

GAHC010122722014



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/695/2014

VISHWANATH MISHRA

S/O- LT. DEVI PRASAD MISHRA, R/O VILL.- BISHNUKHERA, P.S.- LALGANJ,
DIST.- RAI BARELI, UTTAR PRADESH.

VERSUS

THE UNION OF INDIA and 5 ORS

REP. BY ITS SECY., MINISTRY OF HOME AFFAIRS, GOVT. OF INDIA, NORTH
BLOCK, NEW DELHI- 110001.

2:THE DIRECTORATE GENERAL OF SASHASTRA SEEMA BAL
EAST BLOCK- V
R.K. PURAM
NEW DELHI- 110066.

3:THE INSPECTOR GENERAL PERS
SASHASTRA SEEMA BAL
EAST BLOCK-V
R.K. PURAM
NEW DELHI- 110066.

4:THE INSPECTOR GENERAL SSB
FRONTIER HEAD QUARTERS
GUWAHATI.

5:THE DY. INSPECTOR GENERAL CTC SSB
SALONIBARI ASSAM.

6:SOUMEN ROY
TO BE SERVED THROUGH THE OFFICE OF THE RESPONDENT NO. 2

Advocate for the Petitioner : MR.J K PARAJULI

Advocate for the Respondent : MRS. A GAYAN

**BEFORE
HONOURABLE MR. JUSTICE N. UNNI KRISHNAN NAIR**

ORDER

Date : 19.03.2024

Heard Mr. S. N. Tamuli, learned counsel for the petitioner. Also heard Ms. A. Gayan, learned CGC, appearing on behalf of the official respondents. However, none has appeared on behalf of Respondent No. 6.

2. The writ petition has been instituted presenting a challenge to an order, dated 25.05.2012, by which the prayer of the petitioner for grant of notional seniority over his junior in the matter of promotion to the rank of Inspector(GD) in Seema Sashastra Bal(SSB) came to be rejected.

3. The facts requisite for adjudication of the issues arising in the present proceeding is noticed as under:

The petitioner who was initially recruited as a Constable(GD) in Seema Sashastra Bal(SSB) on 21.09.1988, was thereafter granted promotions to the next higher grades of the service and accordingly, he was subsequently promoted to the rank of Sub-Inspector(GD) vide order, dated 29.04.2005. The petitioner on his promotion as Sub-Inspector(GD) was placed above the Respondent No. 6 in the seniority list. The petitioner, thereafter, vide communication, dated 05.10.2007, was detailed for participating in the 12th Batch Platoon Commander(Ref.) Course scheduled to be held w.e.f. 08.10.2007 to 20.11.2007 followed by 11th batch of Senior Sub Inspectors Course Training scheduled to be held w.e.f. 26.11.2007 to 19.02.2008.

It is contended in the writ petition that the said courses have to be successfully completed by an incumbent in the rank of Sub-Inspector(GD) for being eligible for promotion to the next higher rank.

It is contended that the petitioner on successful completion of the 12th Batch Platoon Commander(Ref.) Course held w.e.f. 08.10.2007 to 20.11.2007, had proceeded for participation in the 11th batch of Senior Sub Inspectors Course Training scheduled to be held w.e.f. 26.11.2007 to 19.02.2008. However, he was prevented from undergoing such course on the ground that his ACRs for the preceding year was below the required benchmark. Being aggrieved, the petitioner approached the Patna High Court by way of instituting a writ petition being CWJC No. 4992 of 2008. However, during the pendency of the said writ petition, the respondent authorities allowed the petitioner to undergo the said Senior Sub Inspectors Course Training scheduled to be held w.e.f. 26.11.2007 to 19.02.2008 i.e. in the 12th batch of the said course and the petitioner, accordingly, had undergone the said course and successfully completed the same. The said writ petition was accordingly withdrawn.

Thereafter, the respondent authorities published a list of persons found eligible for promotion to the rank of Inspector(GD) on 15.10.2008 and therein, while the name of the Respondent No. 6 figured, the name of the petitioner did not figure. Being aggrieved, the petitioner approached the Patna High Court by way of filing a writ petition being CWJC No. 18614 of 2009. The said writ petition was given a final consideration and the High Court vide order, dated 09.02.2010 was pleased to dispose of the same requiring the respondent

authorities to consider the case of the petitioner for promotion to the rank of Inspector(GD) with effect from the date he had become eligible for such promotion.

It is contended that in pursuance of the directions passed by the Patna High Court; the petitioner was vide order, dated 22.07.2010, promoted to the rank of Inspector(GD). The said order of promotion, dated 22.07.2010, was followed by another order, dated 04.08.2010, by which the promotion as effected in the case of the petitioner to the rank of Inspector(GD) was so made effective w.e.f. 02.08.2010. Accordingly, the petitioner being so granted the said promotion from a date subsequent to that as granted to his immediate junior i.e. Respondent No. 6; proceeded to prefer a Letters Patent Appeal being LPA No. 1993 of 2010 before the Patna High Court challenging the order, dated 09.02.2010 as passed in CWJC No. 18614/2009. The Division Bench of the High Court vide order, dated 10.02.2012, was pleased to dispose of the said LPA by directing the respondent authorities to consider the case of the appellant for promotion from the date when his junior was promoted to the post of Inspector(GD), if he is otherwise eligible.

It is contended by the petitioner that vide order, dated 25.05.2012, he was shown to be promoted w.e.f. 19.05.2010, however, with notional seniority in the rank of Inspector(GD) w.e.f. 30.01.2009. Being aggrieved, the petitioner instituted a contempt petition being MJC No. 4685/2012. During the pendency of the said MJC No. 4685/2012; the respondent authorities more particularly the Director General, SSB, proceeded to issue the order, dated 25.05.2012, by which the claim of the petitioner for being granted notional seniority over the

Respondent No. 6 in the rank of Inspector(GD) was considered and rejected as of being devoid of merit. Accordingly, the same on being placed before the Patna High Court, the High Court proceeded to close the said MJC No. 4685/2012 with liberty to the petitioner to challenge the order, dated 25.05.2012. In the meantime, the petitioner having been transferred to an area falling within the jurisdiction of this Court; the instant writ petition was so instituted by the petitioner before this Court assailing the order, dated 25.05.2012, with a further prayer for a direction to the respondent authorities to grant him seniority in the rank of Inspector(GD) above the Respondent No. 6 as well as for consideration of his case for promotion to the rank of Assistant Commandant(GD) with effect from the date, the Respondent No. 6 was so promoted to the post of Assistant Commandant(GD).

4. Mr. Tamuli, learned counsel for the petitioner, by reiterating the facts as noticed hereinabove; has submitted that the petitioner was denied his promotion along with his junior i.e. Respondent No. 6 to the rank of Inspector(GD) only on the ground that his ACR for the year 2006-07 was below the benchmark prescribed. It is the specific contention of the learned counsel that the said ACR was graded as "Average" and accordingly, having been found to be not meeting the requisite standards for deputing the petitioner, herein, for undergoing the promotional course along with the Respondent No. 6 and the Respondent No. 6 having completed the course prior to that of the petitioner; the petitioner was denied his promotion along with that of the Respondent No. 6.

5. Mr. Tamuli, learned counsel for the petitioner, has submitted that the ACR of the petitioner for the year 2006-07 basing on which the petitioner was initially not allowed to undergo the Senior Sub Inspectors Course Training, was never communicated to the petitioner at that relevant point of time or even till the institution of the present proceeding before this Court. Mr. Tamuli, learned counsel, has contended that the ACR, in question, having not been communicated to the petitioner as is mandatorily required to be done; the same could not have been taken-up for consideration to the prejudice of the petitioner, herein.

6. In support of his submissions, Mr. Tamuli, learned counsel for the petitioner, has placed reliance on the decisions of the Hon'ble Supreme Court rendered in the case of ***Prabhu Dayal Khandelwal v. Chairman, UPSC & ors.***, reported in ***(2015) 14 SCC 427*** and in the case of ***Rukshana Shaheen Khan v. Union of India & ors.***, reported in ***(2018) 18 SCC 640***.

7. Mr. Tamuli, learned counsel, by placing reliance on the said judgments has submitted that the adverse ACR not being communicated to the petitioner, herein, no reliance could have been placed by the respondent authorities on the same for the purpose of denying to the petitioner, his due service benefits.

8. Mr. Tamuli, has also drawn the attention of this Court, to the list of candidates who were nominated for undergoing the 20th Senior Sub Inspectors Course scheduled to be held w.e.f. 02.07.2012 to 26.09.2012, to contend that the said list also included persons who were already promoted to the rank of

Inspector(GD) and thereafter, deputed for the said training. In the above view of the matter; Mr. Tamuli, learned counsel, has submitted that the petitioner was discriminated in the matter and such discrimination having had the effect of denying to him his due promotion to the rank of Inspector(GD) with effect from the date the Respondent No. 6 was so promoted, has prayed that this Court would be pleased to interfere in the matter and issue appropriate direction for redressing the grievances of the petitioner herein. It was contended that the petitioner is no longer in service and accordingly, the benefits that would now accrue to him, would be in the form of monetary benefits only.

9. Ms. Gayan, learned CGC, by referring to the affidavit filed in the matter by the respondent authorities; has contended that the ACR in respect of the petitioner for the period w.e.f. 01.04.2006 to 31.03.2007 having been graded as "Average", he was in terms of the procedure in place not permitted to undergo the 11th batch of Senior Sub Inspectors Course Training. It is further contended that the promotions were effected by determining the eligibility for such promotion as on 01.01.2008 as per the existing rules. As on 01.01.2008, the petitioner ought to have completed his Senior Sub Inspectors Course Training but due to the said "Average" grading in his ACR, he was not held to be eligible being deputed for undergoing the said training course and accordingly, the respondent No. 6 who had completed the prescribed training and otherwise eligible for such promotion, was accordingly considered and promoted against the vacancy year 2008-09.

10. Ms. Gayan, learned CGC, has contended that the directions as passed by

the Patna High Court in the proceedings instituted by the petitioner before the said Court were duly considered by the respondent authorities and the considerations so made was also duly communicated to the petitioner vide order, dated 25.05.2012.

11. Ms. Gayan, learned CGC, by taking this Court through the order, dated 25.05.2012, has contended that the Director General, Seema Sashastra Bal(SSB), while passing the said order, had taken into consideration all relevant factors and also keeping note of the fact that the petitioner's case was not sponsored for the 11th batch Senior Sub Inspectors Course Training on account of "Average" grading available in his ACR for the year 2006-07, and accordingly, his promotion against the vacancy year 2008-09, being not permissible; it was held that the petitioner is not eligible to claim seniority over the respondent No. 6 in the rank of Inspector(GD). It was also contended that keeping in view the directions passed by the Patna High Court, the petitioner was granted notional seniority from the date he became eligible for such promotion i.e. on his completion of Senior Sub Inspectors Training Course. Accordingly, it is the contention of Ms. Gayan that in view of the facts and circumstances as existing in the matter, there arises no occasion for this Court to interfere with the order, dated 25.05.2012, and/or to grant the petitioner the reliefs as provided by him in the present proceeding.

12. I have considered the submissions advanced by the learned counsels appearing for the parties and also perused the materials available on record.

13. At the outset, it is to be noted that it is not disputed by either of the parties that the ACR of the petitioner for the year 2006-07 which was admittedly graded as "Average", but the same was never communicated to the petitioner. However, such uncommunicated ACR was taken into consideration by the respondent authorities for the purpose of preventing the petitioner from continuing with the training programme of the Senior Sub Inspectors Course training programme along with its 11th batch and thereafter, in view of the said ACR for the year 2006-07; the petitioner's case for promotion against the vacancy year 2008-09 could not be considered and accordingly, the petitioner had become junior to the respondent No. 6 in the rank of Inspector(GD). It is to be noted that the petitioner, herein, was deputed by following the procedure prescribed vide the communication, dated 05.10.2007, for 2 simultaneous training programmes i.e. 12th Batch Platoon Commander(Ref.) Course scheduled to be held w.e.f. 08.10.2007 to 20.11.2007 and 11th batch of Senior Sub Inspectors Course Training scheduled to be held w.e.f. 26.11.2007 to 19.02.200. While the petitioner had completed the 12th Batch Platoon Commander(Ref.) Course, however, he was restrained from completing the Senior Sub Inspectors Course Training in its 11th batch on account of adverse ACR available in the service records of the petitioner. Thereafter, on completion of the 11th batch Senior Sub Inspectors Course Training by the respondent No. 6, herein, the respondent No. 6 was promoted to the rank of Inspector(GD) w.e.f. 25.07.2008. The said deprivation as made to the petitioner, lead to institution of proceedings before the Patna High Court and as noticed hereinabove, the said Court had directed the respondent authorities in the proceeding initiated by the petitioner before it, to consider the case of the petitioner for promotion from the

date when his junior was so promoted to the post of Inspector(GD). It was seen that the petitioner was subsequently allowed to complete his Senior Sub Inspectors Course Training in the 12th batch and thereafter, on completion of such training programme, the petitioner was promoted to the rank of Inspector(GD) vide order, dated 19.05.2010. The said promotion was subsequently vide order, dated 30.06.2010, granted with retrospective effect notionally w.e.f. 30.01.2009 to the rank of Inspector(GD).

14. The issue that arises before this Court is as to whether the action on the part of the respondent authorities in placing reliance on the adverse ACR of the petitioner for the year 2006-07 without communicating the same to him, would be the reason sufficient to justify the denial of promotional benefits to the petitioner with effect from the date his juniors were so promoted to the next higher cadre of the service.

15. In this connection, reference is made to the decisions relied on by Mr. Tamuli, learned counsel for the petitioner. In the case of ***Prabhu Dayal Khandelwal*** (supra) wherein, the Hon'ble Supreme Court on considering the issues arising therein, and also the decision of the Hon'ble Supreme Court rendered in the case of ***Abhijit Ghosh Dastidar v. Union of India***, reported in ***(2009) 16 SCC 146*** as well as the decision of the Hon'ble Supreme Court rendered in the case of ***Sukhdev Singh v. Union of India***, reported in ***(2013) 9 SCC 566*** in which cases, the Hon'ble Supreme Court had held that every entry in an ACR whether poor, fair, average, good or very good, must necessarily be communicated to the employee concerned within a reasonable period, proceeded to direct the respondents to consider the case of the appellant

therein by ignoring the uncommunicated ACRs for the purpose of his promotion to the post of Chief Controller, Income Tax, for the vacancy years 2000-01 and 2001-02.

16. The Hon'ble Supreme Court in the case of ***Rukshana Shaheen Khan***(supra) under similar circumstances, had examined the issue as to whether the uncommunicated ACR which are adverse to the appellant, should have been relied upon for the purpose of consideration of the case of the appellant therein for promotion. On consideration of the decision of the Hon'ble Supreme Court in ***Sukhdev Singh***(supra); the Hon'ble Supreme Court proceeded to direct that the competent authority to ignore the uncommunicated adverse ACRs and thereafter, to take a fresh decision in accordance with law. The appellant therein was also granted liberty to advance submissions in the matter, including submissions by relying on the decision of the Hon'ble Supreme Court in the case of ***Prabhu Dayal Khandelwal*** (supra).

17. Applying the conclusions as reached by the Hon'ble Supreme Court in the above-noted cases to the facts involved in the present case, it is seen that the petitioner herein was denied his due promotion to the rank of Inspector(GD) against the vacancy year 2008-09 along with that of his immediate juniors to the cadre of Inspector(GD) only on account of an adverse ACR being available in the record for the period relevant to be considered for such promotion. Accordingly, in view of the said decisions of the Hon'ble Supreme Court, the said ACR of the petitioner not being communicated, could not have been taken into account by the respondent authorities for the purpose of considering the service benefits as flowing to the petitioner herein in terms of the rules holding the

field. The said ACR, being an uncommunicated one, could not have been relied for preventing the petitioner from participating in the Senior Sub Inspectors Course Training along with the trainees short-listed for undergoing the said course in its 11th batch.

18. Further, what is noticeable is that the respondent authorities had in a subsequent recruitment process relaxed the provisions which requires that a Sub-Inspector(GD) for the purpose of promotion to the next higher grade of Inspector(GD), is mandatorily required to successfully complete the Senior Sub Inspectors Course Training programme and had promoted persons to the next higher grade of Inspector(GD) without insisting for completion of such training programme. The said aspect of the matter was brought on record in the present proceeding by the petitioner by way of filing an additional affidavit.

19. Ms. Gayan, learned CGC, has, with regard to the said aspect of the matter, contended that the same was so necessitated on account of the fact that at that relevant point of time, there was shortage of persons eligible for being considered for promotion to the rank of Inspector(GD) in the force and accordingly, the competent authority in exercise of powers vested in him, had proceeded to relax the said requirement. However, since the same was an one-time exercise; the petitioner cannot rest his claim on the said decision taken in a subsequent process of promotion to the rank of Inspector(GD).

20. The materials as available on record, reflects that in the promotional exercise as undertaken by the Department in the year 2012; 17(seventeen)

Sub-Inspectors(GD) who had not qualified the pre-promotion course i.e. Senior Sub Inspectors Course Training, either, on account of unwillingness to undertake such course, or, on not being recommended by the scrutiny committee on their ACRs being found to be below the benchmark, were so considered for promotion to the rank of Inspector(GD) in terms of the relaxation given in the matter by exercise of discretionary powers vested in the Director General, SSB, due to exigency of service.

21. Be that as it may, the respondent authorities having relaxed the recruitment conditions for promotion to the rank of Inspector even on the ground, wherein the person so considered for promotion had not completed the pre-promotion course, in question; the petitioner herein is better placed in-as-much as he was initially sponsored for undergoing the said training programme but basing on an adverse ACR, which was not communicated to the petitioner, herein, was deprived from undergoing the said course and as a consequence of which, the petitioner was subsequently superseded in the matter of promotion to the rank of Inspector(GD) by his juniors including the respondent No. 6 and further noticing that the petitioner had already superannuated from his service, this Court is of the considered view, following the decisions of the Hon'ble Supreme Court noticed hereinabove, the petitioner is also required to be directed to be given a consideration with regard to his promotion to the rank of Inspector(GD) with effect from the date the respondent No. 6 was so promoted.

22. In view of the above conclusions; following directions are called to be passed in the matter:

(i). The order, dated 25.05.2012, passed by the Director General, SSB, and impugned in the present proceeding, stands set aside and quashed.

(ii). The respondent authorities more particularly the Director General, SSB, is directed to consider the case of the petitioner by way of constituting a review DPC for review of the promotions as effected against the vacancy year 2008-09 and therein, to now have the case of the petitioner considered by deeming him to have completed the Senior Sub Inspectors Course Training prior to 01.01.2008 and by ignoring the uncommunicated "Average" ACR for the year 2006-07.

(iii). The DPC on considering the case of the petitioner in the manner as directed hereinabove; shall make its recommendations and such recommendations if favourable to the petitioner; the respondent authorities shall issue orders towards granting notional seniority to the petitioner w.e.f. 25.07.2008 i.e. the date on which the promotion of the respondent No. 6 was so effected.

(iv). The petitioner in the event of his such promotion being effected shall not be entitled to financial benefits other than the notional fixation of his pay for the period w.e.f. 25.07.2008 till the date of his actual promotion i.e. 19.05.2010.

(v). The pay of the petitioner on the date he had actually assumed the charge of the post of Inspector(GD) shall be now so re-fixed by taking into

consideration the notional pay fixation as directed in his case vide this order, with effect from 25.07.2008 and thereafter, the petitioner shall be released the arrears of pay so accruing to him.

(vi). As the petitioner who in terms of the directions as passed hereinabove, would now rank senior to the respondent No. 6 in the rank of Inspector(GD), would now be required to be considered for promotion to the rank of Assistant Commandant(GD) w.e.f. 11.05.2012. Accordingly, it is directed that the DPC shall also after considering the case of the petitioner for promotion to the rank of Inspector(GD) as directed hereinabove, shall also consider his case for such promotion by making a review of the DPC held which had led to the promotion of respondent No. 6 to the rank of Assistant Commandant(GD).

(vii). In the event, the DPC finds the petitioner eligible for such promotion to the rank of Assistant Commandant(GD); the respondent authorities shall so promote the petitioner notionally with effect from the date the respondent No. 6 was so promoted. The pay of the petitioner would now be notionally fixed with effect from the date his such promotion is effected to the cadre of Assistant Commandant(GD) till the date the petitioner continued in his service i.e. till he either retired on reaching the age of superannuation and/or had left the service in any manner other than in pursuance to an imposition of a penalty in a departmental proceeding.

(viii). The promotion as effected to the ranks of Inspector(GD) as well as the Assistant Commandant(GD) would now mandate a revision of pension and pensionary benefits authorized to the petitioner and the respondent authorities shall carry-out the necessary exercise and release the arrears of the enhanced pension and pensionary benefits now becoming due to the petitioner.

23. The above directions as passed hereinabove shall be so complied with by the respondent authorities within a period of 3(three) months from the date of receipt of a certified copy of this order from the petitioner.

24. The petitioner is directed to submit a certified copy of the present order to the concerned respondent authorities for taking the matter forward along with a representation staking his claim for promotion to the ranks of Inspector(GD) and Assistant Commandant(GD) with effect from the date such promotion was effected in the matter in respect of respondent No. 6, herein.

25. With the above directions and observations; this writ petition stands disposed of.

JUDGE

Comparing Assistant