

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

FRIDAY, THE 12TH DAY OF JUNE 2015/22ND JYAISHTA, 1937

WA.No. 588 of 2011 ()

AGAINST THE JUDGMENT IN WP(C) 28410/2007 DATED 24/01/2011

APPELLANTS/RESPONDENTS :

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1. THE LIFE INSURANCE CORPORATION OF INDIA
YOGAKSHEMA, JEEVAN BHIMA MARG, MUMBAI
REPRESENTED BY THE MANAGING DIRECTOR.
 2. THE CHAIRMAN,
LIFE INSURANCE CORPORATION OF INDIA, YOGAKSHEMA
JEEVAN BHIMA MARG, MUMBAI.
 3. THE EXECUTIVE DIRECTOR (PERSONNEL)
LIFE INSURANCE CORPORATION OF INDIA, YOGAKSHEMA
JEEVAN BHIMA MARG, MUMBAI.

BY SENIOR ADVOCATE SRI.KURIAN GEORGE KANNANTHANAM
BY ADV. SRI.S.EASWARAN

RESPONDENT/PETITIONER :

B.KUNHAMBUR NAIK
ASSISTANT BRANCH MANAGER (SALES), S.R. NO. 554639,
LIFE INSURANCE CORPORATION OF INDIA, BRNCH OFFICE
KASARAGOD, PIN - 671 121.

BY SENIOR ADVOCATE SRI.N.DHARMADAN
BY ADVS. SRI.S.SUNIL MAURYAN
SRI.P.PREMAN

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 20-03-2015, ALONG
WITH WA. 589/2011, THE COURT ON 12-06-2015 DELIVERED THE
FOLLOWING:

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APPENDIX

APPELLANTS ANNEXURES :

- ANNEXURE A1 : COPY OF THE ANNUAL CONFIDENTIAL REPORT OF SRI. B.K. NAIR FOR 1.4.2002 TO 31.3.2003.
- ANNEXURE A2 COPY OF THE ANNUAL CONFIDENTIAL REPORT OF SRI. B.K. NAIR FOR 1.4.2003 TO 31.3.2004.
- ANNEXURE A3 COPY OF THE SPECIAL CONFIDENTIAL REPORT OF SRI. B.K. NAIR FOR 1.4.2004 TO 31.4.2005.
- ANNEXURE A4 COPY OF THE ANNUAL CONFIDENTIAL REPORT OF SRI. B.K. NAIR FOR 1.4.2004 TO 31.3.2005.
- ANNEXURE A5 COPY OF SPECIAL CONFIDENTIAL REPORT OF SRI. B.K. NAIR FOR THE PERIOD 1.4.2005 TO 31.12.2005.
- ANNEXURE A6 COPY OF ANNUAL CONFIDENTIAL REPORT OF SRI. B.K. NAIR FOR THE PERIOD 1.4.2005 TO 31.12.2006.
- ANNEXURE A7 COPY OF SPECIAL CONFIDENTIAL REPORT OF SRI. B.K. NAIR FOR THE PERIOD 1.4.2006 TO 31.3.2006.
- ANNEXURE A8 COPY OF ANNUAL CONFIDENTIAL REPORT OF SRI. B.K. NAIR FOR THE PERIOD 1.4.2006 TO 31.3.2007.
- ANNEXURE A9 COPY OF SPECIAL CONFIDENTIAL REPORT OF SRI. B.K. NAIR FOR THE PERIOD 1.4.2007 TO 31.12.2007.
- ANNEXURE A10 COPY OF ANNUAL CONFIDENTIAL REPORT OF SRI. B.K. NAIR FOR THE PERIOD 1.4.2007 TO 31.3.2008.

RESPONDENT'S ANNEXURES :

- ANNEXURE A1 : COPY OF THE BRIEF VERSION OF SERVICE DETAILS.

//TRUE COPY//

P.S. TO JUDGE

**ASHOK BHUSHAN, CJ
& A.M.SHAFFIQUE, J.**

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W.A.Nos.588 & 589 of 2011

Dated this the 12th day of June 2015

J U D G M E N T

Shaffique, J

The respondents in the writ petitions are the appellants. Since common questions arise for consideration in the above appeals, the same are decided together.

2. W.A.No.588/2011 is filed challenging the judgment dated 24/01/2011 in W.P.C.No.28410 of 2007. The respondent herein, who is hereinafter referred to as the petitioner, challenged the list published by the appellants to the extent of excluding the petitioner in the cadre of Branch Manager and sought for a direction to promote him to the cadre of Branch Manager with effect from April 2005, the date on which his batchmates were promoted. W.A.No.589 of 2011 is filed against the judgment dated 21/01/2011 in W.P.C.No.28179/2007. The respondent in the appeal, who is hereinafter referred to as the petitioner, filed the writ

petition for similar reliefs. The learned Single Judge by separate judgments, directed the appellants to promote the petitioners as Branch Manager with effect from the date on which their immediate junior had been promoted.

3. In the writ petitions, petitioners contended that they rendered more than twenty years of service with the appellant Corporation. Several promotion lists came to be published. The practice in the Corporation was that every year, employees in feeder categories are promoted to higher categories of posts. The batch of officers in which the petitioners were included are promoted to the cadre of Branch Manager in April 2005. No justifiable reason was stated for superseding the petitioners. They were also not included when their junior batch were promoted during 2006 and 2007. It was contended that their superior and preferential qualifications and suitability for being promoted

as Branch Manager has been overlooked illegally. Petitioners referred to Clause 7(3) of the Staff Regulations which inter alia provided that promotion shall be based on merit and suitability of the candidates for a particular post and seniority. The merit and suitability are adjudged through confidential reports and in the absence of any adverse remarks which have been intimated to the petitioners, the other criteria was seniority which should not have been by-passed. Though the petitioners had submitted several representations, no action had been taken in the matter and therefore they had approached this Court.

4. Separate counter affidavits have been filed by the appellants in the writ petitions, inter alia stating that the writ petitions are not maintainable as the persons who had been promoted in terms of the impugned promotion list were not made parties to the writ petitions, that there is delay in filing

the writ petitions and that the selection of officers on promotion from among the eligible officers are guided by Rule 7(3) of the Life Insurance Corporation of India (Staff) Rules, 1960 (hereinafter referred to as 'the Staff Rules') which clearly indicates that promotion shall be based on merit and suitability of the candidate for a particular post and seniority. It is further stated that merit and suitability may be adjudged by confidential reports and/ or interviews and / or examinations. It is also stated that as per practice being followed, merit and suitability are adjudged by the confidential reports. It is further stated that the confidential reports are subjected to evaluation by a committee constituted under Rule 7(2) of the Staff Rules which assists the Chairman in finalising promotion to the post of Branch Manager. It is based on such evaluation and recommendation in the form of report that orders of

promotion are issued. Petitioners were also considered for promotion to the cadre of Branch Managers along with other eligible candidates of Assistant Branch Manager (Sales) during the promotions for the years 2005-2006, 2006-2007, 2007-2008. The petitioners could not find a place in the list of selected candidates. It is also contended that seniority is not the sole criteria for promotion to the higher cadre. It is also made known that on an all India basis during 2005-2006 there were 603 eligible officers and only 205 were promoted. During 2006-2007, 140 officers were promoted as against the eligible officers of 383. During 2007-2008, number of promotions were 58 as against the eligible candidates of 230. Similarly, in Southern zone alone, the eligible candidates during 2005-2006 were 77 and the persons promoted were only 28. During 2006-2007, 20 persons were promoted from among the eligible candidates of 47 and in

2007-2008, 6 persons alone were promoted as against the eligible candidates of 23. It is therefore contended that when the petitioners were in the list for consideration and they were not promoted taking into account the relative merit of the candidates, the petitioners cannot challenge their exclusion from the promotion list and cannot seek a direction as sought for. During the pendency of the writ petition, the petitioner in W.P.C.No.28410/2007 was promoted with effect from 26/05/2008.

5. The learned Single Judge observed that in the absence of any material to indicate that there were any adverse remarks in the confidential reports and since the appellants have not chosen to give any of the details regarding the confidential reports or that any of the promoted juniors were demonstrably superior in merit to the petitioners, the writ petitions are liable to be allowed.

Reliance has also been placed to the judgment in W.P.C.No.26520/1999 which has been affirmed in W.A.No.568/2007 and directions have been issued as stated above.

6. Heard learned senior counsel Sri.Kurian George Kannanthanam and Sri.S.Easwaran, learned counsel appearing on behalf of the appellants and the learned senior counsel Sri.N.Darmadan, appearing for the respondents.

7. By an interim order dated 30/09/2011, direction was issued to the appellants to promote the respondent in W.A.No.589/2011 as Branch Manager at the earliest, subject to the result of the writ appeal. By another interim order dated 09/06/2011, the appellants were directed to make available the original records pertaining to the promotions not only in regard to the appellants but the records pertaining to the promotion process for the relevant years in

question. The said records are made available by the learned counsel appearing on behalf of the appellants for the years 2005, 2006 and 2007.

8. It is brought to the notice of this Court that respondent in W.A.No.589/2011 had been promoted as per the interim order dated 30/09/2011 issued by this Court.

9. The files in this connection disclose that the selection committee considered the claims of various candidates and as against the promoted candidates, they have recorded the word 'P' and in respect of candidates who had represented, the word 'REP' is mentioned. The Committee has also finalised the list of 215 candidates who were promoted to the post of Branch Manager during the period 2005-2006. Similar reports have been prepared by the committee during the year 2006-2007 as well.

10. It is argued on behalf of the appellants that the confidential report contains the report of the Appraisal officer, Reporting officer and Reviewing officer and an over all consideration of the inputs made by the authorities are taken into consideration by the committee to verify whether the officer falls within the zone of consideration. The materials available on record indicates that the committee had considered the case of the petitioners also. It is taking into account the assessment made by the committee that the committee decided not to recommend the case of the petitioners for promotion. The appraisal reports of the petitioners were also produced along with the memorandum of appeal. It is pointed out that several deficiencies in the work had been pointed out in the reports which were taken into consideration by the committee. It is based on a comparative assessment of the merits and demerits of each

candidate that the Committee recommends promotion. Therefore, it is argued that the learned Single Judge was not justified in coming to the conclusion that there was no basis for rejecting promotion to the petitioners.

11. On the other hand, Sri.N.Darmadan, learned senior counsel submitted that both the petitioners were entitled to be promoted at the relevant time when most of their batchmates were promoted. As far as relative merit of seniority is considered, judgment on merit by the committee shall be based only on confidential reports. No adverse reports were made known to the petitioners. Therefore, when their relative merit is considered based on confidential reports alone, in the absence of any adverse entry made known to the petitioners, seniority alone was the criteria. Learned counsel relied upon various judgments which are as under:

(i) **Sukhdev Singh v. Union of India** AIR 2013 SC 2741 is relied upon to contend that every entry in the annual confidential report (ACR) is to be communicated to the public servant within a reasonable period which may enable him to make representation for upgradation of his remarks and enables him to improve his work and it gives transparency in the matter. Paragraphs 8 and 9 are relevant which reads as under:

“8.In our opinion, the view taken in Dev Dutt that every entry in ACR of a public servant must be communicated to him/her within a reasonable period is legally sound and helps in achieving threefold objectives. First, the communication of every entry in the ACR to a public servant helps him/her to work harder and achieve more that helps him in improving his work and give better results. Second and equally important, on being made aware of the entry in the ACR, the public servant may feel dissatisfied with the same. Communication of the entry enables him/her to make representation for upgradation of the remarks

entered in the ACR. Third, communication of every entry in the ACR brings transparency in recording the remarks relating to a public servant and the system becomes more conforming to the principles of natural justice. We, accordingly, hold that every entry in ACR - poor, fair, average, good or very good - must be communicated to him/her within a reasonable period.

9.The decisions of this Court in Satya Narain Shukla v. Union of India and others and K.M. Mishra v. Central Bank of India and others and the other decisions of this Court taking a contrary view are declared to be not laying down a good law."

(ii) Reference is made to a Division Bench judgment of this Court in **The Director, ISRO Interrial Systems Unit v. Saji K.Sam** (O.P.CAT No.2173/2012 dated 09/07/2012), wherein it was observed that since the ACRs were not communicated to the respondent, it has to be ignored.

(iii) In **State of Kerala and others v. E.K.Bhaskaran Pillai** [Appeal (Civil) No.7953/2004 dated 17/4/2007], the Supreme Court held that when the

administration has wrongly denied promotion, he should be given full benefits including monetary benefit subject to there being any change in law or some other supervening factors. The principle, “no work no pay” cannot be accepted as a rule of thumb. When it was found that the person junior to the petitioner was promoted, it was wrongful denial of promotion and therefore he was entitled to all the monetary benefits.

(iv) Further reference is made to the judgment of the Supreme Court in **P.N.Premachandran v. State of Kerala** [AIR 2004 SC 255]. What was under challenge was the promotions granted with effect from 1964. Supreme Court found that, by virtue of Rule 39, promotion could be granted with retrospective effect. It is held at paragraphs 6 and 7 as under:

“6.Rule 39 of the Rules is a residuary provision conferring overriding power and this in terms thereof

grant of promotion/appointment with retrospective effect is permissible.

7.It is not in dispute that the posts were to be filled up by promotion. We fail to understand how the appellant, keeping in view the facts and circumstances of this case, could question the retrospective promotion granted to the private respondents herein. It is not disputed that in view of the administrative lapse, the Departmental Promotion Committee did not hold a sitting from 1964 to 1980. The respondents cannot suffer owing to such administrative lapse on the part of the State of Kerala for no fault on their part. It is also not disputed, that in ordinary course they were entitled to be promoted to the post of Assistant Directors, in the event, a Departmental Promotion Committee had been constituted in due time. In that view of the matter, it must be held that the State of Kerala took a conscious decision to the effect that those who have been acting in a higher post for a long time, although on a temporary basis, but were qualified at the time when they were so promoted and found to be eligible by the Departmental Promotion Committee at a later date, should be promoted with retrospective effect ."

(v) Another judgment relied upon is **State of Uttarpradesh v. Dayanand** [AIR 2013 SC 3066]. That was also a case in which the Supreme Court lays down an exception to the principle “no work no pay”. It is held that if an employee is prevented by an employer to perform his duties, the employee cannot be blamed for having not worked and the principle of “no work no pay” shall not be applicable to such employee.

(vi) Learned counsel relied upon the judgment in W.A.No.568 of 2007 which was relied upon by the learned Single Judge as well. In that case it was found that, mere stating that the confidential reports were assessed and the candidate was found to be not suitable for promotion cannot be accepted, since it does not amount to sufficient compliance of the procedure as established by law. The Division Bench found that in the absence of any material on

record to show that the assessment made had any semblance of a proper assessment, as is required to be made in the matter of promotion of an employee governed by the regulations, the exercise so made was only an eye wash. Hence it was directed that the candidate in that case was entitled to be considered for promotion in par with his juniors. The Division Bench also took note of various judgments regarding the monetary benefits to be granted and directed that the question regarding entitlement of back arrears has to be considered by the 2nd respondent after affording an opportunity to be heard in the matter.

(vii) Another Division Bench judgment of this Court in **T.Padmanabhan v. FACT Ltd.** [1985 (2) ILR 126] is relied upon. That was also a case where the adverse remarks in the candidate's confidential reports were not communicated. It was held that any decision taken or steps taken without

complying with the minimal requirement of law which is consistent with natural justice or fairness is arbitrary and illegal, and hence null and void.

12. Having regard to the factual and legal issues which had arisen in the case, the short question to be considered is whether the appellants were justified in not granting promotion to the petitioners with effect from the date on which their immediate juniors were promoted.

13. The materials placed before us indicates that promotion to the post of Branch Manager is based on Rule 7 (3) of the Staff Rules. It is apparent that the merit and suitability has to be judged on the basis of confidential reports. The files of assessment produced before this Court indicates that the selection committee has prepared a list of the eligible candidates for promotion. The reason for excluding the other candidates has not been specifically

mentioned. It is therefore apparent that the petitioners were also considered for promotion, but they were not selected on account of various reasons. It is not in dispute that there was no interview or written test or other consideration. The selection committee had only referred to the confidential reports of the candidates. According to the appellants, though there is no adverse remarks against the petitioners, what was considered by the selection committee was the relative merit of the candidates to be promoted. In order to give promotion to the post of Branch Manager, there has to be a qualitative analysis which is done by the committee. In the absence of any mala fides on the part of the committee in selecting the petitioners, the question to be looked into is whether this Court can direct promotion to be given purely based on seniority.

14. A decision by the selection committee while

preparing a list of candidates to be promoted, cannot be an eye wash as held by the Division Bench in W.A.No.568/2007. However, when the relative assessment has been made on the basis of confidential reports, can it be said that such a process is bad in law.

15. The petitioners have a case that they were not informed about any adverse remarks against them. Now that the appellants have produced the confidential reports of the petitioners, we do not find any adverse remarks against the petitioners in the confidential reports whereas there is an evaluation being done and reference is also made as to whether they could be promoted to the post of Branch Manager. The counsel for appellants brought to our notice a communication issued by the LIC, Central Offices to all other Zones and Departments on 10/10/1991 in the matter relating to communication of adverse entries in the

confidential reports. The adverse remarks which have to be communicated, as recorded in the respective points with reference to the category of employees is mentioned.

16. In respect of the petitioners, additional documents have been produced along with separate petitions producing the Annual Development Oriented Performance Appraisal for different periods. Each appraisal document contains personal record of the candidate. It also contains parts A to E . Part A is with reference to goals and performance which is signed by the Appraisee. Part B contains the appraisal form for officers of the Cadre of AAOs, AOs and ADMs. Various parameters are mentioned which includes supervision, problem solving, lateral co-ordination, common effectiveness areas, integrity, dependability, sensitivity, creativity, leadership, organisational ability, team building, sense of responsibility, attitude to change etc. Part C is the

Appraisee's comments wherein the Appraisee agrees to the appraisal or offer comments. Part D is the confidential report which is prepared by the Appraiser. It contains the overall assessment as well, where the Appraiser gives a rating based on an overall assessment taking into consideration the facts stated in Parts A, B and C. Part E contains the confidential report of the Reviewing Officer wherein also the overall assessment is mentioned based on Parts A, B and C. In some of the records a further review is also done in Part F. The document therefore indicates a consolidated performance appraisal of the candidate and Part A ,B and C are prepared by the Appraisee. Part D, E and F alone are the confidential reports which indicates an overall assessment of the officer. Perusal of the above documents does not indicate any adverse remarks against the petitioners whereas the appraisal forms indicate various

ratings being given, whether they could be promoted or not, whether independent charge could be given etc.

17. Apparently, there is a detailed report on the capability of the candidate being prepared over a period of time. Since such a detailed performance report is prepared and it does not contain any adverse entry as such, the question of information being given to the candidate does not arise. Further, we find that copies are not given and the appraisal reports are orally communicated. Therefore, this is an instance where even though there was no adverse entry against the candidate, selection committee decided not to promote them. Selection has been made based on various factors including the reports regarding the candidates over a period of time and once such selection process has been carried out and there is evidence to show that only a certain number of candidates were promoted

from a larger group of candidates who were considered, we do not think that this Court will be justified in directing grant of promotion purely on the basis of seniority.

18. The judgments relied upon by the learned counsel for the respondents, of course, relates to information being given in regard to adverse entries against the candidates. Perusal of the appraisal form contains various other parameters in regard to a particular officer during the progress of the work which cannot be ignored. Further the confidential reports are verified by a selection committee and in that process some are eliminated based on a comparative evaluation. Such a process when undertaken by the appellants, it may not be possible for a writ court to direct the appellants to give promotion to the petitioners and that too from a previous date.

In the said circumstances, we are of the view that the

learned Single Judge was not justified in directing the petitioners to be promoted from the date their batchmates were promoted. Consequently, we allow the appeals setting aside the judgments of the learned Single Judge in WP(C) Nos.28410/2007 and 28179/2007. However, we make it clear that the promotions already granted to the petitioners shall not be disturbed further.

(sd/-)

(ASHOK BHUSHAN, CHIEF JUSTICE)

(sd/-)

(A.M.SHAFFIQUE, JUDGE)

jsr