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

+ **Date of Decision: 15.10.2014**

% **W.P.(C) 7455/2013**

A.K.S. RATHORE

..... Petitioner

Through: Mr. Tarkeshwar Nath, Advocate

versus

NATIONAL SMALL INDUSTRIES CORPORATION (NSIC) LTD.
& ORS

..... Respondent

Through: Mr. Sunil Ahuja, Advocate

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE VIPIN SANGHI

S. RAVINDRA BHAT, J. (OPEN COURT)

1. The petitioners grievance is in respect of the order of the Central Administrative Tribunal (CAT/ Tribunal) dated 04.12.2012 in O.A. No.2461/2012, and the subsequent order in review dated 11.12.2013 in R.A. No.12/2013. He had claimed promotion to the post of Executive Director/Chief General Manager in the respondent organisation, i.e. National Small Industries Corporation Ltd. (NSIC).

2. The petitioner had urged in previous proceedings before the CAT being T.A. No.1451/2009 (which was originally filed before this Court) that his entitlement to be considered and promoted as Executive Director/Chief General Manager in the NSIC was unjustifiably rejected and that the DPCs held in 2001, 2003 and 2005 were vitiated. That writ petition was transferred to the CAT and registered as TA No.1451/2009. In the course of the proceedings, it transpired that the petitioner was considered for promotion in 2003 in the DPC which was held on 07.07.2003.

3. The petitioners grading in the ACRs for the years 1992-1999, 1999-2000 and 2000-2001 were “above average”. His grading for 2001-2002 was “outstanding”; for 2002-2003 it was “average” and for 2003-2004 it was “fair”. For 2004-2005, it was ranked “good”. In those proceedings, the petitioner had relied upon the judgment of the Supreme Court in ***Dev Dutt v. Union of India***, (2008) 8 SCC 725, and contended that since the ACR gradings which recorded a deterioration in his performance, and were considered as below benchmark had not been communicated, the same resulted in the denial of promotion. He had also contended that the respondents had acted contrary to the rules in resorting to the procedure of personal interview.

4. The CAT in its final order dated 25.03.2010 while disposing of TA No.1451/2009 held that the method of interview followed by the DPC was without the sanction of rules. The respondent had, at that stage, contended that certain criminal proceedings were pending against the petitioner. After analysing the law on the point, especially the judgment of the Supreme Court in ***Union of India v. K.V. Jankiraman***, AIR 1991 SC 2010, the CAT

applied the law to the facts of the case and held that since no disciplinary or criminal proceedings were pending on 07.07.2003 or 10.12.2003, he had a right to be considered in accordance with law. The operative portion of the final order of the CAT, accordingly, was as follows:

“8. From the stand taken by the Respondent, it is clear that the Applicant has not been considered for promotion because of his ACRs being below the prescribed benchmark. It seems that the benchmark is ‘Very Good’ and ‘Above Average’ is considered ‘Very Good’ by the Respondent. It is, *inter alia*, recorded in an undated note, which seems to be prior to the DPC of 10.12.2005 that:

“As per guidelines (Flag E) the benchmark for Group ‘A’ post of the level of Rs. 12000-16500 (CDA) attached to Deputy General Manager in the Corporation is ‘Very Good’. Thus all candidates who secure overall rating as ‘Outstanding/Exceptional’ and ‘Very Good/Above Average’ will be eligible for empanelment according to the merit of their grading”.

9. In the result the OA succeeds. The respondent is directed to communicate to the Applicant ACR gradings, which may be below benchmark for consideration for promotion to the post of CGM, for the years for which ACRs were considered. This should be communicated within one month from the receipt of a certified copy of this order. The Applicant, if he so wishes, will represent against the below benchmark remarks within one month of the receipt of the aforesaid communication from the Respondent, which will be considered by the Respondent within one month of the receipt of the Applicant's representation. If the grading is upgraded after consideration of the Applicant's representation, on par with the benchmark, a review DPC would be convened within one month from the decision of the Respondent about the gradings to consider the case of the Applicant for promotion. Should the Respondent decide to reject the representation of the Applicant, it would be

done by passing a speaking order, within one month of the Applicants representation and communicated to the Applicant. No costs”.

5. In compliance with the order of the CAT in TA No.1451/2009, the respondent communicated the adverse ACRs to the petitioner. He made representations against the said adverse remarks for the concerned years. However, the ACR gradings recorded earlier qua the petitioner were not disturbed, and left intact.

6. Feeling aggrieved, he again approached the CAT by filing O.A. No.2461/2012. The CAT considered all the submissions made before it. The CAT was also apprised of the fact that on 19.07.2012, the petitioner had been – pursuant to the disciplinary proceedings – imposed with a penalty of compulsory retirement. Taking note of all these facts, the following findings were recorded:

*“16. In so far as the second issue on up-gradation of the ACRs grading for three years namely, 2002-2003, 2003-2004 and 2004-2005 is concerned, the applicant has submitted his two representation to the competent authority. **Our careful perusal of the relevant records placed before us revealed that the competent authority did not pass the order on his representations.** The competent authority in the present case is CMD, NSIC. On the other hand, those representations have been replied by the official respondents vide letter dated 13.09.2010 and 27.08.2010. We have also perused the file No.SIC/PERs.I/10(116) Volume II of Shri A.K.S. Rathore. It is seen from the note sheet at page N/3 that DGM has submitted the proposal to CMD through GM.I/C (HR) on leave, GM-SG (Law & Research) and Director (Finance) but the matter when reached the Director (Finance) he marked to the CVO indicating that CVO should also see so that reply was in consonance to issues dealt with the vigilance division.*

The CVO has seen the same and recorded that the aforesaid draft reply has been seen and discussed with DGM (HR). The contents of letter are not related to any issue dealt with in Vigilance Division. HR Division may take appropriate action to send the reply to Mr. Rathore's representation. On receipt of the same, DGM (HR) has issued the two aforesaid letters to the applicant. The two representations submitted by the applicant on his below benchmark ACRs for 3 periods have not been properly analysed and decided by CMD. This has not been decided by the competent authority namely CMD. On the other hand, the draft letter submitted by DGM has been issued by him only after the perusal of the same up to the level of Director (Finance) and CVO. The CMD has never seen the proposal at all. This, in our opinion, is a legal infirmity that the representations of the applicant have not been considered by the competent authority. However, we take note that of the imposition of penalty of compulsory retirement from service on the applicant for certain misconducts vide Memo dated 19.07.2012 when the issues in the OA were pending adjudication. Since the applicant is not at present in the service of the NSIC but has suffered the infliction of compulsory retirement as penalty it would be merely an academic exercise if we direct the respondent to consider the applicant's representation on the below benchmark ACRs for 3 periods by the competent authority. In view of the typical nature of the present case, it would be futile exercise to direct respondents to consider the applicant's representation in the above manner. Had he been in service, we would have issue writ of mandamus to the respondents to reconsider the applicant's representations below benchmark ACRs but since the applicant has been already compulsory retired from service, we refrain to issue any direction to the respondents".

(emphasis supplied)

7. Learned counsel for the petitioner urges that once the CAT was of the opinion that its previous order in TA No.1451/2009 had not been complied

with, its further action in denying the relief was unwarranted. Highlighting the fact that the CATs earlier finding had now attained finality, it was established that the two grounds for denying promotion in either of the DPCs held in 2003 and 2005, i.e. the performance review on account of the below benchmark gradings and interview, were held to be unjustified. Learned counsel contended that so far as the adverse/ below benchmark ACRs were concerned, the findings recorded were that they were never communicated. While complying with this direction, the respondent, no doubt, communicated the adverse ACRs, but did not comply with the latter part of dealing with – either rejecting or accepting, the representation of the petitioner.

8. Learned counsel for the respondent urged that the impugned order should not be interfered with. He stated that the CAT was conscious of the limited role it plays in matters of selection and further relied upon the decision quoted by the CAT in *Tariq Islam v. Aligarh Muslim University*, (2001) 8 SCC 546. Learned counsel submitted that, conscious of the limits of its jurisdiction, the CAT refrained from issuing any direction despite holding that the representations had not been dealt with. It was also urged that the CATs analysis of facts is erroneous, since that representations were, in fact, dealt with and communicated by the concerned DGM level officer – even though the final decision is taken by the competent authority i.e. the Chairman.

9. From the extract of the findings of the CAT, it is very evident that the petitioners representation have not been considered by the competent authority. This finding was returned, we notice, after the relevant records

were considered by the CAT. Having recorded such a finding – which has not been challenged by the respondents, either before us or more appropriately in review proceedings before the CAT itself, this Court is of the opinion that the CAT ought not to have refrained from issuing appropriate directions to cure the irregularity found by it. Instead, it was influenced by a subsequent event of issuance of a compulsory retirement order against the petitioner. This, in our opinion, was an irrelevant factor. As noticed by the CAT itself in the earlier order, **Janki Raman** (supra) dictated that for the relevant period, if there was no disciplinary or criminal proceeding, the concerned officer or employee would be entitled to be considered for promotion. In the present instance, the compulsory retirement order was made on 19.07.2012. Apparently, that order too is now challenged before the CAT itself. The subsequent charge sheeting/penalisation of the petitioner could, by reason of **Janki Raman** (supra), not have had any bearing on his claim for review of his ACRs and consequent consideration by a review DPC for promotion as Executive Director/ Chief General Manager. At the most, the rejection or acceptance of the petitioners representation would be subject to final orders of the CAT.

10. In these circumstances, we are of the opinion that the impugned order cannot be sustained. It is, therefore, set aside. The respondent is directed to comply with the earlier directions of the CAT, and its competent authority shall pass a speaking order upon the petitioners representation for upgradation of his “below benchmark” ACRs for the concerned three years. This process shall be completed within six weeks from today.

11. In the event of petitioners representation being accepted, appropriate consequential action to the extent it is appropriate shall be taken by way of constituting a review DPC. The writ petition is allowed to the above extent.

S. RAVINDRA BHAT, J

VIPIN SANGHI, J

OCTOBER 15, 2014

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