

CASE NO.:
Appeal (civil) 4482 of 2003

PETITIONER:
Union of India & Anr

RESPONDENT:
Major Bahadur Singh

DATE OF JUDGMENT: 22/11/2005

BENCH:
ARIJIT PASAYAT & C.K. THAKKER

JUDGMENT:
J U D G M E N T

ARIJIT PASAYAT, J.

Union of India and the Chief of Army staff, Army Headquarters, South Block, New Delhi, call in question legality of the judgment rendered by a Division Bench of the Delhi High Court in a Letters Patent Appeal. The High Court by the impugned judgment held that though the Court cannot moderate the appraisal and grading given to an officer while exercising the power of judicial review yet the Annual Confidential Report (in short the 'ACR') for the year 1989-90 has an element of adverse reflection leading to denial of promotion and, therefore, the same ought to have been communicated to the writ petitioner-respondent which has not been done. Though a detailed statutory complaint was filed the same was summarily dismissed without assigning any reason. The sting of adverseness in all events has perilously affected and damaged the career of the writ-petitioner though not reflected in the variation of the marks. Accordingly, the entry in the ACR for the year 1989-90 was quashed and the matter was remanded back to the respondents in the writ petition i.e. the present appellants for re-consideration of the writ-petitioner's case for promotion to the post of Lieutenant Colonel. It is to be noted that the writ petition filed by the respondent was dismissed by a learned Single Judge and the same was challenged in the Letters Patent Appeal.

Background facts in a nutshell are as under:

The respondent was considered for promotion to the rank of Lieutenant Colonel by the Selection Boards held in August 1995, August 1996 and November 1996. He was not empanelled on the basis of overall profile and comparative batch merit. The respondent filed statutory complaint on 3.10.1995 for setting aside the ACRs of 1988-89 and 1989-90. According to him the then initiating officer resented the amalgamation of Food Inspection Cadre officers of ASC main stream and disliked the DFRL trained officers. Statutory complaint of the respondent was rejected on 27.9.1996. The respondent made second statutory complaint which was also rejected on 17.10.1996. The respondent filed writ petition No.1774 of 1997 before the Delhi High Court praying therein that a writ of mandamus be issued to the appellants herein to promote him or in the alternative he be assessed afresh by the

Selection Board and for setting aside ACRs. for the years 1988-1990. Writ petition of the respondent was dismissed by a learned Single Judge of the High Court by order dated 29.4.1997. Aggrieved by the order of dismissal respondent filed LPA No.148 of 1997 before the High Court. The appellants herein filed counter-affidavit in the said LPA.

The High Court after going through the records of the case came to the conclusion that there was an adverse element in the ACRs of the respondent for the years 1988-89 and 1989-90 and, therefore, in the terms of letter dated 21.8.1989 of the Sena Sachiv Shakha (no. 32301/34/F/MS/4) he ought to have been given performance counseling. The Hon'ble High Court quashed the entry of the CR for the year 1988-90 and remanded the case to the appellants for reconsideration.

The High Court was of the view that there was down grading which was adverse to the respondent and ought to have been communicated.

In support of the appeal learned counsel for the appellants submitted that the High Court has not kept in view the correct position in law. The fundamental mistake in the approach of the High Court is that it proceeded on the basis as if whenever there was allotment of marks at a figure lower than for the previous period, it was down gradation, resulted in adverse consequences and ought to have been communicated before the same was considered while considering the respondent's suitability for promotion. The High court proceeded to record that the parameters for recording of ACR was not specified and that being the position, the fact that for the year 1988-89 the respondent was awarded seven marks and for 1989-90 it was six marks amounted to down grading. Since there was no challenge in the writ petition to the effect that there were no parameters for assessment the High Court ought not to have introduced a fresh case of absence of parameters. Said conclusion is erroneous because elaborate guidelines and parameters have been prescribed. Additionally the ACR for 1989-90 was recorded when the respondent was holding the post of Major while for the previous period he was holding the post of Captain. The High Court erred in treating unequals to be equal and proceeded on the basis as if allotment of marks at a figure lower than for the previous period amounted to down grading. This is in fact really not so. The question of any communication did not arise because there was no adverse entry as such. The circumstances when communications have to be made of adverse entries are elaborately provided for. As there was no averment that parameters did not exist in the counter filed, present appellants did not touch on that aspect. But the High Court overlooked this vital aspect and proceeded on the footing that no parameters existed. On that ground alone according to learned counsel for the appellants the High Court's judgment is vulnerable. It is also pointed out that the High Court relied on the decision of this Court in U.P. Jal Nigam and Ors. v. Prabhat Chandra Jain and others (1996 (2) SCC 363) to buttress its view. According to learned counsel for the appellants, bare reading of the said judgment clearly indicates that it was only applicable in the case of U.P. Jal Nigam and has no application to the facts of the present case.

Similarly, the decision in State of U.P. v. Yamuna Shanker Misra and Anr. (1997 (4) SCC 7) was rendered on a

different set of facts and has no application to the facts of the present case. The office memorandum on which the High Court relied upon i.e. the letter/circular dated 21st August, 1989 does not in any way help the respondent, and in fact goes against him. It only lays down the modalities to be followed when an officer is found to be not up to mark. The performance counseling is a continuous process and the concerned employee has to be given appropriate guidance for an improvement as and when a weakness is noticed. Only when the officer fails to show the desired improvement the adverse/advisory remarks can be included in the confidential report.

In response, learned counsel for the respondent submitted that the High Court has taken the correct view considering the fact that serious consequences were involved and directed communication of the entry which had adverse consequences. The reduction in marks for a subsequent period is a clear case of adverse consequences and, therefore, it was correct on the part of the High Court to give direction as contained in the impugned order. It was also submitted that the U.P. Jal Nigam's case (supra) clearly points out that when there is a down grading in the assessment by award of lesser marks, adverse consequences are involved.

As has been rightly submitted by learned counsel for the appellants, U.P. Jal Nigam's case (supra) has no universal application. The judgment itself shows that it was intended to be meant only for the employees of the U.P. Jal Nigam only.

Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In *London Graving Dock Co. Ltd. v. Horton* (1951 AC 737 at p.761), Lord Mac Dermot observed:

"The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge."

In *Home Office v. Dorset Yacht Co.* (1970 (2) All ER 294) Lord Reid said, "Lord Atkin's speech.....is not to be treated as if it was a statute definition. It will require qualification in new circumstances." Megarry, J in (1971) 1 WLR 1062 observed: "One must not, of course, construe even a reserved judgment of Russell L.J. as if it were an Act of Parliament." And, in *Herrington v. British Railways Board* (1972 (2) WLR 537) Lord Morris said:

"There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case."

Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

The following words of Lord Denning in the matter of applying precedents have become locus classicus:

"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

"Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."

The materials on records clearly reveal that the procedure adopted for recording of ACRs. has been elaborately provided for. There are different officers involved in the process, they are: Initiating Officer (in short the 'I.O.'), the Superior Reviewing Officer (in short 'the S.R.O.'), the First Technical Officer (in short the 'FTO') and Higher Technical officer (in short the 'HTO'). As submitted by learned counsel for the appellants the standards for demonstrated performance in the case of Major, Lieutenant Colonel and Colonel are different. The appellant had filed the writ application making a grievance that there were some adverse remarks which were not communicated. The absence of parameters was not specifically highlighted in the writ petition. It appears that on 6th May, 1987 a paper on the selection system was circulated. Paragraph 3 thereof reads as follows:

"Promotion upto the rank of substantive major is carried out based upon the length of service, provided the officer fulfills the mandatory requirements of such a promotion. However, promotions above the rank of Major are done through process of selection."

This is indicative that the promotion is virtually on merit-cum-seniority basis. The document in question elaborately provides the guidelines for assessment. Some of the relevant provisions need to be noted. They are as follows:

"Assessment of the officer is based on the comparative merit of the overall profile of the officers within his own batchee. Needless to say, the grading of the Board is to be assessed from the material placed before the board, and not from personal knowledge, if any.

In case of doubt, benefit must go to the "Service".

Objectivity in the system of Selection is ensured by the MS Branch, by the following:

"Concealment of the identity of the officers being considered to the members of the Board. The MDS placed before the members does not contain the officer's particulars, date of birth, names of the reporting officers or the numbers of the fm/unit the officer has served, there by denying any identification of the officer under consideration. (Applicable for Nos. 2, 3 & 4 Selection Board)."

Instruction for Rendition of Confidential Reports of officer for 1989 has also been detailed and the following procedure of Assessment is relevant:-

"The Personal Qualities and variables of Demonstrated Performance have been selected after a considerable research on Confidential Reports over a period of years to cover the inherent attributes considered essential for the job content of an Army Officer. Each quality has been defined. Marks are required to be entered by the IO and the RO in the columns against each quality. Two marks each have been allotted for three gradation (viz. Above Average 8 or 7, High Average 6 or 5, Low Average 3 or 2) to differentiate within the same."

In the case of Majors, Lieutenant Colonels and Colonels, three sets of Demonstrated Performance variables have been provided in the CR forms. These variables correspond to "Regimental and Command Assignments".

The difference in approach from Captains and below and Major, Lieutenant Colonel and Colonel also spaced out from paragraphs 108 and 109. Paragraph 109 is of considerable importance so far as the present case concerned. The same reads as follows:

"109. Low and Below Average Assessment:
When an officer is assessed 3 marks or

less in any Personal Quality or the aspect of Demonstrated Performance, then it is a matter of concern since, by an large, officers are required to demonstrate at least High Average performance. In order to establish the cause and for the purpose of natural justice, the assessment needs adequate and explicit elaboration. Further, such assessment should invariably be supported by verbal and written guidelines for improvement, details of which also need to be mentioned in the pen-picture."

A reading of para 109 shows that three marks or less is considered to be adverse and in such cases verbal and written guidelines for improvement are to be given and the details are to be mentioned in the pen picture. The brief contents (pen picture) and objectivity of the report is provided in paragraph 113.

A reference is also necessary to the instructions issued on 3rd February, 1989. Paragraph 103 is of considerable importance and reads as follows:

"103. Assessment contained in a CR will not to be communicated to the officer except in the following contingencies:-

(a) When figurative assessment anywhere in the CR is Low or Below Average (i.e. 3 marks). In such cases extract of figurative assessment (i.e. 3 or less) will be communicated to the officer.

(b) When the brief comments (pen picture) contains adverse or advisory remarks. In such cases complete pen picture (excluding the box grading) together with comments on Guidance for Improvements will be communicated to the officer. Further, the box grading will also need communication to the officer when assessment is low or Below Average (3 or less)."

According to the modalities provided for recording and communication of adverse entries clearly indicate as to in which cases the communication of adverse or advisory remarks are to be made. Word "Advisory" is not necessarily adverse. Great emphasis was laid on the instructions dated 21.8.1989 titled "Reflection and Communication of adverse and advisory remarks in the Confidential Reports". The same reads as follows:

"The actual pen picture comprises the brief comments given at Paragraphs 13(e)/19(a) of the ACR forms for Majors to Colonels or Paragraphs 13/15 of the

ACR Form for Captains and below. Therefore adverse/advisory remarks, if any, should be endorsed in these paragraphs/sub paragraphs only. The information to be given under the Column "Verbal or Written Guidance for Improvement" (i.e. Para 18(b)/19(b) or Para 15/16) is only to support the adverse/advisory remarks reflected in the pen picture. If there are no adverse/advisory remarks reflected in the pen picture, there is no requirement of including details of verbal or written guidance for improvement given to the ratees during the reporting period. It is reiterated that "Performance Counselling is a continuous process and, therefore, the ratee must be given appropriate "Guidance for improvement" as and when noticed."

A reading of the instructions clearly indicate that there are different stages: first is the counseling, second is the guidance and third is the consequences of the officer failing to show desired improvement. Only when an officer fails to show the desired improvement the adverse/advisory remarks are included in his Confidential Report so that cognizance is taken for his weakness while planning his future placements. The High Court has clearly overlooked these aspects and on that ground alone the judgment is vulnerable. Additionally, it is noticed that the writ-petitioner had merely made a grievance of non-communication but the High Court quashed the entry for 1989-90 which is clearly indefensible. In the fitness of things, therefore, the High Court should re-hear the matter and consider the grievances of the writ-petitioner in the background of the parameters which clearly exist. We make it clear that we have not expressed any opinion on the merits of the case as the matter is being remitted to the High Court for fresh consideration.

The appeal is accordingly disposed of.