to the superior post and was accordingly reverted. He pleaded ignorance of any such occasion on which he has been disrespectful or has disobeyed any order or has cast aspersions against the

conduct of any superior officer. He made representation against such remarks and when the same was already pending, he was reverted on the ground that he was not found fit in view of the aforesaid adverse entries. Their Lordships of the Supreme Court were of the view that reversion of the petitioner under these circumstances could be held to amount to an unjustified stigma which could not be said to be "devoid of an element of punishment."

16. In our opinion, irrespective of the fact that an employee cannot claim promotion as of right, he has always a right to be fairly considered for promotion if otherwise eligible. In a welfare state, dealings of the superior officers with their subordinates in Government service must be shown to be based on fair play. It is true that it might not be necessary to mention specific instances in the confidential report while making an adverse entry about doubtful integrity of an employee. It is also true that it would not be necessary to hold a regular inquiry to establish the aforesaid fact before making such entry, but the principles of natural justice and fair play definitely require that such remarks shall be made only when the authority is fully satisfied about the same and an opportunity is thereafter given to the employee to represent by communicating such remarks. As a matter of fact, the General Book Circulars quoted above fully satisfy these requirements. The difficulty arises only when the authorities concerned do not care to follow them and when their action is challenged before the Court, the plea taken is that the circulars being administrative instructions, breach of the same, even if any, will not render the action invalid. True it may be, but if injustice is caused to an employee and principles of natural justice are violated, the Courts have without any hesitation always interfered. Mala fide and arbitrary action, even if administrative, cannot be sustained if it results in injustice to others. In service matters, such action will be in contravention of Article 16 of the Constitution of India and may be open to interference in suitable cases by invoking the jurisdiction under Article 226 of the Constitution of India.

17. To sum up the actual position which emerges from the above discussion in this respect is as below:

(a) That the instructions contained in the General Book Circulars provide sufficient guidance in the matter of recording confidential remarks and fully satisfy the requirements of natural justice and efforts should be made to follow the instructions as far as possible and the tendency to flout the same should be avoided;

(b) The circulars being executive instructions, there will be no case of breach of statutory provisions and therefore, a decision about selection or competitive suitability based on such confidential remarks will not be rendered invalid merely on the ground of non-compliance of any requirement unless the same is found to be mala fide;

(c) The departmental promotion committee or any other authority is not expected to enter into investigation about the compliance of the requirements of the instructions about the making and communication of such entries while considering the suitability of an employee for promotion and can always take the remarks into consideration as they find place in the service records;

(d) So far as communication of adverse entries is concerned, it will always depend upon the nature of remarks and the circulars provide sufficient guide line in this respect;

(e) If cases of injustice and breach of principles of natural justice due to non-compliance of the requirements for instance non-communication of such remarks, which need to be communicated, are brought to notice, they should be communicated to the employee with an opportunity to make a representation against the same. If any such representation is made, the same may be expeditiously disposed of;

(f) However, in suitable cases, where it is found that the adverse entries, which have been either expunged or modified, were the only reason for supersession or for not finding the employee concerned as fit for promotion and there was no other material to sustain the recommendation made by the selection committee or departmental promotion committee or any other competent authority, the propriety and desirability of reconsidering the case of the employee in the light of expunged or modified remarks should be considered so as to remove the injustice.

18. However, in the present case, we find that apart from non-communication of the entries, the State was not in a position even to produce the confidential record said to contain those entries. During the course of arguments, the learned Government Advocate tried to urge that the relevant record might have been mischievously done away with by the petitioner in collusion with the officials concerned. Nothing has been shown as to since when those records were found missing. The mere say on behalf of the State, that they have been lost and the blame lies on the petitioner, is of no avail. Apart from this, no material was placed to show that any follow-up action was taken to confirm the truth of the alleged doubtful integrity of the petitioner, as required by the circulars quoted above. Even if the confidential file was lost, the respondent-State could have produced other material or data on the basis of which such adverse entries were made. In the absence of any such material, it will be highly unfair in the peculiar facts and circumstances of this case to compel the petitioner to suffer supersession solely on the ground of alleged adverse entries from 1963 to 1965 which were never communicated to him and thereby he was deprived of an opportunity to make a representation.

19. As already noted above, undisputedly the present petitioner was not found fit for promotion by the departmental promotion committee in 1968 only, because of the two uncommunicated adverse entries relating to the period of 1963 to 1965 and for

no other reason. In the facts and circumstances of this case, therefore, the best course, just and fair to both the sides, in our opinion, would be to direct the State Government to reconsider the case of promotion of the petitioner if necessary after communicating the adverse remarks and giving him an opportunity to make representation against the same within the prescribed time. If any representation is made, the same shall be inquired and expeditiously disposed of. If the adverse entries are not expunged or modified and are maintained, there will, however, be no need to reconsider the case, because the selection made by the departmental promotion committee in April, 1968 has not been found bad on any other ground. However, if the adverse entries in question are either expunged or even modified, the claim of the petitioner for promotion shall be considered afresh and if he is found fit, he shall be promoted without prejudice to his seniority over the other respondents, who were junior to him and have been promoted earlier. This can always be done by giving him notional seniority. We would like to clarify that resort to such course of action, as directed by us, will depend upon the facts and circumstances of each case and no hard and fast rule of universal application can be laid down.

20. During the course of arguments, the learned Government Advocate made a statement that the petitioner has been later on recently found fit by the departmental promotion committee and he is likely to be promoted in due course in pursuance of the aforesaid selection. However, the directions, which we are giving in this case, will be still operative with a view to protect at least the seniority of the petitioner against the other respondents who have been promoted earlier in case he is found fit for promotion as in 1968 along with the other respondents. Further, we would like to clarify that till the final decision is taken in the light of the directions given by us, the promotions given to the respondents and their seniority shall continue to remain in force and will not be affected unless it becomes unavoidably necessary for the State Government to disturb the same.

21. The petition is, therefore, partly allowed. Parties will bear their own costs. The amount of security, if any, be refunded to the petitioner.