

\$~2

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

Date of Decision: 22nd August, 2016

+ W.P.(C) 1050/2015 & CM No. 1848/2015 (Stay)

UNION OF INDIA & ORS.

..... Petitioners

Through Mr. Kirtiman Singh, CGSC with Mr. P. Agrawal, Mr. Waizo Ali Noor and Mr. Prateek Dhanda, Advocates

versus

AMIYA KUMAR JENA & ANR.

..... Respondents

Through Mr. A. K. Behera, Advocate with Mr. Amar Pandey, Advocate for respondent No.1.
Mr. Naresh Kaushik and Mr. Animesh Dubey, Advocate for respondent No.2

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE I.S.MEHTA

G.S.SISTANI, J (ORAL)

1. Challenge in this writ petition is to the order passed by the Central Administrative Tribunal (*briefly the 'Tribunal'*) dated 04.09.2014 in O.A 190/2013, whereby the Tribunal had allowed the OA filed by respondent no.1. With the consent of the parties, we set down the writ petition for final hearing and disposal.

2. The facts necessary for the disposal of the present writ petition are that the respondent no. 1 is an officer of the Indian Defence Accounts Service (IDAS) of 1991 Batch. In 2009, he was working in Junior Administrative Grade (NSFG) when a DPC was held for promotion of

NSFGs to the post of Senior Administrative Grade (SAG) against 5 vacancies for the year 2009-10.

3. As per the rules, the DPC was to consider the ACRs for the previous 5 years, in this case, from 2003-04 to 2007-08. For an officer to be eligible for promotion his ACRs for the period must show the grading of 'Very Good'. In the case of the respondent no. 1, he was found to be unfit as his ACRs for the period 2004-2005 and 2005-2006 were below the benchmark. He was awarded with the grading of 'Good' and consequently, he was not promoted.

4. On 13.04.2010, the Department of Personnel and Training ('DoPT') issued OM No. 21011/1/2010-Estt.A stating that all ACRs below benchmark for the previous years ought to be communicated to the officers in case they are to be considered for future promotions. Accordingly, the ACRs of respondent no. 1 for the year 2004-2005 and 2005-2006 were communicated to him. Respondent no. 1 made a representation on 08.10.2010 seeking upgradation of his ACRs.

5. On 15.12.2010, the respondent no. 1 was informed that his ACRs for the year 2004-2005 and 2005-2006 had been upgraded from 'Good' to 'Very Good'. In view of the ACRs being upgraded, the respondent no. 1 sent a representation to the petitioners for holding a review DPC for the vacancies of the year 2009-10. Since no response was received, the respondent no. 1 approached the Tribunal in O.A. 349/2012 and sought a direction to the petitioner herein for convening a review DPC for the vacancy of SAG which had arisen in the year 2009-2010. This OA was allowed and we are informed that the order has attained finality as the writ petition and SLP assailing the order have been dismissed.

6. Meanwhile, on 17.02.2011, the DPC was held for the consideration of the upgradation for the posts of SAG for the vacancy of the year 2011-

2012. The respondent no. 1 was promoted by the DPC. It is appropriate to mention that the DPC had taken into consideration the upgraded ACR of respondent No.1 for the year 2005-2006 grading him as 'Very Good'.

7. Thereafter, in compliance of the order of the Tribunal in O.A. 349/2012, a review DPC was held on 23.11.2012. However, the case of the respondent No.1 was not considered fit as the DPC found that the order upgrading the ACR for the year 2005-06 was not consistent and justified and therefore, once again graded the respondent no. 1 as 'Good' for the year. This led to the filing of the second OA, which was allowed and has led to the filing of the present writ petition by the present petitioners herein.

8. Mr. Kirtiman Singh, learned counsel appearing for the petitioners, submits that the Tribunal exceeded its jurisdiction and passed an order which is *ex facie* erroneous and unsustainable in law. It is contended that the Tribunal has erred in observation that the recommendation in the review DPC dated 23.11.2012 are arbitrary and unfair.

9. Learned counsel for the petitioners also contends that Tribunal has failed to take into consideration that as per DoPT's OM dated 10.04.1989 each DPC has power to make its own independent assessment, as has been carried out by the DPC dated 23.11.2012. The OM reads as under:-

"6.2.1. Confidential Rolls are the basic inputs on the basis of which assessment is to be made by each DPC. The evaluation of CRs should be fair, just and non-discriminatory. Hence –

...

(e) The DPC should not be guided merely by the overall grading, if any, that may be recorded in the CRs but should make its own assessment on the basis of the entries in the CRs, because it has been noticed that some times the overall grading in a CR may be inconsistent with the grading under various parameters or attributes."

10. The learned counsel for the petitioners further submits that it is not incumbent upon the DPC to record reasons for deviating from the grading of the ACR since the same is merely an administrative function. In this regard he has relied upon the judgement of the Supreme Court in **UPSC v. K. Rajaiah and Ors., (2005) 10 SCC 15** which reads as under:-

*“9. We cannot also endorse the view taken by the High Court that consistent with the principle of fair play, the Selection Committee ought to have recorded reasons while giving a lesser grading to the first respondent. The High Court relied on the decision of this Court in *National Institute of Mental Health & Neuro Sciences v. Dr. K. Kalyana Raman* [1992 Supp (2) SCC 481 : 1992 SCC (L&S) 959 : (1992) 21 ATC 680 : AIR 1992 SC 1806] . Far from supporting the view taken by the High Court, the said decision laid down the proposition that the function of the Selection Committee being administrative in nature, it is under no obligation to record the reasons for its decision when there is no rule or regulation obligating the Selection Committee to record the reasons. This Court then observed: (SCC p. 485, para 7)*

*“[E]ven the principles of natural justice do not require an administrative authority or a Selection Committee or an examiner to record reasons for the selection or non-selection of a person in the absence of statutory requirement. This principle has been stated by this Court in *R.S. Dass v. Union of India* [1986 Supp SCC 617 : (1987) 2 ATC 628] (SCC at p. 633)....”*

In the next paragraph, the learned Judges indicated as to what is expected of the Selection Committee, in the following words: (SCC p. 485, para 8)

“[W]e may state at the outset that giving of reasons for decision is different from, and in principle distinct from, the requirements of procedural fairness. The procedural fairness is the main requirement in the administrative action. The ‘fairness’ or ‘fair procedure’ in the administrative action ought to be observed. The Selection Committee cannot be an exception to this

principle. It must take a decision reasonably without being guided by extraneous or irrelevant consideration. But there is nothing on record to suggest that the Selection Committee did anything to the contrary.”

That being the legal position, the Court should not have faulted the so-called down gradation of the first respondent for one of the years. Legally speaking, the term “downgradation” is an inappropriate expression. The power to classify as “outstanding”, “very good”, “good” and “unfit” is vested with the Selection Committee. That is a function incidental to the selection process. The classification given by the State Government authorities in the ACRs is not binding on the Committee. No doubt, the Committee is by and large guided by the classification adopted by the State Government but, for good reasons, the Selection Committee can evolve its own classification which may be at variance with the gradation given in the ACRs. That is what has been done in the instant case in respect of the year 1993-94. Such classification is within the prerogative of the Selection Committee and no reasons need be recorded, though it is desirable that in a case of gradation at variance with that of the State Government, it would be desirable to record reasons. But having regard to the nature of the function and the power confided to the Selection Committee under Regulation 5(4), it is not a legal requirement that reasons should be recorded for classifying an officer at variance with the State Government's decision.”

(Emphasis Supplied)

11. In support of his contention that the DPC may make its own independent assessment without being bound by the grading in the ACR, the learned counsel for the petitioner has relied upon ***Union of India & Anr. v. S. K. Goel and Ors., (2007) 14 SCC 641***. The relevant part of the judgment reads as under:-

“27. In our opinion, the judgment of the Tribunal does not call for any interference inasmuch as it followed the well settled dictum of service jurisprudence that there will ordinarily be no interference by the courts of law in the proceedings and recommendations of DPC unless such DPC

meetings are held illegally or in gross violation of the rules or there is mis-grading of confidential reports. In the present case, the DPC had made an overall assessment of all the relevant confidential reports of the eligible officers who were being considered. DPC considered the remarks of the reviewing officers. There was clear application of mind. Respondent 1 did fulfill the benchmark. Hence, the impugned direction of the High Court ought not to have been issued as the same will have the impact of causing utter confusion and chaos in the cadre of the Indian Revenue Service, Customs and the Central Excise Service.

28. It was also argued by the learned Senior Counsel appearing for Respondent 1 that the entries for the period had an element of adverse reflection and for that purpose the seniority of Respondent 1 was downgraded and, therefore, ACR ought to have been communicated to Respondent 1. In our opinion, the observations of the High Court are wholly unjustified inasmuch as the post of the Commissioner of Customs and Central Excise is a post required to be filled up on selection made strictly on the basis of merit. No judicial review of the DPC proceedings, which are ordinarily conducted in accordance with the standing government instructions and rules is warranted. The norms and procedure for DPC are prescribed in OM dated 10-4-1989. It is thus seen that the decision taken by the appellants has been as per the instructions issued on the subject that only adverse entries and remarks are to be communicated and there is no provision to communicate the downgrading of ACR to a government employee. The decision of the Central Government is in strict accordance with the prevailing rules and government instructions. In the absence of any violation, the impugned order of the High Court while undertaking a judicial review under Article 226 of the Constitution of India, is wholly unjustified. Since the matter of seniority has been well settled and this Court in a plethora of cases has held that the seniority/promotion granted on the strength of DPC selection should not be unsettled after a lapse of time. Therefore, in the facts and circumstances of the present case, where there are no adverse remarks whatsoever against Respondent 1, the High Court ought not to have interfered with and passed the impugned direction. This apart, as per the

instructions contained in Para 6.21 of DOP&T Order No. 22011/5/86/Estt. D dated 19-4-1981, as amended, DPC is not required to be guided merely by the overall grading, if any, that may be recorded in CRs but to make its own assessment on the basis of the entries in CRs. DPC enjoyed full discretion to devise its method and procedure for objective assessment of suitability and merit of the candidate being considered by it. Hence, the impugned order of the High Court, in our opinion, is liable to be set aside.”

(Emphasis Supplied)

12. Mr. Singh has further relied upon the judgment in ***Smt. Nutan Arvind v. Union of India & Anr, (1996) 2 SCC 488*** to support his contention that it is for the DPC to consider, at the time of assessing the candidates, the comparative merits of the candidates.

13. Mr. N. Kaushik, learned counsel appearing for UPSC/respondent no. 2 submits that petitioner has taken a fair stand and the proposition of law has been laid down in the judgments foregoing.

14. On the other hand, Mr. A.K. Behera, learned counsel for respondent no. 1, submits that there is no infirmity in the decision rendered by the Tribunal. The Tribunal has correctly analysed the ACRs grading of respondent no. 1 and after analysing the law has rightly quashed and set aside the recommendations of the review DPC held on 23.11.2012. He submits that the recommendations of the review DPC held on 23.11.2012 being arbitrary have been rightly set-aside by the Tribunal. The recommendations were made without any basis and had failed to assign any reason for the same. Therefore, the order of the Tribunal warrants no interference by this court.

15. We have heard the learned counsel for the parties and given our thoughtful consideration to the matter. The main argument by the learned counsel for the petitioners is that the DPC has unfettered right to evaluate

an ACR and that it need not record reasons for the same. It has also been strongly urged before us that after an ACR has been considered and graded by a DPC, a subsequent DPC can grade the same ACR differently.

16. Primarily, three judgments have been cited by the learned counsel for the petitioner mentioned by us in the foregoing paragraphs. Although there is no quarrel to the proposition of law laid down in the foregoing judgments, but the judgments do not come to the aid of the petitioners as they pertain to the right of the DPCs to ignore the overall grading in the ACRs and to devise its own method and procedure. The other judgment cited by the counsel states that reasons need not be recorded giving a lesser grading to the officer but the same relates to initial evaluation only and not a subsequent one. The only need is the satisfaction of the committee after an objective assessment of the officer. At the same time, the committee must not act arbitrarily or unfairly. In such circumstances, the courts may exercise their power of judicial review to set-aside an unfair or arbitrary action of the DPC.

17. In view of the foregoing, what needs our consideration is whether the action of the review DPC held on 23.11.2012 in downgrading the assessment of the ACR for the year 2005-06 was a fair and just, especially in view of a previous grading by another DPC.

18. We note that, pursuant to a representation made by the respondent no. 1, his ACRs were reconsidered and a order dated 15.12.2010 was passed upgrading the ACRs from 'Good' to 'Very Good'. It is clear that the ACR for the year 2005-06 was upgraded after considering all factors including that the respondent no. 1 herein was deprived of correct assessment due to failure to quantify achievements, absence of specific shortfalls, decrease in assessment of inherent abilities not easily susceptible to change over the years and, especially, in view of the

reporting officer's remark that he had adopted stringent standards not in tune with global practice.

19. Thereafter, the grading was accepted by the DPC held on 17.02.2011 for the vacancies of the year 2011-12 and the respondent no. 1 has been promoted. Despite the acceptance, the review DPC held on 23.11.2012 downgraded the assessment for the same year to 'Good'. The relevant portion of the order dated 23.11.2012 reads as:

“4. The review DPC accordingly undertook a limited review of the DPC proceedings dated 13th March, 2009 to reconsider Sh. Amiya Kumar Jena for promotion to the Senior Administrative Grade of IDAS under the Ministry of Defence against the vacancy year 2009-10. The Committee adopted the same grading for the years 2003-04, 2006-07 & 2007-08 given by the regular DPC and re-assessed the ACRs for the year 2004-05 & 2005-06 as the Competent Authority in the Department has upgraded the same from 'Good' to 'Very Good'. The Committee went through the speaking orders thoroughly and reached to a conclusion that the speaking order upgrading the ACR for the year 2005-06 in r/o Shri Amiya Kumar Jena is not consistent and justified with the attributes recorded in the various columns of the said ACR. Therefore, the Committee decided to grade the Officer as 'Good' for the year 2005-06.

5. On the basis of the above assessment, the Committee accordingly assessed Shri Amiya Kumar Jena as 'UNFIT' for promotion to the Senior Administrative Grade of IDAS, M/o Defence for the vacancy year 2009-10. Accordingly the recommendations of the original DPC held on 13.03.2009 remain unchanged.”

(Emphasis Supplied)

20. It is clear that no reason has been assigned for the contradictory stand taken by the DPC held on 17.02.2011 and the review DPC. We may also note that before the Tribunal, the respondent no. 2/UPSC was unable to justify such a contradictory stand. This had lead to the filing of an

affidavit on 22.07.2014 but the UPSC only reiterated the stand that the DPC has full discretion to devise its own method and procedure. Through the affidavit is not on record before us, it is clear that the Tribunal had come to the conclusion that the UPSC had *“not explained the lack of inconsistency in the assessment of one ACR of the applicant by two different DPCs.”*

21. Although the counsel for the petitioners has relied upon **K. Rajaiaj (Supra)** in support of his argument that recording of reasons by a DPC for non-agreeing with an earlier DPC was not mandatory. In the facts of the present case, in our view recording of reasons was necessary, we say so because the DPC held on 17.02.2011 had accepted the upgradation from ‘Good’ to ‘Very Good’. The logical question which arises for consideration is why the review DPC held later on will take a different view for the same ACR; thus recording of reasons was necessary in this case.

22. During the course of hearing, we also put a question to the learned counsel for the petitioners as to how he would reconcile the situation where for promotion of a subsequent year, the DPC found the upgraded ACR to be reliable and granted promotion; but when the same ACR was considered for an earlier year, the DPC found that the attributes in the ACR to be inconsistent and unjustified and resultantly found the respondent no. 1 to be unfit for the vacancy. Expectantly, there is no satisfactory answer. Therefore, we find that there is no rationale to justify the downgradation by the review DPC either in the order dated 23.11.2012 itself nor has one been produced before us. In view of the foregoing, it is clear that the downgradation of the overall assessment for the ACR of the year 2005-06 by the review DPC held on 23.11.2012 was arbitrary. It is this aspect which is rightly considered by the Tribunal and

the recommendations of the review DPC resultantly quashed. Therefore, there are no grounds to interfere.

23. Original record is seen and returned.

24. The writ petition stands dismissed.

CM No. 1848/2015 (Stay)

In view of the order passed in the writ petition, this application has been rendered infructuous and is disposed of as such.

G.S.SISTANI, J

I.S.MEHTA, J

AUGUST 22, 2016
b

