



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 73 OF 2020

Shri. Ashok Ratnapal Narwade
Age : 49 years, C.P.F. No.2200724
Dy. Executive Engineer,
M.S.E.D.Co. Ltd.,
Testing Division, Vasai, Palghar
Residing at 1104, Gitanjali, D Wing
Chota Masoba, Chikenghar,
Kalyan (West), Pin-400 703.

.... Petitioner

V/s.

1. Maharashtra State Electricity
Distribution Co. Ltd. Through its
Chairman and Managing Director
Prakashgad, Ground Floor, Plot
No.G-9, Anant Kanekar Marg,
Station Road, Bandra (East),
Mumbai 400 051.

2. The General Administration
Department, Government of
Maharashtra

..... Respondents

Appearances:

Mr. Kishor D. Walanju, Advocate for petitioner.
Mrs. Anjali R. Shiledar Baxi, Advocate for respondent no.1.

**CORAM : S.V. GANGAPURWALA, ACTING C.J. &
SANDEEP V. MARNE, J.**
DATE : 29TH MARCH, 2023.

JUDGMENT : (Per: Sandeep V. Marne, J.)

1. Rule. Rule made returnable forthwith. With the consent of the parties, taken up for final hearing.

2. Petitioner seeks deemed date of promotion on the post of Deputy/Additional Executive Engineer w.e.f. 15.05.2012. Since

promotion is denied referring to the Administrative Circular No.310 dated 5.08.2010, the said Circular is also challenged in the present petition.

3. Brief facts of the case are that petitioner joined the service with Maharashtra State Electricity Distribution Company Limited on 29.06.1999. While functioning as Assistant Engineer, an adverse grading of 'Poor' came to be recorded in the confidential report for the year 2007-08 (period 18.06.2007 to 31.03.2008). The adverse grading was communicated to petitioner four years later on 21.07.2012. He made representation to the General Manager (H.R.) for re-consideration of the grading. The request was rejected by letter dated 3.12.2012. Petitioner therefore made representation to the Maharashtra State Scheduled Castes & Scheduled Tribes Commission which directed the respondents to reconsider the grading vide letter dated 23.12.2013. As per the recommendations of the Commission, the Competent Authority upgraded Petitioner's C.R. for the year 2007-08 from 'Poor' to 'Very Good'.

4. In the meantime, Petitioner's case was considered for promotion to the post of Dy/Addl. Executive Engineer in the Selection Committee meeting held on 15.05.2012 in which he was not recommended for promotion on account of failure to meet the required / standard benchmark during the period from 1.04.2007 to 31.03.2008.

5. Consequent to upgradation of his C.R. for the year 2007-08 from 'Poor' to 'Very Good', respondent no.1 conducted Selection Committee on 17.06.2014 for consideration of Petitioner's case on the post of Dy/Addl. Executive Engineer w.e.f. 15.5.2012. However, relying on the Administrative Circular No. 310 dated 25.08.2010, the Selection Committee did not recommend

his case for promotion to the post of Dy/Addl. Executive Engineer w.e.f. 15.5.2012. The Administrative Circular No.310 dated 25.08.2010 provides that if C.R.s are reviewed, the same shall not be considered for deemed date of promotion and that the upgraded grading can be considered only with prospective effect. Petitioner has accordingly challenged the Administrative Circular No.310 dated 25.08.2010 as well as decision not recommending his promotion to the post of Dy/Addl. Executive Engineer w.e.f. 15.05.2010. Petitioner has also challenged communication dated 11.11.2019 conveying him the decision of the Selection Committee Meeting held on 17.06.2014.

6. Appearing for petitioner, Mr. Walanju the Ld. Counsel would submit that since Petitioner's C.R. for the year 2007-08 has been upgraded from 'Poor' to 'Very Good', the benefit of such upgradation must enure to him. That the Administrative Circular No. 310 dated 25.08.2010, cannot have the effect of denial of benefit of promotion from retrospective effect. That the adverse grading was communicated to petitioner belatedly and that therefore, he cannot be made to suffer on account of mistake of respondent no.1. That upgradation of CR would be rendered meaningless if such upgradation is not taken into consideration while reconsidering the case for promotion.

7. *Per-contra*, Mrs. Baxi the Ld. Counsel appearing for Respondent No. 1 would oppose the petition submitting that the Administrative Circular No.310 dated 25.08.2010 disentitles petitioner from grant of deemed date of promotion even upon subsequent upgradation of his A.C.R. She would further submit that, petitioner's case was subsequently considered for promotion to the post of Deputy/Additional Executive Engineer on 6.05.2014, 31.03.2015, 19.12.2015, 5.5.2017, 23.5.2018 and 21.2.2019 when he was not recommended for such promotion. It is only on

03.11.2021 that the Selection Committee recommended petitioner's case for promotion to the post of Dy/Addl Executive Engineer. She would submit that ACR is not the sole criteria for adjudging fitness of an officer for promotion and that the same depends on various other factors. She would pray for dismissal of the petition.

8. Having heard the learned counsels for the parties, following issue arises for our consideration:

'Whether confidential report upgraded subsequent to meeting of selection committee can be taken into consideration by the review selection committee for grant of retrospective promotion or deemed date of promotion?'

9. The confidential reports are written with multiple objectives of making employees strive for better gradings by working hard, to improve upon their performance, for assessing suitability of employees for promotion, etc. After the judgment of the Apex Court in **Dev Dutt Vs. Union of India and Ors.**, (2008) 8 SCC 725 the performance reports are now no longer 'confidential'. Now every grading, whether 'outstanding', 'very good', 'average' or 'poor' must be communicated to the employees. Since communication of every grading is now mandatory, the nomenclature of the reports have now changed from 'Annual Confidential Reports (ACR)' to 'Annual Performance Assessment Report (APAR)'. In **Sukhdev Singh Vs. Union of India and Others**, (2013) 9 SCC 566, the Apex Court has restated the principle of importance of communication every grading 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."

10. Petitioner was awarded adverse grading of 'Poor' in the ACR for the year 2007-08. However that grading was communicated to him belatedly on 21.07.2012. This action on the part of respondent no.1 is clearly erroneous as the whole object behind reporting performance of an officer is frustrated if the ACR is belatedly communicated. Be that as it may, Petitioner made representation for upgradation of the ACR, which was turned down on 3.12.2012. On intervention by the Maharashtra State Scheduled Castes & Tribes Commission, the respondent no.1 ultimately upgraded the ACR for the year 2008-09 from 'Poor' to 'Very Good' on 20.02.2014. Thus, the ACRs of the petitioner for the year 2007-08 now stands upgraded as 'Very Good'.

11. On account of error on the part of respondent no.1, petitioner's ACR for the year 2007-08 continued to remain 'Poor' during the years 2008 to 2014. The respondent no.1 corrected the error only on 20.02.2014.

12. In the meantime, his case was considered for promotion to the post of Dy/Addl Executive Engineer in Selection Committee held on 15.05.2012 and on account of 'Poor' grading being reflected in the ACR for the year 2007-08, he was not

recommended for promotion. This is borne out by following observations of the Selection Committee, which met on 17.06.2014 :

“Shri. A.R. Narwade, AE was not selected for promotion to the post of Dy.Ex.Engineer in Competent Selection Committee meeting held on 15.05.2012 (PR No.1121) due to performance not up to the required / standard bench marks during period from 01.04.2007 to 31.03.2008.”

13. After upgradation of petitioner’s ACR for the year 2007-08, his case was reconsidered for promotion retrospectively w.e.f. 15.05.2012 by the Selection Committee held on 17.06.2014. However, by making following observations, the Selection Committee did not recommend petitioner’s case :

“The committee also reviewed contains of Adm. Circular No.310 Dtd. 25.08.2010 and noted that “such review of confidential report shall not be considered for deemed date of promotion. Considering the 5-point rating scale of Annual Confidential Report of concerned employee of higher grade under the provisions of G.A. 74(P)/G.O. 111(P) on this aspect at later stage, by the Competent Selection Committee / Competent Authority. The case shall only be considered for promotion / grant of benefit of higher grade lunder the provision of G.P. 74(P) & G.O. 111(P) in the next ensuing meeting of Competent Selection Committee/by Competent Authority as per overall gading on five point rating scale with prospective effect only.”

The Committee reviewed the annual performance of Shri. Narwade for a period of 5 years i.e. from 01.04.2003 to 31.03.2008 including upgraded CR for the yer 2007-2008 and as per the provision of Administration Circular No.310 Dtd. 25.08.2010, not recommended Shri. Narwade for promotion to the post of Dy.EE w.e.f. 15.05.2012. The Administration Circular No.310 Dtd.25.08.2010 is very specific that whenever such change is there, it will always operate as prospective and never be applicable to

retrospective. In the circumstance, the recommendation of the Commission in respect of the promotion and other benefits need not be taken into consideration. However, his right to be considered for the promotion and other benefits can be taken into consideration only as per the S.R. and no exception should be carved out in such cases.

After the detailed discussions the committee concluded that the case of Shri. A.E. Narwade A.E. (Dist.) for promotion to the post of Dy. Executive Engineer (Dist.) during 2012-13 (PR1121) is not considered in the light of Administration Circular No.310 Dtd. 25.08.2010."

14. The sole reason for not recommending petitioner for promotion to the post of Deputy/Additional Executive Engineer w.e.f. 15.05.2012, is the Administrative Circular No.310 dated 25.08.2010 which reads thus :

ADMINISTRATIVE CIRCULAR NO.310 DATED 25/08/2010

Sub : Review of overall gradings of Annual Confidential Reports i.e. "Poor", "Below Average" and "Average"-Representations thereof and consideration for Deemed date of Promotions.

As per instructions contained in Administrative Circular No.422 dt.10.06.2004, the overall grading falling in the category "Average", "Below Average" & "Poor" recorded in the Annual Confidential Reports of employees are communicated to the concerned, so that employees will not remain ignorant about the overall gradings recorded in their Annual Confidential Reports and will get an opportunity to improve their performance and make efforts to remedy, defects and shortcomings.

Accordingly representations against communication of overall gradings such as "Poor", "Below Average" & "Average" are entertained for review by the Competent Authorities.

It is observed that, on representation from the employee, the same Competent Authority is reviewing the said representation

and upgrading the overall gradings as "Good" or "Very Good" after year or two without any justification. Thereafter, the concerned employee is subsequently representing for grant of promotion/deemed date promotions/grant of higher grade benefit under G.O.74(P) dt. 30.04.1974/G.O. 111(P) dated 13.05.1982.

It is also a general trend that, Annual Confidential Reports are reviewed by showing gesture of generosity by the concerned authority, rather than based on performance of the employee during the period under report. Moreover, review of Annual Confidential Report is made, when the authorities are either transferred or retiring shortly, at the behest of employee's requests. This type of upgradation is not appreciated.

In view of this, it is decided that, such review of Confidential Report shall not be considered for deemed date promotions. Considering the 5 point rating scale of Annual Confidential Reports of concerned employee of relevant period, he shall not be held eligible for deemed date of promotion/grant of higher grade under the provisions of G.O. 74(P)/G.O. 111(P) on this aspect at later stage, by the Competent Selection Committee/Competent Authority. The case shall only be considered for promotion/grant of benefit of higher grade under the provisions of G.O.74(P) & G.P.111(P) in the next ensuing meeting of Competent Selection Committee/by Competent Authority as per overall gradings on five point rating scale with prospective effect only.

Further, it is also decided that, after considering the representation against communication of overall grading such as "Poor", "Below Average" & "Average", the Annual Confidential Reports shall only be upgraded one step higher i.e. "Poor" to "Below Average" or "Average" to "Good" only by the concerned Reporting / Countersigning /Accepting Authorities.

The review of overall grading of Confidential Report at later stage, will be considered in the next ensuing meeting of Competent Selection Committee for selection of higher post at a later stage of selection. The practice of granting deemed date promotion/grant of higher grade benefit under G.O. 74(P) and G.O. 111(P) with back date, on the basis of review of Confidential Reports will not be considered. All such cases shall be considered with prospective effect only.

This circular is issued with the approval of Chairman cum Managing Director, MSEDCL.

This Administrative Circular shall come into force with effect from the date of issue of this Circular.

The Administrative Circular is made available on Company's website i.e. www.mahadiscom.in.

[Col.Rahul Gowardhan (Retd.)
Executive Director (HR)]

15. We find the provisions of the Administrative Circular No.310 dated 25.08.2010 denying the benefit of promotion from an earlier date even after upgradation of ACR to be inconsistent with the entire scheme of reporting performance. One of the reasons why performance of an employee/officer is reported in the form of ACR/APAR is to adjudge his fitness for promotion. Another important object is to enable him to improve his performance. It is therefore eminent that, if any adverse grading is recorded, the same is brought to the notice of the Officer concerned immediately so that he can not only improve his performance but can also make representation for upgradation of the grading so that he does not suffer in the matter of promotion. In the present case, communication of 'Poor' grading pertaining to the year 2007-08 on 21.07.2012 has completely frustrated the above objective. It is again due to mistake on the part of respondent no.1 that erroneous grading of 'Poor' continued to remain reflected in the ACR for the year 2007-08 during the period 2008 to 2014. Issue is whether, petitioner should be made to suffer for the mistake on the part of respondent no.1 The answer is obviously in the negative.

16. Coming back to the Administrative Circular No.310 dated 25.08.2010 the same is against the spirit of the law laid down by the Apex Court in the case of **Amar Kant Choudhary v.**

State of Bihar, (1984) 1 SCC 694, in which the Apex Court has held as under :

8. After giving our anxious consideration to the uncontroverted material placed before us we have reached the conclusion that the case of the appellant for promotion to the Indian Police Service Cadre has not been considered by the Committee in a just and fair way and his case has been disposed of contrary to the principles laid down in *Gurdial Singh Fiji case* [(1979) 2 SCC 368 : 1979 SCC (L&S) 197 : (1979) 3 SCR 518] . **The decisions of the Selection Committee recorded at its meetings in which the case of the appellant was considered are vitiated by reason of reliance being placed on the adverse remarks which were later on expunged.** The High Court committed an error in dismissing the petition of the appellant and its order is, therefore, liable to be set aside. We accordingly set aside the order of the High Court. We hold that the appellant has made out a case for reconsideration of the question of his promotion to the Indian Police Service Cadre of the State of Bihar as on December 22, 1976 and if he is not selected as on that date for being considered again as on March 12, 1981. If he is not selected as on March 12, 1981 his case has to be considered as on October 14, 1981. **The Selection Committee has now to reconsider the case of the appellant accordingly after taking into consideration the orders passed by the State Government subsequently on any adverse entry that may have been made earlier and any other order of similar nature pertaining to the service of the appellant.** If on such reconsideration the appellant is selected he shall be entitled to the seniority and all other consequential benefits flowing therefrom. We issue a direction to the respondents to reconsider the case of the appellant as stated above. We hope that the above direction will be complied with expeditiously but not later than four months from today.

17. Even in ***Sukhdev Singh*** (supra), the appellant therein was already promoted (as in the present case). The Apex Court granted an opportunity to the appellant therein to make a representation to the authorities for retrospective promotion, depending upon upgradation of his gradings.

18. Thus, it is axiomatic in service jurisprudence that whenever grading of an employee/officer is upgraded, such

upgraded grading is required to be taken into consideration by a Review DPC which meets to review the recommendations made by earlier DPC, which had taken into consideration the non-upgraded grading. If this is not done, the entire objective behind conducting review DPC would be frustrated. This is exactly what has happened in the present case. Though respondent no.1 convened Selection Committee meeting on 17.06.2014 for re-consideration of petitioner's case for promotion to the post of Dy/Addl. Executive Engineer w.e.f. 15.05.2012 owing to his upgraded grading from 'poor' to 'very good' in the ACR for the year 2007-08, the Selection Committee refused to take into consideration such upgraded grading relying upon Administrative Circular No.310 dated 25.08.2010. Thus, the entire objective behind conducting review Selection Committee meeting is completely frustrated. We are therefore of the considered view that the Selection Committee which met on 17.06.2014 ought to have reconsidered petitioner's case for promotion to the post of Deputy/Additional Executive Engineer as on 15.5.2012 by considering the upgraded grading of 'Very Good' in the ACR for the year 2007-08. We are also of the view that the Administrative Circular No.310 dated 25.08.2010 directing consideration of case for promotion prospectively even upon upgradation of ACR, to be not in tune with the law laid down by the Apex Court.

19. True it is that suitability for promotion may not be adjudged solely on the basis of gradings in the ACRs/APARs and that the employer is bound to take into other factors such as pendency of disciplinary proceedings, punishments, etc into consideration. It is also well settled that the DPC/Selection Committee is not bound by the overall grading given by the reporting officer and is entitled to assess the performance of employee by going through the contents of the entire ACR/APAR. However at the same time, gradings in ACR/APAR is one of the

most vital criteria on the basis of which suitability of an employee for promotion can be decided. Therefore the moment there is change in the grading in ACR/APAR, such change is required to be considered by the DPC/Selection Committee while reconsidering his/her case for promotion.

20. The contention of Mrs. Baxi that petitioner's case was considered subsequently on various dates during the years 2014 to 2021 does not cut any ice. Petitioner's performance upto 15.05.2012 will have to be taken into consideration for reconsideration of his case for promotion to the post of Dy/Addl. Executive Engineer. As observed earlier, the Selection Committee itself has made an observation that the petitioner was not recommended for promotion in the Selection Committee meeting held on 15.5.2012 '*due to performance not upto to the required standard/benchmark during the period from 01.04.2007 to 31.03.2008*'. Therefore, earlier 'Poor' grading in the ACRs of 2007-08 appears to be the main reason why petitioner was not recommended for promotion by the Selection Committee which met on 15.05.2012.

21. Resultantly, the Writ Petition succeeds. We pass the following order:

ORDER

(i). The impugned communication dated 11.11.2019 is set aside.

(ii) The respondent no.1 is directed to reconsider Petitioner's case for promotion to the post of Deputy/Additional Executive Engineer as on 15.05.2012 by taking into consideration the upgraded grading of 'Very Good' in the ACR for the year 2007-08.

(iii) If Petitioner is found fit for promotion upon such reconsideration, the promotion be granted to him w.e.f. 15.05.2012 with all consequential benefits.

(iv) The Writ Petition is accordingly allowed in the above terms.

22. Rule is made absolute.

(SANDEEP V. MARNE, J.)

(ACTING CHIEF JUSTICE)