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

+ **W.P. (C) 4210/2007**

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Date of Judgment: 15th February, 2017

JAGDISH CHAND

..... Petitioner

Through: Mr.Sachin Chauhan, Adv.

Versus

UOI & ANR

..... Respondents

Through Mr.R.V. Sinha, Adv. with Mr.R.N. Singh, Adv.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE VINOD GOEL

G.S.SISTANI, J. (ORAL)

1. Rule DB was issued in this matter on 12th November, 2007.
2. Pursuant to an application for early hearing, which was allowed by order dated 9th September, 2016, the writ petition is set down for final hearing and disposal today.
3. The petitioner had approached Central Administrative Tribunal (hereinafter referred to for short as 'the Tribunal') in the year 2006.

The following reliefs were sought:

“a. Call for the records of the case and give appropriate order/direction to the Respondents to consider the case of the Applicant for appointment/promotion to entry grade of the

service (DANIPS) against the vacancies of 2005 and thereafter appoint him as such with all consequential benefit of pay, allowances, seniority etc.

b. Pass such other or further order(s) as may be deemed fit and proper in facts and circumstances of the present case.

c. Grant all consequential benefits to which the Applicant is entitled in law.”

4. The petitioner was working as Inspector (Executive) in the Delhi Police. He was not considered for appointment/ promotion to the entry grade of the service known as National Capital Territory of Delhi, Andaman and Nicobar Islands, Lakshadweep, Daman and Diu and Dadra and Nagar Haveli Police Service (hereinafter referred to as DANIPS). The petitioner prayed before the Tribunal that his case be considered for appointment/ promotion to the entry grade of DANIPS against the vacancies of 2005 and thereafter appoint him with all consequential benefits of pay, allowance and seniority etc.
5. In response to the OA the stand taken by the respondent was that the petitioner was considered by the DPC in accordance with the rules and instructions. In its meeting held on 1st February, 2005 the case of the petitioner was assessed by the DPC who found the petitioner unfit for appointment to the entry grade of DNIPS against the vacancies pertaining to the year 2005 after scrutiny. It was found that the petitioner had not attained the prescribed benchmark of ‘Good’ or above in four out of five Annual Confidential Reports (ACRs) assessed by the Committee. After the reply was filed, the petitioner in his rejoinder built up a case of discrimination as according to him the criteria adopted in the DPC held on the same day with respect to

another officer, being Kapoor Singh, as a separate yardstick was applied i.e. three Goods or above and two Average ACRs out of five. The petitioner alleged discrimination, arbitrariness and violation of Articles 14 and 16 of the Constitution. The criteria adopted for the ACRs in the DPC held on 1st February, 2005 in the case of the petitioner admittedly is as under: -

“The benchmark grading for assessing an officer as suitable for promotion will be that the officer should have earned the grading of ‘Good’ or above at least in four out of the five ACRs being assessed by the Committee. The officers will be assessed as ‘Fit’ or ‘Unfit’ and those assessed as ‘Fit’ will be arranged in the order of their seniority within each category.”

6. It is not in dispute that since the petitioner did not meet the eligibility criteria of at least four ‘Good’, he was overlooked. In the aforesaid DPC this criteria was uniformly applied to all the officers who were considered in the said DPC.
7. During the course of hearing before the Tribunal, the learned counsel for the petitioner had restricted his arguments only with regard to the plea of discrimination as is evident upon reading Para 11 of the impugned order. The case of the petitioner was rejected by the Tribunal by holding that the Article 14 of the Constitution cannot be applied to legitimize an illegal action nor it can be enforced in a negative manner. Paras 15 and 16 of the impugned order read as under:

“15. We have given our thoughtful consideration to the contentions raised by the learned counsel based upon judicial precedents mentioned above, but are unable to accept the same. We are of the view that Article 14 of the Constitution

cannot be applied to legitimize an illegal action. Article 14 cannot be enforced in a negative manner. If, therefore, an individual may have got some orders in favour which under law were impermissible, some one equally situate cannot demand the same benefit based upon Article 14. It may be recalled that Vishundas Hundumal (supra) was not a case of grant of a benefit to persons equally situate as the applicant, which may not be permissible under law or may be against law. It was a case of grant of route permits to ply motor vehicles. The scheme framed by the Corporation had only mentioned that on some other routes permits may not be granted to private entrepreneurs and yet by conscious decision and not by accidental mistake, some of the persons equally situate were granted permit on such routes. It is no doubt true that the error or omission was on the part of the Regional Transport Authority in not supplying the information to the Special Secretary about all the valid permits in force at the relevant time and which were either to be curtailed or cancelled consequent upon approval of the scheme and the error or omission had resulted in gross discrimination between the transport operators in the same class in that some had their permits remaining intact with right to ply their vehicles on the notified routes, and some others whose permits were curtailed, and that the same was discrimination among persons in the same class, but it was held to be a case of an error and not a case of illegal grant of route permits to others. In Sengara Singh (supra) there was no plea raised by the respondent State of Punjab that there was some embargo in law not to reinstate about 1000 persons who were reinstated. The Hon'ble Supreme Court did not advert to this aspect of the case. The judgment of the Tribunal in Basanta Chandra Ganguli (supra), on the facts as mentioned above, was not a case of illegal grant of benefit to somebody. That apart, there appears to be some change in interpretation of Article 14 of the Constitution in the recent decisions of the Hon'ble Supreme Court. Article 14 of the Constitution, in such decisions of the Hon'ble Supreme Court, it appears, cannot be pressed into service in claiming relief if the same may have been illegally allowed to others. In Ekta Shakti Foundation v Government of NCT of Delhi [AIR 2006 SC 2609] the Apex Court held that the rational relationship

and legal back up are the foundations to invoke the doctrine of equality in case of persons similarly situated. If some persons derived benefit illegally and had escaped from the clutches of law, similar persons cannot plead nor court can countenance that benefit had from infraction of law and must be allowed to be retained. The question as to whether one illegality be compounded by permitting similar illegal or illegitimate or ultra vires acts was answered in the negative. For holding so, the Hon'ble Supreme Court relied on its earlier decisions in *Coromandel Fertilizers Ltd. v Union of India & Others* [(1984) Supp SCC 457]; *Secretary, Jaipur Development Authority, Jaipur v Daulat Mal Jain & Others* [(1997) 1 SCC 35]; *Gursharan Singh & Others v NDMC & Others* [(1996) 2 SCC 459]; *State of Haryana & Others v Ram Kumar Mann* [(1997) 3 SCC 321]; and *State of Bihar & Others v Kameshwar Prasad Singh & Another* [(2000) 9 SCC 94]. In the last decision referred to above, it was held that two wrongs can never make a right.

16. Coming to the facts of the present case, it is quite evident that the name of Kapoor Singh was assessed with a different yardstick even though it was clearly mentioned in the minutes of the meeting of the review DPC that the same criteria of benchmark would be adopted as was adopted by the DPC held on 1.2.2005. By a sheer inadvertent mistake, however, while mentioning the criteria adopted on 1.2.2005, it was mentioned that the benchmark criteria would be three 'good' or above and two 'average' out of five Confidential Reports that would be considered. If Kapoor Singh got the benefit which was not authorized and which was against the criteria, surely, the applicant cannot seek the same relief by stating that even though Kapoor Singh might have been wrongly or illegally given the benefit, he too must be given the similar benefit."

8. During the course of hearing, learned counsel for the petitioner has urged that the average ACRs were not communicated to the petitioner although he candidly admits that the said ACRs were pre **Dev Dutt v. UOI & Ors.**, 2008 (8) SCC 725, wherein it has been held that all

ACRs below benchmark are to be communicated to an officer. He submits that had the ACR been communicated even post decision of **Dev Dutt** (supra), petitioner would have made a representation as he had a very strong case on merit.

9. Mr.Sinha, learned counsel appearing on behalf of the respondent, submits that the submission sought to be urged by the learned counsel for the petitioner is an absolute afterthought. Neither any foundation has been laid in the OA nor has any ground been urged. Once the petitioner had learnt that he had been overlooked, it was open for him to have taken such remedies as were available to him in accordance with law which he did not and at this late stage the same cannot be urged.
10. At this stage, Mr.Chauhan, learned counsel for the petitioner, on instructions from the petitioner, submits that he does not press this petition any further as he would seek such remedies as available to him in accordance with law including seek copies of ACRs and initiate the remedies as available to him.
11. The petition is dismissed as not pressed.

G. S. SISTANI, J.

VINOD GOEL, J.

FEBRUARY 15, 2017/jitender