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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 856 OF 1997

Shri R. V. Keskar
of Mumbai Indian Inhabitant,
residing at Flat No.5, BEST Officers
Partners, Raut Road, Shivaji Park,
Mumbai – 400 028.

.. Petitioner

Vs.

1. Municipal Corporation of Greater
Mumbai, a statutory corporation,
having its Main Office at
Mahapalika Marg, Mumbai – 400 001.

2. The Bombay Electric Supply &
Transport Undertaking,
BEST Bhavan, BEST Marg,
Mumbai – 400 039.

3. The General Manager,
Bombay Electric Supply & Transport
Undertaking, BEST Bhavan, BEST Marg,
Mumbai – 400 039.

4. The Deputy General Manager, (Supply)
Bombay Electric Supply & Transport
Undertaking, BEST Bhavan, BEST Marg,
Mumbai – 400 039.

5. Chief Personnel Officer,
Bombay Electric Supply & Transport
undertaking BEST Bhavan, BEST Marg,
Mumbai – 400 039.

6. Mr. M. M. Ambare
Superintendent Supply Vigilance
Dept: B.E.S.T. Undertaking
Mumbai – 400 039.

7. Mr. S. D. Pawar
Superintendent, Supply Project Dept:
B.E.S.T. Undertaking, Mumbai 400 005.

8. Mr. D. S. Khalap
Superintendent Supply Erection
(North) B.E.S.T. Undertaking
Mumbai 400 010.

9. Mr. P. V. Haldankar
Superintendent Supply Operation
and Maintenance Central South)
B.E.S.T. Undertaking Pathak Wadi,
Mumbai 400 002.

10. Mr. E. G. Jeavan
Superintendent Supply Computer
Application Cell B.E.S.T. Undertaking,
Mumbai 400 039.

.. Respondents

Mr. Suresh Pakale, for the Petitioner.
Mr. S.K. Tulsania, Senior Advocate with Ms. Kavita Anchan i/by
M/s. M.V. Kini & Co., for Respondent nos. 2 to 10.

CORAM : A.A.SAYED AND
M.S.KARNIK, JJ.

RESERVED ON : 3rd JULY 2017

PRONOUNCED ON : 13th JULY 2017

JUDGMENT (PER M.S. KARNIK, J.) :-

The petitioner who was working as an Officiating Superintendent at the time of the filing of the Petition, has filed the Petition challenging the order dated 14th June 1996 passed by respondent no.3 denying promotion to him as a Probationary Superintendent. During the pendency of the Petition, the petitioner was again considered for promotion and he was promoted as Probationary Superintendent on 1/4/1998. The petitioner was confirmed as Superintendent on 1/4/1999.

2. The petitioner is B.E. (Electrical) by qualification. He was appointed as a Probationer Engineer on 22/9/1980. He was confirmed as a Deputy Engineer on 22/9/1981. The petitioner was promoted on 31/1/2010 as an Assistant Engineer in Grade A5.

3. The petitioner was promoted as an Officiating Superintendent by an order dated 22/12/1994 and directed to work in Operation and Maintenance Department (Supply)

North. It is the petitioner's case that he worked very sincerely and to the entire satisfaction to his superiors even in the officiating post as a Superintendent. On 29th February, 1996, the petitioner was communicated adverse remark for the period 1/1/1995 to 31/12/1995, "you take no more than minimum interest in work as a result work suffers". By a communication dated 12th March, 1996, the petitioner was informed that while studying his confidential report it was observed that his performance has been evaluated as below average. Specific qualities under which the petitioner's performance is below average is mentioned thus :

"Takes no interest in the work, Performs duties moderately"

"Likely to qualify for promotion in time".

"It is necessary to take work seriously".

4. The petitioner filed representation on 21st March, 1996 submitting that the adverse remarks are vague and asked for details about the officer who has written his confidential reports and instances where work suffered. According to the

learned Counsel for the petitioner, the remarks have been written by the officers other than the Reporting Officer without personally observing his work.

5. The petitioner was reappointed as a Superintendent (Supply) purely on temporary basis by an order dated 30th May, 1996.

6. The grievance of the petitioner is that though his representation against the adverse remark was pending, six officers were promoted as the Probationary Superintendent against the permanent post by an order dated 14th June, 1996. Out of these six officers, five officers being respondent nos. 6 to 10 were junior to him.

7. Respondent no.3 by communication dated 21/9/1996 informed the petitioner that the adverse remarks did not deserve to be expunged. Learned Counsel for the petitioner

contends that there is no justification for denying promotion to the petitioner. According to him, the action on the part of the respondents denying him promotion is malafide and his confidential reports have been spoiled only because his superiors found the petitioner inconvenient. Learned Counsel further contended that the remarks in the confidential report is vague and cannot be said to constitute adverse remark. Moreover, according to the learned Counsel for the petitioner, the confidential report is written by the officer other than the reporting officer and therefore the said confidential report could not form the basis of consideration the petitioner's case for promotion. He further submits that even without deciding the representation made by the petitioner against the adverse remark the respondents have taken into consideration the said confidential report while considering the petitioner's case for promotion.

8. In the submission of the learned Counsel for the petitioner, he has never been served with any adverse remark

during his entire career except the said adverse remark. In fact the petitioner was already working as a superintendent on an officiating basis from 22/12/1994 and even on 30/5/1996 the petitioner was reappointed as a Superintendent on a temporary basis. Learned Counsel for the petitioner submits that during the pendency of the Petitioner he was again considered for promotion and on 1/4/1998 he was promoted as a Probationary Superintendent. Upon satisfactory completion of probation period, the petitioner was confirmed as a Superintendent on 1/4/1999. In the submission of the learned Counsel for the petitioner the respondents are not justified in giving prominence to an adverse remark in a single year when year after year no adverse remarks were recorded. Much emphasis was given by learned Counsel for the petitioner on the guidelines dated 16th February, 1993 to submit that the confidential report has been written in the breach of the said guidelines.

9. Learned counsel for the respondents supported the

decision to deny promotion to the petitioner. According to learned Senior Counsel, the petitioner's case was considered and he was not found fit for promotion. Learned Senior Counsel submitted that there is no material on record to indicate that the action of the respondents is in any manner malafide. He submits that the petitioner infact has been promoted during the pendency of the Petition and therefore, according to him no weightage should be given to the contention of the petitioner that the action of the respondents is malafide. Learned Senior Counsel invited our attention to the affidavit-in-reply filed on behalf of the respondents to contend that the petitioner's service is not satisfactory enough and therefore he was not considered for the said promotion. The petitioner's case was considered in detail, with as many as three senior officers of the respondent undertaking having examined the suitability of the petitioner for promotion. It was only after each of them individually applied their mind to the issue of the petitioner's promotion that the decision not to promote the petitioner was taken. The representation made by the petitioner was considered in detail

by none less than the General Manager of the respondent undertaking himself who independently came to the conclusion that there was no infirmity in the said decision. The said decision was duly communicated to the petitioner. Our attention was invited to para 4 and 5 of the affidavit. The gist of which is “The performance of the petitioner was found wanting and not upto the mark. There was material to indicate that the work of the petitioner was not satisfactory during this period and accordingly in the confidential report of the petitioner for the year 1995, an adverse remark was entered, since the petitioner's senior officers felt that the petitioner failed to show his interest in the work because of which his work suffers.”

10. We called upon the respondents to produce the original records in respect of the confidential reports. Learned Senior Counsel accordingly has placed the petitioner's Annual Confidential Report on record. We find that the Reporting Officer has graded the petitioner and recommended the petitioner as fit for promotion. The Countersigning Reviewing

Officer has observed that the petitioner has been overrated. The General/Special Remarks of the Countersigning/Reviewing Authority indicates the grading given to the petitioner and it has been observed thus :

“The officer is highly overrated. He is just a mediocre officer who taken no more than minimum interest in the work. The evaluation by Shri Bhagia, DEMN is overrated for everyone. As a result the work suffers. This point is taken into account while evaluating the performance of Shri Bhagia.

The petitioner was held not fit for promotion. It is not clear to us as to whether the General/Special Remarks of the Countersigning/Reviewing Authority are made by the Reviewing Officer or an Officer superior to him viz. Deputy General Manager (Supplies). Learned Senior Counsel for the Respondents fairly conceded that he is not a position to state who has actually written the remarks. Be that as it may we are of the opinion that there is substantial compliance with the procedure as laid down in the guidelines dated 16/2/1993 while recording the confidential remarks.

11. There is nothing adverse against the petitioner in his career except when Annual Confidential Report is recorded for the period 1/1/1995 to 31/12/1995. The petitioner was working as an Officiating Superintendent with effect from 22/12/1994. Even as per the respondents the said appointment of the petitioner to the post of Superintendent, Operation and Maintenance Department (Supply) North with effect from 22nd December 1994 was a fortuitous appointment on a temporary basis and on the clear understanding that the same was not to be considered for the purpose of seniority. The last re-appointment of the petitioner was once again on the said temporary basis for the period 12th March, 1996 to 17th April, 1999.

12. In the affidavit-in-reply it has been stated by the respondents that as a part of his duties, the petitioner was expected to oversee the site operations when a technical defect arose and supervise and guide the officers subordinate to him in resolving the same. It is however observed that the petitioner is

failed in carrying out these duties. A number of wrong operations were carried out by the junior officers, subordinate to the petitioner, because the petitioner either failed to instruct and/or guide them properly or because the petitioner was not available at site to assist and/or supervise them. This marked reluctance of the petitioner to visit the site was not an isolated incident but was consistently observed. In some cases, the failure and/or refusal to visit the concerned site was despite receiving specific instructions from his superiors. In several cases, despite complaints and instances of tripping of transformers, the petitioner did not visit the site concerned. Four instances of tripping occurred in a single day at Sithaladevi Receiving Station and the petitioner was not available to set matters right.

13. We find from the record that the Reporting Officer recommended the petitioner fit for promotion. Reviewing Officers, however, were of the opinion that the petitioner was not fit for promotion after recording adverse entries in the

confidential report.

14. Undisputedly, the adverse remarks were communicated to the petitioner against which his representation came to be rejected. As indicated earlier, the petitioner was working on an officiating basis as a Superintendent by an order dated 22nd December, 1994. The petitioner's case was considered for regular promotion (the post he was holding on an officiating basis) but he was found unfit due to an adverse remarks. The decision not to promote him was taken on 14th June, 1996 when his juniors were promoted. Infact, petitioner was reappointed as a Superintendent on an officiating basis on 30th May, 1996. There are some subsequent events which we are taking into consideration to meet the ends of justice. The petitioner was regularly promoted to the post of Superintendent by an order dated 1st April, 1998 and confirmed in the said post on 1st April, 1999. From the record it appears that except for the year 1995-1996 when the petitioner was holding the charge of the promotional post on an officiating basis nothing adverse is

recorded. It therefore appears that year after year prior to 1995-1996 and even thereafter the petitioner's record has not been adverse. Infact the petitioner came to be promoted on regular basis from 1st April, 1998. We may not be understood to mean that adverse entry for one year cannot be taken into consideration to deny promotion. It is in the peculiar facts of this case and also due regard being had to the subsequent events after the petition was filed that we feel the adverse remark for the year 1/1/1995 to 31/12/1995 should be ignored while considering the Petitioner's case for promotion. We are equally conscious that the Reviewing Authority has written the confidential reports on the basis of the material then available. The fact that the Petitioner was already officiating in the promotional post, coupled with the fact that he continued to occupy the said post even after promotion was denied to him and in close proximity thereafter the Petitioner was found fit for regular promotion, are the circumstances which compelled us to take this view. It is in these peculiar circumstances we took into consideration the subsequent events in the interest of justice.

The Petitioner has now superannuated from service w.e.f. 1/11/2013.

15. In these circumstances we are of the opinion that the Petitioner's case for promotion may be considered afresh ignoring the adverse remarks recorded during the period 1/1/1995 to 31/12/1995 and in the event the Petitioner is found fit for promotion he may be notionally promoted to the post of Superintendent from the date his juniors- Respondent nos. 6 to 10 are promoted. We are not inclined to grant any consequential relief as the Petitioner was already working on officiating basis in the said post and has since superannuated. Hence the following order.

ORDER

1. Writ Petition is partly allowed.
2. The Respondents to consider the case of the Petitioner for promotion afresh ignoring the adverse remarks recorded during the period 1/1/1995 to 31/12/1995.

3. If the Petition is found fit to be promoted he may be notionally promoted as a Superintendent from the date his juniors-Respondent nos. 6 to 10 are promoted.

4. Rule accordingly made absolute with no order as to costs.

(M.S.KARNIK, J.)

(A.A.SAYED, J.)