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Special Civil Application No.2584 of 1982

Date of Decision: 19-7-95

For Approval and Signature:

HONOURABLE MR. JUSTICE M.R. CALLA

1. Whether Reporters of Local Papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether Their Lordships wish to see the fair copy of the judgment? No
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any other order made thereunder? No
5. Whether it is to be circulated to the Civil Judge? No

Ms.K.A.Mehta, learned counsel for the petitioner.

Mr.A.G.Uraizee, learned A.G.P. for the respondents.

Coram: (M.R. Calla, J.)

Dt:19-7-95

ORAL JUDGMENT:

1. The petitioner joined the services of the Government of Saurashtra as Sub-Overseer by order of the Director of Agriculture, Government of Saurashtra dated 20-3-56 and he joined on the said post on 4-4-56. The petitioner was absorbed and allocated to the services of the State of Bombay and was appointed as Agriculture Assistant in Group-II - a post equivalent to that of

Sub-Overseer. The petitioner's case is that in the State of Saurashtra itself Shri J.V.Sutaria was appointed after the petitioner as Sub-Overseer with effect from 6-4-56. He too was likewise absorbed in the State of Bombay as Agriculture Assistant. Later on both were allocated to the services of the State of Gujarat and they continued on the post of Agriculture Assistant in the service of the State of Gujarat from 1-5-60. By the order dated 25-4-63 Mr.Sutaria was promoted to the higher post of Agriculture Supervisor, but the petitioner was not promoted. The petitioner, therefore, submitted a representation on 25-4-63 that he being senior to Mr.Sutaria and the criteria for promotion to the next higher post being seniority-cum-merit, he should have been preferred for promotion to the post of Agriculture Supervisor and that he has been wrongly superseded. The petitioner's case is that he had been promoted as Agriculture Supervisor in June 1967 and by Government letter dated 27-12-68, the Government also re-fixed the petitioner's seniority as Agriculture Assistant over Mr.Sutaria. Thereafter, the petitioner was reverted by the order dated 18-9-67. The petitioner, therefore, preferred Special Civil Application No.1229 of 1970 challenging the reversion order. This Special Civil Application No.1229 of 1970 was decided on 22-1-74 and the reversion order was set aside. In this order dated 22-1-74, which is placed on record as Annexure "C", it is mentioned that admittedly the petitioner was senior in the cadre of Agriculture Assistant. Thus, the petitioner's grievance with regard to the promotion on the post of Agriculture Supervisor, as such, was over and the question of petitioner's seniority over Mr. Sutaria has also to be taken to be settled down. The only question, therefore, remains is as to whether the petitioner is entitled to be promoted as Agriculture Supervisor from 25-4-63 instead of June, 1967 and as to whether the petitioner is entitled for a direction to ante-date the date of his promotion from June 1967 to 25-4-63.

2. On this aspect of the matter, it may be pointed out that there were adverse remarks against the petitioner for the year 1962-63 and these adverse remarks had been duly communicated to the petitioner. It appears that the petitioner submitted a representation for expunging the remarks for the year 1962-63. Strangely enough, in the affidavit-in-reply dated 18-7-83, which is filed in this case by the Joint Director of Agriculture, Rajkot Division Mr.N.R.Patel, it has been stated that the Sub Divisional Soil Conservation officer, Survey, Rajkot, who was petitioner's immediate officer,

was informed vide Confidential letter dated 12-3-65 that no application against adverse remarks in the Confidential Reports is to be entertained according to Department Circular dated 28-12-54 and, therefore, petitioner's application had been filed and the applicant be informed accordingly. It is also stated in para 6 of this affidavit-in-reply that in case of Mr.K.M.Vora in Second Appeal No.610 of 1980 filed in High Court of Gujarat, the Department had deposed that while giving promotion, criteria of consideration of last three years Confidential Reports is to be followed and the case of the petitioner was considered for promotion on the marking system basis, but he was not possessing merit factor of 55% marks to be eligible for promotion and later on, on instructions received from the Department vide letter dated 16-6-66, petitioner's case was considered for promotion and he was promoted on 1-6-67 as per the new formula. It is stated in para 4 of the affidavit-in-reply dated 18-7-83 filed by Joint Director Mr.N.R.Patel that petitioner was informed by Superintending Agricultural Officer, Rajkot vide letter dated 2-3-76 that his case for promotion to the post of Agriculture Supervisor in the years 1963, 1964 and 1965 was considered, but the petitioner was not found to possess the merit factor i.e. 55% marks on the basis of Confidential Reports.

3. Thus from the pleadings of the parties of both the sides, it is clear that the adverse remarks recorded in the Annual Confidential Reports against the petitioner for the year 1962-63 were taken into consideration against him and on that basis he was not found to possess 55% marks and also that in the other relevant years, there are no adverse remarks against the petitioner. The only adverse remarks are for the year 1962-63, for which the petitioner had submitted a representation and that representation was not entertained. It is the trite law that the adverse remarks recorded against an employee even if conveyed, can not be taken to have become final, if the concerned employee submits a representation against the same and pending such representation the adverse remarks can not be taken into consideration and if the representation remains undisposed and the concerned employee is held to be unsuitable on the ground of such adverse remarks, against which the representation is pending, such consideration can not be said to be fair consideration and the same stands vitiated. In the case at hand, it is the case of the respondents themselves that they did not entertain the representation submitted by the petitioner against the adverse remarks for the year 1962-63 and they have gone to the extent of telling

that they have the Departmental Circulars, according to which, the grievance against the adverse remarks is not to be entertained. Now this is an absolutely unlawful situation created by the respondents not to consider the representation against the adverse remarks. The right to represent against the adverse remarks had been recognized in more than one decisions and it has been clearly held in *Gurdial Singh v. State of Punjab*, reported in AIR 1979 Supreme Court 1622, that in accordance with the rules of natural justice, an adverse report in a confidential roll can not be acted upon to deny promotional opportunities unless it is communicated to the person concerned so that he has an opportunity to improve his work and conduct or to explain the circumstances leading to the report and further that such an opportunity is not an empty formality, its object, primarily, being to enable the superior authorities to decide on a consideration of the explanation offered by the person concerned, whether the adverse report is justified. It is, therefore, well settled that a decision has to be taken as to whether the adverse remarks were justified or not. If the representation is filed by the concerned employee against the adverse remarks and in case, the representation is not considered and the adverse remarks are taken into consideration, the same is contrary to the principles of fair play and natural justice and such consideration would certainly stand vitiated and apart from the fact that it will not be a case of fair consideration within the meaning of principle of equality of opportunity in matters relating to employment enshrined in Article 16 of the Constitution of India, it will be a case of discrimination, vitiating the consideration as such. The Annual Confidential Reports in case of Government servants form a very valuable basis to determine their fate in future. In fact, the Annual Confidential Reports work like a mirror before the concerned authorities while considering the matters for promotion, etc. so as to reflect the image and efficiency of the Government servant and, therefore, not only while recording the Annual Confidential Reports, all the instructions have to be followed and the same are to be recorded with care and caution, the representations made by the Government servants, against such adverse remarks, have also to be considered with an active application of mind objectively and a decision as to whether the remarks were justified or not has to be taken by the concerned appropriate authority before the same are put to use to the prejudice of the Government servant at the time of the consideration of his candidature for promotion to the next higher post. Had the petitioner's representation been considered and had the authorities come to the

conclusion that the remarks were not justified, the petitioner may have been found to possess the requisite standard of 55% marks and in that case, he could have been promoted also.

4. In this view of the matter, this Special Civil Application deserves to be partly allowed and the same is hereby partly allowed with the direction that the respondents shall first decide the petitioner's representation made against the adverse remarks for the year 1962-63 and in case the representation is accepted and the adverse remarks are found to be unjustified, the petitioner's candidature for promotion from 25-4-63 shall be considered de novo and the orders, as a result of such consideration on the basis of the instructions and system, which was applicable at that time, shall be issued accordingly. In case, the petitioner is selected for promotion as Agriculture Supervisor from 25-4-63 as a result of the consideration of his candidature now de novo on the basis of the result of the decision on his representation against the adverse remarks, all legal consequences shall follow and the petitioner shall be entitled to all legal consequences as if he had been promoted on 25-4-63 instead of June 1967 and in case, the petitioner is found to have retired, his retiral benefits shall also be revised accordingly and should the petitioner succeed in his representation against adverse remarks, the mere fact that he had retired in the year 1994 shall not come in the way of the petitioner for the purpose of getting the reliefs, as directed herein-above. The aforesaid directions shall be carried out within a period of three months from the date the writ is served upon the respondents. Rule is made absolute accordingly. No order as to costs.