

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

+ **W.P.(C) 355/2012**

SANT KUMAR SINGH

....Petitioner

Through: **Mr. Sanjeev Sahay & Ms. Sanya
Bhatnagar, Advocates**

versus

UNION OF INDIA & ORS

..... Respondents

Through: **Ms. Barkha Babbar, Advocate for
UOI**

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MR. JUSTICE NAJMI WAZIRI

ORDER

05.08.2014

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KAILASH GAMBHIR, J. (ORAL)

1. The petitioner has filed the instant writ petition under Article 226 of the Constitution of India to seek the following reliefs:-

“a) Issue appropriate writ, order or direction for quashing of the memorandum dated 04.04.11 issued on behalf of the respondent No. 3 and representation dated 23.10.10 may be allowed;

b) Direct the respondent No. 3 to review the ACR for the period 2007-2008 and ACR for the period 2008-2009 afresh and adverse grading be expunged;

c) Direct respondent No. 2 to review the DPC dated 17.06.11, on the basis of which Promotion-cum-posting list dated 24.06.11 was made, afresh for considering the petitioner's case in view of revised ACR & ICR grading.

d) The petitioner may be promoted from the post of Asst. Executive Engineer (Civil) to Executive Engineer (Civil) with effect from 17.06.11 and all consequential relief be given.”

2. The case of the petitioner is that he had joined the General Reserve Engineer Force (GREF) on 13.5.2002 as an Assistant Executive Engineer (Civil), after qualifying the Indian Engineering Service Examination conducted by the UPSC in the year 2000 and is presently posted at 764 BRTF/Project Swastik in West Bengal as an Assistant Executive Engineer (Civil). The petitioner asserts that his performance was always praised, appreciated and acknowledged by all his colleagues and seniors.

3. It is the case of the petitioner that he had achieved all the targets entrusted to him in the years 2007-08, 2008-09 within the prescribed time limit; however, he was taken aback when he was communicated about the below bench mark grading of his ACRs for the period '1st April, 2007 to 31st March, 2008' and '1st April, 2008 to 1st December, 2008'. It is submitted that subsequently, the petitioner filed his representation dated 23.10.2010 but the same was rejected on 4.4.2011 by respondent No. 3 in a most cryptic and casual manner and also in gross defiance of OM No. 21011/1/2005-Estt (A) (Pt-II). The petitioner's grievance is that he was denied promotion to the post of Executive Engineer (Civil) by the first DPC, held on 13th June, 2011 while his juniors were promoted; that a 2nd DPC was held on 23.9.2011 for the panel year 2011-2012 to fill up 33 vacancies for the post of Executive Engineer (Civil); that although the ACRs of the petitioner for the years from 2005-06 to 2009-10 were

relevant for evaluation by this DPC, he was again assessed unfit because of the said two below bench mark gradings of the years 2007-08 & 2008-09. The learned counsel for the petitioner submits that surprisingly the petitioner was declared fit for promotion by the DPC, which was held on 4.1.2013 to fill up the vacancies for the period 2012-13 wherein the relevant ACRs of the petitioner from 2006-07 to 2010-11 were evaluated, which also included the said two below bench mark gradings of the years 2007-08 and 2008-09. Eventhough, the petitioner was promoted during the pendency of the present petition to the said post of Executive Engineer (Civil) by the DPC held on 4.1.2013, his prime grievance is that he could have been promoted to the said post on 13.6.2011 itself when the first DPC was held, where the ACRs which were taken into consideration included the below bench mark gradings for the years 2007-08 and 2008-09. Another grievance raised by the petitioner is that there was a delay of two years in communicating the said below bench mark gradings to him and that his representation was decided by respondent No. 3 in the most off-handed manner by passing an abstruse and non-speaking order and that the relevant guidelines in terms of OM No. 21011/1/2005-Estt (A) (Pt-II) were ignored.

4. Mr. Sanjeev Sahay, the learned counsel for the petitioner vehemently contends that the performance of the petitioner during the

period for which he has been arbitrarily given below bench mark gradings has been exceptionally good and was duly acknowledged and appreciated by his senior officers, but for no reasons as detailed in the appraisal report, the petitioner was assessed as 'Average'. The learned counsel also submits that the petitioner was not called for any counselling for review of his performance and no show cause notice or memo was ever issued to him during the said period to complain about or question his performance or efficiency in the duties entrusted to him. The learned counsel also submits that the work done by the petitioner during the said period includes the most prestigious task of the BPO i.e., summer snow clearance at Zozila-Kargil-Leh road, which was completed two weeks prior to its scheduled opening. The learned counsel also argued that the principles of natural justice entail procedural fairness followed by a fair decision by objective decision making and in the case of the petitioner there is a flagrant violation of the principles of natural justice by down grading him in the said two ACRs without there being any objective assessment of his performance or any material to support the same. The learned counsel thus, submits that the conduct of the respondents in down grading the petitioner for the said years and for not deciding his representation objectively has resulted in gross violation of his Fundamental Rights as enshrined under Article 14 and 16 of the

Constitution of India. The learned counsel also submits that arbitrariness and maliciousness in the acts of the respondents is writ large on the face of it because, based on the said two below benchmark ACRs, the petitioner was not promoted to the post of Executive Engineer (Civil) by the DPCs held on 13th June, 2011 & 20th to 23rd September, 2011; however, based on the same ACRs he was granted promotion by the DPC, held on 4.1.2013.

5. Based on the above submissions the learned counsel for the petitioner strongly argued for granting the petitioner various reliefs as prayed for in the present petition. In support of his arguments the learned counsel for the petitioner has also placed reliance on the following judgments:-

1. ***M.A Rajashekar vs. State of Karnataka & Anr. (1996) 10 SCC 369.***
2. ***Sukhdeo vs. Commissioner Amravati Division, Amravati & Anr. (1996) 5 SCC 103.***
3. ***State Bank of India Etc. Vs. Kashinath Kher & Ors Etc. (1996) 8 SCC 762.***
4. ***U.P Jai Nigam & Ors. Vs. Prabhat Chandra Jain & Ors. (1996) 2 SCC 363.***
5. ***Dev Dutt vs. Union of India and Ors. (2008) 8 SCC 725.***
7. ***Kranti Associates Pvt. Ltd. & Anr. Vs. Sh.***

***Masood Ahmed Khan & Ors (2010) 9 SCC
496.***

6. In reply, Ms. Barkha Babbar, the learned counsel appearing for the respondents submits that the DPC enjoys full discretion to device its own methods and procedure for the objective assessment of the suitability of candidates, who are to be considered by them. She also submits that as per para 6.1.2 (e) of the DOPT guidelines laid down vide Office Memo dated 10.4.1989, the DPC is not to be guided merely by the overall grading of the candidate that may be recorded in his/her ACR but has to make its own assessment on the basis of the entries in his ACR because it has been noticed that sometimes the overall grading in the ACR may be inconsistent with the gradings under various parameters and attributes of assessment. The learned counsel thus submits that the DPC, under the relevant rules has been obligated to see the overall performance of the candidate in question and then consider his/her eligibility for promotion and merely because a particular grading in a particular year is not in tune with the bench-mark for the next promotion, the same will not necessarily affect his chances of promotion if his/her performance otherwise does not reflect that particular down gradation. Attention of the Court was also invited to the Office Memorandum dated 10.4.1989 in this regard. The

learned counsel also submits that the evaluation made by an expert committee of the DPC with regard to the petitioner for his promotion to the next higher rank of Executive Engineer (Civil) should not be facilely interfered with by the Courts due to their lack of expertise to undertake such kind of an exercise. In support of her arguments, the learned counsel for the respondents has placed reliance on the following judgments:

1. *Union of India & Anr. Vs. S.K Goel & Ors.*
(2007) 14 SCC 641.
2. *Mrs. Anil Kattiyar vs. Union of India & Ors.*
(1997) 1 SCC 280.
3. *UPSC vs. L.P Tiwari & Ors.* (2006) 12 SCC 317.

7. We have heard the learned counsel for the parties and given our thoughtful consideration to the arguments advanced by them.

8. It is a settled legal position that the annual assessment of any officer in public employment so as to grade him in various categories as Outstanding, Very Good, Good, Satisfactory, Average, etc. must be carried out in a composed manner and with full objectivity by the officers entrusted with such a task. Their approach cannot be casual and must be with due diligence in making their remarks, as any casual or reckless approach by the officers carrying out the assessment can play havoc with

the career prospects of the officer concerned. Laying emphasis on the need of such objectivity on the part of the officer entrusted with the task of assessment, the Supreme Court in the case of ***State Bank of India v. Kashinath Kher*** reported in AIR 1996 SC 1328, held as under:-

“It would appear that the confidential reports and character rolls are being prepared by the officers of the same rank in the same MMGS II working in the establishment department over the same cadre officer working elsewhere and the reporting officers are the same. Ms. Nisha is right and the High Court is well justified in holding that such a procedure is violative of the principles of natural justice. Such procedure and practice is obviously pernicious and pregnant with prejudices and manipulation violating the principles of natural justice and highly unfair. The object of confidential report is two fold, i.e. to give an opportunity to the officer to remove deficiencies and to inculcate discipline. Secondly, it seeks to serve improvement of quality and excellence and efficiency of public service. This Court in Delhi Transport Corporation's case pointed out pitfalls and insidious effects on service due to lack of objectives by the controlling officer. Confidential and character reports should, therefore, be written by superior officers higher above the cadres. The officer should show objectivity, impartiality and fair assessment without any prejudices whatsoever with highest sense of responsibility alone to inculcate devotion to duty, honesty and integrity to improve excellence of the individual officer. Lest the officers get demoralised which would be deleterious to the efficacy and efficiency of public service. Therefore, they should be written by a superior officer of high rank. Who are such high rank officers is for the appellant to decide. The appellants have to prescribe the officer competent to write the confidentials. There should be another higher officer in rank above the officer who was written confidential report to review such report. The appointing authority or any equivalent officer would be competent to approve the confidential reports or character rolls. These procedures would be fair and reasonable. The reports thus written would form basis for consideration for promotion. The procedure presently adopted is clearly illegal, unfair and unjust.”

9. It is trite that every entry and not merely a poor and adverse entry relating to an employee under the State or an instrumentality of the State, whether in civil, judicial, or in the police or any other service (other than the military), must be communicated to him within a reasonable period so that the officer concerned has an opportunity to make a representation seeking his upgradation. We may now usefully refer to the following observations of the Supreme Court in the landmark case of ***Dev Dutt v. Union of India and Ors., (2008) 8 SCC 725***

“Hence, in our opinion, the 'good' entry should have been communicated to the appellant so as to enable him to make a representation praying that the said entry for the year 1993-94 should be upgraded from 'good' to 'very good'. Of course, after considering such a representation it was open to the authority concerned to reject the representation and confirm the 'good' entry (though of course in a fair manner), but at least an opportunity of making such a representation should have been given to the appellant, and that would only have been possible had the appellant been communicated the 'good' entry, which was not done in this case. Hence, we are of the opinion that the non-communication of the 'good' entry was arbitrary and hence illegal, and the decisions relied upon by the learned Counsel for the respondent are distinguishable.

Learned Counsel for the respondent submitted that under the Office Memorandum 21011/4/87 [Estt.'A'] issued by the Ministry of Personnel/Public Grievance and Pensions dated 10/11.09.1987, only an adverse entry is to be communicated to the concerned employee. It is well settled that no rule or government instruction can violate Article 14 or any other provision of the Constitution, as the Constitution is the highest law of the land. The aforesaid Office Memorandum, if it is interpreted to mean that only adverse entries are to be communicated to the concerned employee and not other entries, would in our opinion become arbitrary and hence illegal being violative of Article 14. All similar Rules/Government Orders/Office Memoranda, in respect of all

services under the State, whether civil, judicial, police, or other service (except the military), will hence also be illegal and are therefore liable to be ignored.

It has been held in Maneka Gandhi v. Union of India and Anr. [1978]2SCR621 that arbitrariness violates Article 14 of the Constitution. In our opinion, the non-communication of an entry in the A.C.R. of a public servant is arbitrary because it deprives the concerned employee from making a representation against it and praying for its up-gradation. In our opinion, every entry in the Annual Confidential Report of every employee under the State, whether he is in civil, judicial, police or other service (except the military) must be communicated to him, so as to enable him to make a representation against it, because non-communication deprives the employee of the opportunity of making a representation against it which may affect his chances of being promoted (or get some other benefits). Moreover, the object of writing the confidential report and making entries in them is to give an opportunity to a public servant to improve his performance, vide State of U.P. v. : (1997) 11LLJ1SC. Hence such non-communication is, in our opinion, arbitrary and hence violative of Article 14 of the Constitution.

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.”

10. The judgment in Dev Dutt case (*supra*) has been reiterated by a larger Bench of the Supreme Court in the case of *Sukhdev v. Union of India* reported in **2013 (4) SLR 440 (SC)** wherein it was held as under:-

“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.”

The decisions of this Court in Satya Narain Shukla v. Union of India and Ors. (2006) 9 SCC 69 and K.M. Mishra v. Central Bank of India and Ors. (2008) 9 SCC 120 and the other decisions of this Court taking a contrary view are declared to be not laying down a good law.”

11. In the background of the aforesaid legal position, what we find from the facts of the case in hand is that the petitioner was denied promotion to the post of Executive Engineer (Civil) twice when his case was placed before the DPCs held on 13th June 2011 and 23rd September, 2011. The two below bench mark gradings for the years 2007-08 and 2008-09 formed part of the five ACRs, which were considered by the three DPCs. We fail to comprehend as to how the petitioner was denied promotion by the first and second DPC when the same two adverse ACRs were also under consideration before the 3rd DPC. There would be no dispute to the proposition canvassed by the learned counsel for the

respondents that the DPC is not to be guided merely by overall grading, if any, recorded in the ACR but it should devise its own method and procedure for objective assessment to test the suitability of the candidates under consideration, however such objectivity on the part of the DPC should be evident and not remain just as an obscure affair. No records have been produced by the respondents to satisfy the Court as to how this change in the approach of the DPC, which was held on 4th January, 2013, came about when no substantive material was placed before them. As per the own case of the respondents, the prescribed benchmark for promotion to the post of Executive Engineer (Civil) is 'Good' and if it was so, then we fail to comprehend as to how the petitioner was granted promotion against a vacancy for the panel year 2012-2013 in the face of his 'Average' grading for the year 2007-2008 and 'part Average' and 'part Good' in the ACR gradings for the year 2008-2009. Grant of promotion to the petitioner to the post of Executive Engineer (Civil) for the panel year 2012-2013, itself negates the stand taken by the respondents that he was denied promotion earlier by the first DPC for the vacancy year 2010-2011 and by the second DPC for the vacancy year 2011-2012 when indisputably the said two below benchmark gradings for the years 2007-2008 and 2008-2009 formed part of the five ACRs, which were considered by the said DPCs.

12. We also find that there was a delay of two years in communicating the said ACRs to the petitioner for which the respondents have given no cogent reason. Not only this, the representation made by the petitioner vide his representation dated 23.10.10 was rejected by the Competent Authority by passing a very cryptic and non-speaking order, without giving any regard to the contentions raised by the petitioner in his representation. There is no justification for said order which was passed on a representation by an officer seeking upgradation of his ACRs. Such a cryptic order is in gross violation of sub para (vi) of para 2 of the Office Memorandum dated 14th May, 2009, which mandates that the Competent Authority shall decide the representation objectively, based on the material placed before him within a period of 30 days from the date of receipt of the representation. The said guideline is reproduced as under:-

“2. (vi) The competent authority for considering adverse remarks under the existing instructions may consider the representation, if necessary, in consultation with the reporting and / or reviewing officer and shall decide the matter objectively based on the material placed before him within a period of 30 days from the date of the receipt of the representation.”

13. Taking into consideration the totality of the facts and circumstances of the present case, we find no justification in denying promotion to the petitioner to the post of Executive Engineer (Civil)

against a vacancy for the panel year 2010-2011 and while directing so, we further direct that his seniority be reckoned from the date when his other batch mates were granted promotion by the DPC held on 13th June, 2011. The petitioner shall also be entitled to all other consequential benefits arising as a result of his promotion from the retrospective date. It is ordered accordingly.

14. With the aforesaid directions, the writ petition is allowed and accordingly disposed off. No costs.

KAILASH GAMBHIR, J.

NAJMI WAZIRI, J.

AUGUST 05, 2014
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