

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment pronounced on: 19.12.2012

W.P.(C) 5036/2012

UNION OF INDIA & ANR.

..... Petitioners

Versus

V.K.VASHISHT

..... Respondent

Advocates who appeared in this case:

For the Petitioners : Mr Rajeev Mehra, ASG with Mr Amit Chadha and
Mr Kunal Kahol.

For the Respondent : None.

CORAM:

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SIDDHARTH MRIDUL

J U D G M E N T

SIDDHARTH MRIDUL, J.

1. By way of the present writ petition, the petitioner herein, challenges the order dated 07.03.2012 passed by the Central Administrative Tribunal in OA No.3444/2011, whereby the Tribunal has allowed the OA and directed the petitioners to constitute a review DPC expeditiously to consider promotion of the respondent on the post of Deputy Secretary from the time he was first overlooked by his juniors.

2. In brief, facts relevant for the determination of the present petition may be noted.

- (i) The respondent joined the services of the petitioner as Deputy Field Officer (Tele) in Telecom cadre on 07.06.1976. He was promoted as per his turn from 1984 to 1991, first on the post of Field Officer (Cr.) in Crypto cadre and then as Senior Field Officer and in 1998, once again, as per his turn, as Under Secretary. The next higher promotional post is that of Deputy Secretary.
- (ii) In the DPC held on 12.03.2007, the case of the respondent along with others came up for consideration for the post of Deputy Secretary, wherein ACRs for the period 2001-02 to 2005-06 were under consideration. The respondent was superseded in the matter of promotion on the post aforesaid by his juniors.
- (iii) Another DPC was held in July, 2008, wherein, too, the respondent was not recommended, and his juniors were promoted. On both occasions, the respondent was overlooked

in the matter of promotion by his juniors as some of his ACRs were not commensurate to the benchmark.

- (iv) Aggrieved by his non-promotion, the respondent made a representation on 02.01.2008. The same was, however, rejected on 24.01.2008 by a non-speaking order stating that his case would be considered by the next DPC as and when the same met. The respondent submitted further representations on 29.07.2008, 31.12.2008 and 12.06.2009 for reviewing his ACRs. His last representation came to be rejected by the petitioners vide order dated 06.07.2009 on the ground that the new system was introduced with effect from the reporting period 2008-09, and that the respondent should refrain from representing on the same ground.
- (v) Thereafter, the respondent issued a legal notice on 20.07.2009 calling upon the petitioners to promote him to the post of Deputy Secretary from the date his juniors were promoted. The petitioners did not react to the same after which he approached the Tribunal by way of an original application bearing OA No.2888/2009.

(vi) While this OA No.2888/2009 was pending, the petitioners forwarded photo-copies of the ACRs of the respondent for the years 2004-05 and 2006-07 requiring him to submit a representation, if any. On receipt of the ACRs aforesaid, the respondent submitted his representation on 11.05.2010. The same was considered by the competent authority, which decided to upgrade the grading from “good” to “very good” in respect of both the ACRs aforesaid. Communication dated 11.10.2010 in that regard was also sent to the respondent.

(vii) In view of this favourable development, the respondent withdrew his OA No.2888/2009. On 08.11.2010, yet another DPC was held, by which time the two ACRs of the Respondent, as mentioned above, had since been upgraded commensurate to the benchmark, and the respondent was found fit and promoted on the post of Deputy Secretary vide order dated 22.11.2010.

(viii) When the ACRs of the respondent referred to above were upgraded commensurate to the benchmark, the respondent made a representation on 25.11.2010 asking the petitioners to promote him to the post of Deputy Secretary from the date his juniors

were promoted, by constituting a review DPC. This was followed by two more representations dated 07.02.2011 and 23.03.2011. When the same, however, brought no tangible results, an original application seeking a direction to be issued to the respondents to constitute a review DPC to consider the promotion of the respondent from the date when he was first so considered and ignored, and to promote him from the said date, came to be filed.

- (ix) The Tribunal allowed the OA with a direction to constitute a review DPC expeditiously to consider promotion of the respondent on the post of Deputy Secretary from when he was first overlooked by his juniors.

3. The issue to be considered for adjudication in the instant petition is whether a review DPC is required to be convened to consider a candidate for promotion, when there has been an upgradation of his below benchmark ACRs, from the time he was first found unfit for promotion.

4. The arguments canvassed by the petitioners are two-fold. It is first submitted by the learned counsel for the petitioner that the issue regarding

the consideration of promotion retrospectively is pending before a Larger Bench of the Supreme Court in the matter of **UOI v. A.K.Goel & Ors.**, SLP(C) No.15770/2009 and, therefore, this Court should await the decision of the Supreme Court before disposing of this petition.

5. It is next submitted that the Office Memorandum No.21011/1/2010 dated 13.04.2010 issued by the Director Government of India, Ministry of Personnel, Public Grievances & Pensions Department of Personnel Training clearly demonstrates that upgradation of the ACRs of the employee in the present circumstances is to be considered for promotion in a future DPC only. In other words, the upgradation of ACRs, if any, after consideration will have prospective effect only.

6. It is also brought to the notice of this Court that the respondent herein has not challenged this particular Office Memorandum before the Tribunal.

7. In this behalf it is noticed that the Supreme Court has settled the law on this aspect in the cases reported as **Dev Dutt vs. Union of India & Ors.**, (2008) 8 SCC 725 and **Abhijit Ghosh Dastidar vs. Union of India & Ors.**, (2009)16 SCC 146.

8. Dealing with the issue of non communication of ACRs, the Supreme Court in case of ***Dev Dutt*** (*supra*) has observed:

“39. In the present case, we are developing the principles of natural justice by holding that fairness and transparency in public administration requires that all entries (whether poor, fair, average, good or very good) in the Annual Confidential Report of a public servant, whether in civil, judicial, police or any other State service (except the military), must be communicated to him within a reasonable period so that he can make a representation for its upgradation. This in our opinion is the correct legal position even though there may be no Rule/G.O. requiring communication of the entry, or even if there is a Rule/G.O. prohibiting it, because the principle of non-arbitrariness in State action as envisaged by Article 14 of the Constitution in our opinion requires such communication. Article 14 will override all rules or government orders.

40. We further hold that when the entry is communicated to him the public servant should have a right to make a representation against the entry to the concerned authority, and the concerned authority must decide the representation in a fair manner and within a reasonable period. We also hold that the representation must be decided by an authority higher than the one who gave the entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar to Caesar. All this would be conducive to fairness and transparency in public administration, and would result in fairness to public servants. The State must be a model employer, and must act fairly towards its employees. Only then would good governance be possible.”

Further:-

“45. In our opinion, non-communication of entries in the Annual Confidential Report of a public servant, whether he is in civil, judicial, police or any other service (other than the military), certainly has civil consequences because it may affect his chances for promotion or get other benefits (as already discussed

above). Hence, such non-communication would be arbitrary, and as such violative of Article 14 of the Constitution.”

9. Subsequently, a Bench of three Honourable Judges of the Supreme Court in the case of **Abhijit Ghosh Dastidar** (*supra*) has observed:

“4. It is not in dispute that the CAT, Patna Bench passed an order recommending the authority not to rely on the order of caution dated 22.09.1997 and the order of adverse remarks dated 09.06.1998. In view of the said order, one obstacle relating to his promotion goes. Coming to the second aspect, that though the benchmark "very good" is required for being considered for promotion admittedly the entry of "good" was not communicated to the appellant. The entry of 'good' should have been communicated to him as he was having "very good" in the previous year. In those circumstances, in our opinion, non-communication of entries in the ACR of a public servant whether he is in civil, judicial, police or any other service (other than the armed forces), it has civil consequences because it may affect his chances for promotion or get other benefits. Hence, such non-communication would be arbitrary and as such violative of Article 14 of the Constitution. The same view has been reiterated in the above referred decision relied on by the appellant. Therefore, the entries "good" if at all granted to the appellant, the same should not have been taken into consideration for being considered for promotion to the higher grade. The respondent has no case that the appellant had ever been informed of the nature of the grading given to him.”

10. Thus, the principle as laid down by the Supreme Court in **Dev Dutt** (*supra*) makes it incumbent upon the concerned authorities to communicate all ACRs to a public servant in order to enable him to make a representation against them, if so advised. It also gives directions to consider such a representation in a fair manner within a reasonable period by placing the

same before an authority higher than the one who gave the original entry, thereby, emphasising upon the principles of transparency and fairness in public administration.

11. The Supreme Court in the case of ***Abhijit Ghosh Dastidar*** (*supra*) went a step further by holding that non-communication of entries in the ACR being violative of Article 14, should not be considered for promotion to the next higher grade.

12. In the instant petition, the respondent's ACRs were communicated to him at a belated stage and he represented against the same. On consideration of such representation the respondent was granted an upgradation of the below benchmark ACRs.

13. It was the case of the respondent before the Tribunal that considering he was found unfit for promotion based on below benchmark ACRs which were subsequently upgraded, the benefit of such upgradation should be given from the time that such below benchmark ACRs were first considered.

14. With regard to the contention that a similar matter is pending before a Larger Bench of the Supreme Court, it would suffice to state that reference to Larger Bench does not lead to an inescapable conclusion that

such matters be kept in abeyance. In a recent case reported as **Ashok Sadarangani and Anr. vs. Union of India and Ors.**, AIR 2012 SC 1563, the Supreme Court has observed:

“19. As was indicated in Harbhajan Singh's case (supra), the pendency of a reference to a larger Bench, does not mean that all other proceedings involving the same issue would remain stayed till a decision was rendered in the reference. The reference made in Gian Singh's case (supra) need not, therefore, detain us. Till such time as the decisions cited at the Bar are not modified or altered in any way, they continue to hold the field.”

15. With regard to the second submission made on behalf of the petitioners the Office Memorandum No.21011/1/2010 dated 13.04.2010 is reproduced below for ready reference:

**“No. 21011112010-Estt.A
Government of India
Ministry of Personnel, Public Grievances & Pensions
Department of Personnel & Training**

North Block, New Delhi
Dated the 13th April, 2010

OFFICE MEMORANDUM

Subject: Below Benchmark gradings in ACRs prior to the reporting period 2008-09 and objective consideration of representation by the competent authority against remarks in the APAR or for upgradation of the final grading.

The undersigned is directed to say that prior to the reporting period 2008-09, only the adverse remarks in the ACRs had to be communicated to the concerned officer for representation, if any to be considered by the competent authority. The question of treating the grading in the ACR which is below the benchmark for next promotion has been considered in this Department and it has been decided that if an employee is to be considered for promotion in a future DPC and his ACRs prior to the period 2008-09 which would be reckonable for assessment of his fitness in such future DPCs contain final grading which are below the benchmark for his next promotion, before such ACRs are placed before the DPC, the concerned employee will be given a copy of the relevant ACR for his representation, if any, within 15 days of such communication. It may be noted that only below benchmark ACR for the period relevant to promotion need be sent. There is no need to send below benchmark ACRs of other years.

2. As per existing instructions, representations against the remarks or for upgradation of the final grading given in the APAR (previously known as ACR) should be examined by the competent authority in consultation, if necessary, with the Reporting and the Reviewing Officer, if any. While considering the representation, the competent authority decides the matter objectively in a quasi-judicial manner on the basis of material placed before it. This would imply that the competent authority shall take into account the contentions of the officer who has represented against the particular remarks/grading in the APAR and the views of the Reporting and Reviewing officer if they are still in service on the points raised in the representation vis-a-vis the remarks/gradings given by them in the APAR. The UPSC has informed this Department that the Commission has observed that while deciding such representations, the competent authorities sometimes do not take into account the views of

Reporting/Reviewing Officers if they are still in service. The Commission has further observed that in majority of such cases, the competent authority does not give specific reasons for upgrading the below benchmark ACR/APAR gradings at par with the benchmark for next promotion.

3. All Ministries/Departments are therefore requested to inform the competent authorities while forwarding such cases to them to decide on the representations against the remarks or for upgradation of the grading in the APAR that the decision on the representation may be taken objectively after taking into account the views of the concerned Reporting/Reviewing Officers if they are still in service and in case of upgradation of the final grading given in the APAR, specific reasons therefor may also be given in the order of the competent authority.

(C.A.Subramanian)
Director”

16. The said OM has been issued pursuant to the instructions of DOP&T and has come in compliance of the judgments rendered by the Supreme Court as noted above. It cannot be interpreted to mean that an employee, who had below benchmark ACRs prior to the declaration of law, upon upgradation of those ACRs would be entitled to consideration for promotion in future alone. Such an interpretation would defeat the very purpose of the benefit intended to be given. The fact that below benchmark ACRs are upgraded pursuant to a representation made in that behalf goes to show that

the concerned authority recognises and subsequently corrects an erroneous assessment made by it at the first instance. To restrict the benefit of such an admitted correction for the purpose of future DPCs would deprive the concerned employee of valuable rights. It is an admitted position that the respondent was considered unfit for promotion on 3 different occasions and thereby deprived of legitimate promotion for 3 years. The benefit thus accrues to him from the date he was first denied promotion on the basis of the erroneous assessment.

17. In **Union of India and Ors. vs. Krishna Mohan Dixit and Ors.** (WP(C) No.6013/2010 decided on 8.10.2010) a Division Bench of this Court considered OM No.21011/1/2010 dated 13.04.2010 in the case of non-communication of below benchmark ACRs. The court directed that adverse ACRs below the benchmark which fell within the zone of consideration, and were not communicated earlier, would be communicated. The respondent would then be eligible to make a representation against the same and such representation would be decided by the competent authority, which would be higher in rank to the authority who gave the adverse ACR. In case, the ACR is upgraded, making the incumbent eligible for consideration, review DPC would be held based upon the reappraised ACRs for the relevant period. In

case, the review DPC finds the incumbent fit for promotion, the benefit thereof would be given to him from the date when he was entitled for promotion to the next higher post had the ACR in question not been considered averse to him with all consequential benefits.

18. In another case reported as **Union of India and Ors vs. Haldhar Prasad**, WP(C) No.3937/2012 and WP(C) No.3970/2012, decided on 18.07.2012, a similar case of subsequent upgradation of below benchmark ACRs was considered by this Court and it was observed:

“4. We have heard counsel for the parties at some length. We find that the below benchmark ACRs had not been communicated. The Supreme Court in *Dev Dutt vs. Union of India and Ors.*, (2008) 8 SCC 725, was of the opinion that the non-communication of ACRs would be arbitrary and as such would be violative of Article 14 of the Constitution of India. That decision had come on 12.05.2008. After that, it was well known that the below benchmark ACRs ought to have been communicated before they were to be considered against the incumbent. The fact that they were not communicated, and, it is because of that Dr Prasad was found unfit in the DPC held in 2009, meant that the valuable rights of Dr Prasad had been violated. Consequently the Tribunal has provided relief to Dr Prasad by directing that a review DPC be constituted particularly in view of the fact that subsequently those very below benchmark ACRs have been upgraded by the competent authority.

5. We see no reason to interfere with this finding of the Tribunal. We also see no reason to alter the direction given by the Tribunal that in case Dr Prasad is found fit for promotion to the post of Senior Administrative Grade, he would be paid actual wages. The Tribunal was right in directing that his pay would be fixed

notionally on the promotional post. In view of the foregoing, both the writ petitions are dismissed. There shall be no order as to costs.”

19. Thus, the law as is clearly enunciated by the aforementioned decisions has been correctly appreciated by the Tribunal. We find no reason to interfere with the same. The instant petition is devoid of merit and is hereby dismissed. No costs.

SIDDHARTH MRIDUL, J.

BADAR DURREZ AHMED, J.

DECEMBER 19, 2012