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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgement delivered on: 17.05.2016

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W.P.(C) 8403/2014

RAM NATH

..... Petitioner

Through: Mr T.D. Yadav, Adv.

versus

UNION OF INDIA & ORS

..... Respondents

Through: Mr Sanjeev Narula, CGSC with Mr Ajay Kalra, Adv. for Resp./ UOI.

Mr Naresh Kaushik & Ms Joymoti Mize, Advs. for UPSC.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE NAJMI WAZIRI

SANJIV KHANNA, J (ORAL)

1. Learned counsel for the petitioner questioning the order dated 11.10.2013, passed by the Principal Bench of the Central Administrative Tribunal in OA No. 3509/2009, submits that OM No.F. 22011/5/86-Estt.-D dated 10.04.1989 stands superseded by OM F.No. 35034/7/97-Estt.(D) dated 08.02.2002 and, therefore, the Departmental Promotion Committee (for short DPC), could not have re-examined or downgraded the gradings given in the Annual Confidential Reports (for short ACRs).

2. We have examined the said contention, but do not agree.

3. The petitioner had filed OA No. 656/2007, which was disposed of on 01.07.2008 with the direction that the respondent should inform below the benchmark grading in the ACRs within two months and the petitioner could make a representation that would be decided within

one month by the competent authority. If the ACRs were upgraded, a review DPC would be convened within three months to consider the petitioner's case for promotion to the post of Deputy Director (General). If found fit, the petitioner would be promoted with retrospective effect from the date his junior colleagues were promoted as Deputy Director (General) with all consequential benefits in law.

3. The mandate in the order dated 01.07.2008 in OA No. 656/2007 was followed. By order dated 29.01.2009, the petitioner was informed that the ACRs for the period 2000-2001 to 2005-2006 had been upgraded from 'good' to 'very good'. The review DPC was convened to consider the case of the petitioner for promotion to the post of Deputy Director (General). The review DPC, recorded the following minutes and declared the petitioner unfit for promotion:-

“.....9. The Review Departmental Promotion Committee accordingly examined the upgraded character rolls of Sh. Ram Nath (SC) and observed that the upgradation by the competent authority vide Ministry of Civil Aviation order no. A.60015/047/2007-VE dated 29.1.2009 has been done mainly on the basis of the following grounds:

1) That the downgrading of the entries has been done during the period of review of only one review officer. All the other reviewing officers have agreed to the gradings awarded by the reporting officers in various years.

2) adequate weightage needs to be given to the assessment of the reporting officers who have direct link with the officer reported upon and are in a better position to assess the work of the officer.”

“10. The Committee accordingly assessed the ACRs of respondent no.1 for the relevant period as under:

1) 2000-01 Both the reporting officer and the

reviewing authority have graded the officer as “Good” only. There is, therefore, no downgrading by the Reviewing Officer.

2) 2001-02 The parameters and attributes given by the reporting officer against various columns of the said ACR, does not fully support the overall grading of “Very Good” given to him by the reporting officer, which is in contravention of para 6.2.1(e) of the DPC Guidelines of DOP&T. The countersigning authority which is a different authority, has also graded him as “Good”.

3) 2002-03 The reporting officer has assessed the performance as “Good” (column. A.2); the capability of the officer to participate and handle problems as “Good” (column 3); communication skill (column 5 of the ACR) as Good/ Average only; professional competence (practical) (column 10.C(b)) as Good; ability to face difficult situation and improvise (column 10. C(e) as Average.

4) 2003-04 (Part I) The reporting officer agrees with the self appraisal only to limited extent. He had graded his performance as Good (column A.2); has average capacity to plan his work and achieve targets (column B.1); communication skill “Average” (column B.5); practical professional competence (column C.1(b)) as “Good”; awareness of current developments (column C.2(c)) as “Average” and ability to face difficult situations and to improvise (column C.2(e)) is “Good”.

5) 2003-04 (Part II) The reporting officer has graded him in the leadership qualities (Column B.1) as “Average”. Communication skill (column B.5) as “Average and Poor”, professional competence (column C.1) as Average/ Good. The general assessment of the reporting officer is Average and the overall grading is “Good”.

6) 2004-05 The various parameters and attributes in this ACR is assessed as only Average or Good. The overall assessment is Average and the grading is “Good” by the Reporting Officer. There is, therefore, no downgrading done by the Reviewing Officer.

7) 2005-06 In this ACR also the reporting officer has assessed various parameters and attributes as only Average or Good. The overall assessment is Average and the grading is "Good" by the reporting officer. Hence, here too, there is no down grading by the Reviewing Officer.

Further, the relevant extract of the DPC Guidelines, circulated vide DOP&T vide their O.M. No. 22011/5/86-Estt.(D) dated 10.04.1989 is as under:

"6.2.1(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 entries in the CRs, because it has been noticed that sometimes the overall grading in a CR may be inconsistent with the grading under various parameters and attributes..."

A reading of the aforesaid minutes reflects that the review DPC had examined the ACRs for each of the relevant years and has adversely commented upon the upgradation granted to the petitioner. Factual inaccuracies, justifying the upgradation, have been highlighted. Reasons have been given and recorded by the review DPC, for not accepting the upgradation in the ACRs. Reference was made to OM dated 10.04.1989, and that as per paragraph 6.2.1(e) of the said OM, the DPC was not to be guided merely by the overall grading in the ACRs and was entitled to make its own assessment on the basis of entries.

5. The petitioner does not dispute OM dated 10.4.1989 and its interpretation. The contention of the petitioner is that OM dated 10.04.1989 stands superseded and is no longer applicable in view of OM dated 08.02.2002. This contention is misconceived and

unacceptable. OM dated 08.02.2002 does refer to OM dated 10.04.1989, which was earlier amended vide OM No. 22011/5/91-Estt.(D) dated 27.03.1997, but does not supersede the earlier OM as suggested. The OM dated 08.02.2002 is in respect of other matters and does not in any way affect the right and duty of the DPC as recorded and mentioned in paragraph 6.2.1(e) of the OM dated 10.04.1989.

6. OM dated 08.02.2002 refers to the existing and revised guidelines for promotion at different levels and the mode or criteria for selection. The Bench-marks for promotion at different levels have been prescribed. By the aforesaid OM the nomenclature and earlier bench-marking criteria in the guidelines were partially modified as indicated. Paragraphs 3.2 and 3.2.1 of the OM read:

“....3.2 ‘Bench-mark’ for promotion

The DPC shall determine the merit of those being assessed for promotion with reference to the prescribed bench-mark and accordingly grade the officers as ‘fit’ or ‘unfit’ only. Only those who are graded ‘fit’ (i.e. who meet the prescribed bench-mark) by the DPC shall be included and arranged in the select panel in order to their inter se seniority in the feeder grade. Those officers who are graded ‘unfit’ (in terms of the prescribed bench-mark) by the DPC shall not be included in the select panel. Thus, there shall be no supersession in promotion among those who are graded ‘fit’ (in terms of the prescribed bench-mark) by the DPC.

3.2.1 Although among those who meet the prescribed benchmark, inter se seniority of the feeder grade shall remain intact, eligibility for promotion will no doubt be subject to fulfilment of all the conditions laid down in the relevant Recruitment/ Service Rules, including the conditions that one should be the holder of

the relevant feeder post on regular basis and that he should have rendered the prescribed eligibility service in the feeder post....”

Thus the DPC, as convened, has to determine the merit of those being assessed for promotion with reference to the prescribed benchmark and, accordingly, decide whether the officer was fit or unfit for promotion. Only those who are graded ‘fit’, i.e. who meet the prescribed bench-mark, are to be arrayed in the select panel, in the order of their *inter se* seniority in the feeder grade. Those officers graded ‘unfit’, i.e., who do not meet the prescribed benchmark, shall not be included in the select panel.

7. The aforesaid paragraphs do not indicate or state that the DPC is bound to accept the gradings given in the ACR or that the DPC should not apply their mind to the grading given. If we accept the contention of the petitioner, the DPC is required to act in a mechanical manner, take note of the grading given in the ACRs and apply the prescribed benchmark and, accordingly, declare whether the particular employee was fit or unfit. This, according to us, is not the purport of the afore-stated quotation from OM No. 08.02.2002. This OM nowhere denudes or takes away the power of the DPC to examine the gradings given in the ACRs in terms of the mandate expressed in the earlier OM dated 10.04.1989. No such statement is to be found mentioned and stated in the OM. No such inference is possible. The correct position has been clarified by OM No. 22011/5/2013-Estt.(D) dated 09.05.2014, the relevant portion of which reads as under:

“....4. It has been brought to the notice of this Department that in certain cases the Departmental Promotion Committees while assessing suitability of officers have given recommendations as ‘unfit’ on grounds including non-fulfilment of procedural requirements of disposal of representations preferred on entries/ gradings in APAR.

5. It is reiterated that in discharge of its statutory functions the respective DPCs are required to determine the merits of those being considered for promotion with reference to the prescribed bench-mark, by making its own assessment, on the basis of the entries and gradings contained in the APARs and other relevant material facts placed before it, and accordingly grade the officers as ‘fit’ or ‘unfit’. Relevant material would inter alia include the orders of the competent authority on the representation of the Government servant on the entries/ grading in APAR. In the event of DPC deciding not to take cognisance of such an order, on the ground that the same is not a speaking order, the DPC shall make its assessment based on the entries in APAR and other material including the representation of the Government servant. The DPCs should substantiate its assessment by giving justifiable and sustainable reasons including the cases where the assessment of the DPC is different from the grading in APAR (original or amended after representation by the Government servant)....”

8. We do not think that the review DPC, in the present case, while recording its finding and declaring the petitioner ‘unfit’ for promotion, had exceeded their jurisdiction or power in examining the revised gradings given to the petitioner in the ACR forms. Valid and good reasons have been given for not accepting the upgradation. The reasons and grounds recorded have not been challenged and questioned on the ground of perversity, or as bad on account of an

error in the decision making process.

9. The view we have taken is in conformity with the ratio elucidated by the Supreme Court in ***Union of India & Anr. vs S.K. Goel & Ors. AIR 2007 SC 1199***, wherein OM No. 10.04.1989 and paragraph 6.2.1(e) of the DPC guidelines were considered and it was observed as under:

“....20. In our opinion, the judgement 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 the 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. The DPC considered the remarks of the reviewing officers. There was clear application of mind. Respondent no. 1 did fulfil the bench mark. 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 Central Excise Service.

21. It was also argued by the learned senior counsel appearing for respondent no.1 that the entries for the period had an element of adverse reflection and for that purpose the seniority of respondent no.1 was downgraded and, therefore, the ACR ought to have been communicated to respondent no.1. In our opinion, the observations of the High Court are wholly unjustified inasmuch as the post of 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 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 O.M. 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 is no adverse remarks whatsoever against respondent No.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 DPVT Order No. 22011/5/86/Estt. D dated 19.4.1981, as amended, the DPC is not required to be guided merely by the overall grading, if any, that may be recorded in the CRs but to make its own assessment on the basis of the entries in the CRs. The 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...”

The above quotation notices and records that paragraph 6.2.1(e) did not formulate a new provision or stipulation but refers to a well settled dictum of service jurisprudence. It observes that courts normally would not interfere in the proceedings and recommendations

of the DPC unless they are shown to be illegal or in gross violation of the rules. The DPCs are entitled to take an overall assessment of the relevant confidential reports of the eligible officers, being considered. There should be an application of mind by the DPC.

9. The Supreme Court in ***Union of India & Anr. vs A.K. Narula*** ***AIR 2007 SC 2296***, has observed that the DPC has to be given a certain amount of play in the joints and need not be guided by the overall grading recorded in the confidential reports. They must make their own assessment on the basis of entries made in the ACR. The assessment and performance of each candidate has to be made separately. If the DPC has proceeded in a fair, impartial and reasonable manner by applying the same standards and norms to all candidates, the court would not interfere for there is no arbitrariness. In the said case the review DPC had decided not to change the grading of the Respondent from 'good' to 'very good' and had held that the grading should continue to remain as 'good'. The said finding was upheld in the absence of any allegation of malafide or bias against the DPC. It was not shown that there was arbitrariness in the said assessment.

10. A similar view was expressed by the High Court in judgement dated 06.07.2015, passed in WP(C) No. 12596/2009, titled: ***Avinash Tripathi & Ors. vs Union of India & Ors.*** and other connected matters.

11. The petitioner has referred to a decision of the Supreme Court in ***Union of India & Anr. vs Hemraj Singh Chauhan & Ors. (2010) 4 SCC 290***. The decision holds that eligible employees have a right

to be considered for promotion, as a part of the rights under Article 16 of the Constitution. The said Article guarantees a fair consideration in the matter of promotion and this right also flows from the guarantee of equality under Article 14 of the Constitution. Right to consideration for promotion cannot be equated with a claim or right to promotion. The said decision, we do not think, will help the petitioner in the facts of the present case. The petitioner was certainly considered for promotion by the review DPC and for good and valid reasons was not found fit for promotion.

12. Accordingly, we do not find any reason to interfere with the impugned order of the Tribunal. The writ petition is, dismissed. There will be no orders as to costs.

SANJIV KHANNA, J

MAY 17, 2016/kk

NAJMI WAZIRI, J