

(2013) 03 DEL CK 0252

Delhi High Court

Case No: LPA 598 of 2012, CM No. 15084 of 2012 (for stay) , CM No.15086 of 2012 (for condonation of delay) and CM No. 15087 of 2012 (for filing additional documents)

Indian Overseas Bank

APPELLANT

Vs

L.R. Joanwal and Another

RESPONDENT

Date of Decision: March 22, 2013

Citation: (2013) 136 DRJ 660

Hon'ble Judges: D. Murugesan, C.J; Rajiv Sahai Endlaw, J

Bench: Division Bench

Advocate: Dhruv Mehta, Mr. Rajesh Kumar, Mr. Mr. Ram Krishna and Mr. Prashant Narang, for the Appellant; Amrit Pal Singh and Mr. Gurjinder Kaur for R- 2, Respondent No. 1 in person, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.

This intra-court appeal impugns the judgment dated 5th July, 2012 of the learned Single Judge of this Court allowing W.P. (C) No. 23267/2005 filed by the respondent No. 1 (respondent No. 2 is the Union of India) and holding that the respondent No. 1 was deliberately, illegally and discriminately not promoted from Middle Management Grade-III (MMG-III) to Senior Management Grade-IV (SMG-IV) in the years 2004-2005 and directing the appellant Bank to promote him w.e.f. the year 2004 with all consequential benefits. The appeal is accompanied with an application for condonation of 19 days delay in preferring the same, an application for permission to file additional documents being the letter dated 3rd August, 1989 of the Ministry of Finance, Department of Economic Affairs (Banking Division), Government of India and an application for stay. Vide order dated 31st August, 2012 the proceedings in the contempt petition initiated by the respondent No. 1 for non-compliance by the appellant of the direction in the writ petition, were deferred till after the disposal of this appeal. The respondent No. 1 appearing in person, rather than opposing the application for condonation of delay, argued the matter on merits. Thus, for the reasons stated in the application, the delay in filing the appeal is condoned. We have heard the senior counsel for the appellant and the

respondent No. 1 in person.

2. The respondent No. 1 filed the writ petition from which this appeal arises pleading, (i) that he had joined the appellant Bank as a Probationary Officer on 16th August, 1978 in Junior Management Grade-I (JMG-I); (ii) that he was promoted to MMG-II from 1st January, 1990, to MMG-III from 3rd June, 1998 and his seniority number was 421; (iii) that in the year 2004 the appellant Bank conducted promotion interview for promoting officers from MMG-III to SMG-IV without publishing the promotion vacancies and the seniority list as on the date of conducting the promotion; (iv) that the eligibility criteria for promotions from MMG-III to SMG-IV as per para 2.3 of Bank Promotion Policy for Officers as amended on 1st June, 2001 was "five years of satisfactory service in MMG-III"; (v) that for assessing performance, the Performance Review System of the appellant Bank was to be followed; (vi) that the respondent No. 1 fulfilled the eligibility criteria and was as such called for and appeared in the Promotion Interview; (vii) that the appellant Bank on 17th February, 2004 declared list of 78 promoted officers, of which a large number were junior to the respondent No. 1 and with lower performance than the respondent No. 1; (viii) that in the year 2005 again Promotion Interviews were held, again without publishing the number of vacancies and the list of eligible officers and the respondent No. 1 again participated in the same; (ix) that his name again did not figure in the list dated 25th February, 2005 of 90 promoted officers of which a large number were not only junior to the respondent No. 1 but also with lower performance than the respondent No. 1; (x) that the respondent No. 1 submitted his appeal; (xi) respondent No. 1 in the meanwhile learnt a similar appeal preferred by one Mr. B.P. Gupta had been accepted and he was promoted-the said Mr. B.P. Gupta had much lower performance than the respondent No. 1 and had also been accused of financial irregularities/lapses; (xii) that the respondent No. 1 preferred another representation comparing himself to the said Mr. B.P. Gupta; (xiii) that another list of 16 promoted officers whose appeal against non-promotion was accepted was published but the name of the respondent No. 1 did not figure in the same also; (xiv) that the respondent No. 1 represented to the National Commission for Scheduled Castes but the appellant Bank inspite of directions of the National Commission for Scheduled Castes did not produce the records before the said Commission. It was the case of the respondent No. 1 in the writ petition that he had never been declared unfit for promotion and had been discriminated against the said Mr. B.P. Gupta.

3. Though the respondent No. 1 alleged discrimination vis-à-vis Mr. B.P. Gupta but the said Mr. B.P. Gupta was not impleaded as respondent to the writ petition.

4. The appellant Bank contested the writ petition pleading, (i) that the respondent No. 1 was assessed under various parameters of the policy but was not found eligible by the Promotion Committee for promotion to SMG-IV; (ii) that seniority is not the only criteria for promotion from MMG-III to SMG-IV and thus the allegation

of juniors having been promoted has no legal foundation; (iii) that the number of vacancies for promotion were circulated and though a seniority list for deciding the zone of consideration for selection process for promotion was prepared but was not required to be circulated; (iv) that the appeals preferred by the respondent No. 1 as well as other were considered and while appeals of some others were allowed, that of the respondent No. 1 was rejected; (v) that the cut off marks for promotion to SMG-IV is not different for SC/ST and general category officers; (vi) that the respondent No. 1 had not preferred any appeal against his non-promotion in the year 2004, whereas Mr. B.P. Gupta had and the respondent No. 1 cannot compare himself to the said Mr. B.P. Gupta; (vii) that the fresh record of the respondent No. 1 was not clean-charge sheet under the vigilance case for misappropriation of funds had been issued to the respondent No. 1 in the year 1983-84 and vide order dated 30th September, 1986 his increment pay falling due on 1st August, 1987 was withheld on charges of granting of clear overdraft and availing of personal loan for purchase of furniture from a non-existent firm; (viii) that the respondent No. 1 was also charge sheeted on 25th September, 1991 under vigilance angle for mis-utilization of loan proceeds as he did not verify the end use of three loans; (ix) that vide order dated 31st July, 1993, two increments of the respondent No. 1 were withheld; (x) that on 17th April, 2003 a complaint of purchase by the respondent No. 1 of Benami property and holding of assets disproportionate to his known sources of income was received and investigation closed after issuing a warning letter to the respondent No. 1; (x) that a charge sheet dated 28th March, 2006 had also been issued to the respondent No. 1 for sanction of housing loan etc. under vigilance angle; and, (xi) that a reply had been submitted to National Commission for Scheduled Castes.

5. The learned Single Judge, in the impugned judgment has observed/found/held:

(a). that the respondent No. 1 had been found fit for promotion till promotion to MMG-III w.e.f. 3rd June, 1998;

(b). that even the DPC of the year 2004-05 did not find him fit for promotion;

(c). that the appellant Bank promoted a large number of juniors when the performance of the respondent No. 1 in MMG-III was exemplary as per details in annexure to the petition (the said annexure, it may be mentioned comprise of a note prepared by the respondent No. 1 himself highlighting his performance and appreciation letters issued to the respondent No. 1 from time to time);

(d). that though as per the Bank Promotion Policy the number of persons to be considered for promotion from one scale to another is to be restricted to three times the number of posts for which promotions are being considered, but the appellant Bank in violation of its own instructions considered and promoted out of around 1000 officers i.e. over 12 time of the 78 vacancies for promotion in the year 2004 and 90 vacancies for promotion in the year 2005;

(e). that as per the Bank Promotion Policy, any guidelines/directives issued by Government of India from time to time are deemed to be a part of the Promotion Policy and any guidelines contained in the brochure on Reservation for Scheduled Castes (SC) and Scheduled Tribes (ST) issued by the Government of India are also to be deemed part of the Promotion Policy;

(f). that the Public Information Officer of the Department of Financial Services, Ministry of Finance, Government of India had also in reply dated 24th March, 2008 to the RTI query informed that all guidelines issued by Government of India through Department of Personnel and Training (DoPT) on reservation etc. are applicable to all public sector banks/financial institutions;

(g). that the appellant Bank wrongly, illegally and deliberately considered over first 160 senior most officers during 2004 and over first 180 senior officers during 2005 and also wrongly, illegally and deliberately promoted a large number of juniors of the respondent No. 1 who were not even falling under the prescribed zone of consideration;

(h). that the respondent No. 1 had also been denied promotion because of violation by the appellant Bank of the DoPT circular dated 8th February, 2002 providing that though there was no reservation and concession available to SC and ST officers above the Scale-IV in public sector banks yet to increase their chances and to avoid supersession of senior officers, the old existing selection by "Selection by Merit" method of promotion had been revised to "Selection" method of promotion-that in the "Selection" method the criteria of "fit" and "unfit" and not the criteria of higher grading superseding lower grading was to prevail-thus once the respondent No. 1 had been found "fit" for promotion, he was to be promoted;

(i) that the binding nature of the guidelines aforesaid also follows from letter dated 18th October, 2010 of the DoPT clarifying that the instructions issued by DoPT are to be complied by all concerned-that the appellant Bank under the Ministry of Finance is thus covered;

(j). that the appellant Bank had before the National Commission for Scheduled Castes also admitted having followed the instructions dated 8th February, 2002 supra of the DoPT;

(k). that the respondent No. 1 was not promoted owing to the appellant Bank in violation of the aforesaid guidelines following the "Selection by Merit" instead of the "Selection" method of promotion;

(l). that as per the ACR of the respondent No. 1 for the year 2005 the respondent No. 1 was entitled to outstanding grading and was thus "fit" for promotion;

(m). that the respondent No. 1 having been found fit for promotion, both in the year 2004 as well as 2005 and having been included in the select panel, ought to have been promoted as per the guidelines aforesaid;

(n). that the version of the appellant Bank of the respondent No. 1 not having a clean record for denying promotion to the respondent No. 1 was not correct since the same had not come in the way of the respondent No. 1 having earlier been promoted till the MMG-III and the charge sheet dated 28th March, 2006 being of a date after the relevant years 2004 and 2005;

(o). that as per the Promotion Policy for officers of the appellant Bank, even officers against whom charge sheets were pending were to be assessed but results withheld in sealed cover.

6. The reasons which thus prevailed with the learned Single Judge for allowing the writ petition were twofold. Firstly, of officers beyond the permissible zone of consideration being considered for promotion and secondly, the criteria for selection adopted by the Promotion Committee being of "Selection by Merit" instead of "Selection", in violation of the DoPT guideline qua SC;

7. The senior counsel for the appellant Bank has argued that the learned Single Judge has erred in relying on the DoPT guidelines ignoring the Regulations of the appellant Bank itself. Attention is invited to Regulation 17 of the Indian Overseas Bank Officers (Service) Regulations, 1979 framed by the Board of Directors of the appellant Bank in consultation with the Reserve Bank of India with prior sanction of the Central Government and as per which promotions are to be in accordance with the policy laid down by the Board of the appellant Bank from time to time, though having regard to the guidelines if any of the Government. Attention is next invited to the Promotion Policy dated 18th January, 1993 in force in the years 2004-05 as per which the zone of consideration is three times the number of posts for which the promotions are being considered and prescribing the criteria for performance appraisal. The senior counsel for the appellant Bank had argued that the learned Single Judge has decided the matter de hors the said policy and giving the same a go by. It is contended that the learned Single Judge has been unduly swayed by seniority and which has no bearing. With respect to the reasoning given by the learned Single Judge of the appellant Bank in the year 2004-05 expanding the zone of consideration beyond three times the number of posts as prescribed in the policy, it is argued that the same is without any basis and there is no material whatsoever on record to show that the zone of consideration was so expanded.

8. The senior counsel for the appellant Bank has then invited attention to the DoPT circular dated 8th February, 2002 and the additional affidavit dated 22nd July, 2009 of Shri Vipin Tyagi, Chief Manager of the appellant Bank in response thereto stating that the said guidelines are not applicable to and not communicated to the public sector banks and with respect to the RTI reply contended that it is not clear therefrom whether the queries raised related to the zone of consideration or promotion. It is argued that it is the settled principle that there is no reservation in promotion.

9. The senior counsel for the appellant Bank has further argued that in the reply of the appellant Bank before the National Commission for Scheduled Castes and Tribes, there is no such admission as has been imputed by the learned Single Judge in para 61 of the impugned judgment to the appellant Bank.

10. Attention is next invited to the letter dated 3rd August, 1989 (qua which the application for additional document has been filed) of the Department of Economic Affairs (Banking Division) Ministry of Finance, Government of India addressed to the Chief Executives of the Nationalized Banks clarifying that an officer considered for promotion but not promoted and where his juniors have been promoted would be covered by the term "Superseded Officer". It is contended that such clarifications alone are binding on the Nationalized Banks and not the DoPT circulars. It is argued that since as per the Promotion Policy of the Bank, a SC candidate even if fit for promotion, has to compete with others, it is the said policy and not the DoPT circular which will apply.

11. We may mention that the appellant Bank in the memorandum of appeal has also stated that in the year 2004, for the 78 vacancies in SMG-IV only 382 MMG-III officers were considered and the last candidate declared successful had secured 75.63 marks while the respondent No. 1 had secured 70.83 marks. Similarly with respect to the year 2005 it is stated that for the 90 vacancies of SMG-IV, 284 MMG-III officers were considered and the last successful candidate had secured 75.13 marks while the respondent No. 1 had secured 73.08 marks.

12. It is further contended that the learned Single Judge, without there being any basis, considered the version of the respondent No. 1. On enquiry whether the pleas as taken in the memorandum of appeal also existed before the learned Single Judge, attention is invited to the written arguments filed before the learned Single Judge.

13. Per contra, the respondent No. 1 arguing in person has contended that the Promotion Policy of the appellant bank itself in Clause 20 thereof provides that the guidelines/directives issued by the Government of India from time to time will be deemed to be a part of the policy and guidelines contained in the brochure on Reservation for SC and ST in service or relating to the service of SC and ST in the bank would be deemed to be a part of the Promotion Policy. He has further invited our attention to the Office Memorandum dated 24th December, 1980 of the DoPT laying down the principles for promotion for selection posts.

14. The senior counsel for the appellant Bank has interrupted to contend that it is not directed against the appellant bank as the letter dated 3rd August, 1989, supra is.

15. We have already summarized above the two reasons which prevailed with the learned Single Judge for allowing the writ petition of the respondent No. 1. Of the same, the appellant Bank has been successful in showing that one, namely the bank

having considered candidates more than in the prescribed zone of consideration, has no factual basis. The respondent No. 1 has been unable to show that the MMG-III officers considered for promotion to SMG-IV, either in the year 2004 or in the year 2005 were more than three times the posts available. The said reasoning of the learned Single Judge thus cannot be sustained.

16. As far as the second reasoning which prevailed with the learned Single Judge, of the promotion process of the bank being violative of the DoPT circular dated 8th February, 2002 is concerned, before we go into the merits of the same, we may highlight that the writ petition filed by the respondent No. 1 was not on that basis and the same did not even find mention therein. The challenge by the respondent No. 1 in the writ petition was on the basis of seniority and the respondent No. 1 is having been discriminated vis-a-vis Mr. B.P. Gupta and who as aforesaid, was not even impleaded as respondent. The said circular appears to have been relied upon subsequently. We may also highlight that there was no challenge also in the writ petition to the Promotion Policy of the appellant Bank and which admittedly is for selection by merit and not selection basis. Though undoubtedly the said policy also itself provides for guidelines issued by the Government relating to service of SC and ST in the bank being part of the Promotion Policy but there is nothing to show that the said guidelines were before the Competent Authority or the Selection Committee which considered the candidates for promotion in the year 2004 and 2005. The respondent No. 1 also then appears to have been unaware of the same.

17. For the aforesaid reasons, we are of the view that the selection process of the bank cannot be found fault with.

18. That however does not mean that the appeal is to be allowed for this reason only. It still remains to be considered whether the DoPT guidelines dated 8th February, 2002 are applicable to the appellant bank or not and whether if the same were to be followed, the non-promotion of the respondent No. 1 is wrongful.

19. We however do not deem it expedient to go into the question of applicability of the DoPT circulars to the appellant bank in as much as we find the DoPT Guidelines dated 8th February, 2002 to be not making any difference and find the same to have been misread in the impugned judgment.

20. We may at the outset state that the Office Memorandum dated 8th February, 2002 is not concerned with ST/SC candidates only and is generally concerned with the procedure to be observed by the DPCs. We are unable to accept that the Office Memorandum dated 8th February, 2002 even, if applicable to the appellant bank vitiates the selection process. The only change made by the said Office Memorandum is that it did away with the supersession earlier prevalent in the select panel, of those with the higher grading being listed above those who though clearing the benchmark but having a lower grading. As per the said circular all those fit for consideration are to be listed in the select panel as per their inter se seniority.

The said Office Memorandum does not deal with the selection process and does not provide that the SC candidates fit for consideration for promotion to be necessarily promoted even though scoring lower than the other competing candidates.

21. What the learned Single Judge in para 57 of his judgment has attributed to the Office Memorandum dated 8th February, 2002 is in fact a part of para 3 (i) of the additional affidavit of the respondent No. 1 bearing the next date of hearing as 19th August, 2011 before the learned Single Judge and which has perhaps led to the learned Single Judge holding the Office Memorandum dated 8th February, 2002 as dealing with the promotion of SC/ST candidates. We are therefore unable to uphold either of the two reasons which prevailed with the learned Single Judge in granting the relief to the respondent No. 1 and accordingly allow this appeal, set aside the judgment of the learned Single Judge and dismiss the writ petition of the respondent No. 1.

No costs.