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

+ **W.P.(C) 11786/2015**

Reserved on: 13th January, 2016

Date of decision: 2nd February, 2016

Y.P. MITTAL

..... Petitioner

Through: Mr. Praveen Swarup, Adv. with
Petitioner in person

versus

GOVT. OF INDIA THOROUGH SECRETARY, CENTRAL
WATER COMMISSION

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE NAJMI WAZIRI

SANJIV KHANNA, J.:

1. Mr. Y.P. Mittal, the petitioner by this present writ petition impugns the final judgement and order dated 26.09.2014 passed by the Principal Bench of the Central Administrative Tribunal, Delhi ('Tribunal' for short) dismissing his application for quashing and setting aside order dated 04.11.2010. The petitioner seeks grant of Non-Functional Upgradation with effect from 1.7.2006.
2. The petitioner had superannuated from the post of Deputy Director (Executive Engineer) on 30.11.2006.
3. On 17.06.2010, the petitioner was communicated his grading in the Annual Confidential Reports (ACRs) for the periods 04.05.2001 to 31.03.2002; 02.05.2002 to 31.03.2003; 01.04.2003 to 31.03.2004; 20.08.2004 to 31.03.2005 and 01.04.2005 to 31.03.2006. This communication after retirement was with a purpose, for the

petitioner along with others was to be considered for grant of Non-Functional Upgradation.

4. On 14.07.2011, the Ministry of Water Resources (Central Water Commission) granted Non-Functional Upgradation with effect from 01.07.2006 to others including those who had retired and were juniors to the petitioner, but the petitioner was denied this upgradation.
5. The petitioner protested by sending a legal notice dated 26.08.2011 and feeling aggrieved, filed the aforesaid original application before the Tribunal. His objection was that his juniors had been granted Non-Functional Upgradation whereas his claim had been overlooked by relying on below the benchmark ACRs, which should not have been considered and made the basis to deny grant of Non-Functional Upgradation.
6. The respondent, in the counter affidavit, rebutted the points raised by the petitioner, stating that the Department Promotion Committee (DPC, for short) in their meeting on 1.7.2011 had examined and evaluated eligible employees in the zone of consideration, but the petitioner was not recommended due to his below the benchmark grading in the ACRs.
7. The primary grievance raised by the petitioner before the Tribunal was that the ACR gradings were not communicated to him, and thus it should be ignored. He had relied on the decision of the Supreme Court in *Dev Dutt versus UOI and Others*, (2008) 8 SCC 725 and *Sukhdeo Singh vs. Union of India & Ors.* (2013) 9 SCC 566.
8. The judgment in **Dev Dutt** case (Supra), was pronounced on 12.05.2008. In the operative portion, in **Dev Dutt's** case (Supra), noticing the fact that the petitioner therein had also superannuated,

the Supreme Court had directed as under:

“..... 47. We are informed that the appellant has already retired from service. However, if his representation for upgradation of the 'good' entry is allowed, he may benefit in his pension and get some arrears. Hence we direct that the 'good' entry of 1993-94 be communicated to the appellant forthwith and he should be permitted to make a representation against the same praying for its upgradation. If the upgradation is allowed, the appellant should be considered forthwith for promotion as Superintending Engineer retrospectively and if he is promoted he will get the benefit of higher pension and the balance of arrears of pay along with 8% per annum interest.

48. We, therefore, direct that the 'good' entry be communicated to the appellant within a period of two months from the date of receipt of the copy of this judgment. On being communicated, the appellant may make the representation, if he so chooses, against the said entry within two months thereafter and the said representation will be decided within two months thereafter. If his entry is upgraded the appellant shall be considered for promotion retrospectively by the Departmental Promotion Committee (DPC) within three months thereafter and if the appellant gets selected for promotion retrospectively, he should be given higher pension with arrears of pay and interest @ 8% per annum till the date of payment....”

9. In **Sukhdev Singh versus UOI & Others**, (2013) 9 SCC 566, reference was made to the earlier order by a bench of two Judges of the Supreme Court granting leave dated 12.12.2006, who had prima facie felt that the ratio of the decisions in **U.P. Jal Nigam and Others versus Prabhat Chandra Jain and Others**, (1996) 2 SCC 363 and **Union of India and Another versus Major Bahadur Singh**, (2006) 1 SCC 368 were inconsistent. The issue was therefore referred to a larger Bench. In **Sukhdev Singh** (supra), the Supreme Court emphasised that every entry in the ACR of a public servant

must be communicated to the employee within a reasonable time, whether it be poor, fair, average, good or very good. Several paragraphs in the judgment of **Dev Dutt** (Supra), were quoted and referred to with approval.

10. Decision of three Judges' bench of the Supreme Court in **Abhijit Ghosh Dastidar versus Union of India and Others**, (2009) 16 SCC 146, similarly observes:

“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 ACR 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 for promotion or get 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 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 never been informed of the nature of the grading given to him.”

11. We have referred to the decisions in **Dev Dutt, Sukhdev Singh and Abhijit Ghosh Dastidar (Supra)** for they expound and clearly set forth the law which is binding and has to be applied. The question which would arise is whether there has been violation of the aforesaid principle and ratio in the present case. In **Sukhdev Singh (Supra)**, two judges' bench of the Supreme Court in the reference

order dated 12.12.2006 had noted somewhat dissimilar legal ratios after referring to the decision in *U.P. Jal Nigam (Supra)*. It is perceptible and apparent that the decision in *Dev Dutt (Supra)* decided on 12.05.2008 had expounded and enunciated the law that was at variance with the position and government instructions / guidelines which were being implemented and applied in the past. O.M. dated 30th January, 1978 had postulated as under:

“(i) The Annual Reports should be recorded within one month of the expiry of the report period and delay in this regard on the part of the reporting officer should be adversely commented upon. If the officer to be reported upon delays submission of self-appraisal, this should be adversely commented upon by the reporting officer;

(ii) xxx xxx xxx

(iii) All adverse remarks in the Confidential Reports of Govt. Servants, both on performance as well as on basic qualities and potential, should be communicated along with a mention of good points, within one month of their being recorded. The communication should be in writing and a record to that effect should be kept in the C.R. dossier of the Govt. Servants concerned.”

Clause (iii) of the O.M. required communication of the adverse remarks in the confidential reports to the government servants, in terms of their performance, qualities and potential. It was not stipulated that below the bench mark ACR should be communicated to the concerned employee. *U.P. Jal Nigam (Supra)* was also a case relating to communication of adverse entries. It is in this context and while laying down the law in *Dev Dutt (Supra)* directions in paragraphs 47 and 48 quoted above were issued. Decisions in

Sukhdev Singh and **Abhijit Ghosh (Supra)** would postulate that the ACRs should be communicated to the concerned officer within a reasonable period for non-communication of below the bench mark entries in the ACR would be arbitrary and violative to Article 14 of the Constitution of India.

12. In the present case, below the bench mark entries in the ACR were communicated to the petitioner – Y.P. Mittal before the DPC had examined his case alongwith others within the zone of consideration for grant of Non-Functional Upgradation. The petitioner cannot have any grievance that he was not communicated below the bench mark grading before his case was taken for consideration. Pertinently, the petitioner had retired on 30th November, 2006, before the decision and the judgment in the case of **Dev Dutt (Supra)** was pronounced on 12th May, 2008. Therefore, the respondent / authorities had acted in terms of the mandate and the directions issued in paragraphs 47 and 48 by the Supreme Court in the case of **Dev Dutt (Supra)**. Consequently, the petitioner cannot raise any grievance relying upon **Sukhdev Singh and Abhijit Ghosh cases (Supra)**. The two decisions do not state that below the bench mark ACRs which were recorded prior to the pronouncement dated 12th May, 2008 in **Dev Dutt's case (Supra)**, would stand obliterated and erased, and such grading would stand replaced and substituted with an appropriate grading meeting the bench mark. The requirement in this particular case was that the below the bench mark grading should be communicated to the adversely affected employee / officer, so as to enable him to make a representation and protest against his below the bench mark or unacceptable grading. Representation, if any, by an employee has to be examined and

decided before below the bench mark grading is made the basis or the foundation to deny promotion or any other benefits. This was done and the ACR were communicated to enable the petitioner to make a representation.

13. ACR grading serves two purposes - one it enables the authorities to evaluate performance of an officer / employee in a particular year / period. Such evaluation is necessary and helpful when the government servant's case for promotion, financial and other benefits is considered to evaluate suitability or for comparative assessment with other officers etc. The second purpose is to inform the officer of the grading given by his seniors so as to enable the officer to improve his performance and grading in future.
14. In the present case, the petitioner having retired on 30th November, 2006, his case for grant of non-functional up-gradation was considered post his retirement in July, 2011, and before consideration, the authorities had communicated below the bench mark gradings in the ACRs. This would meet the statutory legal mandate, as postulated in *Dev Dutt, Sukhdev Singh and Abhijit Ghosh (Supra)*. The petitioner on being communicated the said gradings was given an opportunity or right to object and protest his gradings that were unacceptable and to seek review and upgradation. The petitioner did make a representation dated 1st July, 2010, acknowledging having been informed of his gradings recorded in the ACRs from 2001 to 2006, but his protest was restricted and confined to late communication and not that his gradings were incorrect and should be upgraded. No such prayer or assertion was made.
15. In this context, that we would like to refer to the recent judgment of the Supreme Court in *Saroj Kumar Vs. UOI* in Civil Appeal

No.6081/2015 decided on 18th August, 2015, which makes reference to the earlier decisions of the Supreme Court in *Dev Dutt, Sukhdev Singh and Abhijit Ghosh (Supra)*. The grievance of the appellant in this case was that the DPC held on 10th May, 2006 had ignored him and had promoted his juniors, relying upon below the bench mark ACRs, relating to the periods 1999 to 2000, 21st June, 2000 to 31st March, 2001 and 1st April, 2001 to 31st March, 2002, which could not have been taken into consideration, for they were not communicated to the petitioner. Saroj Kumar had partly succeeded in the first round of litigation when the matter was remitted to the authorities to communicate the said ACRs and consider Saroj Kumar's representation. The second round followed when the representation made by Saroj Kumar for up-gradation was rejected. The second challenge by Suraj Kumar was also partly accepted with an order of remit for fresh consideration of the representation. Government had challenged the said order in the High Court, which was disposed of observing that the down-grading was without any material available on record and if there were complaints, the same should have been mentioned when the down-grading entries were recorded. Third round followed, when the review DPC rejected the claim of Saroj Kumar. This time again Saroj Kumar succeeded before the Tribunal, but the writ petition filed by the authorities was allowed. The stand taken by the authorities before the High Court was that the entries had been communicated after the first round of litigation and therefore, there was no violation of the ratio in the three decisions of the Supreme Court. Saroj Kumar thereupon approached the Supreme Court, but did not succeed for the following reasons:

“8. From the above paragraphs of the counter affidavit it is clear that after first round of litigation i.e. OA No. 640 of 2006, concluded vide order dated 18.9.2008, passed by the Tribunal, communication of the entries, due to which the appellant’s promotion was affected, was made and representation was submitted by the appellant on 12.6.2009. It is also clear from the record that the representation of the appellant was rejected vide order dated 22.1.2010. Consequent to subsequent direction of the Tribunal in second round of litigation, as affirmed by the High Court in Civil Miscellaneous Writ Petition No. 8357 of 2011, the matter has been reconsidered and rejected. In the above circumstances, after communication of the entries made to the appellant and subsequent rejection of the representation, now, the law laid down in the cases of *Dev Dutt v. Union of India (supra)*, *Abhijit Ghosh Dastidar v. Union of India and others (supra)*, and *Sukhdev Singh v. Union of India*, is of little help to the present appellant for the reason that in the present case not only the ACRs have been communicated to the appellant, his representation too has been rejected.

9. In our opinion, the High Court has rightly taken note of the fact that on conclusion of second round of litigation neither there was direction by the Tribunal nor by the High Court to ignore the entries in question (after rejection of the representation against it) for promotion of the appellant from the date when his juniors were promoted. In the present round, the Tribunal has erred in directing the authorities to consider the case of the appellant for promotion from the date when his juniors were promoted, ignoring the remarks, which had been communicated after the first round of litigation. We are in agreement with the High Court that after the ACRs have been communicated and representation has been rejected, the Tribunal should not have treated the remarks as uncommunicated.”

16. The factual position is more or less identical as in the present case below the bench mark entries were communicated more than a year before the said entries were considered and examined by the DPC

convened for the purpose of examining the petitioner's case for non-functional up-gradation. The petitioner had made a representation, but restricted to and questioning late communication without raising any grievance on the grade awarded and did not pray for upgradation of the grades for the periods 04.05.2001 to 31.03.2002, 02.05.2002 to 31.03.2003, 01.04.2003 to 31.03.2004, 20.08.2004 to 31.03.2005 and 01.04.2005 to 31.03.2006. Therefore, there was compliance of law and the ratio of the Supreme Court in the case of *Dev Dutt* and other cases.

17. In view of the aforesaid discussion and in these circumstances, we do not find any merit in the said Writ Petition and the same is dismissed.
18. There will be no order as to costs.

(SANJIV KHANNA)
JUDGE

(NAJMI WAZIRI)
JUDGE

FEBRUARY 2nd, 2016
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