

No -
Promotion

(14)

CAT/J/12

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
AHMEDABAD BENCH

O.A. No. 207/88
~~XXXXXX~~

DATE OF DECISION 20-09-1991

Shri Vishnukumar J. Upadadhyay Petitioner

Mr. N.S. Shevde Advocate for the Petitioner(s)

Versus

Union of India & Ors. Respondent

Mr. Jayant Patel Advocate for the Respondent(s)

CORAM :

The Hon'ble Mr. M.M. Singh : Administrative Member

The Hon'ble Mr. R.C. Bhatt : Judicial Member

1. Whether Reporters of local papers may be allowed to see the Judgement? *Yes*
2. To be referred to the Reporter or not? *no*
3. Whether their Lordships wish to see the fair copy of the Judgement? *Yes*
4. Whether it needs to be circulated to other Benches of the Tribunal? *no*

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Shri Vishnukumar J Updadhayay,
Opposite Kachchh Mitra Press,
Bhuj.

: Applicant

(Advocate Mr. N.S. Shevde)

Versus

Union of India

Through:

1. Department of Post,
New Delhi.
2. Post Master General,
Gujarat Circle,
Ahmedabad.
3. Director Postal Services,
Rajkot Region,
Rajkot.

: Respondents

(Advocate: Mr. Mukesh Patel
for Mr. Jayant Patel)

J U D G M E N T

O.A./207/88

Date: 20-09-1991

Per: Hon'ble Mr. R.C. Bhatt

: Judicial Member

1. This application under Section 19 of the Administrative Tribunals Act, 1985 is filed by the applicant challenging the impugned orders dated 29.2.88, 16.3.88 and 18.3.88 produced at Annexure A/3, A/4 and A/5 respectively by which the applicant who was officiating as ASP (T) Bhuj was reverted to C.I. Bhuj. The applicant has also prayed that the action of respondents of not promoting the applicant to the post of Assistant Superintendent of Post Offices be declared as arbitrary, illegal, discriminatory, ultra-vires and unconstitutional and that the respondents be directed to treat the promotion of the applicant to the post of ASP as regular and any other order be passed by this Tribunal which is deemed fit and proper.

2. The applicant was promoted as Assistant Superintendent of Post Offices, Kutch division vide order dated 9th September, 1985 produced at Annexure A/1 purely on adhoc and temporary basis but according to the applicant, he is being illegally and arbitrarily reverted to the post of Complaint Inspector, Bhuj and posted under his junior Shri A.E.Khatri, C.I., Bhuj who is promoted as ASP (T) Bhuj. It is alleged by the applicant that the post of ASP is non-selection post which is filled up by promotion from Inspectors of Post Offices with three years' regular service in the grade on the basis of seniority-cum-fitness. It is alleged by him that the respondents have illegally promoted the applicant's juniors including Shri A.E.Khatri, P.H.Khimani, B.R.Patel, J.R.Valvi, etc. and reverted the applicant which action on the part of the respondents is discriminatory, arbitrary and illegal.

3. The respondents have filed reply and further reply also contending that the application is not maintainable and no condition of service of the applicant is violated. It is also contended that this Tribunal has no jurisdiction to entertain the dispute in question. It is contended that the applicant was promoted as Assistant Superintendent of Post Offices purely on adhoc and temporary basis vide order dated 9.9.1985 and therefore, he has no right to hold the said post. It is not disputed by the respondents that the post of Assistant Superintendent of Post Offices is a non-selection post which is filled up by promotion from Inspector of Post Offices with three years regular service in the grade, and on the basis of seniority-cum-fitness provided selected by DPC as per Recruitment (Amendment) Rules, 1970.

(17)

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It is contended that the applicant was not selected by the DPC and, therefore, order was issued on 29.2.1988. It is contended that the DPC met on 27.5.1987 which considered the cases for promotion to the cadre of Assistant Superintendent of Post Offices including the applicant's name with other candidates, but the DPC did not consider the applicant fit for promotion to the ASPOs cadre. It is contended that Confidential Report file of the applicant was perused by the said DPC. The respondents have contended that by the order dated 10.6.1983, Senior Superintendent of Post Office, Jamnagar had censured the applicant and on 16.6.1983 the Senior Superintendent of Post Office, Jamnagar ordered that next increment of the applicant shall be withheld for a period of six months without cumulative effect. The applicant preferred appeal against the said order to the Director of Postal Service, but the same was rejected on 20.8.1983 and he further appealed to the Government of India, Ministry of Communications, P & T Board^{which} was also rejected on 10.4.84. It is contended that as there was entry in his C.R. that he was censured and his next increment for six months was withheld without cumulative effect, the applicant was considered not fit for promotion by DPC considering the applicant's C.R. and the applicant was not promoted to the post in question and therefore, the applicant cannot make any grievance and that the application be dismissed.

4. The applicant has filed rejoinder controverting the averments made by the respondents in their reply. It is contended that the promotion to the post of Assistant Superintendent of Post Offices is governed by the Post and Telegraph, Assistant Superintendent of Post Offices and Railway Mail Service Recruitment Rules, 1977 and not by the Rules of 1970 as contended. It is also denied by the

applicant that the promotion is given provided an employee selected by DPC as per the Recruitment Rules. It is also contended by the applicant that the respondents have not considered the applicant in all the meetings of DPC and the criteria adopted for DPC is contrary to the rules for promotion. The applicant has stated in his rejoinder that remarks like not yet fit are adverse and they were ^{not} communicated to the applicant. It is contended that the adverse remarks are required to be communicated. It is contended that the applicant's C.Rs. are satisfactory and no adverse remarks were ever communicated to him and and that he is fit for promotion to the higher post. It is contended that the applicant was promoted to the post of ASPO against an existing post vide order Annexure A/1 after verifying his service record. The applicant has contended that he is a senior most Inspector and is at Sr.No.104 in the temporary consolidated list and the applicant is at Sr.No.147 in the seniority list Examination yearwise seniority for the purpose of promotion to the post of ASPO. It is contended that the employees at Sr.No.28 to 36 in the promotion order dated 9.9.1985 are junior to the applicant in the seniority of Inspectors, but these junior employees are regularised in preference to the applicant.

5. Learned advocate for the applicant at the time of arguments submitted that according to his information received from the applicant, the applicant has been found fit by DPC in 1989 and now he is promoted as ASPO. Therefore, now the question which requires to be considered is that whether the DPC has ^{not} properly considered the case of the applicant in its meetings.

6. Before we consider the application on merits, the contentions taken by the respondents in their reply about maintainability of the application and the jurisdiction

of this Tribunal required to be considered. It cannot be disputed that the averments made in the application relate to the service condition of the applicant and therefore, this Tribunal has jurisdiction under Section 14 of the Administrative Tribunals Act 1965 to entertain this application. This application is also maintainable before this Tribunal. The respondents' learned advocate has not pointed out any authority or any rule to show ^{how} this application is not maintainable. We, therefore, hold that this Tribunal has jurisdiction to entertain this application and the application is maintainable at law.

7. It is common ground that the post of ASPO is a non-selection post which is filled up by promotion from Inspectors of Post Offices with three ^{years} regular service in the grade on the basis of seniority-cum-fitness. The applicant along with 35 employees were promoted as ASPO vide Memo dated 9.9.1985 produced at Annexure A/1 issued by Assistant Post Master General (Staff), Gujarat Circle, Ahmedabad on adhoc and temporary basis and posted as ASP (T), Bhuj in post which was already existing. The learned advocate for the applicant submitted that the said promotion order inter alia states that the promotions of the officials in ASPOs cadre were subject to the condition that no disciplinary/Vigilance case was pending/contemplated against them. He submitted that no disciplinary/vigilance case of the type referred to the memo was pending against the applicant and no punishment like stoppage of increment was current one. He submitted that the said promotion order was issued after scrutinising the applicant's service record and the applicant joined ⁱⁿ the promotional post on 5.10.1985 and was working satisfactorily in the said post. The learned advocate for the applicant submitted that C.B.s of the applicant were satisfactory and no adverse remarks were ever communicated to him. He

submitted that though the respondents in their reply have mentioned about the order of censure and the order about withholding of the next increment of the applicant for a period of six months without cumulative effect in June, 1983, the adverse remarks were never communicated to the applicant. He submitted that the remarks like not yet fit etc. are adverse and should be communicated to the employee as per Railway Rule 174 of Postal Manual Vol. 3. He submitted that all adverse remarks in the C. Rs. of Government servants both on performance as well as on basic qualities and potentials should be communicated along with the mention of good points within one month of recording and the communication should be in writing and a record to that effect should be kept in the C.Rs. Dossier of the Government servants concerned. He submitted that as per this Rule 174, the adverse remarks which are not communicated are normally to be ignored. He submitted that according to the applicant his C.Rs. are satisfactory and he was never communicated about any adverse remarks.

8. The learned advocate for the applicant submitted that the applicant received the letter dated 8.3.1988 and the memo dated 29.2.1988 produced at Annexure A/2 and A/3 from the respondent No. 2 by which the Assistant Postmaster General (staff), Gujarat Circle, Ahmedabad stated that four officials who were working as ASPOs on adhoc basis on their reversion were allotted to the region shown against their names for posting in the cadre of IPOs. The respondent No. 3 has issued memo dated 16.3.1988 promoting one A.E. Khatri as ASP vice applicant and reverted the applicant as C.I., Bhuj in his place a copy of which is produced at Annexure A/4 and respondent No. 4 has issued posting order vide memo dated 18.3.'88 at Annexure A5.

9. Learned advocate for the applicant submitted that criteria for promotion to the post of ASP from Inspectors cadre is on the basis of seniority-cum-fitness and the applicant possessed the required qualification and he is eligible for

promotion to the post of ASP. The Tribunal had called for the minutes of DPC from the respondents and the respondents have produced the minutes of the DPC. The minutes of the meeting of DPC on 27.5.87 met for considering selection of ASPOs. for promotion to the cadre of ASPOs, ^{show that} the Committee after scrutinising the C.Rs. files and other records recommended the names of 107 officials fit for promotion to the cadre of ASPOs. The said DPC did not consider 4 officials fit for promotion to ASPOs cadre including the applicant. The minutes of the DPC which met thereafter on 3.12.1987 also after scrutinising the C.Rs. files and other records recommended selection of 20 officials to the cadre of ASPOs and did not consider the 5 officials fit for promotion including the applicant to the cadre of ASPOs. Thereafter, on 28.12.1988 the DPC met and the minute shows that after scrutinising of C.Rs. files and other records the DPC recommended selection of 15 officials to the cadre of ASPOs, and the DPC did not consider 12 officials fit for promotion including the applicant. The learned advocate for the applicant submitted that the minutes of these 3 meetings dated 27.5.87, 3.12.87 and 28.12.1988 do not show any material on the basis of which the DPCs. did not consider the applicant fit for promotion. He submitted that while recommending the selection of the officials to the cadre of ASPOs, the DPC scrutinised the C.R. files ^{of those officials} and other records, but while not considering the applicant and others fit for promotion, ^{it} is not mentioned whether the C.R. files and other records were examined by the DPC or whether there were any adverse remarks therein nor any material on the basis of which the applicant was not considered fit for promotion, and therefore, he submitted that the DPC has not followed the correct procedure but

arbitrary ^{and} following wrong procedure rejected the applicant on the ground that he is not fit for promotion to the cadre of ASPOs. He relied on the decision in D.B.Shah & Mrs. vs. State & Anr. XXIV (1) GLR page 319 in which it is held that when the appointment to the post is on principle of seniority-cum-fitness, no question of comparing or assessing performance of candidate competing for the post is to be considered but the question to be considered is only with respect to the fitness to the post. The learned advocate for the respondents also agreed to the settled legal position that when appointment in a post or service is by promotion based on the principle of seniority-cum-fitness, there is no question of comparing or assessing the performance of a candidate competing for the post of other candidates of his cadre. Therefore, the question to examine with respect to fitness to the post would be considered whether he is positively unfit for promotion. We respectfully agree with the ratio laid down in the above decision. The next decision relied on by the learned advocate for the applicant is Kum. Sudhaben Vishnuprasad Shukla vs. Regional Passport Officer, Ahmedabad and Another XXIV (2) GLR 1297 where the rules of the Central Central Passport & Immigration Organisation (Recruitment and Promotion to Class III Posts) Maintenance Rules, 1968 were considered. In these rules it is clear that for the purposes of promotion of LDC Clerks to UDC Clerks, the DPC must apply the seniority-cum-fitness test meaning thereby the negative test, that is rejection of those only who are found to be unfit for promotion should be considered. It was held by the High Court of Gujarat that in order to decide the question of promotion, the concerned authorities have to come to the conclusion that

the employees are positively unfit to the promoted to the next higher post, notwithstanding the seniority but instead of applying the negative test, the Committee applied the positive test and therefore, the DPC having applied the wrong test in deciding the question of selection of candidates for promotion to the next higher post, the selection list prepared cannot be sustained. In our opinion, this decision does not apply to the facts of this case.

10. The learned advocate for the applicant submitted that no disciplinary or vigilance proceedings was pending against the applicant at the time he was promoted on adhoc basis and this post of promotion being non-selection post, the criteria was only seniority-cum-fitness and in absence of any adverse remarks in the C.R. of the applicant, the applicant was entitled to be promoted. He submitted that though in the reply, the respondents have referred about the remarks of censure and withholding of increments for six months without cumulative effect in the year 1983, the same being adverse remarks were never communicated to the applicant. He submitted that the DPC has not mentioned in the minutes anything as to why the applicant be considered not fit for promotion. He submitted that ^{the applicant} ~~he~~ cannot be denied the said promotion because the DPC could not have taken into consideration the adverse remarks and entry in the records which have not been communicated to the applicant. He submitted that even the minutes regarding not considering the applicant fit for promotion does not show the material on what basis he was not considered for promotion. He submitted that in the minute of 27.5.1987 the DPC recommended officials fit for promotion and not fit for promotion while the minutes of 12.12.1987 and 28.12.1988 show that the scrutiny for selection of the

officials to the cadre of ASPOs. The learned advocate for the respondents submitted that the DPC considered the applicant not fit for promotion after having examined the record. Here the criteria for promotion was seniority-cum-fitness and there is no question comparing or assessing the performance of candidate competing for the post of other candidate of his cadre. Reading the minutes of the DPC, it is not understood what consideration weighed with the DPC for not making the applicant fit for promotion to the cadre of ASPOs for about the names marked unfit for the promotion figures in the DPC proceedings "D.P.C. did not consider the following officials fit for promotion to the cadre of ASPOs." From this sentence, it is not all clear as to on what material applicant was not found fit for promotion. We do not find any reason why the applicant who was senior was found unfit. The case of the applicant is that his C.Rs. are satisfactory. We find, therefore, that the applicant has a genuine grievance and in our opinion the DPC had not disclosed on what material, the applicant was found not fit for next higher post. In this view of the matter, the D.P.C.'s decision with regard to the applicant cannot be sustained, and therefore, it shall have to be quashed and set aside.

11. The learned advocate for the applicant submitted that the order of reversion of the applicant is not passed by the competent officer. We need not go into the details because of our above finding. The applicant has prayed that the action of the respondents of not promoting him to the post of ASPO be declared is arbitrary, illegal and discriminatory and the respondents be directed to treat his promotion as regular but these prayers cannot be granted

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because he was promoted temporarily on adhoc basis, his prayer that the order of reversion also should be quashed and set aside cannot be granted because in our opinion, the direction to promote an officer can ordinarily be not issued straight away in such a case and it would be just and proper to direct the respondents to reconstitute the DPC to reconsider the case of the applicant according to rules for his promotion to the post of ASPOs.

12. Hence the following order is passed.

The application is allowed partly and the Departmental Promotion Committee meetings dated 27.5.1987, 3.12.1987 and 28.12.1988 to the effect that it did not consider the applicant fit for promotion to the cadre of ASPO, is quashed and set aside and we direct the respondents to convene within four months of the date of communication of this order, the DPC which shall consider the case of the applicant for promotion to the post for ASPO as per the rules and if the DPC clears the applicant for promotion accordingly he shall be granted retrospective promotion from that ^{next} date when ^{was he} junior to him ~~were~~ also promoted. We pass no orders as to costs. The application is disposed of.

R.C. Bhatt

(R.C. Bhatt)
Member (J)

M. M. Singh
(M.M. Singh)
Member (A)