

SUPREME COURT OF INDIA

U.O.I.

Vs.

S.P.Nayyar

C.A.No.5852 of 2014

(Sudhansu Jyoti Mukhopadhaya and Kurian Joseph JJ.)

30.06.2014

JUDGMENT

SUDHANSU JYOTI MUKHOPADHAYA, J

1. Leave granted.

2. This appeal has been preferred by the appellants against the order dated 21st August, 2012 passed by the Division Bench of the High Court of Delhi, New Delhi in Writ Petition (Civil) No. 3004/2000. By the impugned judgment, the Division Bench of the High Court after going through the relevant record including ACRs of respondent- S.P. Nayyar, opined that due to personal bias of his superior officer, E.N.Ram Mohan, the respondent- S.P. Nayyar was targeted and was wrongly superseded in the matter of departmental promotion and hence allowed the writ petition filed by the respondent directing the appellants to promote the respondent as Additional DIG with back wages with the following observations:

13. Under the circumstances, we allow the writ petition and direct the petitioner to be promoted as Addl. DIG. We are directing petitioner to be promoted and not a review DPC to be held, for the reason, learned counsel for the respondent does not dispute that the bench mark to be achieved was 3 Very Good grading in the ACR in the preceding 5 years and that the petitioner achieved the bench mark. Admittedly, there are no adverse entries against the petitioner. The

petitioner had not suffered any penalty during the said 5 years period.

14. Needless to state, petitioners promotion as an Addl. DIG would be with effect from the date person immediately junior to the petitioner was promoted. We note that as an Addl. DIG, the petitioner would have superannuated on 31st July, 2007. We direct petitioner to be paid wages for the said period, notwithstanding the petitioner not having rendered actual services on account of the apparent mala fide of the DG BSF. Needless to state, pension of the petitioner would be re-fixed in the grade applicable and paid accordingly. All consequential benefits will also flow. The petitioner is also held entitled to a sum of Rs.11,000/- to be paid by the respondents towards costs. Necessary payment be made to the petitioner within 12 weeks from today.

3. The factual matrix of the case is as follows:-

The respondent "S.P. Nayyar joined the Border Security Force (BSF) as an Assistant Commandant(Technical) in 1971 and was promoted as Deputy Commandant in the year 1981. While in service, the respondent was issued Director-Generals displeasure on 27th March, 1984 and 25th February, 1998 for not observing laid down procedure in disposal of condemned vehicles and for irregularities in fabrication of recovery vehicles, respectively.

4. According to the appellants, as per paragraph 6.1.2. of the guidelines on the Departmental Promotion Committees and related matters issued vide DOP&T OM dated 10.4.1989, Departmental Promotion Committees (hereinafter referred to as ~DPCs for short) have been empowered to enjoy full discretion to devise their own method and procedure for objective assessment of the suitability of candidates who are to be considered.

5. The respondent was promoted as Second-in-command in 1990 and became Commandant (Ordinary Grade) on 9th February, 1993. Thereafter, the respondent became Commandant (as Ordinary Grade and Selection Grade got merged) with effect from 1st October, 1997. On 25th January, 2000, the case of the respondent was considered for his promotion by selection to the Rank of Addl. DIG by the DPC constituted for such purpose. After consideration, the name of respondent, having not found fit, was not recommended by the DPC.

6. Being aggrieved, the respondent filed Writ Petition (Civil) No. 3004 of 2000 before Delhi High Court challenging the decision of the said DPC. He alleged that he fulfilled the criteria of having three ~Very Good out of five previous ACRs, yet persons junior to him were selected. He imputed this to be malafide act of Appellant No.3 “ E.N. Ram Mohan. The appellants in their counter affidavit denied the said allegations and brought to the notice of the High Court the service record, decision taken by DPC and reasons for not recommending the name of the respondent. The High Court after perusal of the record, allowed the writ petition with the observation as mentioned above.

7. Learned counsel for the appellants made the following submissions to assail the judgment:

(a) The High Court was not right in directing the appellants to grant promotion to the respondent rather than directing the appellants to reconsider the case under DPC; and

(b) The High Court without any evidence, adjudicated disputed issue of malafide acts alleged against the appellant no. 3 in writ jurisdiction while dealing with a service matter, particularly, in the case where allegation was made by a person who had vested interest in the allegation.

8. Learned counsel for the respondent submitted that the respondent was wrongly superseded in the matter of promotion from the rank of Commandant to the rank of Addl.DIG in the BSF in the DPC held on 25th November, 2000 which considered the ACRs for the years 1994-95, 1995-96, 1996-97, 1997-98 and 1998-99.

It was submitted that the ACRs of 1994-95 and 1995-96, respondent was graded ~Very Good by the Initiating Officer(IO) Reviewing Officer(RO) as well as Accepting Authority(AO). For the ACR of 1996-97, the respondent was graded ~Very Good by the Initiating Officer as well as Reviewing Officer, but the appellant no. 3- E.N.Ram Mohan who was the Accepting Officer, down-graded the ACR as ~Good without recording any reason. However, the Director-General, BSF, undoing the damage, graded the respondent as ~Very Good. It is further contended that the record produced before the High Court also revealed

that appellant no.3 “E.N. Ram Mohan who took over as Director-General, BSF, down-graded ACRs of the respondent for the years 1997-98 and 1998-99 to ~Good contrary to the grading given by Initiating Officer and Reviewing Officer that too without assigning any reason there for, contrary to the instructions dated 3rd December, 1991. The down-graded ACRs of the respondent for the years 1997- 98 and 1998-99 were never communicated to him.

9. The bench-mark for promotion from the rank of Commandant to Addl. DIG is ~Very Good. The bench-mark ~Very Good has been defined in the instructions dated 6th February, 1991. The sum and substance of the said instructions is that the DPC would grade an officer as ~Very Good if atleast three of his five ACRs are ~Very Good and in the remaining ACRs under consideration, the performance is generally ~Good and that there is no adverse entry in any of the five ACRs under consideration.

10. According to the learned counsel for the respondent, despite the two wrong down-graded and un-communicated ACRs for the years 1997-98 and 1998-99, the respondent fulfilled the bench-mark, having ~Very Good in three ACRs for the years 1994-95, 1995-96, 1996-97 and ~Good in his remaining two ACRs and there is no adverse entry against him in any of the five ACRs under consideration. However, despite the aforesaid, the DPC held on 25th November, 2000, which was presided over by the appellant no. 3 “E.N. Ram Mohan graded the respondent as ~Good as against the ~Very Good, resulting into supersession of the respondent to the rank of Addl. DIG depriving the respondent of well-deserved promotion.

11. After giving our careful consideration to the facts and circumstances of the case and submissions made by learned counsel for the parties, we are of the view that High Court was wrong in holding that the respondent was targeted due to the personal bias of appellant no. 3 -E.N Ram Mohan. The High Court was also not justified in directing the authorities to promote the respondent to the post of Addl. DIG.

12. It is settled that High Court under Article 226 of the Constitution of India cannot sit in appeal over the assessment made by the DPC. If the assessment made by the DPC is perverse or is not based on record or proper record has not been considered by the DPC, it is always open to the High Court under Article 226 of the Constitution to remit the matter back to the DPC for recommendation, but the High Court cannot assess the merit on its own, on perusal of the service record of one or the other

employee.

13. The selection to the post of Addl. DIG is based on merit-cum- suitability which is to be adjudged on the basis of ACRs of different candidates. The merit position can be adjudged by the Selection Committee on appreciation of their Character Roll. In absence of the Character roll of other candidates, who were also in the zone of promotion, it is not open to the High Court to assess the merit of one individual who moves before the High Court, to give a finding whether he comes within the zone of promotion or fit for promotion.

14. The bias and malafide acts can be adjudged only on the basis of evidence. The assessment of Character Roll by one or the other officer, giving a general grade such as ~Good cannot be the sole ground to hold that the officer was biased against the person whose Character Roll is assessed. In the instant case, there is nothing on record to suggest that the appellant no. 3 "E.N. Ram Mohan was biased against the respondent. Merely because he assessed the ACR of the respondent as ~Good as against assessment of ~Very Good made by I.O. it cannot be said that he was biased against the respondent.

15. The Departmental Promotion Committee consists of a Chairman and the members. Even if bias is alleged against the Chair-person, it cannot be presumed that all the members of the Committee were biased. No ground has been made out by the respondent to show as to why the assessment made by the DPC is not to be accepted. The High Court failed to notice the aforesaid fact and wrongly discarded the assessment made by the D.P.C.

16. It is also settled that the High Court under Article 226 can remit the matter for reconsideration if a person was not properly considered for a promotion for which he was eligible. But it cannot direct to promote a person to the higher post, without giving a plausible ground.

17. For the reasons as aforesaid, we cannot uphold the findings of the judgment dated 21st August, 2012 passed by the High Court of Delhi and the same is accordingly set aside.

18. The appeal is allowed.