

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.1452 OF 2004

Vasant s/o. Baburao Patil,
Age: 50 years, Occu.: Assit.
Mechanical Engineer,
R/o. 101, Shukratara Apartment
Vasundhara Colony, N-7,
CIDCO, Aurangabad.

...PETITIONER

VERSUS

1. The State of Maharashtra
through Secretary,
State Transport,
Mantralaya, Mumbai.
2. The Vice-Chairman and
Managing Director,
Maharashtra State Road
Transport Corporation,
Wahatuk Bhawan,
Dr. Anandrao Nayar Road,
Mumbai Central, Mumbai-8
3. The Works Manager,
Central Workshop,
Chikalthana,
Aurangabad
- (4. Suresh S/o. Dashrath Tingre,
Superintendent (Engine/Coach),
Central Workshop,
Chikalthana, Aurangabad.)

(Resp.No.4 dismissed vide
Registrar's order dated 25/08/2008).

...RESPONDENTS

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WITH

WRIT PETITION NO.9081 OF 2011

Vasant S/o. Baburao Patil,
Age: 57 years, Occu.:Service,
R/o. 101 Shukratara Apartment
Vasundhara Colony, N-7,
CIDCO, Aurangabad

...PETITIONER

VERSUS

1. The State of Maharashtra
through Secretary,
State Transport Mantralaya Mumbai
2. The Vice Chairman,
& Managing Director,
Maharashtra State Road Transport
Corporation Wahatuk Bhavan
Dr. Anandrao Nayer Road Mumbai-
Central, Mumbai-8
3. The General Manager
Personal and Industrial Relation
Maharashtra State Road Transport
Corporation Wahatuk Bhavan
Dr. Anandrao Nayer Road Mumbai-
Central, Mumbai-8.
4. Maharashtra State Road Transport
Corporation through Chairman,
Wahatuk Bhavan, Dr. Anandrao Nayar
Road, Mumbai Central, Mumbai -8

(Amendment carried out as per
order dated 20/04/2012)

...RESPONDENTS

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Shri Vivek J. Dhage, Advocate h/f Mr. R.I. Wakode,
Advocate for Petitioner.

Shri. S.J. Salgare, Assistant Government Pleader, for
Respondent No.1.

Shri. D.S. Bagul, Advocate for Respondents No. 2 and 3 in
WP No.1452/2004 and for respondents No.2 to 4 in WP
No.9081/2011.

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CORAM: SUNIL P.DESHMUKH AND P.R. BORA, JJ.

DATE : January 4th, 2018

ORAL JUDGMENT: (Per Sunil P.Deshmukh, J.)

1. Petitioner had been appointed as an Assistant Works Superintendent (Trainee) by respondent No.1 Corporation on 01-01-1980. Since 1985, he was promoted in Class II, Junior category. He had been selected for advanced training course at Advance Training Institute at Chennai. In 1991, the petitioner had been included in Special Inspection Cell working under the superintendence of Chairman. Special Inspection Cell comprised certain officers with credibility and sincerity. Petitioner had also been sent to Ashok Leyland Company for training. A certificate of appreciation had been issued to him by respondent no.2, in respect of his performance in duty at Pachora. His performance had been acknowledged as commendable by the Regional Manager, Nashik, by writing a personal letter. The then Legislative Assembly Member had also congratulated petitioner. Petitioner had, however,

referred to in the self appraisal report about shortfall due to non availability of special tools. In 1999, petitioner had been posted at Aurangabad in State Transport Central Workshop. Petitioner refers to that in 2000-2001 production of R/C Engines had been increased by seven per cent.

2. Thereafter, Petitioner had received an annual confidential report dated 02-05-2001 containing a remark 'average' for non achieving 60 per cent incentive level. Vide representation dated 09-05-2001 petitioner had approached the authority at Aurangabad, making grievance against the adverse remark so communicated to him and seeking redressal. The authority at Aurangabad had not responded to the first representation dated 09-05-2001 and as such, petitioner had once again approached said authority on 26-05-2001, which too went unattended. In July, 2001, petitioner had submitted representation with respondent No.2 - the Vice Chairman and Managing Director of the Maharashtra State Road Transport Corporation. The petitioner had with reasons explained shortfall and had also referred to that the extraordinary achievement expected had not been possible and had not been achieved till the date by any one, requesting recalling of the remark in annual confidential report. Petitioner has imputed motives to respondent No.4 in respect issuance of such adverse

remark against the petitioner.

3. As aforesaid representations were being not responded to, petitioner had made further representation on 27-07-2001 to Vice Chairman and Managing Director - respondent no.2 giving details about his duties and performances. According to petitioner, respondent No.4 (against whom the petition is dismissed for non service of notice), had been entertaining grudge against petitioner resulting into issuance of a memo, imputing unsatisfactory work whereas, for same engine block, prizes have been awarded. None of representations of petitioner had been responded to.

4. One Mr. K.Y.Pawar who had been junior to the petitioner in seniority list had been given promotion as Deputy Mechanical Engineer under order dated 19-06-2002.

5. Before aforesaid promotion order had been issued, it is the case of the petitioner that he was sought to be involved ostensibly in an enquiry, charging him with indiscipline and lack of supervising capacity, however, soon after aforesaid promotion order dated 19-06-2002, a letter exonerating him from the charges so levelled had been issued on 03-07-2002.

Petitioner contends that the strategy had been developed in order to dodge him from getting promotion. Petitioner, therefore, had filed a representation on 04-07-2002. He had made another representation to respondent No.2 on 08-07-2002. In 2003, another promotion order had been issued granting promotion to juniors, superseding petitioner. Petitioner, under the circumstances, had sent a letter to the General Manager at Mumbai, pointing out that petitioner is being deprived of his legitimate promotion. Petitioner's grievances met with an action, causing injustice to him, as those who could not be given promotion earlier, were being given benefit of gradation, increasing their pay scales and 48 persons have been benefitted from the same; yet, petitioner had not been considered for giving any such gradation benefit. Not only this, the gradation benefits had been given to the persons concerned with retrospective effect. Petitioner, in the circumstances, had filed representation with Chief Security and Vigilance Officer, Mumbai and thereafter as well had filed couple of representations, however, to no avail.

6. Learned Counsel for the petitioner Mr. Vivek Dhage contends that the criteria for promotion is seniority-cum-merit, merit to be adjudged from the annual confidential reports of five years of which at least three should be of 'above average

grade'. Petitioner's annual confidential reports for the years 1997-1998, 1998-1999 and 1999-2000 had been of grade 'above average'; albeit, for immediate preceding year 2000-2001 for the promotions of 2002, the same had been purportedly communicated to be 'average'. He submits that the so called adverse remark 'average' dated 02-05-2001 had been taken objection to and representations as required under the Regulations as appearing in the circular dated 06-10-1995 had been made to superior authorities.

7. The superior authorities had not taken cognizance of the same, had not attended and / or responded to the same. He submits that under the Regulations, petitioner was entitled to submit representations and those were incumbent and expected to be considered in accordance with the procedure prescribed thereunder. He submits that the procedure for passing adverse remarks, as referred to in the circular, had not been followed in petitioner's case while communicating remarks in the annual confidential report as 'adverse' to him.

8. He submits that prescribed procedure to deal with representation against adverse remarks communicated requires the final evaluating authority to seek justification from the first and countersigning authority. The justification of the

first authority, who wrote the adverse confidential report, and comments of the then counter signing authority, are required to be sought and then those are to be submitted to the Vice Chairman and Managing Director and he is supposed to take decision thereon.

9. He emphatically refers to that the prescribed procedure under the Regulation has not at all been followed either while communicating adverse remark or even after submission of the representations. He submits that the representations, which are several in number, have been submitted to various authorities, including immediate first authority and even the Vice Chairman and Managing Director. Yet, none of them had been responded to.

10. He submits that the annual confidential reports of the petitioner generally had been of the grade 'above average', however, in 2000-2001, the same had been scaled down deliberately to 'average' in order to avoid grant of promotion to the petitioner. He further submits that motives have been imputed to respondent No.4 and the same have gone uncontroverted. He submits that, in the circumstances, the so called adverse remark, purportedly communicated in the face of failure to decide on the representations, could not have been

acted upon, in fact and in law.

11. Mr. Vivek Dhage submits that petitioner had, thereafter, been given *ad hoc* promotion in 2007, however, in 2009, he had been reverted for non germane reasons. The same had been subject matter of challenge before this Court in writ petition, however, deliberately certain enquiries were shown to be pending against petitioner and, in the circumstances, the Court had passed an order directing the authorities to dispose of the enquiries pending against petitioner as early as possible. According to instructions to learned Counsel, enquiries were not being duly proceeded with. He submits, under the circumstances, petitioner had been before this Court in writ petition No.9081 of 2011 seeking direction to the authorities to promote petitioner with effect from the date on which Mr. K.Y.Pawar had been promoted and to give to him all ancillary and consequential benefits arising therefrom.

12. Mr. D.S.Bagul, learned counsel appearing for respondent - State Transport Corporation and its authorities, submits that there is no dispute that requirement for promotion is 'seniority-cum-merit', and merit is to be judged from the confidential reports. According to the procedure, it has been

prescribed that annual confidential reports for three years preceding the promotion shall have to be of the grade "above average". This being the requirement for promotion in accordance with the Regulations, while promotions were being given in 2002, it was found that last preceding three years' annual confidential reports of the petitioner were not in conformity with the requirement since his annual confidential report for the year 2000-2001, had been 'average' and, as such, he had not been considered to be eligible for promotional post.

13. His next leg of submission is, while it was contended on behalf of the petitioner that he had submitted representations against the annual confidential report to the authorities which are claimed to have been acting adverse against his interest yet, it is not the case that such representations had been made to the competent authority as required under the circular / Regulations of 1995. Pursuant to said Regulation, the representations ought to have been addressed to the Regional Manager or General Manager or the Works Manager. As such, while it emerges that representations were not addressed to the concerned competent authorities, there is hardly any scope for responding to the same and it would not be proper to say that the representations were not

being responded to. He further goes on to submit that even otherwise, the representations are supposed to be made within 30 days of communication of adverse remarks. This particular stipulation also cannot be said to have been complied with since the representations appear to be addressed to respondent no.2, long after expiry of period prescribed.

14. The Learned Counsel further purports to point out that even annual confidential reports for the period 2002-2003 2003-2004 of petitioner were of 'average' grade. While, as a one time measure, in respect of the employees to whom adverse remarks were not communicated, a decision had been taken by the Corporation to grade their reports as 'good' and the petitioner had received benefit of the same and had been then temporarily promoted in 2007. When Departmental Committee found that several enquiries were pending against him and his annual confidential report for the years 2005-2006 and 2006-2007 were not 'above average', it had been decided to revert the petitioner.

15. He submits, Petitioner could not be considered for promotion since he had fallen short of qualifying himself for promotion and satisfying the requirement therefor. While promotions were being given, the petitioner had not been

meeting with the criteria for promotion and, as such, his name had not figured in the lists of promotions.

16. There is no dispute on that annual confidential reports of petitioner for the years 1997-98, 1998-99, 1999-2000 had been of the grade "above average" and that annual confidential report is of "average" grade for the year 2000-2001 had been communicated after 02-05-2001.

17. So far as seniority is concerned, the parties are not at dispute that the petitioner had, indeed, been senior to Mr. K.Y.Pawar who had been promoted in 2002.

18. Although petitioner had been at Sr.No.27, he could not be promoted for he did not fulfill the condition of having annual confidential reports of grade "above average" for preceding three years, latest preceding year's report being of grade 'average'. As such, his junior Mr. K.Y.Pawar had been selected for promotion to the next higher post for he fulfilled the condition of having three annual confidential reports in preceding years of above average grade; this is the submission appearing in the affidavit in reply on behalf of respondents No.2 and 3 in Writ Petition No.9081 of 2011 based on the document annexed along with the same at page No.149; especially, grade of the latest preceding year had been above

average.

19. The focus will have to be on the aspect whether the petitioner would qualify for promotion with reference to the prescribed criteria which is 'seniority and merit' and merit to be adjudged from the preceding three years' annual confidential report as 'above average' or better. Whether promotion can be declined for claimed non fulfillment of requisite criteria of three preceding years' annual confidential reports to be of the grade "above average".

20. It appears, after hearing learned counsel for the parties, annual confidential reports of the petitioner for years 1997-1998, 1998-1999, 1999-2000 had been of 'above average' grade; whereas, he had been communicated after 02-05-2001 about his annual confidential report to be of 'average' grade. It is not the case that the petitioner had not made representations against annual confidential report of the year 2000-2001; albeit, it is being claimed that the same were not made to the competent authority.

21. The case pleaded and sought to be made out on behalf of Petitioner is that while communicating such annual confidential report, the procedure as prescribed under circular dated 06-10-1995, at page No. 75 of writ petition No.1452 of

2004 (in paragraph No.24 of memo of writ petition and synopsis, date of said circular is mentioned as 16-10-1995), when promotions were being given in 2002, has not been followed, which reads thus:

" *As instructed earlier, the Annual Confidential Report in respect of class II & I officers are to be written by the concerned Unit Head / sectional Head (i.e. Reporting Officer) and sent to the concerned RM/WM/Dy.GM/ as the case may be through various countersigning Authorities. The final evaluating Authority i.e. RM/WM/Manager in respect of class II (Jr.) and Dy.GM. in respect of class II (Sr.) officer after evaluating such A.C.R. the same will be sent to the services Board Section before 30th April of every year. However, before forwarding the A.C.R. to this section, the adverse remarks are to be communicated to the concerned officer by evaluating Authority. "*

22. The stipulation refers to that the concerned Unit Head - Sectional Head is to write the annual confidential report himself and send it to the officers of the rank of Regional Manager, Works Manager, Deputy Regional Manager, through various counter signing authorities, the final evaluating authority is expected to send the same to the Services Board Section before 30th of April every year, and before that, it is expected to communicate adverse remarks to the concerned officer. This particular aspect does not appear to have been met with on behalf of the respondents.

23. Indisputably, the adverse remarks for 2000-2001 appear to have been prepared in May, 2001 and were subsequently communicated to the petitioner.

24. It does appear that the petitioner had submitted representations to the Deputy General Manager and respondent no.2 - Vice Chairman and Managing Director, who had not communicated anything in respect of the same to the petitioner, nor had rejected the same for it being not competent authority or for that matter being beyond the period prescribed.

25. Submissions on behalf of the respondents purport to justify their inaction on the representations for not being submitted to the competent authority, yet it is not their case that respondent no.2 had not been a competent authority to deal with the representations in respect of the annual confidential reports. Said authority as well, had not rejected the representation on the ground of it being not made to the competent authority or, for that matter, within the period prescribed under the circular.

26. Under said circular, the officer concerned to whom annual confidential reports are communicated, is expected to submit representation within 30 days and thereupon a justification too is expected to be called by the final evaluating authority from the first and counter signing authorities and he is required to submit the same to the Vice Chairman and Managing Director to take a decision as would

emerge from following extract of the circular dated 06.10.1995:

" Now, the concerned Aggrieved officer can submit representation against the adverse remarks to the Final Evaluating Officer addressed to the Competent authority within 30 days from the receipt of such adverse communication. On receipt of such representation, the Final Evaluating Authority i.e. RM/WM. or GM. as the case may be call the justification of the First and Countersigning Authority who have written the Adverse Confidential Report and submit the same to VC & MD with his observation/remarks about the confidential Report on examining such remarks, justification and relevant record produced before the VC & MD. as Appointing Authority, can be take decision on the appeal and he can expunge/remove the adverse remarks if required and the same will be communicated to the concerned Appellant. The VC & MD. can take his decision within three months from the receipt of appeal. The procedure as laid down vide Govt. in GAD's Resolution No.CFR 1086/PK/43/Tera dated 15-7-86 and be followed while expunging the confidential remarks. "

27. This procedure does not appear to have been followed, contending that representations were not made to competent authorities, yet the position emerges that representations had, indeed, been made to respondent no.2 - the Vice Chairman and the Managing Director, may be in July, 2001 and subsequently.

28. Those had not been responded to and dealt with. Inaction is sought to be reasoned out saying that the same being made beyond the period as appearing in the circular. But, fact remains that respondent no.2 had not rejected the representations on that ground at all.

29. Going by the logic, as is submitted on behalf of the respondents that the representations had not been made to the competent authorities under the circular; in such a case, very circular stipulates preparation of annual confidential reports before 30th of April each year and its communication to the concerned officer. This stipulation does not appear to have been scrupulously followed in present case. Certainly, communication to petitioner in respect of the same is made after annual confidential report had been prepared after 30.04.2001, which had been an act jumping stipulation.

30. It would not be proper for respondents to apply different yardsticks of consideration in respect of stipulations under circular of 1995.

31. Thus, the reasons justifying non consideration of the petitioner's case for promotion, his annual confidential report being adverse for 2000-2001, without considering his representations against the same, should not form basis for non consideration of petitioner's case for promotion. Pedantic approach adopted by the respondents would not sub-serve cause of justice.

32. It does not appear that requirements of procedure

about preparation, communication and decision on representation in respect of adverse remarks to petitioner had been properly followed. In the circumstances, we do not consider that so far as the promotions of 2002 are concerned, while the petitioner's case is declined to be considered for annual confidential report of 2000-2001, against which representations had been made and redressal had been sought persistently but those had remained undecided and un-responded, the same could not justifiably form basis for declining promotion to the petitioner. As such, we do not consider that in such a situation, the confidential report of 2000-2001 would be computed for consideration for promotion and, as such, the same shall not act adversely affecting petitioner's interest. In such a case his past three years grade in annual confidential reports, would be relevant and would be required to be considered for promotion, fulfilling the criteria. Annual confidential reports for three years preceding 2000-2001 are of grade 'above average'.

33. In the circumstances, Writ Petition No.1452 of 2004 is, thus, allowed. We direct the respondents not to act upon the annual confidential report of the petitioner for the year 2000-2001 and to grant promotion to the petitioner with effect from 19-06-2002 and to give to him all incidental, ancillary

and consequential benefits.

34. The petitioner is stated to have retired in 2011 and, as such, he would be entitled to the benefit of aforesaid as would accrue to him in pecuniary terms.

35. Rule made absolute in aforesaid terms.

36. In view of aforesaid, no separate orders on Writ Petition No.9081 of 2011 are necessary and the same stands disposed of as such.

(P.R.BORA)
JUDGE

(SUNIL P.DESHMUKH)
JUDGE

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agp/