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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) 903/2013

THDC INDIA LTD

..... Petitioner

Through: Mr. Neeraj Malhotra with Mr. Prithu
Garg, Advs.

versus

R.K.RATURI

..... Respondent

Through: Mr. R.K. Saini, Adv.

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Date of Decision : 08th July, 2014

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J: (Oral)

1. The present writ petition has been filed challenging the order dated 04th January, 2013 passed by the Central Information Commission (for short 'CIC') whereby the petitioner has been directed to provide photocopies of the DPC proceedings including the comparative grading statement pertaining to the recommended candidates as well as ACRs of the appellant himself for the period mentioned by him in his RTI application.
2. The relevant portion of the impugned order is reproduced hereinbelow:-

"4. We have carefully considered the contents of the RTI application and the response of the CPIO. The objective of the Right to Information (RTI) Act is to bring about

transparency in the functioning of the public authorities. All decision making in the government and all its undertakings must be objective and transparent. It is only by placing the details of all decision making in the public domain that such objectivity and transparency can be ensured. Therefore, we do not see any reason why the DPC proceedings, specially, the comparative gradings of those recommended for promotion should not be disclosed. It is not at all correct to claim that such information is held in a fiduciary capacity. After all, the DPC operates as a part of the administrative decision making process in any organisation. The material that it considers is also generated within the organisation. Therefore, it is not correct to say that the DPC proceedings including the recommendations made by it can be said to be held by the public authority in a fiduciary capacity. About the ACRs of the Appellant, the Supreme Court of India has already held that the civilian employees must be allowed access to their confidential rolls, specially when these are held out against them in the matter of their career promotion. Following the Supreme Court order, the Department of Personnel and Training, we understand, has already issued a circular for disclosure of ACR.”

3. Mr. Neeraj Malhotra, learned counsel for the petitioner submits that the impact of the impugned order passed by CIC is that the petitioner would be required to give information pertaining to DPC proceedings including the comparative grading statement pertaining to the recommended candidates, which information is excluded under the provisions of Sections 8(1)(e) and 8(1)(j) of the RTI Act. He emphasizes that the information directed to be released pertaining to other employees of the petitioner is being held by the petitioner in fiduciary capacity and would amount to disclosure of personal information.

4. Sections 8(1)(e) and 8(1)(j) of the RTI Act are reproduced hereinbelow:-

“8. Exemption from disclosure of information. —(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—

xxx xxx xxx

(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

xxx xxx xxx

(j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.”

5. Mr. Malhotra also submits that as some of the information sought for pertains to third party, provisions of Sections 11(1) and 19(4) of the RTI Act would be applicable. Sections 11(1) and 19(4) of the RTI Act are reproduced hereinbelow:-

“11. Third party information.—(1) Where a Central Public Information Officer or a State Public Information Officer, as the case may be, intends to disclose any

information or record, or part thereof on a request made under this Act, which relates to or has been supplied by a third party and has been treated as confidential by that third party, the Central Public Information Officer or State Public Information Officer, as the case may be, shall, within five days from the receipt of the request, give a written notice to such third party of the request and of the fact that the Central Public Information Officer or State Public Information Officer, as the case may be, intends to disclose the information or record, or part thereof, and invite the third party to make a submission in writing or orally, regarding whether the information should be disclosed, and such submission of the third party shall be kept in view while taking a decision about disclosure of information:

Provided that except in the case of trade or commercial secrets protected by law, disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party.

xxx xxx xxx

19. Appeal.-

xxx xxx xxx

(4) If the decision of the Central Public Information Officer or State Public Information Officer, as the case may be, against which an appeal is preferred relates to information of a third party, the Central Information Commission or State Information Commission, as the case may be, shall give a reasonable opportunity of being heard to that third party.”

6. On the other hand, Mr. Saini, learned counsel for the respondent submits that it is difficult to comprehend that any public interest would be served by denying information to the respondent with regard to DPC proceedings including the comparative grading statements pertaining to the

recommended candidates as also photocopy of respondent's ACR containing the remarks of the reporting and the reviewing officers as well as accepting authority.

7. Mr. Saini points out that the respondent himself is a Government servant working in the same corporation and was considered by the selection committee for promotion in the said DPC proceedings. Hence, according to him, the respondent has a right to seek information regarding DPC proceedings including the comparative grading statements pertaining to the recommended candidates.

8. In support of his submission, Mr. Saini relies upon a judgment of the Supreme Court in ***Dev Dutt v. Union of India and Others (2008) 8 SCC 725*** wherein it has been held as under:-

“36. 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.”

9. Mr. Saini lastly submits that there is no question of compliance of pre-condition and pre-requisite of Section 11(1) read with Section 19(4) of

the RTI Act.

10. Having heard learned counsel for the parties, this Court finds that in the case of **Arvind Kejriwal v. Central Public Information Officer AIR 2010 Delhi 216**, a Coordinate Bench of this Court has held that service record of a Government employee contained in the DPC minutes/ACR is “personal” to such officer and that such information can be provided to a third party only after giving a finding as regards the larger public interest involved. It was also held in the said judgement that thereafter third party procedure mentioned in Section 11(1) of the RTI Act would have to be followed. The relevant portion of the judgment in **Arvind Kejriwal** is reproduced hereinbelow:-

“21. This Court has considered the above submissions. It requires to be noticed that under the RTI Act information that is totally exempt from disclosure has been listed out in Section 8. The concept of privacy is incorporated in Section 8(1)(j) of the RTI Act. This provision would be a defense available to a person about whom information is being sought. Such defence could be taken by a third party in a proceeding under Section 11(1) when upon being issued notice such third party might want to resist disclosure on the grounds of privacy. This is a valuable right of a third party that encapsulates the principle of natural justice inasmuch as the statute mandates that there cannot be a disclosure of information pertaining to or which „relates to“ such third party without affording such third party an opportunity of being heard on whether such disclosure should be ordered. This is a procedural safeguard that has been inserted in the RTI Act to balance the rights of privacy and the public interest involved in disclosure of such information. Whether one should trump the other is ultimately for the information officer to decide in the facts of a given case.

25. The logic of the Section 11(1) RTI Act is plain. Once the information seeker is provided information relating to a third party, it is no longer in the private domain. Such information seeker can then disclose in turn such information to the whole world. There may be an officer who may not want the whole world to know why he or she was overlooked for promotion. The defence of privacy in such a case cannot be lightly brushed aside saying that since the officer is a public servant he or she cannot possibly fight shy of such disclosure. There may be yet another situation where the officer may have no qualms about such disclosure. And there may be a third category where the credentials of the officer appointed may be thought of as being in public interest to be disclosed. The importance of the post held may also be a factor that might weigh with the information officer. This exercise of weighing the competing interests can possibly be undertaken only after hearing all interested parties. Therefore the procedure under Section 11(1) RTI Act.”

11. This Court is also of the opinion that the finding of public interest warranting disclosure of the said information under Sections 8(1)(e) and 8(1)(j) of the RTI Act and the procedure contemplated under Sections 11(1) and 19(4) of the RTI Act are mandatory in nature and cannot be waived. In the present case, CIC has directed the petitioner to provide DPC minutes to the respondent without considering the defence of the petitioner under Section 8(1)(e) of the RTI Act and without following the procedure specified under Sections 11(1) and 19(4) of the RTI Act. It is pertinent to mention that Sections 11(1) and 19(4) of the RTI Act incorporate the principles of natural justice. Further, in the present case no finding has been given by CIC as to whether public interest warranted such a disclosure.

12. However, this Court is of the view that the respondent is entitled to the contents of his own ACR after redaction of the names of the reviewing, reporting and accepting officers. In fact, another coordinate Bench of this Court in ***THDC India Ltd. v. T. Chandra Biswas*** 199(2013) DLT 284 has held as under:-

“9. While the learned counsel for the respondent has contended before me that the respondent ought to have been supplied with the ACRs for the period 2004 to 2007, the respondent has not assailed that part of the order of the CIC. In my view, while the contention of the respondent has merit, which is that she cannot be denied information with regard to her own ACRs and that information cannot fall in the realm of any of the exclusionary provisions cited before me by the learned counsel for the petitioner i.e. Section 8(1)(d), (e) and (j), there is a procedural impediment, in as much as, there is no petition filed to assail that part of the order passed by the CIC.

9.1. In my view, the right to obtain her own ACRs inheres in the respondent which cannot be denied to the respondent under the provisions of Section 8(1)(d), (e) and (j) of the RTI Act. The ACRs are meant to inform an employee as to the manner in which he has performed in the given period and the areas which require his attention, so that he may improve his performance qua his work.

9.2 That every entry in the ACR of an employee requires to be disclosed whether or not an executive instruction is issued in that behalf – is based on the premise that disclosure of the contents of ACR results in fairness in action and transparency in public administration. See Dev Dutt vs Union of India (2008) 8 SCC 725 at page 732, paragraph 13; page 733, paragraph 17; and at page 737, paragraphs 36, 37 and 38.

9.3 Mr Malhotra sought to argue that, in Dev Dutt's case, the emphasis was in providing information with regard to gradings and not the narrative. Thus a submission cannot be accepted for more than one reason.

9.4 First, providing to an employee gradings without the narrative is like giving a conclusion in judicial/quasi-judicial or even an administrative order without providing the reasons which led to the conclusion. If the purpose of providing ACRs is to enable the employee to assess his performance and to judge for himself whether the person writing his ACR has made an objective assessment of his work, the access to the narrative which led to the grading is a must. [See State of U.P. Vs. Yamuna Shankar Misra and Anr., (1997) 4 SCC 7]. The narrative would fashion the decision of the employee as to whether he ought to challenge the grading set out in the ACR.

9.5 Second, the fact that provision of ACRs is a necessary concomitant of a transparent, fair and efficient administration is now recognized by the DOPT in its OM dated 14.05.2009. The fact that the OM is prospective would not, in my view, impinge upon the underlying principle the OM seeks to establish. The only caveat one would have to enter, is that, while providing the contents of the ACR the names of the Reviewing, Reporting and the Accepting Officer will have to be redacted."

13. Consequently, this Court is of the view that ACR grading/ratings as also the marks given to the candidates based on the said ACR grading/ratings and their interview marks contained in the DPC proceedings can be disclosed only to the concerned employee and not to any other employee as that would constitute third party information. This Court is also of the opinion that third party information can only be disclosed if a

finding of a larger public interest being involved is given by CIC and further if third party procedure as prescribed under Sections 11(1) and 19(4) of the RTI Act is followed.

14. Accordingly, the present writ petition is allowed and the matter is remanded back to CIC for consideration of petitioner's defences under Sections 8(1)(e) and Section 8(1)(j) of the RTI Act and if the CIC is of the view that larger public interest is involved, it shall thereafter follow the third party procedure as prescribed under Sections 11(1) and 19(4) of the RTI Act.

15. With the aforesaid observations and directions, the present writ petition is disposed of.

MANMOHAN,J

JULY 08, 2014
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