

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

W.P.(S) No.2116 of 2005

- Prem Singh Chouhan, aged 72 years, S/o Late Shri D.S. Chouhan, R/o Smrati Bhawan, Near Green Chowk, Station Road, Durg (C.G.)

---- Petitioner

Versus

1. State of Madhya Pradesh, Through the Secretary, Govt. of M.P., Vallabh Bhawan, Bhopal
- 1(a) State of C.G., Through the Secretary, Commercial Tax Deptt., Mantralaya, D.K.S. Bhawan, Raipur,
2. The Excise Commissioner, M.P., Moti Mahal, Gwalior
- 2(a) The Excise Commissioner, C.G. Raipur.

---- Respondents

For the Petitioner	:	Shri Prem Singh Chouhan, in person along with Shri Jitendra Gupta, Advocate
For the respondent/State :		Shri R.K. Gupta, Dy. Advocate General

S.B. Hon'ble Shri Justice Manindra Mohan Shrivastava

C A V Order

23/03/2017

1. The petitioner filed an original application before the then existing Madhya Pradesh Administrative Tribunal, Principal Bench at Jabalpur, aggrieved by his supersession in the year 1984 and 1987. The petition remained pending and upon abolition of the State Administrative Tribunal, the case was transferred to this Court for decision.

2. Relevant factual matrix, necessary for adjudication of controversy involved in the petition are stated infra.
3. The petitioner was selected through direct recruitment on the post of District Excise Officer and appointed vide order dated 25/09/1973. Two other officers namely Shri B.L. Chouke and Shri Narendra Singh were junior to the petitioner in the order of merit prepared at the time of direct recruitment. Shri B.L. Chouke and Shri Narendra Singh were confirmed on the post of District Excise Officer along with the petitioner, vide order dated 25/11/1978 and according to the petitioner, both the respondents were junior to him.
4. The petitioner was communicated three adverse remarks in respect of the period ending 31/03/1982, 31/03/1983 and 31/03/1984 vide communications dated 18/08/1983, 20/01/1984 and 06/11/1985 respectively. Against the first adverse remarks for the period ending 31/03/1982, the petitioner preferred representation on 05/01/1984, followed by reminder dated 15/06/1984. Departmental Promotion Committee (DPC) was convened in the month of August, 1984. Thereafter, a promotion order dated 22/10/1984 (Annexure A/5) was issued by which, alongwith 9 officers promoted to the post of Assistant Excise Commissioner, Shri B.L. Chouke was also granted promotion. Aggrieved by his supersession, the petitioner preferred representation on 02/02/1985 followed by reminders on 23/09/1985 and 23/07/1986.

As against adverse remarks for the period ending 31/03/1983 petitioner had submitted representation on 14/02/1984. The said adverse remarks was expunged by the government, vide order dated 08/05/1985.

As against communication of adverse remarks for the period ending March 1984 the petitioner had represented vide letter dated 14/12/1985 which also found favour as the government expunged that adverse remarks vide order dated 29/06/1987.

5. In the meantime, the other junior officer Shri Narendra Singh was promoted on ad-hoc basis on 23/09/1986. Thereafter, another Departmental Promotion Committee was convened in the month of July 1987 but Shri Narendra Singh was found more meritorious and he was promoted to the next higher post, therefore, though junior to the petitioner, his ad-hoc promotion was regularized.
6. Even against ad-hoc promotion of Shri Narendra Singh to the next higher post of Assistant Excise Commissioner, petitioner had preferred representation in the year 1986. When his promotion was regularized vide order dated 28/07/1987, supersiding the petitioner, the petitioner again preferred representations on various dates on 14/09/1987, 30/01/1988 and 27/06/1988.
7. In another important development, the adverse remark for the period ending 31/03/1982 which was communicated to the petitioner vide D.O. letter dated 18/08/1983 and against which the petitioner had submitted representation on 05/01/1984, followed by several reminder, finally found favour and vide order dated

02/07/1987, the Government expunged adverse remarks for the period ending 31/03/1982 except those parts of adverse remarks which related to alleged failure of the petitioner to achieve desired targets of recovery of tax arrears. The petitioner sought review of the order dated 02/07/1987 to the extent it retained part of the adverse remarks on the ground that Shri B.L. Chouke and Shri Narendra Singh, who were District Excise Officer under the same Divisional Officer were not given any adverse remarks, though they also could not achieve targeted recovery of excise arrears and failed by the same standard as alleged against the petitioner. According to the petitioner, recovery of excise arrears by him was much more as compared to his predecessor Shri R.S. Tiwari, who was not subjected to any adverse remark on that ground and rather Shri Tiwari was promoted despite lesser recovery. The petitioner sent two reminders on 30/01/1988 and on 06/05/1989 thereafter the government accepted the petitioner's representation and vide letter dated 23/06/1989, expunged the remarks relating unsatisfactory recovery of excise arrears also. In this manner, the adverse remarks for the period ending 31/03/1982 communicated vide memo dated 18/08/1983 was completely nullified after 23/06/1989.

8. It is not in dispute that the petitioner was, later on, promoted as Assistant Excise Commissioner vide order dated 24/05/1990, having been found fit by the DPC which was convened on 07/12/1989.

9. The petitioner who appeared in person argued that while considering his case for promotion, the respondents committed illegality in granting promotion to Shri B.L. Chouke by reserving one post of Assistant Commissioner Excise contrary to the provisions of grouping of post for the purposes of granting promotion by way of reservation, as contained in General Administration Department circular dated 24/09/1971. He submitted that Shri B.L. Chouke was a blue eyed officer of the then Minister and in order to extend undue favour to him, without sending any proposal of grouping of post over and above 20 posts, Shri B.L. Chouke was granted promotion wrongly extending him the benefit of reservation. Had the post been not reserved but treated as post in general category, petitioner being senior, would have been promoted on the basis of seniority as Shri B.L. Chouke was junior to him.

The next submission of the petitioner is that the respondents ought to have considered the petitioner's case for promotion in the year 1984 itself, ignoring adverse remark dated 18/08/1983, which was communicated after long inordinate delay. His representation made on 05/01/1984 and 15/06/1984 was also kept pending without any decision, though, vide circular dated 04/06/1977, a time limit of two months was provided for decision. Had the case of the petitioner been considered by treating one post as unreserved and ignoring remarks for the ending 31/03/1982 having no effect, the petitioner would have certainly got

promotion before Shri B.L. Chouke.

Further submission of the petitioner is that in the year 1986, while granting ad-hoc promotion to his junior Shri Narendra Singh, the petitioner was illegally excluded and not granted promotion on the basis that there were adverse remarks and he was not fit for even ad-hoc promotion, whereas against Shri Narendra Singh also there was serious allegation of offering bribe to higher officer.

It is next submitted that when occasion arose for consideration for promotion to the next higher post of Assistant Commissioner Excise in the year 1987, the respondents illegally held the petitioner less meritorious, as compared to his junior Shri Narendra Singh, ignoring that all the adverse remarks except part of adverse remark for the period ending 31/03/1982, were expunged and representation by the petitioner, was not taken into consideration by the DPC.

Lastly, it is contented that the only operative reason for holding the petitioner less meritorious, as compared to his junior Shri Narendra Singh, was that a part of adverse remarks in the Annual Confidential Report for the period ending 31/03/1982, one relating to loss recovery of arrears, was finally expunged vide memo dated 23/06/1989, therefore, the petitioner was entitled to be promoted from the date he was first supersided by his junior Shri B.L. Chouke, who was promoted vide order dated 22/10/1984.

10. Per contra, learned counsel for the State submitted that against the petitioner, various adverse remarks were recorded in his Annual

Confidential Report for the period ending 31/03/1982, 31/03/1983 and 31/03/1984. It is submitted that at the time when promotion were made in the year 1984, his junior Shri B.L. Chouke was promoted against reserve post of Scheduled Tribe, therefore, the petitioner could not raise any legitimate grievance in that regard. Thereafter, when again occasion arose for promotion on ad-hoc basis, at that time, the adverse remarks for the period ending 31/03/1982 remained in force, though, it was partially expunged in the year 1987 and fully expunged in the year 1989. Therefore, in the year 1986, the petitioner was not considered fit for even ad-hoc promotion and in that view of the matter, the next junior officer, Shri Narendra Singh was given ad-hoc promotion. According to the learned State counsel when the case of the petitioner was considered for promotion in the month of July 1987, the criteria for promotion being merit-cum-seniority, the record of service of his immediate junior Shri Narendra Singh was found more meritorious and therefore, against the sole available vacancy, he was promoted and when later on adverse remarks for the period ending 31/03/1982 was fully expunged vide memo dated 23/06/1989, petitioner was granted promotion in the year 1990. Therefore, there is no illegality.

11. I have given my anxious consideration to submissions of the petitioner as well as the State counsel.
12. It is not in dispute that the petitioner was senior to Shri B.L. Chouke and Shri Narendra Singh. The petitioner has pleaded and

also placed on record the order of appointment as well as order of confirmation with emphatic pleading that as Excise Officer, he was senior to Shri B.L. Chouke and Shri Narendra Singh. This factual assertion has not been disputed by the State.

While the petitioner has raised that he was superseded when Shri B.L. Chouke was promoted as Assistant Commissioner, Excise vide order dated 22/10/1984, the respondents have sought to justify the action on the plea that Shri B.L. Chouke was promoted against the reserve post of Scheduled Tribe, however, on this issue the petitioner's case has been that while promoting Shri B.L. Chouke as reserved category candidate against one post of Assistant Commissioner, reserving one post for promotion to the next higher post of Assistant Commissioner Excise, the Government circular of grouping of 20 posts and above for the purposes of granting reservation has been violated and without any proposal sent to the General Administration Department, Shri B.L. Chouke was benefited by promotion. In order to appreciate this submission, it is apposite to look into the relevant circular dated 24/09/1971 (Annexure A/20). By that circular, the government had issued instructions that in order to provide benefit of reservation to reserve category candidates in fulfillment of the constitutional obligation under Article 335 read with Article 16(4) of the Constitution of India, model roster is required to be prepared by the appointing authority. However, in clause 3 thereof, it was clearly submitted that, if in any department, there are less than 20 number

of post in a given cadre, roster will not be required to followed and a proposal for grouping of post as per proforma in Appendix 2, shall be forwarded to the General Administration Department. In the petition as well as in the rejoinder, the petitioner has asserted that in the department, there were less than 20 number of post to Assistant Commissioner Excise and therefore, the reservation could be worked out only by sending a proposal of grouping of post to the Government, which was never done and Shri B.L. Chouke was promoted. This categoric averment has been made by the petitioner in para 6 (vi) of the petition. However, the respondent-State in its return has neither controverted the statement of fact in this regard nor has come out with any specific reply on this specific aspect of violation of circular relating reservation. All that has been stated in the return is that Shri B.L. Chouke was considered and selected by the DPC as reserved category candidate and promoted. In view of this reply of the State, irresistible conclusion has to be drawn that while promoting Shri B.L. Chouke as reserved category candidate, government circular dated 24/09/1971 regarding grouping of post and forwarding in post to General Administration Department was given a go by. The petitioner has made specific allegation that this was done only to extend undue favour of Shri B.L. Chouke.

13. As far as ad-hoc promotion in 1986 is concerned, obviously, the adverse remark against the petitioner, in so far as Annual Confidential Report for ending 31/03/1982 is concerned, though

the petitioner had preferred representation, remained on ACRs. Therefore, in so far as ad-hoc promotion to Shri Narendra Singh is concerned, this Court finds no illegality because the petitioner could not claim ad-hoc promotion as at that time, his record was tainted with adverse remark. As regards the third occasion for consideration for promotion in the year 1987, the respondents have come out with the case that as the criteria for promotion was merit-cum-seniority, seniority alone could not earn promotion. According to the respondents, the petitioner's junior was more meritorious, therefore, he was promoted. A perusal of the relevant minutes of Meeting of Departmental Promotion Committee convened on 15/07/1987 (page No. 150 to 155 of the Paper-Book) shows that the selection was based on merit with due regard to seniority. For the purpose of assessment, the recorded Annual Confidential Reports for the past five years (ending March 1982 to March 1986) were scrutinized and assessment was made. Moreover, under clause (f), the yardstick for determining the merit for promotion was as below :-

1. Integrity should be beyond doubt.
2. Three years Confidential Reports out of five years should generally be "Good" or above.
3. The last two years Confidential Reports should generally be "Good" or above.
4. In case there is "Poor" report in any year, it can be compensated by "Outstanding" or "Very Good" report in any other

year.

At page No. 102 of Paper-Book, under the caption 'select list' under clause 6, it has been stated that the Committee has evaluated the records of five officers including the petitioner and found them fit for promotion. Under the caption 'select list' it has been recorded as below :-

"Select List :

6. Consistent with the forgoing facts and factors, the Committee has evaluated the following officers as fit for promotion in the serial order indicated below subject to the remarks, if any, given against their names :-

- | | |
|------------------------------|---|
| <i>1. Shri B.S. Rajput,</i> | |
| <i>2. " V.K. Mishra,</i> | |
| <i>3. " Narendra Singh</i> | <i>- He has been given seniority over Shri P.S. Chauhan due to outstanding record.</i> |
| <i>4. " P.S. Chauhan,</i> | |
| <i>5. " T.P. Shrivastava</i> | <i>- Shri Shrivastava has retired on 31-5-87 and his ad -hoc promotion has been regularised from the date of his joining as Asstt. Commissioner."</i> |

A perusal of aforesaid finding of the Committee shows that, though, the petitioner was found fit for promotion, Shri Narendra Singh has been given priority over the petitioner due to outstanding record. On what basis, Shri Narendra Singh, junior to the petitioner, was rated as more meritorious, as compared to the

petitioner, has however, not been disclosed anywhere in the return. The petitioner has emphatically stated there was nothing available with the respondents to conclude that the Shri Narendra Singh was more meritorious due to any outstanding merit. Minutes of Departmental Promotion Committee do not record anything as to what were the grading in the Annual Confidential Report of Shri Narendra Singh, however, no they have produced any material or any other credential of service of the petitioner and Shri Narendra Singh to satisfy the Court that Narendra Singh was more meritorious and therefore, by applying the criteria of merit having due regard to seniority, petitioner though found fit, could not be promoted as Shri Narendra Singh was found more meritorious and therefore promoted against sole vacancy available for grant of promotion in the year 1987. A perusal of various order-sheets of this case shows that time and again respondents were directed to produce record of the Departmental Promotion Committee before this Court. It was recorded in the order-sheet dated 19/03/2010 that one last opportunity is granted to State to place relevant D.P.C. Records for consideration of the Court, as ordered earlier on 20/01/2010, making it clear that non-production of the records may lead to adverse inference against the respondents. Even thereafter, respondents failed to produce the record. No explanation has been offered before this Court for non-production of the record, therefore, in this circumstances an adverse inference has to be drawn against the respondents that the D.P.C., without

any basis held Narendra Singh, junior to the petitioner, as more meritorious and thereby arbitrarily denying promotion to the petitioner in the year 1987.

Even if it is assumed that because of solitary adverse remark for the period ending 31/03/1982, the petitioner was presumably held less meritorious as compared to his junior Shri Narendra Singh, after complete expungement of adverse remark vide memo dated 23/06/1989, no adverse remarks remained against the petitioner.

14. In view of the above analysis, I am inclined to hold that in the year 1984 and also in the year 1987 the petitioner was illegally superseded. The reason for supersession of the petitioner in the year 1984 was that his junior Shri B.L. Chouke was promoted against reserved quota of Scheduled Tribe, which for reason stated hereinabove, has been held to be against the government's circular dated 24/09/1971. The supersession of the petitioner in the year 1987 was also illegal as respondent has failed to satisfy as to on what basis, the junior officer was held more meritorious as compared to the petitioner.
15. The petitioner and his juniors all have retired from the service.
16. Consequently, this petition is allowed with the direction that the petitioner's case for promotion to the post of Assistant Commissioner Excise shall be considered as on the date when Shri B.L. Chouke was considered in the year 1984 and promoted vide order dated 22/10/1984, by treating adverse remarks for the period ending 31/03/1982 and 31/03/1983 and for the period

ending 31/03/1984 having been expunged and there being nothing against adverse against him. This will have to be done by holding review D.P.C. as on 21/08/1984. If as a result of consideration, the petitioner is found fit on the basis of criteria, he will be entitled to notional promotion from 22/10/1984 as the petitioner has actually been promoted to the next higher post only in the year 1989. The notional promotion shall carry notional fixation of pay on the post of Assistant Commissioner Excise w.e.f. 22/10/1984 with all other allowances attached to it and thereafter fixation of pay of the petitioner at an appropriate stage from 22/10/1984 till his retirement. All other consequential benefits shall also be extended to the petitioner, keeping in view that notional fixation of pay from 22/10/1984 on the post of Assistant Commissioner Excise may result in re-fixation of his last pay at the time of retirement and all consequential amendments in the pension, gratuity and other retiral benefits depending upon last pay certificate.

17. The petition is allowed in the manner and to the extent stated above. No order as to costs.

Sd/-

(Manindra Mohan Shrivastava)

Judge