Sh. J.S. Garg Vs Union of India (UOI) and Others

Court: Delhi High Court

Date of Decision: Aug. 16, 2002

Citation: (2002) 100 DLT 177 : (2003) 3 SLJ 256

Hon'ble Judges: S.B. Sinha, C.J; S.K. Mahajan, J; A.K. Sikri, J

Bench: Full Bench

Advocate: V. Shekhar and S. Madhavan, for the Appellant; T.V. George and Rahul Sharma for U. Hazarika, for the Respondent

Final Decision: Allowed

Judgement

S.B. Sinha, C.J.
Applicability of a decision of the Apex Court in U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and others, in the

facts and circumstances of this case, is the question involved in this writ petition.

2. The basic fact of the matter is as follows:

3. The petitioner was appointed as Architect Assistant in the office of the Central Public Works Department. He was again appointed as Deputy

Architect in the said department. He was promoted to the post of Architect. The petitioner would contend that he was eligible and qualified in all

respects to be promoted to the post of Senior Architect. However, he was superseded by the respondents 3 to 6 although he was senior to them.

The petitioner would further contend that his position is at S.No. 13 in the seniority list whereas the respondents 3 to 6 were at S.No. 14, 16 and

19.

4. Being aggrieved by and dissatisfied with the said action on the part of the respondents in promoting the said respondents in supersession of his

claim, he filed an Original Application before the Central Administrative Tribunal, New Delhi questioning the said order dated 2nd February, 1998

which was marked as Original Application No. 2389/99 in June, 1999. Two other persons, namely, Mr. R.K. Kakkar and Mr. A.S. Sanyal were

also granted promotions. By reason of the impugned judgment dated 14th September, 2000 the petitioner"s Original Application was dismissed by

the learned Tribunal. A review application was filed by the petitioner which was also dismissed by an order dated 25th October, 2000.

5. The short question which has been raised in this writ petition is that in view of the fact that a bench mark of three ''very good'' within a period of

five years was required for the purposes of promotion having regard to the purported fall in standard it was obligatory on the part of the

respondents to communicate the same to the petitioner pursuant to or in furtherance of Rule 9 of the CPWD Service Manual, Vol-I 1992

(hereinafter referred to as the ''CPWD Manual). In any event, the learned counsel would contend that such an obligation was imperative in terms of

the decision of the Apex Court in U.P. Jal Nigam and Ors. (Supra). Mr. George, learned counsel appearing on behalf of the respondents,

however, would submit that having regard to the service records of the petitioner, even if the remark was communicated to him, the same would

not have led to a different result.

6. It is not in dispute that the remarks obtained by the petitioner giving relevant period are as follows:

FIVE YEAR GRADING ASSESSED FROM 1992 TO 1997 WITHOUT

UNCOMMUNICATED REMARKS :

YEAR REPORTING REVIEWING ACCEPTING REMARKS

1992- Good Good Good

93

1993- Good Good Good

94

1994- Very Good Very Good Very Good

95

1995- Good Good Good Downgraded by

96 Reporting Officer

1996- Very Good Very Good Very Good

97

1997- Very Good Very Good Good Downgraded by

98 Accepting Authority.

7. It is also not in dispute that the ACR of the petitioner in terms whereof he was ranked ''Good'' had never been communicated to him. From the

facts as noticed hereinbefore, it would appear that although he received the remarks ''good'' consecutively for the period 1992-93, 1993-94 as

also 1995-96, he received ''very good'' remarks in the years 1994-95 and 1996-97. The Rule evidently was made for a purpose. Pursuant to and

in furtherance of the said Rule not only the adverse remarks but also in a case where an appropriate authority notices a fall in standard of an officer

in relation to his past performances, he has an obligation to draw his attention to the said effect so that he can be altered for improving his

performance. Such communication, a bare perusal of the Rule would clearly demonstrate, was necessary so as to prevent sufferance of service

prospect by the employee concerned by way of ignorance as regards deterioration in his performance. It stands admitted that the petitioner was

not communicated about such fall in standards.

8. In U.P. Jal Nigam and Ors. (Supra), the Apex Court has clearly held:

We need to explain these observations of the High Court. The Nigam has rules, whereunder an adverse entry is required to be communicated to

the employee concerned, but not downgrading of an entry. It has been urged on behalf of the Nigam that when the nature of the entry does not

reflect any adverseness that is not required to be communicated. As we view it the extreme illustration given by the High Court may reflect an

adverse element compulsorily communicable, but if the graded entry is of going a step down, like failing from ''very good'' to ''good'' that may not

ordinarily be an adverse entry since both are a positive grading. All that is required by the authority recording confidentials in the situation is to

record reasons for such downgrading on the personal file of the officer concerned, and inform him of the change in the form of an advice. If the

variation warranted be not permissible, then the very purpose of writing annual confidential reports would be frustrated. Having achieved an

optimum level the employee on his part may slacken in his work, relaxing secure by his one-time achievement. This would be an undesirable

situation. All the same the sting of adverseness must, in all events, not be reflected in such variations, as otherwise they shall be communicated as

such. It may be emphasised that even a positive confidential entry in a given case can perilously be adverse and to say that an adverse entry should

always be qualitatively damaging may not be true. In the instant case we have seen the service record of the first respondent. No reason for the

change is mentioned. The downgrading is reflected by comparison. This cannot sustain. Having explained in this manner the case of the first

respondent and the system that should prevail in the Jal Nigam, we do not find any difficulty in accepting the ultimate result arrived at by the High

Court.

9. Applicability of the said decision in the instant case has not been questioned. Mr. Shekhar, learned counsel appearing for the petitioner would

urge that had an appropriate communication been made to the petitioner keeping in view the fact that bench mark had been fixed, the petitioner

herein could have filed a representation there against. According to the petitioner in the event such a representation was entertained instead and in

place of "good" he could have been graded as "very good". The learned counsel would further urge that as by reason of such non-communication,

the petitioner had been denied an opportunity to make any effective representation and, then, the impugned order whereby and whereunder the

petitioner has been superseded by his juniors must be held to be bad in law.

10. The learned counsel also contended that in the instant case, the petitioner has alleged malice against the respondent No. 7 as contained in para

4.8 of the Original Application which was not taken into consideration by the learned Tribunal.

11. In the instant case the learned Tribunal had adopted a procedure which is unknown in law. It is not in dispute that for the purpose of promotion

no written examination is held nor any interview is taken. The Departmental Promotion Committee ("DPC" for short) makes its own grading solely

relying on or on the basis of the ACRs of the candidates concerned. Before us, a chart has been placed to show that the other promoted

candidates had fulfilled the prescribed bench mark which is in the following terms:

S

Date of 91- 92- 93- 95- 97-

NameNo. 94-95 96-97

birth 92 93 94 96 98

(S/Sh.)

1 . T.S.

25.10.42 Good Good Good V.G. Good V.G. Good

Garg

2. Y.S.

28.03.42 O.S. O.S. V.G. V.G. V.G. V.G. V.G.

Sardar

3. N.N.

Chpal 01.11.42 V.G. Good V.G. V.G. V.G. V.G. V.G.

Katti

4 .G.K.

03.01.50 V.G. V.G. V.G. V.G. V.G. V.G. O.S.

Kaura

5. R.K.

01.08.51 O.S. O.S. O.S. O.S. V.G. O.S.

Kakkar

6. A.

01.11.40 O.S. V.G. V.G. V.G/O.S. V.G. V.G./O.S. O.S.

Sanyal

7. S.C.

04.05.46 Good Good V.G. V.G. O.S. O.S. V.G.

Bhatia

12. The learned Tribunal perused the general categorisation made in the ACRs. It further went through the purported relevant reports for the DPC.

It was held:

The relevant reports for the DPC would be of 1992-93, 1993-94, 1994-95, 1995-96 and 1996-9. Of this period he has been graded ''Very

Good'' twice but three times as ''Good''. The decision of the Hon''ble Apex Court in the case of U.P. Jal Nigam. cited by the applicant does not

help him as we can only ignore the categorisation, ''Good'' awarded in 1995-96, as it was come down from the grading ''Very Good'' awarded in

1994-95. We cannot replace the categorisation or update it, as the applicant would like us to do. We had also seen the ACRs for one year earlier

and one year later. In these years as well as overall grading has been only ''Good'' and this five years period reckoned either way he has got only

two ''Very Good'' and he could not have been categorized as ''Very Good'' by the DPC. We, Therefore, find no fault in the assessment made by

the DPC.

13. The learned Tribunal, in our opinion, committed a serious misdirection in law in so far as it failed to pose unto itself a right question so as to

enable it to arrive at a correct finding of fact with a view to give a correct answer. The question which was posed before the learned Tribunal was

not that whether the petitioner had been correctly rated by the DPC? The question, as noticed hereinbefore, which arose for consideration before

the learned Tribunal as also before us was as to whether having regard to the decision of the Apex Court in U.P. Jal Nigam and Ors. (Supra) as

also Rule 9 of the CPWD Manual the concerned respondents had acted illegally in not communicating his ''fall in standard''. It is not trite that the

court or the Tribunal cannot usurp the jurisdiction of the statutory authority but it is also a settled principle of law that the jurisdiction of this court to

exercise its power of judicial review would arise in the event it is found that the concerned authority has, in its decision making process, taken into

consideration irrelevant fact not germane for the purpose of deciding the issue or has refused to take into consideration the relevant facts. The

learned Tribunal, in our opinion, while holding that having regard to the decision of the Apex Court in U.P. Jal Nigam and Ors. the DPC could

ignore categorisation, committed a serious error in usurping its jurisdiction. Once such categorisations are ignored, the matter could have been

remitted to the DPC for the purpose of consideration of the petitioner''s case again ignoring the remarks ''good'' and on the basis of the other

available remarks. This position stands settled by various judgments of the Supreme Court.

14. It is now trite that a bad record, if not communicated, the effect thereof would be that the same cannot be taken into consideration by the

appropriate authority. (See: Karnail Singh Vs. State of Punjab and Another,

15. In M.A. Rajasekhar Vs. State of Karnataka and Another, , the Apex Court has held:

It was found that his integrity was not doubted and his work also in all those respects was found to be satisfactory. Under those circumstances,

the remark that he ""does not act dispassionately when faced with dilemma"" must be pointed out with reference to specific instances in which he did

not perform that duty satisfactorily so that he would have an opportunity to correct himself of the mistake. He should be given an opportunity in the

cases where he did not work objectively or satisfactorily. Admittedly, no such opportunity was given. Even when he acted in dilemma and lacked

objectivity, in such circumstances, he must be guided by the authority as to the manner in which he acted upon. Since this exercise has not been

done by the respondents, it would be obvious that the above adverse remark was not consistent with law.

16. At this stage, we may also refer to another authoritative pronouncement of the House of Lords in England. In Secretary of State for Education

and Science v. Metropolitan Borough of Tameside reported in 1973 3 A E.R. 665. Lord Denning stated the law thus:

To my mind, if a statute gives a Minister power to take drastic action if he is satisfied that a local authority have acted or are proposing to act

improperly or unreasonably, then the Minister should obey all the elementary rules of fairness before he finds that the local authority are guilty or

before he takes drastic action overruling them. He should give the party affected notice of the charge of impropriety or unreasonableness and a fair

opportunity of dealing with it. I am glad to see that the Secretary of State did so in this case. He had before him the written proposals of the new

council and he met their leaders. In addition, however, the Minister must direct himself properly in law. He must call his own attention to the

matters he is bound to consider. He must exclude from his consideration matters which are irrelevant to that which he has to consider. And the

decision to which he comes must be one which is reasonable in this sense, that it is, or can be, supported with good reasons or at any rate be a

decision which a reasonable person might reasonably reach.

Scarman, J observed:

...But, first, I think that the epithet "subjective" is of no assistance in this context. The point of principle is simply that it is not a judicial but a

ministerial discretion in an administrative matter which is under review. Of course, the unusual feature of the present case is that we have under

review two administrative decisions each by a different Authority: the Secretary of State"s decision to use his Section 68 power of direction and

the authority"s earlier decision not to implement the Section 13 proposals, the decision which in fact led the secretary of State to act u/s 68.

Secondly, I do not accept that the scope of judicial review is limited quite to the extent suggested by counsel for Secretary of State. I would add a

further situation to those specified by him; misunderstanding or ignorance of an established and relevant fact. Let me give two examples. The fact

may be either physical, something which existed or occurred or did not, or it may be mental, an opinion. Suppose that, contrary to the Secretary of

State"s belief, it was the fact that there was in the area of the authority adequate school accommodation for the pupils to be educated, and the

Secretary of State acted under the section believing that there was not. If it were plainly established that the Secretary of State was mistaken, I do

not think that he could substantiate the lawfulness of his direction under this section. Now, more closely to the facts of this case, take a matter of

expert professional opinion. Suppose that, contrary to the understanding of the Secretary of State, there does in fact exist a respectable body of

professional or expert opinion to the effect that the selection procedures for school entry proposed are adequate and acceptable. If that body of

opinion be proved to exist, and if that body of opinion proves to be available both to the authority and to the Secretary of State, then again I would

have thought it quite impossible for the Secretary of State to invoke his powers u/s 68.

By adding this situation to situations more commonly described as occasions for judicial review, I can find no objection in principle.

Lord Denning MR has briefly referred to some of the case law on the matter; and in the short time available I have looked to see if there is

authority which would belie what I believe to be the law, and there is none. I think that the law, which I believe to exist, follows from the cases to

which Lord Denning MR has referred, and is really to be deduced from a well-known passage in Professor de Smith''s Judicial Review of

Administrative Action (3rd Edn.(1973) P 320), where he says:

''Secondly, a court may hold that it can interfere if the competent authority has misdirected itself by applying a wrong legal test to the question

before it, or by misunderstanding the nature of the matter in respect of which it has to be satisfied. Such criteria are sufficiently elastic to justify

either a broad or a narrow test of validity; and they seem to have become increasingly popular. Thirdly, a court may state its readiness to interfere

if there are no grounds on which a reasonable authority could have been satisfied as to the existence of the conditions precedent. This test can be

combined with the first and the second.''

I would add by way of parenthesis and somewhat out of place that in the present case the evidence now before the court does show that the

Secretary of State either misunderstood or was not informed as to the nature and effect of the professional educational advice available to the

authority.

I have already put in my own words the situation which I think, in addition to those more commonly described, enables the court to exercise its

power of review. I would now try and put that situation into a formula; and my formula would be as follows: that the Secretary of State cannot

lawfully be satisfied that the authority are proposing to act unreasonably unless on the information that was or ought to have been available to him

the authority, action reasonably, could not have acted, or proposed to act, as they in fact did. In other words, while it is not for the court to

substitute its view for the Secretary of State''s, it is also the law that the Secretary of State cannot substitute his view for that of the authority,

provided always that an authority, acting reasonably, could have made the decision that in fact it made.

17. In State of West Bengal and Others Vs. Nuruddin Mallik and Others, , the law is stated in the following terms:

It is not in dispute in this case that after the management sent its letter dated 6-8-1992 for the approval of its 31 staff, viz., both teaching and non-

teaching staff, both the District Inspector of Schools and the Secretary of the Board sought for certain information through their letters dated 21-9-

1992. Instead of sending any reply, the management filed the writ petition in the High Court, leading to passing of the impugned orders. Thus, till

this date the appellant-authorities have not yet exercised their discretion. Submission for the respondents was that this Court itself should examine

and decide the question in issue based on the material on record to set at rest the long-standing issue. We have no hesitation to decline such a

suggestion. The courts can either direct the statutory authorities, where it is not exercising its discretion, by mandamus to exercise its discretion, or

when exercised, to see whether it has been validly exercised. It would be inappropriate for the Court to substitute itself for the statutory authorities

to decide the matter.

18. For the reasons aforementioned, this writ petition is allowed and the impugned judgment is set aside and the matter is remitted back to the

DPC to consider the question of the promotion of the petitioner afresh.

19. However, in the facts and circumstances of the case, there shall be no order as to costs.