

\$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) No.2801/2010**

% **Date of decision: 13th February, 2013**

DEV DUTT Petitioner
Through Mr.Yogender Mishra, Adv.with
Mr. Rajesh Kumar Katiyar, Adv.

Versus

UNION OF INDIA & ORS. Respondents
Through Mr. Janendra, Adv. with Mr.V.C. Jha,
Adv.

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE J.R. MIDHA

GITA MITTAL, J (Oral)

1. By this writ petition, the petitioner assails an order dated 9th November, 2009 passed by the respondents rejecting the petitioner's representation dated 13th May, 2009 against the adverse entries in his ACR for the period 1993-94 as well as the communication dated 7th December, 2009 whereby the respondents communicated the reasons on which the previous rejection was based.

2. The facts giving rise to the instant petition are within the narrow compass and to the extent necessary, are briefly noted hereafter.

3. The petitioner was in the service of the Border Roads Engineering Service which was governed by the Border Roads Engineering Service Group 'A' Rules as amended. The admitted position is that on 22nd February, 1988,

the appellant was promoted as an Executive Engineer and became eligible for consideration for promotion to the post of Superintending Engineer on 21st February, 1993 on completion of five years in the grade of Executive Engineer. The name of the petitioner was included in the list of candidates who were considered eligible for promotion.

4. Unfortunately, in the Departmental Promotion Committee meeting held on 16th December, 1994, the appellant was found not eligible for promotion while his juniors were considered and promoted to the rank of Superintending Engineering. The petitioner assailed the action of the respondents before the Guwahati High Court by way of a petition being Civil Rule No.5307/1995 which was rejected by an order passed on 21st August, 2001. The petitioner's challenge against this judgment before the Division Bench was also rejected. The petitioner assailed the action of the respondents against him, by way of a special leave petition which was registered as Civil Appeal Case No.7631/2002 before the Supreme Court of India.

5. We may note the primary ground of challenge of the petitioner. It was pointed out by the respondents that the petitioner did not meet the benchmark grade of 'very good' for the last five years before the Departmental Promotion Committee and, therefore, could not be considered for promotion to the post of Superintending Engineer. The petitioner made a grievance that the 'good' entry in his ACR for the year 1993-94 was not communicated to him and if the same had been communicated, he would have had the opportunity of making a representation for upgrading that entry to 'very

good'. If that representation was allowed, the petitioner would have become eligible for consideration for promotion to the post of Superintending Engineer. The appeal of the petitioner before the Supreme Court was allowed by a landmark judgment dated 12th May, 2008 whereby the Supreme Court held as follows:-

"xxx fairness and transparency in the 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".

It was further held as follows:-

"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."

6. After clear enunciation of the applicable legal principles, so far as the present petitioner was concerned, the court issued the following directions:-

"46. In view of the above, we are of the opinion that both the learned Single Judge as well as the learned Division Bench erred in law. Hence, we set aside the judgment of the Learned Single Judge as well as the impugned judgment of the learned Division Bench.

47. We are informed that the appellant has already retired from service. However, if his representation for upgradation of the 'good' entry is allowed, he may benefit in his pension and get some arrears. Hence we direct that the 'good' entry of 1993-94 be communicated to the appellant

forthwith and he should be permitted to make a representation against the same praying for its upgradation. If the upgradation is allowed, the appellant should be considered forthwith for promotion as Superintending Engineer retrospectively and if he is promoted, he will get the benefit of higher pension and the balance of arrears of pay along with 8% per annum interest.

48. 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."

7. The above directions mandated that the respondents, therefore, should have communicated the 'good' entry to the petitioner within a period of two months from the date of receipt of the copy of the judgment. Liberty was given to the petitioner to make a representation which was to be decided by the authority 'higher than the one who gave the entry'. If the entry was upgraded, the appellant was required to be considered for promotion retrospectively by the Departmental Promotion Committee.

8. We may briefly look at the manner in which the respondents have proceeded in purported compliance of the clear directions of the Supreme Court. The petitioner has placed before us a copy of the letter dated 28th November, 2008 wherein the respondents have simply reproduced the directions of the Supreme Court stating that "You have been graded 'Good' during the year 1993-94". The petitioner has assailed this communication as

being violative of the clear mandate of the directions of the Supreme Court complaining that the actual entry has not been communicated. The respondents have responded to the objection stating that the ACR dossier of the petitioner had been destroyed on completion of its prescribed retention period after disposal of Civil Rule No.5307/1995 which was the writ petition filed by the petitioner in the Guwahati High Court. Unfortunately, this position was never disclosed before the Supreme Court of India which adjudicated on the claims of the petitioner. The directions given to the respondents by the Supreme Court may have been different then and the present writ petition may not have been necessitated.

9. The petitioner appears to have submitted a representation dated 13th May, 2009 to the respondents against the grading granted to the petitioner in the ACR for the year 1993-94. The petitioner's representation was rejected by an order dated 9th November, 2009 by the respondents giving two reasons. The respondents firstly stated that the petitioner had replied to their communication after a delay of more than three months wherein he had stated that he had been under assessed by the initiating officer during the year 1993-94. The respondents have secondly clearly stated that "your ACR cannot be upgraded being devoid of merit". This communication clearly suggests that it was because of the delay from 1993-94 till 2009 when the petitioner's representation was being considered that the respondents were unable to consider the petitioner's representation for upgrading of the ACR.

10. The petitioner, however, did not rest on receipt of this communication. He challenged the rejection by the respondents by way of representations

dated 20th November, 2009 and 30th November, 2009 pointing out that the respondents had passed an unreasoned order. The respondents responded to these representations rejecting the petitioner's contention by the letter dated 7th December, 2009 giving the following reasons for rejection of the petitioner's representation which deserves to be considered in extenso and reads as follows:-

"However, with reference to your letter dated 11.11.2009, 20.11.2009 and 30.11.2009, it has been ascertained from the available records, that you had been issued a non-recordable warning by Commander 13 BRTF on 07 Oct 95 as per the order of DGBR on a Court of Inquiry regarding a case pertaining to year 1993. You were also involved in a Court of Inquiry regarding loss of Govt. property (15 Nos of chequered steel plates) on Dhar-Udampur road Unit line and for not making proper security arrangement to safeguard the Govt. property for which a disciplinary action under CCS (CC&A) Rules 1965 was also held and accordingly displeasure of the Govt. was communicated vide Sectt BRDB Order No.BRDB/02(138)/2000-GE.II dated 02 Feb 2001."

11. We may note that these very reasons have been cited by the respondents in opposition to the present writ petition both in the counter affidavit which has been filed before us and in the submission made by learned counsel for the respondents.

12. We have given our considered thought to both the reasons which have been cited by the respondents to support the rejection of the petitioner's claim. The letter dated 7th December, 2009 refers to the fact that the respondents have "*ascertained from the available records*" that the petitioner had been issued a non-recordable warning by the Commander 13 BRTF on 7th October, 1995 as per the order of DGBR on a court of inquiry

regarding a case pertaining to the year 1993. It is noteworthy that before this court, the respondents have taken a stand that the ACR dossier of the petitioner stands destroyed. The respondents have explained that their communication of the ACR as 'good' for the year 1993-94 is based on the extracts of the ACR dossier which are contained in the judgment dated 21st August, 2001 passed by the learned Single Judge of the Guwahati High Court which reads as follows:-

"xxx The petitioner got only 'good' and as such he was not eligible for promotion to the rank of Superintending Engineer on the basis of ACRs of the last 5 years which were placed and considered by the DPC.

xxx

xxx

xxx

That was done in the instant case in as much as there is an entry in the year i.e. 1.4.93 to 31.3.94 which reads as follows:-

*Guidelines for improvement communicated
To the officer reported upon:*

"Yes, verbally on a few occasions"

*(The reporting officer reported as above)
And the accepting officer written as follows:*

*"I partially agree with the resume in that
There has been shortfall in the achievement of the
officer"*

13. This extract does not refer to any court of inquiry or non-recordable warning by the Commander as stated by the respondents. Another important aspect of the matter is that reference has been made by the respondents to a case which pertains to the year 1993. However, the non-recordable warning stated to have been issued by the Commander was

issued only on 7th October, 1995 which was beyond the period of 1993-94 for which the ACR had been recorded. Therefore, the non-recordable warnings may have impacted the petitioner's ACR for the year 1994-95 but could not have been a consideration for recording of the ACR for the year 1993-94.

On this issue, on a query by the court, we are informed that the non-recordable warning related to an alleged incident of 6th/7th January, 1993. Therefore, the respondents' contention that the non-recordable warning was relevant for the year 1993-94 is also devoid of any merit inasmuch as incident could have been considered while recording the ACR for the year 1992-93 and not the next year with which we are concerned herein.

14. The second reason cited by the respondents in their communication dated 7th December, 2009 relates to the petitioner's implication in a court of inquiry regarding which displeasure of the Government was allegedly communicated to the petitioner vide an order dated 2nd February, 2001. This displeasure on the face of the record, could not have been an input for recording the ACR for the year 1993-94.

15. We may note that given the admitted position noted above and the submissions of the respondents that they have destroyed the record and do not have available with them even the ACR for the period of 1993-94, the respondents clearly had no relevant material available to them for meaningfully considering the representation of the petitioner which was made pursuant to the judgment dated 12th May, 2008.

16. The above narration would also show that the respondents have, therefore, neither communicated the ACR entry in terms of the mandate of

the Supreme Court in para 47 of the said judgment nor have placed the same on record. They are admittedly not in a position to do so.

17. Our attention has been drawn to the directions by the Supreme Court in para 40 that an authority higher than the authority which initiated the ACR of the petitioner, is required to consider the petitioner's representation.

18. The petitioner has complained that the original ACR for the year 1993-94 was settled by the Director General, Border Roads (DGBR). It is pointed out that the petitioner's representation dated 13th May, 2009 was rejected by an order dated 9th November, 2009 passed by the same authority i.e. Director General, Border Roads. The petitioner's subsequent representations dated 20th & 30th November, 2009 were also rejected by the very same authority by the communication dated 7th December, 2009. This submission is manifested from a perusal of the letters dated 9th November, 2009 and 7th December, 2009 both of which have been issued by the Director General, Border Roads. There is, therefore, also substance in the petitioner's grievance that the representations of the petitioner have not been considered by an authority higher than the authority which settled the petitioner's ACR initially as mandated by the Supreme Court in their order dated 12th May, 2008.

19. We may note that learned counsel for the respondents submits that so far as the channel for recording of the ACRs of the Executive Engineer is concerned, the same is recorded by the Superintending Engineer and reviewed by the Chief Engineer. It is an admitted position that the second review is by the Director General, Border Roads. The petitioner's

representation deserved to be considered by an authority higher than the Director General, Border Roads.

20. In view of the above discussion, it has to be held that the impugned order dated 9th November, 2009 rejecting the petitioner's representation and the communication dated 7th December, 2009 communicating the reasons thereof are based on no material and have been passed in violation of the clear mandate of the judgment of the Supreme Court.

21. In view of the above principles laid down by the Supreme Court, the action of the respondents denies fairness to the petitioner and that the respondents have failed to give consideration to the petitioner's representations which it was legally required to accord. The order dated 9th November, 2009 and the communication dated 7th December, 2009 are accordingly hereby set aside and quashed. It becomes necessary to consider the appropriate relief to which the petitioner may be entitled. The same would require to be guided by the fact that the respondents have clearly stated that the relevant records relating to the petitioner stand destroyed. We also need to bear in mind that the petitioner has admittedly retired on 31st October, 2000. He has been litigating qua his rights. A challenge to the action of the respondents commenced in the year 1995 when the petitioner had filed Civil Rule No.5307/1995 in the Guwahati High court.

22. The respondents admit that persons junior to the petitioner were promoted on the 16th December, 1994 in the Departmental Promotion Committee. The petitioner was denied the promotion on the ground that he did not meet the bench mark and that he had a 'good' entry in the year

1993-94. Despite redressal of his grievance by the Supreme Court by the judgment dated 12th May, 2008, the petitioner has been deprived of the fair opportunity to claim the benefits of the relief granted to him.

23. Given the status of non-availability of record with the respondents, no fresh consideration of the petitioner's representations can be directed at this stage.

24. Mr.Yogender Mishra, learned counsel for the petitioner has drawn our attention to the order dated 22nd October, 2008 (page 89) passed by the Supreme Court in SLP (C) No.26556/2004 **Abhijit Ghosh Dastidar Vs. Union of India & Ors.** wherein in similar circumstances, the court issued the following directions:-

“5. Learned counsel appearing for the appellant has pointed out that the officer who was immediately junior in service to the appellant was given promotion on 28.08.2000. therefore, the appellant also be deemed to have been given promotion from 28.08.2000. Since the appellant had retired from service, we make it clear that he is not entitled to any pay or allowances for the period for which he had not worked in the Higher Administrative Grade Group-A, but his retrospective promotion from 28.08.2000 shall be considered for the benefit of re-fixation of his pension and other retiral benefits as per rules.”

25. In the given facts, interests of justice merit that a similar direction is issued in the case of the petitioner. In view of the above, it is directed as follows:-

(i) The order dated 9th November, 2009 and the communication dated 7th December, 2009 are hereby set aside and quashed.

(ii) The petitioner shall be deemed to have been given promotion w.e.f. 16th December, 1994, the date on which the officer immediately junior to the

petitioner was granted promotion.

(iii) Inasmuch as the petitioner has retired from service, he would not be entitled to pay and allowance for the period for which he has not worked in the post of Superintending Engineer.

(iv) However, the petitioner would be entitled to consideration of his retrospective promotion w.e.f. 16th December, 1994 for the benefit of re-fixation of his pension and other retiral benefits in accordance with the rules applied to the petitioner. Appropriate orders shall be passed by the respondents within two months.

(v) The petitioner shall be entitled to costs which are quantified at Rs.10,000/- and shall be paid to the petitioner along with the pension within a period of twelve weeks from today.

(vi) This writ petition is allowed in the above terms.

(GITA MITTAL)
JUDGE

(J.R. MIDHA)
JUDGE

FEBRUARY 13, 2013
aa