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

% ***Judgment dated 3rd August, 2015***

+ **W.P.(C) 7193/2015**

DIRECTOR GENERAL E.S.I.C Petitioner

Through : Mr. Yakesh Anand, Mr. Murari Kumar
and Mr. Nimit Mathur, Advocates.

versus

DR. SATISH KUMAR AZAD & ANR Respondents

Through : None.

+ **W.P.(C) 7200/2015**

DIRECTOR GENERAL E.S.I.C. Petitioner

Through : Mr. Yakesh Anand, Mr. Murari Kumar
and Mr. Nimit Mathur, Advocates.

versus

DR. R.K. TARA & ANR Respondents

Through : None.

+ **W.P.(C) 7213/2015**

DIRECTOR GENERAL E.S.I.C. Petitioner

Through : Mr. Yakesh Anand, Mr. Murari Kumar
and Mr. Nimit Mathur, Advocates.

versus

BHAGAT AND ANR. Respondents

Through : None.

+ **W.P.(C) 7214/2015**

DIRECTOR GENERAL E.S.I.C. AND ANR Petitioners

Through : Mr. Yakesh Anand, Mr. Murari Kumar
and Mr. Nimit Mathur, Advocates.

versus

PREM CHANDRA GUPTA Respondents

Through : None.

CORAM:

HON'BLE MR. JUSTICE G. S. SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G. S. SISTANI, J (ORAL)

1. Four writ petitions have been filed by the petitioners herein assailing

the common Order dated 17.07.2013 passed by the Central Administrative Tribunal.

2. The facts, which gave rise to the filing of the OA and as noticed by the learned Tribunal, are as under :

(i) *“Issue in all these Original Applications being the same, they are being decided by this common order. According to the Applicants, they have been denied promotion illegally taking into consideration of their Annual Confidential Reports (“ACRs” for short) which were below benchmark without communicating them and without giving them an opportunity for making representations for their up-gradation within a reasonable time and thus violating the principles of nature justice.*

(ii) *The only difference in these cases is that while all the Applicants except Dr. Prem Chandra Gupta in OA No. 3067/2011 were furnished with copies of the relevant ACRs which were below the benchmark at a belated stage after denying them the promotions and their representations were rejected, in the case of Dr. Gupta, he obtained his below the benchmark ACRs under the Right to Information Act, 2005 and made a representation but the same was also rejected.*

(iii) *All the Applicants are working as Doctors in the Employees State Insurance Corporation (“ESIC” for short). The Government, while accepting the recommendations of the 6th Pay Commission, resolved in para 12 of the Resolution No. 1/1/2008-IC dated 29.08.2008 that the Dynamic Assured Career Progression Scheme (“DACPS” for short) for Doctors has to be extended up to Senior Administrative Grade (“SAG” for short) (Grade Pay of Rs.10000/- PB-4) to all Medical Doctors without linkage to vacancies whether they belong to the organized services or holding isolated posts. The said Scheme was duly adopted by the ESIC in toto. Thereafter, they prepared a list of eligible Medical Officers in the Non Functional Selection Grade (“NFSG” for short) working as Deputy Medical*

Commissioner/Medical Superintendent/Director (Medical) Pay Band-4 with Grade Pay of Rs.8700/- including the Applicants for promotion to SAG Grade in Pay Band-4 with Grade Pay of Rs.10,000/- on regular basis on 18.12.2008 and vide their letter dated 16.01.2009, they forwarded the same to Regional Head to verify the period(s) of extraordinary leave, if any, availed by them otherwise than on medical grounds/study purpose during the period of service with ESIC so that their cases may be placed before the Departmental Promotion Committee ("DPC" for short) in its next meeting. Thereafter, the DPC held its meeting on 18.02.2009 and considered the last 5 ACRs of the eligible candidates including those of the Applicants. The DPC fixed the benchmark "Very Good" for the purpose of placing the otherwise eligible Medical Officer of NFSF in the SAG Scale Pay Band-4. The Respondents-ESIC, thereafter, issued Office Order No. 72 of 2009 dated 20.02.2009 containing the list of such Medical Officer who have been granted the said scale. According to the Applicants, they were shocked to see that their names did not figure in the aforesaid list despite the fact that all of them fulfilled all the requisite qualifications. They have also stated that they had unblemished record throughout their service and no adverse entries have ever been communicated to them. However, through unofficial sources they came to know that some of the ACRs considered by the DPC were below the benchmark of "Very Good". They have, therefore, made representations/applications under Right to Information Act, 2005 and obtained copies of those ACRs which were graded below the benchmark. Thereafter, they made number of representations to the Respondent-ESIC stating that the uncommunicated ACRs which were below benchmark should not have been taken into consideration for granting them the SAG Grade. They have also pointed out that some of the similarly placed persons who were denied promotion to SAG grade on the same ground of uncommunicated below benchmark ACRs, have been subsequently granted promotion to the said scale. In this regard, they have cited the cases of Dr. S. C. Jain, Dr. Nirmal Singh and Dr. Krishna Awatar Gupta. They have, therefore, requested the Respondents to consider their

cases also sympathetically and grant them promotion to SAG grade from the due dates.

(iv) However, the Respondents informed the Applicants that their requests for upgradation of gradings were not acceded to by the competent authority. They have also informed that the review DPC cannot be convened ignoring their below benchmark ACRs. It is in the above facts and circumstances that the Applicants have approached this Tribunal through these Original Applications seeking a direction to the Respondents – ESIC to place them in the SAG Scale in Pay Band-4 with Grade Pay of Rs.10,000/- from due dates, with all consequential benefits.

3. By the impugned order dated 17.7.2013 the Original Applications filed by the petitioners (respondents herein) were allowed. The respondents before the Central Administrative Tribunal had placed heavy reliance on the decision of the Central Administrative Tribunal in the case of ***Dr. (Mrs.) Nirmal Singh Vs. Union of India through Secretary, Ministry of Labour and Another*** passed in OA No. 43/2010 wherein observations of various judgments of the Hon'ble Supreme Court was noticed including the judgment rendered in the case of ***Dev Dutt v. Union of India & Ors.***, reported at 2008 (8) SCC 725. The Tribunal also relied upon the decisions of the Hon'ble Supreme Court of India and Hon'ble High Court of Delhi and allowed the OAs.
4. It is contended by counsel for the petitioners that the Tribunal has failed to consider the facts of each case and has passed the impugned order in a mechanical manner ignoring the benchmarks of ACRs of the respondents.
5. It is also contended that the Tribunal has failed to take into consideration the judgment of the Hon'ble Supreme Court of India in the case of ***Sukhdev Singh Vs. Union of India and Ors.*** reported in

(2013) 9 SCC 573 where a bench of two Judges has referred the matter to a Larger Bench and the Tribunal has also failed to consider that only if the representation for upgradation is allowed, should a Review DPC be held.

6. It has also been submitted that promotion or a right to get higher Grade Pay should be based on an employee's performance and not merely be based on a lapse on the part of the authorities to communicate a below benchmark grading in time.
7. It is also contended that the learned Tribunal failed to consider that the Hon'ble Supreme Court in the case of ***Satya Narain Shukla Vs. Union of India & Ors. reported in (2006) 9 SCC 69*** has held that procedure for communication of ACRs cannot be questioned by an employee and neither the Courts should interfere as it is the function of Government. Para 29 of the said judgment which has been relied upon reads as follows :

“The Respondent also argued that the remarks made in the ACR were not communicated to him. It was also urged by the Respondent that this Court should direct the authorities to streamline the whole procedure so that even remarks like “good” or “very good” made in ACRs should be made compulsorily communicable to the officers concerned so that an officer may not lose his change of empanelment at a subsequent point of his service. In our view, it is not our function to issue such directions. It is for the Government to consider how to streamline the procedure for selection. We can only examine if the procedure for selection as adopted by the Government is unconstitutional or otherwise illegal or vitiated by arbitrariness and mala fides”.

8. It is also contended that the learned Tribunal has failed to take into consideration the decision rendered by the Hon'ble Supreme Court of India in the case of ***K. M. Mishra Vs. Central Bank of India & Anr. reported in (2008) 9 SCC 120***.

9. It is also the contention of counsel for the petitioner that ***Dev Dutt v. Union of India & Ors.***, reported at 2008 (8) SCC 725, cannot be relied upon when the Supreme Court has taken note of the apparent conflict between ***Union of India Vs. A. K. Goel and Dev Dutt*** and also decisions of ***Satya Narain Shukla Vs. UOI (2006) 9 SCC 69*** and ***K. M. Mishra Vs. Central Bank of India & Ors. (2008) 9 SCC 120***.
10. We have heard the learned counsel for the petitioner and also carefully examined the judgment passed by the Central Administrative Tribunal.
11. The facts which have led to the filing of the OA have been detailed above. The issue at hand is whether the ACRs which were not communicated to the respondents could have been relied upon by the petitioners in the DPC which was held. It is not in dispute that prior to the holding of the DPC i.e. on 18.02.2009, the ACRs were not communicated to any of the respondents. Some of the respondents had obtained the ACRs under the Right to Information Act, 2005 and thereafter made representations but they were rejected.
12. The short question which comes up for consideration today is as to whether the decision rendered in the case of ***Dev Dutt*** (supra) has put the controversy at rest or not?
13. In our view, the issue, as to whether ACRs, which were not communicated, can be relied upon while conducting the DPC and as to whether every entry in ACR of a public servant must be communicated to him within a reasonable period, stands well settled. In fact the decision rendered in the case of ***Dev Dutt*** (supra) stands re-affirmed by a three Judges Bench of the Hon'ble Supreme Court in the case of ***Sukhdev Singh Vs. Union of India and Ors. reported in (2013) 9 SCC 566***, paras 8 and 9 of which read as under :

“8. 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.

9. 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.”

14. Similar view has been expressed in the case of **Prabhu Dayal Khandelwal Vs. Chairman, UPSC & Ors. Civil Appeal Nos. 8006-8007/2003 decided on 23.07.2015**, paras 5 & 6 of which read as under :

5. In so far as the issue of non-consideration of the claim of the Appellant is concerned, we are satisfied that the proposition of law relevant for the controversy in hand, was declared upon by this Court in Abhijit Ghosh Dastidar v. Union of India and Ors. (2009) 16 SCC 146, wherein a three-Judge Division Bench of this Court, held as under:

7. It is not in dispute that 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.

8. 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 Annual Confidential Report 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 of promotion or getting 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 [Dev Dutt v. Union of India and Ors. (2008) 8 SCC 725] 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.

6. The aforesaid position of law has again been affirmed by this Court in Sukhdev Singh v. Union of India and Ors. (2013) 9 SCC 566, wherein another three-Judge Division Bench of this Court, has concluded as under:

8. 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.”

15. In view of the fact that the Hon’ble Supreme Court has affirmed the decision of Dev Dutt by a three Judges Bench in the case of ***Sukhdev Singh (supra)***, reported in (2013) 9 SCC 566 and the case of ***Prabhu Dayal Khandelwal v. Chairman, UPSC & Ors. Civil Appeal Nos. 8006-8007/2003 decided on 23.07.2015***, we find that these present writ petitions are without any merit. There is no infirmity in the order dated 17.07.2013 passed by the Central Administrative Tribunal. The same are accordingly dismissed *in limine*.

CM.APPL 13214/2015(stay)in WP(C)7193/2015

CM.APPL 13227/2015(stay)in WP(C)7200/2015

CM.APPL 13241/2015(stay)in WP(C)7213/2015

CM.APPL 13243/2015(stay)in WP(C)7214/2015

16. The applications stand dismissed in view of the order passed in the present writ petitions.

G. S. SISTANI, J.

SANGITA DHINGRA SEHGAL, J.

AUGUST 03, 2015

sc/msr