

Unreportable
IN THE HIGH COURT OF DELHI AT NEW DELHI

+ WP(C) No.183/2009 & CM Appl. No.376/2009

- Date of Decision: 14.01.2009

#Kendriya Vidyalaya Sangathan & Anr.
!

.....Petitioner
Through: Mr. U.N. Singh

Versus

\$Dr. (Smt.) Reena Bhattacharya

.....Respondent
Through Nemo

CORAM :-

***THE HON'BLE MR.JUSTICE A.K.SIKRI**

THE HON'BLE MR. JUSTICE SURESH KAIT

- 1.Whether Reporters of Local papers may be allowed to see the Judgment?
- 2.To be referred to the Reporter or not?
- 3.Whether the judgment should be reported in the Digest?

A.K. SIKRI, J. (Oral)

:

1. The respondent herein was not recommended for promotion to the post of PGT by the Departmental Promotion Committee (DPC), which held its sitting on 19.2.2007. The reason for ignoring the respondent was that she was not fulfilling the requisite benchmark 'Good' prescribed for the said post as she had earned 'Average' rating in her ACRs in past few years. It is not in dispute that the said ACR ratings were not communicated to the respondent. The respondent, in these

circumstances, filed application under Section 19 of the Administrative Tribunal Act before the Central Administrative Tribunal, Principal Bench, New Delhi challenging the decision of the DPC. Her plea was that she should have been communicated the grading 'Average' to enable her to make her representation there against.

2. The petitioner herein, on the other hand, countered the aforesaid submission of the respondent submitting that there was no need to communicate the said grading, which was not 'Adverse'. The Tribunal allowed the OA vide orders dated 10.9.2008 following the judgment of the Apex Court in Dev Dutt v. Union of India and others, **(2008) 8 SCC 725** as per which, all ACRs are to be communicated. The Tribunal, in these circumstances, gave the following directions:-

“5. In the result, for the foregoing reasons, the OA is partly allowed with a direction to the respondents to communicate the adverse entries of below bench mark to the applicant within a period of two months from the date of communication of this order and thereafter the applicant shall prefer a representation against the same, which shall be decided by the respondents by passing a reasoned and speaking order within two months from the date of receipt of the representation. In case the adverse entries are upgraded, a review DPC shall be held and in case of her selection, her promotion is to be effected retrospectively within a period of three months with all consequences in law. No costs.”

3. The petitioners have filed the present writ petition challenging the aforesaid order. Their contention remains the same. The petitioners rely upon the judgment in the case of K.M. Mishra v. Central Bank of India and others, (2008) 9 SCC 120 in support of their submission that only adverse entries are to be communicated. The question that falls for consideration is as to whether grading 'Average' given to the respondent, which otherwise is not treated as adverse', would become adverse in the context where for promotional post the benchmark is 'Good' and any employee having entry below the said benchmark is adversely affected and would not get the promotion as has happened in the case of the respondent herein. This Bench had the occasion to deal with this very aspect and the aforesaid judgments of the Supreme Court in detail in the case of D.G. Employees State Insurance v. R.S. Gautam & Ors., WP(C) No.12110/2006 decided on 13.1.2009. Our purpose would be served in reproducing the said exercise by analyzing the judgment in the aforesaid cases:-

“Learned counsel for the petitioner submits that reliance upon **U.P.Jal Nigam** (supra) which is relied upon by the Full Bench in **J.S. Garg** (supra) by the Tribunal was not appropriate in view of later pronouncement of the Supreme Court in the case of **Union of India and another vs. Major Bahadur Singh**,

(2006) 1 SCC 368. She submits that in the said case the Supreme Court categorically held that the ratio laid down in **U.P. Jal Nigam** (supra) would be applicable only to the employees of Jal Nigam. She also referred to a recent judgment of the Supreme Court in the case of **K.M.Mishra vs. Central Bank of India and others, (2008) 9 SCC 120** wherein the Supreme Court dealt with the question where the appellant in the said appeal who was given excellent rating before 1995 was grading "Very Good" in the year 1995 and thereafter in his ACR for the year 1996-97 he was rated as "Good". It was argued by him that line down from excellent to "Very Good" and then to "Good" amounted to downgrading and such ACRs should have been communicated to him making him to represent against. The Supreme Court in this case opined that grading "Good" was not adverse it was not necessary to communicate this grading. As against that learned counsel for the respondent has referred to another judgment of the Supreme Court in **Devdutt vs. Union of India and others, (2008) 8 SCC 725**. In this case another DB of the Supreme Court has held in no uncertain terms that principle of natural justice demand that all ACRs should be communicated to the employees. This principle, it is held, shall apply to employees of statutory authorities/public sector employees and other instrumentalities of State (in addition to Government servants) and it is held excluded only in the case of officers because the position for them is different as clarified in the case of **Major Bahadur Singh** (supra).

It was submitted by Ms. Jyoti Singh that since there appears to be an equality between K.M.Mishra and Devdutt and is both judgments are of two Judge Bench K.M.Mishra should be followed as that is latter in point of time.

After hearing learned counsel for the parties, we are of the opinion that in this case it is not even necessary to go into the question where there is any

equality between the two judgments of the case or not. In the present case it is not disputed that bench mark for promotion to the post of Assistant Directors etc. in the petitioner organization is 3 "Good" gradings out of 5. Thus, an employee who is earning the grading "Good" can safely presume that he would have good chances of getting promoted to the higher post. However, in case he is given the grading which is below "Good", then it affects his promotional prospects. Therefore when the respondent had earned, in the previous year, "Good" grading and it was in the subsequent years downgraded to average which in fact has become reason to deny him promotion a down grading him to "Average" for the purpose of promotion has to be treated as adverse entry. Therefore it was required to communicate this entry to the respondent to enable him to make representation there against. Since this entry was recorded for 3 years successively were not communicated to the respondent, we are of the view taken by the Tribunal that in such circumstances these gradings could not have been taken into consideration while considering his case for promotion as Assistant Director etc. We find that under similar circumstances in Devdutt the Supreme Court had given the following directions while holding that grading good which was below bench mark should have been communicated to the appellant in the said case.

"We, therefore, direct that the "good" entry be communicated to the appellant within a period of two months from the date of receipt of the copy of this judgment. On being communicated, the appellant may make the representation, if he so chooses, against the said entry within two months thereafter and the said representation will be decided within two months thereafter. If his entry is upgraded the appellant shall be considered for promotion retrospectively by the Departmental

Promotion Committee (DPC) within three months thereafter and if the appellant gets selected for promotion retrospectively, he should be given higher pension with arrears of pay and interest @ 8% per annum till the date of payment.”

4. We, thus, see no reason to interfere with the directions given in the aforesaid case and dismiss the writ petition along with the application for stay.

(A.K. SIKRI)
JUDGE

January 14, 2009
hp.

(SURESH KAIT)
JUDGE