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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **WRIT PETITION (CIVIL) No. 429/2016**

Date of decision: 23rd May, 2017

DEPUTY COMMANDANT KULDEEP J CHOUDRY..... Petitioner
Through Ms. Jyoti Singh, Sr. Advocate with Ms.
Tinu Bajwa & Mr. Himanshu Gautam,
Advocates.

versus

UNION OF INDIA AND ORS. Respondents
Through Dr. Ashwani Bhardwaj, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE NAVIN CHAWLA

SANJIV KHANNA, J. (ORAL):

The petitioner was appointed as Assistant Commandant in the Border Security Force on 6th January, 2003.

2. The petitioner alongwith his batchmates and others was considered for promotion for Deputy Commandant in the Departmental Promotion Committee (DPC) meeting held on 23rd September, 2009.

3. The petitioner was not promoted because of below the benchmark grading in his Annual Confidential Report (ACR) for the year 2007-08 (1st April, 2007 to 31st March, 2008).

4. The petitioner protested and made representation to the respondents relying upon decision of the Supreme Court in *Dev Dutt versus Union of India and Others*, (2008) 8 SCC 725.

5. The respondents vide letter/order dated 22nd April, 2015 rejected the petitioner's representation, *inter alia*, relying upon Department of Personnel and Training's OM's dated 19th April, 2010 and 13th April, 2010. This order also refers to earlier replies given by the respondents. The petitioner, it was observed, was not entitled to communication of below the benchmark grading in the ACR for the year 2007-08 as DOPT's OM dated 13th April, 2010 applies prospectively to DPCs, which was held on or after the said date. The DPC in question in which the petitioner and his batchmates were considered was held on 23rd September, 2009.

6. Aggrieved, the petitioner has filed the present writ petition making several prayers, but we are inclined to dispose of the writ petition accepting the prayer clause (iv) by directing the respondents to communicate below the benchmark/adverse grading recorded in the petitioner's ACR for the period 2007-08 and thereafter follow the procedure as has been prescribed and laid down by the Supreme Court in ***Dev Dutt*** (supra) and ***Sukhdev Singh versus Union of India and Others***, AIR 2013 SC 2741.

7. Decision in ***Dev Dutt*** (supra), which was pronounced on 12th May, 2008, the Supreme Court in affirmative terms had held as under:-

“13. In our opinion, *every entry (and not merely a poor or adverse entry) relating to an employee under the State or an instrumentality of the State, whether in civil, judicial, police or other service (except the military) must be communicated to him, within a reasonable period, and it makes no difference whether there is a benchmark or not.* Even if there is no

benchmark, non-communication of an entry may adversely affect the employee's chances of promotion (or getting some other benefit), because when comparative merit is being considered for promotion (or some other benefit) a person having a “good” or “average” or “fair” entry certainly has less chances of being selected than a person having a “very good” or “outstanding” entry.

14. In most services there is a gradation of entries, which is usually as follows:

- (i) Outstanding
- (ii) Very Good
- (iii) Good
- (iv) Average
- (v) Fair
- (vi) Poor

A person getting any of the entries at Items (ii) to (vi) should be communicated the entry so that he has an opportunity of making a representation praying for its upgradation, and such a representation must be decided fairly and within a reasonable period by the authority concerned.

15. If we hold that only “poor” entry is to be communicated, the consequences may be that persons getting “fair”, “average”, “good” or “very good” entries will not be able to represent for its upgradation, and this may subsequently adversely affect their chances of promotion (or get some other benefit).

16. In our opinion if the office memorandum dated 10/11-9-1987, is interpreted to mean that only adverse entries (i.e. “poor” entry) need to be communicated and not “fair”, “average” or “good” entries, it would become arbitrary (and hence illegal) since it may adversely affect the incumbent's chances of promotion, or to get some other benefit. For example, if the benchmark is that an incumbent must have “very good” entries in the last five years, then if he has “very good” (or even “outstanding”) entries for four years, a “good”

entry for only one year may yet make him ineligible for promotion. This “good” entry may be due to the personal pique of his superior, or because the superior asked him to do something wrong which the incumbent refused, or because the incumbent refused to do sycophancy of his superior, or because of caste or communal prejudice, or to for some other extraneous consideration.

17. In our opinion, *every entry in the ACR* of a public servant must be communicated to him within a reasonable period, whether it is a poor, fair, average, good or very good entry. This is because non-communication of such an entry may adversely affect the employee in two ways: (1) had the entry been communicated to him he would know about the assessment of his work and conduct by his superiors, which would enable him to improve his work in future; (2) he would have an opportunity of making a representation against the entry if he feels it is unjustified, and pray for its upgradation. Hence, non-communication of an entry is arbitrary, and it has been held by the Constitution Bench decision of this Court in *Maneka Gandhi v. Union of India* [(1978) 1 SCC 248 : AIR 1978 SC 597] that arbitrariness violates Article 14 of the Constitution.

18. Thus, it is not only when there is a benchmark but in all cases that an entry (whether it is poor, fair, average, good or very good) must be communicated to a public servant, otherwise there is violation of the principle of fairness, which is the soul of natural justice. Even an outstanding entry should be communicated since that would boost the morale of the employee and make him work harder.

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26. In our opinion, our natural sense of what is right and wrong tells us that it was wrong on the part of the respondent in not communicating the “good” entry to the appellant since he was thereby deprived of the right

to make a representation against it, which if allowed would have entitled him to be considered for promotion to the post of Superintending Engineer. One may not have the right to promotion, but one has the right to be considered for promotion, and this right of the appellant was violated in the present case.”

8. Thereafter, the Supreme Court in *Dev Dutt* (supra) also referred to the procedure, which is to be followed when the public servant is communicated below the benchmark grading, in the following words:-

“37. We further hold that when the entry is communicated to him the public servant should have a right to make a representation against the entry to the authority concerned, and the authority concerned must decide the representation in a fair manner and within a reasonable period. We also hold that the representation must be decided by an authority higher than the one who gave the entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar to Caesar. All this would be conducive to fairness and transparency in public administration, and would result in fairness to public servants. The State must be a model employer, and must act fairly towards its employees. Only then would good governance be possible.

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44. 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* (supra), a three Judge Bench of the Supreme Court examined the whole issue afresh as the ratio in *Dev Dutt* (supra) was referred to a Larger Bench. The Supreme Court affirmed the view taken in *Dev Dutt* (supra) observing that they were in complete agreement. Reference was also made to another three Judge Bench decision of the Supreme Court in *Abhijit Ghosh Dastidar versus Union of India and Others*, (2009) 16 SCC 146. In *Abhijit Ghosh Dastidar* (supra), it has been observed as under:-

“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 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 abovereferred decision (*Dev Dutt case* [*Dev Dutt v. Union of India*, (2008) 8 SCC 725 : (2008) 2 SCC (L&S) 771] , SCC p. 738, para 41) 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.”

10. In *Sukhdev Singh* (supra), the Supreme Court held as under:-

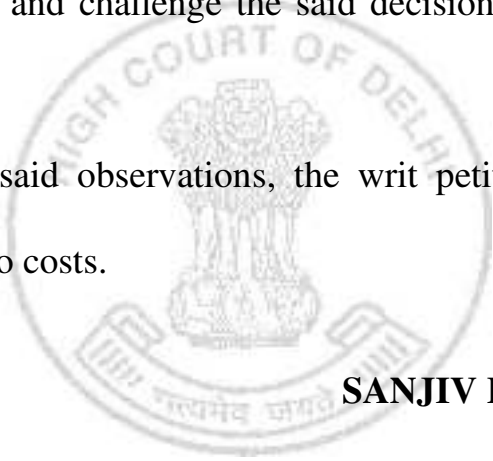
“8. In our opinion, the view taken in *Dev Dutt* [*Dev Dutt v. Union of India*, (2008) 8 SCC 725 : (2008) 2 SCC (L&S) 771] that every entry in ACR of a public servant must be communicated to him/her within a reasonable period is legally sound and helps in achieving threefold objectives. First, the communication 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.”

11. The decision in the case of *Dev Dutt* (supra) was pronounced on 12th May, 2008. Law laid down by the Supreme Court is binding on the authorities and the High Courts. In the present case, the DPC was held on 23rd September, 2009 and, therefore, should have followed the said law and ratio in *Dev Dutt* (supra) before relying upon the adverse ACR for the year 2007-08.

12. Accordingly, we direct the respondents to communicate below the

benchmark adverse ACR for the year 2007-08 to the petitioner within a period of six weeks from the date a copy of this order is received. The petitioner would be at liberty to make a representation within four weeks thereafter. The respondents would consider the representation and communicate their decision to the petitioner within four weeks after the representation is made. In case, the ACR of the petitioner is upgraded, a review DPC would be held as per law to consider the case of the petitioner for promotion. In case ACR is not upgraded, it will be open to the petitioner to question and challenge the said decision in accordance with law.

13. With the aforesaid observations, the writ petition is disposed of, without any order as to costs.



SANJIV KHANNA, J.

NAVIN CHAWLA, J.

MAY 23, 2017
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