(1988) 4 BomCR 264 : (1988) 90 BOMLR 656 : (1989) 2 LLJ 359 : (1989) MhLj 495

Bombay High Court

Case No: Writ Petition No. 1655 of 1985

Gopal Yeshwantrao Shende		APPELLANT
	Vs	
State of Maharashtra and another		RESPONDENT

Date of Decision: Dec. 22, 1988

Acts Referred:

- Constitution of India, 1950 - Article 14, 226
- Maharashtra Civil Services (Pay) Rules, 1981 - Rule 37, 37(2)

Citation: (1988) 4 BomCR 264 : (1988) 90 BOMLR 656 : (1989) 2 LLJ 359 : (1989) MhLj 495

Hon'ble Judges: G.G. Loney, J; Dhabe, J

Bench: Division Bench

Judgement

Dhabe, J.
The main grievance of the petitioner in this writ petition is that although the efficiency bar in his time-scale should have been lifted on the due date of his increment, i.e., 1st November 1981, it was lifted by the competent authority with effect from 1st November 1984 as per the order dated 19th April 1985 with the result that he was put to a pecuniary loss of increments and pay fixation which action of the respondents was illegal and arbitrary.

Briefly, the facts are that originally the petitioner was appointed as a Forester in the then State of Madhya Pradesh and was posted in Chhindwara district. After the re-organisation of the States he was allocated firstly to the then State of Bombay and thereafter to the State of Maharashtra. He was thereafter promoted in the post of Range Forest Officer on 4th November 1961 in which post he worked upto 17th November 1978 when he was further promoted to the Class II Gazetted post of Assistant Conservator of Forests in the pay-scale of Rs. 600-30-750-EB-40-1150.

2. On 26th November 1978, he was posted in the Forest Development Corporation of Maharashtra with the headquarters at Nagpur. From 14th December 1978 to 9th September 1982, the petitioner was posted as Assistant Manager in the said Corporation at Sironcha and from 22nd September 1982 to 1st November 1983, he was posted as Desk Officer in the office of the Conservator of Forests, Chanda Circle, district Chandrapur. With effect from 1st November 1983, however, the petitioner has been working as Assistant Director, Social Forestry, Nagpur, in the aforesaid pay-scale of Rs. 600-30-750-EB-40-1150.

3. It is not in dispute that the normal date of increment of the petitioner falls on 1st November of each year. After 1st November 1980 the petitioner has reached the basic pay of Rs. 750/- and on 1st November 1981, he would have been entitled to draw his increment if his efficiency bar was lifted as provided in rule 37 of the Maharashtra Civil Services (Pay) Rules, 1981 (for short, "the Pay Rules"). The next increment after the efficiency bar is of Rs. 40/- and if the efficiency bar had been lifted on 1st November 1981, the basic pay of the petitioner on 1st November 1981 would have been fixed at Rs. 790/

4. The efficiency bar of the petitioner was, however, not lifted on 1st November 1981 but was actually lifted by the order dated 19th April 1985 with effect from 1st November 1984 by the second respondent. The petitioner made a representation to him on 3rd May 1985 requesting him that his efficiency bar should be lifted with effect from 1st November 1981 so as to remove his pecuniary loss instead of from 1st November 1984. The second respondent, however, rejected the said representation by his order dated 24th June 1985. Feeling, therefore, aggrieved, the petitioner has preferred the instant writ petition in this Court.

5. The petitioner has alleged in the instant writ petition that his record of service was satisfactory and that no adverse remarks, if any, were ever communicated to him. The petitioner has, therefore, urged in this writ petition that his efficiency bar was illegally withheld by the respondent No. 2 and his action in doing so was arbitrary and violative of Article 14 of the Constitution of India.

6. The respondents have filed the return in answer to the allegation made by the petitioner in his petition. The case of the respondents is that the question of lifting the effiency bar of the petitioner was considered in the light of the instructions contained in the Government Resolution dated 28th October 1976. It is specifically submitted in the return that the confidential record of the petitioner for the period from 29th April 1979 to 31st March 1980 was not satisfactory and the adverse C.Rs. were recorded against him in regard to the said period. According to the respondents it is for this reason that the respondent No. 2 was of the view that the petitioner should not be permitted to cross the efficiency bar on his due date of increment i.e. 1st November 1981. He, therefore, referred the said proposal of not lifting the efficiency bar of the petitioner to the State Government as required by the Government Resolution dated 28th October 1976 as per

his letter dated 2nd April 1983, which proposal was approved by the Government by its letter dated 12th September 1984.

7. It is then submitted by the respondents in their return that after observing the confidential records of the petitioner for the next two years i.e. 1982-83 and 1983-84, the respondent No. 2 permitted him to cross the efficiency bar by his impugned letter date 19th April 1985 with effect from 1st November 1984. The respondents have thus justified the action of not lifting the efficiency bar of the petitioner with effect from 1st November 1981 but of lifting the same with effect from 1st November 1984 only.

8. The learned counsel for the petitioner has urged before us that the action of the respondents in not lifting the efficiency bar of the petitioner with effect from 1st November 1981 was solely based upon the alleged adverse remarks against him for the period 29th June 1979 to 31st March 1980 which adverse remarks were never communicated to him. The submission, therefore, is that the uncommunicated adverse remarks could not have been taken into consideration by the respondent No. 2 in not lifting his efficiency bar on the due date of his increment, which fell on 1st November 1981. In support of the above submission, the learned counsel for the petitioner has relied upon the decision of the Supreme Court in the case of Brij Mohan Singh Chopra v. State of Punjab 1987 I LLJ 552

9. In the context of compulsory premature retirement under the Service Rules, the Supreme Court has observed as follows in para 9 :

"....There is no doubt that whenever an adverse entry is awarded to a Government servant it must be communicated to him. The object and purpose underlying the communication is to afford an opportunity to the employee to improve his work and conduct and to make representation to the authority concerned against those entries. If such a representation is made it is imperative that the authority should consider the representation with a view to determine as to whether the contents of the adverse entries are justified or not. Making of a representation is a valuable right to a Government employee and if the representation is not considered, it is bound to affect him in his service career, as in Government service grant of increment, promotion and ultimately premature retirement all depend on the scrutiny of the service records. In Gurdial Singh Fijji Vs. State of Punjab and Others, the appellant therein was denied promotion on account of certain adverse entries against which he had made representation to the Government, but for some reason or the other those representations could not be considered or disposed of. In view of those adverse entries he was not selected for promotion. This Court while considering the effect of non-consideration of the representation observed -

"The principle is well settled that in accordance with the rules of natural justice, an adverse report in confidential roll cannot be acted upon to deny promotional opportunities unless it is communicated to the person concerned so that he has an opportunity to improve his work and conduct or to explain the circumstances leading to the report. Such

an opportunity is not an empty formality, its object, partially being to enable the superior authorities to decide on a consideration of the explanation offered by the person concerned, whether the adverse report is justified. Unfortunately, for some reason or another, not arising out of any fault on the part of the appellant, though the adverse report was communicated to him, the Government has not been able to consider his explanation and decide whether the report was justified.""

10. It is clear from the above observations of the Supreme Court that it is obligatory upon the Government to communicate the adverse remarks to the employee concerned, because otherwise he is deprived of the valuable right of making a representation against the same, particularly when such an adverse remark is bound to affect his service career as regards the granting of increment, promotion and ultimately premature retirement all of which depend upon the scrutiny of the service records. It is also clear from the above judgment of the Supreme Court as well as its judgment in the case of State of Haryana v. P. C. Wadhwa 1981 I LLJ 529 that the object of the communication of the adverse remarks is to afford an opportunity to the employee to improve his work and conduct for which reasons the adverse remarks need to be communicated to him within reasonable time.

11. The learned counsel for the respondents has, however, relied upon the decision of the Full Bench of this Court in the case of Y.V. Thatte Vs. State and Maharashtra and another, and the decision of the Punjab and Haryana High Court in the case of the Haryana Khadi and Village Industries Board, Chandigarh v. Shri Kishan Gopal Tanoja 1985 (2) S.L.R. 121 in support of the submission that the principles of natural justice are not applicable in such matters and even though adverse entries are not communicated the same can still be taken into consideration while considering the question of crossing the efficiency bar of the petitioner. The learned counsel for the respondents has particularly pressed into service the decision of the Supreme Court in the case of R.L. Butah Vs. Union of India (UOI) and Others, , which is relied upon by the Full Bench of this Court in the case cited supra.

12. With the assistance of the above cases it is urged by the learned counsel for the respondents that the representation dated 3rd May 1985 made by the petitioner in regard to the lifting of the efficiency bar with effect from 1st November 1984 and not with effect from 1st November 1981 is considered by the respondent No. 2 and, therefore, no interference should be made in the impugned order in the instant writ petition. The submission is that the question of adverse entry was in substance agitated by the petitioner in his representation dated 3rd May 1985 and since the same is considered by the respondents No. 2 and is rejected, it should be held that non-communication of the adverse remarks to the petitioner for the period 26th September 1979 to 31st March 1980 did not affect the impugned order in the instant case. In appreciating the above submission, it may be seen that the representation of the petitioner dated 3rd May 1985 is not based upon the above adverse remarks because it is clear from his aforesaid representation that he wanted to know why his efficiency bar was not lifted with effect

from 1st November 1981. It is not shown that at any time it was communicated to the petitioner that his efficiency bar was not lifted on his due date of increment in view of the aforesaid adverse remarks against him. Even the order dated 24th June 1985 passed by the respondent No. 2 does not show that the representation of the petitioner was rejected because of the aforesaid adverse remarks against him. It is thus clear that the petitioner had no opportunity to represent against the aforesaid adverse remarks which are the basis of not permitting the petitioner to cross the efficiency bar on his due date of increment i.e. 1st November 1981. The above submission made on behalf of the respondents, therefore, deserves to be rejected.

13. As regards the question whether it is obligatory upon the State Government to communicate the adverse remarks before taking them into consideration, the latest decision of the Supreme Court, cited supra, should be the final word on that question. The said law is again reiterated and followed by the Supreme Court in the case of Vijay Kumar, I.A.S. Vs. State of Maharashtra and Others, and in the case of U.P.S.C. v. Haranyalal Dev (1988) 2 SLR 148 . The judgment of this Court in the case of Ishwarlal J. Naik Vs. Development Commissioner cum Secretary, Edu. Dept. and Others, is a direct case about withholding of the efficiency bar. It was held in the said case that since the representation of the petitioner in that case against the adverse remarks against him was not decided, the said adverse remarks could not be acted, upon. The Full Bench decision, it may be seen, is merely upon the scope of power of the High Court under Article 226 and even the decision of this Court before it 1983 Mh.L.J. 1108 taking a view that the uncommunicated adverse remarks cannot be acted upon was not overruled by if. The ratio of the Full Bench decision thus needs to be restricted to the facts or the case before it. The contention raised on behalf of the State based upon the Full Bench decision cannot thus be accepted.

14. As regards the submission based upon the case of R. L. Butail v. Union of India, (supra) and relied upon in the decision of the Full Bench of this Court it may be seen that it was a case of non-promotion on the basis of the confidential reports of the appellant in that case. It was held by the Supreme Court that his representation against the adverse remarks of 1964 made subsequently was actually rejected. The Supreme Court has then referred to the practice followed by the Promotion Committee in that case that if the representation made by the employee against his adverse remarks was accepted and in consequence his confidential report was altered or expunged, the Promotion Committee had to review its adverse recommendation in the case of such employee. The ratio of the above decision is thus on entirely different facts and circumstances. The judgment of the Punjab and Haryana High Court in the case of Haryana Khadi and Village Industries Board, (supra) relied upon on behalf of the State has also no relevance, because the question considered in the said case was whether withholding of efficiency bar was a punishment requiring compliance with the principles of natural justice. The contention raised on behalf of the State that uncommunicated adverse remarks could be taken into consideration for withholding the efficiency bar cannot be accepted, particularly when the

case of the petitioner is squarely covered by the ratio of the decision of the Supreme Court in Brij Mohan Singh''s case, (supra) and more so by the direct decision of this Court in Ishwarlal J. Naik''s case (supra)

15. In the recent decision in the case of Brij Mohan Singh, (supra), the Supreme Court has emphasised the importance of communication of the adverse remarks which not only provides an opportunity to the employee to make a representation against it but gives him an opportunity to improve his work and conduct also. It may, therefore, be seen that had the aforesaid adverse remarks been communicated to the petitioner promptly, the petitioner would have got an opportunity not only to represent against the same but to improve his work and conduct, so that his efficiency bar could be lifted earlier also. It is pertinent to see that Note to rule 37(2) of the Pay Rules casts an obligation upon the Competent Authority to review annually the annual confidential records of the Government servants who are held up at the efficiency bar. There is nothing to show that before the impugned order was issued on 19th April 1985 the Respondent No. 2 had applied his mind to the confidential record of the petitioner annually, as required by the aforesaid Note to rule 37(2) of the Pay Rules. The impugned order thus infringes the Note to rule 37(2) of the Pay Rules also.

16. The respondents have thus acted illegally and arbitrarily in not lifting the efficiency bar of the petitioner with effect from 1st November 1981 because if the adverse remarks for the period 29th June 1979 to 31st March 1980 are excluded from consideration, it is not in dispute that the record of the service of the petitioner was satisfactory. The action of the respondents in not lifting the efficiency bar with effect from 1st November 1981 and not releasing the future increment due to the petitioner from the said date is, therefore, liable to be set aside.

17. In the result, the instant writ petition is allowed. The impugned orders dated 19th April 1985 and 24th June 1985 passed by the respondent No. 2 are set aside and it is directed that the efficiency bar of the petitioner should be lifted with effect from 1st November 1981. It is further directed that the next increment of the petitioner after the efficiency bar should be released from 1st November 1981 and his pay fixation thereafter should be made accordingly and any arrears arising therefrom should be paid to the petitioner within three months from the date of this order. Rule made absolute in the above terms. No order as to costs.