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

+ **WRIT PETITION (CIVIL) No. 7324/2016**

Date of decision: 24th January, 2017

CHANDER BHAN

..... Petitioner

In person.

versus

UNION OF INDIA

..... Respondent

Through Mr. Abhay Prakash Sahay, CGSC, Mr. Arun Kumar Mishra & Mr. Arnav Kumar, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL):

The petitioner- Chander Bhan appears in person. The petitioner impugns the order dated 3rd June, 2016 passed by the Principal Bench of the Central Administrative Tribunal (Tribunal, for short), which allows the Review Application No. 256/2015 filed by the Union of India, Ministry of External Affairs, recalling the earlier order dated 22nd July, 2015 which had partly allowed OA No. 622/2014 filed by the petitioner.

2. The respondents before us have produced the original record of the Departmental Promotion Committee (DPC) proceedings relating to the year 2008-09.

3. In order to appreciate the controversy, we would first refer to the relevant facts. The petitioner, an officer of the Indian Foreign Services, was

promoted to senior scale in the recruitment year 2009-2010. The petitioner had thereafter superannuated on 30th November, 2012. Post retirement, the petitioner filed OA No. 622/2014 on or about 5th February, 2014, claiming that he should have been promoted in the preceding recruitment year 2008-2009. The prayer was for quashing and setting aside of memo dated 25th May, 2009 issued by the Ministry of External Affairs by which thirteen other officers were promoted to the senior scale of Indian Foreign Service for the recruitment year 2008-09. The petitioner was excluded from the said list as he was not found fit for promotion by the DPC. The petitioner had sought a direction that a review DPC should be held for considering his candidature for promotion to the senior scale in the recruitment year 2008-09.

4. A reading of the Original Application would indicate that the petitioner had predicated and reasoned that he was never intimated and informed about his non-promotion, which factum he had learnt only on the basis of information furnished under the Right to Information Act, 2005. It was then that the petitioner had learnt that the DPC had not found him fit for promotion. Further, the DPC had erroneously taken into consideration ACRs of the last 7 years instead of the last 5 years. The petitioner had 'very good' grading in 6 ACRs, yet the DPC had not considered the petitioner as fit for promotion. Another assertion was that the Ministry of External Affairs had ignored the Rules and directions of the Supreme Court and the Tribunal, which require communication to the employee of any information of the content in the ACRs coming in the way of an employee's promotion.

5. The OA was allowed vide order dated 22nd July, 2015, rejecting the objection as to the limitation or abnormal delay, observing and holding that

the petitioner was conveyed and informed about the below the benchmark grading in the ACRs only on 27th December, 2013, when the information was furnished to him under the Right to Information Act. The period of limitation should be counted only from 27th December, 2013. This order had assumed and had proceeded that the petitioner was never informed about the below the benchmark grading in the ACRs and he, therefore, did not get an opportunity to represent against the grading and demand upgradation. The Tribunal, relying upon the decisions in ***Dev Dutt versus Union of India and Others***, (2008) 8 SCC 725 and ***Abhijit Ghosh Dastidar versus Union of India and Others***, (2009) 16 SCC 146 held:-

“7. We have considered the submissions made on both sides. So far as the submission of the respondents that the Application is hopelessly barred by time, we do not find any merit in the same for the reason as noted above. The delay has been explained as the ACRs were only supplied to him pursuant to his application under the RTI Act in the month of October, 2013, and thereafter the Application under Section 19 is filed in the month of February, 2014. Therefore, it is difficult to hold that the Application is barred by time. Besides that the applicant since has filed application seeking condonation of delay, and the explanation furnished, in our view, is sufficient to condone the delay, we allow the application and condone the delay.

8. Now coming to the merits of the case, nothing is brought before us to show that ACRs which were below benchmark were communicated to the applicant, and thus the uncommunicated below benchmark ACRs cannot be looked into by the DPC while making assessment of an officer for promotion to the higher grade. In the instant case ACRs for seven years, i.e., from 2001-02 to 2007-08 were taken into consideration, out of which two ACRs, i.e., for 2005-

06 and 2006-07 are partly graded as below average and average, which would be below benchmark for consideration for promotion to the next higher grade. These ACRs were supplied to the applicant only on 27.12.2013 pursuant to his RTI application. The DPC meeting for promotion to the senior scale of IFS for the recruitment year 2008-09 (supplementary panel) was held on 06.05.2009, wherein the applicant was declared unfit. Therefore, these ACRs having not been communicated to the applicant, the DPC should have ignored the same, and instead looked into the ACRs of the years immediately preceding the first ACR under consideration, i.e., 2001-02, or the respondents should have communicated the same so that the applicant could have represented against the below benchmark ACRs. The Government of India have also issued office memorandum No.21011/1/2010-Estt.A dated 13.04.2010, which provides that if an employee is to be considered for promotion in a future DPC and his ACRs prior to the period 2008-09 which would be reckonable for assessment of his fitness in such DPC, contain final grading which are below benchmark for his next promotion, before such ACRs are placed before the DPC, the concerned employee will be given a copy of the relevant ACRs for his representation, if any, within fifteen days of such communication. The respondents, therefore, ought to have communicated these two ACRs of 2005-06 and 2006-07 which were below benchmark to the applicant to enable him to make such representation, which, admittedly, has not been done in the instant case. The controversy, therefore, regarding supply of below benchmark ACRs is concluded by the judgments of the Apex Court in Dev Dutt (supra) and Abhijit Ghosh Dastidar (supra), wherein their Lordships were of the view that the below benchmark ACRs have civil consequences as the same would affect the chances of promotion or other benefits, hence non-communication thereof is arbitrary and violative of Article 14 of the Constitution.

In the instant case, admittedly, the aforesaid two ACRs of the period 2005-06 and 2006-07 were not communicated to the applicant, though the same were below benchmark, and for that reason he was not recommended by the DPC for promotion to the senior scale of the IFS from Grade-I of IFS-B for the recruitment year 2008-09. It is stated in para 7 of the counter affidavit of the respondents that the applicant was considered along with others for promotion to the senior scale of IFS for the recruitment year 2008-09, but the DPC did not find him fit for promotion as he had 'below average' grading for the part period of the assessment year 2005-06, and 'average' grading for the assessment year 2006-07. Therefore, it is admitted position that on account of these two ACRs, which were never communicated to the applicant, he was declared unfit for promotion. However, in the next meeting for the recruitment year 2009-10, he was again considered by the DPC and recommended for promotion to senior scale of IFS, pursuant to which he was promoted to the senior scale of IFS w.e.f. 31.10.2010 on the vacancy being available for substantive promotion. Therefore, in our view the controversy is squarely covered by the aforesaid two judgments of the Apex Court, i.e., *Dev Dutt* (supra) and *Abhijit Ghosh Dastidar* (supra).

9. We, therefore, dispose of this Application with the direction to the respondents to communicate the aforesaid below benchmark ACRs to the applicant within one month for his representation, and on receipt of the same, to examine and take a decision thereon within one month thereafter. In the event the ACRs are upgraded, a review DPC would be convened to consider his case for promotion against the vacancies of 2008-09, and in the event he is found suitable he should be given promotion from the date when his immediate junior was so promoted. However, he shall not be entitled to claim arrears of salary etc. for that

period, but the necessary corrections in his pension etc. would be made accordingly. However, if the reporting/reviewing/accepting authorities who had occasion to supervise the work of the applicant is/are not available due to retirement or for any other reason, in that event, the competent authority shall consider the representation on its own merit and the records/documents available, as per DOP&T OM dated 13.04.2010. If the competent authority were to arrive at the conclusion that the offensive remarks for the periods 2005-06 and 2006-07 are not justified and deserve to be upgraded for the reasons to be recorded in writing, a review DPC shall be held to re-consider the claim of the applicant for promotion for the recruitment year 2008-09.”

6. Several significant and material facts not revealed and stated by the petitioner in the OA, only came to light when the respondents filed the Review Application No. 256/2015. Below the benchmark grading for the period December 2005 to March 2006, when the petitioner was graded ‘below average’ and period November 2006 to March, 2007, when the petitioner was rated as ‘average’ had been communicated to the petitioner on 24th May, 2007 and 2nd July, 2007, respectively. The petitioner had made representations against the remarks/ aforesaid grading. The representation relating to December 2005 to March, 2006 was decided on 8th July, 2008. Thirteen adverse remarks were expunged while six adverse remarks were retained. With regard to the period between November 2006 to March 2007, eight adverse remarks were retained and three adverse remarks were expunged. The petitioner had then filed an appeal before the appellate authority, which was dismissed. Still aggrieved, the petitioner had filed OA No. 3076/2009 before the Tribunal challenging the adverse remarks as well

as the grading given in the ACRs. This OA was dismissed by the Tribunal vide order dated 9th November, 2009. The petitioner thereupon had filed Writ Petition (C) No. 1653/2010 before the High Court, raising the contention that the appellate authority while rejecting the appeal had not specifically dealt with the contentions raised and given reasons. The writ petition was allowed setting aside the order passed by the appellate authority dated 18th November, 2008, with the direction to re-decide the statutory appeal. The Division Bench, while deciding the writ petition, was conscious that in case the petitioner succeeds and the remaining adverse remarks in the ACRs were erased, then the authorities would have to take necessary corrective steps. Directions to this effect were given.

7. Consequent to the order of remand, the Appellate Authority passed an order dated 20th September, 2010, rejecting the appeal. The order dated 20th September, 2010 is a detailed and speaking order.

8. The petitioner, who appears in person, accepts that he has not challenged this order dated 20th September, 2010. He, however, submits that he had made a representation dated 27th September, 2010 against the said order. The petitioner accepts that the representation is not a statutory representation. Filing of this representation is inconsequential and not relevant.

9. What is perplexing and confounding is the failure of the petitioner to mention the aforesaid facts in his OA No. 622/2014. Noticeably, the petitioner while filing the said OA did not challenge and question the order dated 20th September, 2010 by which his statutory appeal against the adverse remarks for the period December 2005 to March 2006 and November 2006 to March 2007 was rejected. The petitioner has allowed the said order dated

20th September, 2010 to attain finality. Concealment of material facts *ex-facie* is apparent and cannot be disputed.

10. We have already quoted the relevant portion of the order disposing of OA No. 622/2014 dated 22nd July, 2015. The said order does not narrate and refer to the true and correct factual position, which have been stated above, i.e., the communication of the adverse remarks/ACRs, the representation filed by the petitioner and the orders passed thereon dated 8th July, 2008 and the statutory appeal order dated 20th September, 2010 passed pursuant to the remand by the High Court. These were vital and crucial facts, which were withheld and not referred to, to obtain the order dated 22nd July, 2015.

11. When the aforesaid facts were brought to the notice of the Tribunal in the review application, the Tribunal rightly recalled their earlier order dated 22nd July, 2015, which had been passed in ignorance of and was oblivious to the material facts stated above. Once the correct position was revealed, the Tribunal had no option but to recall the earlier order.

12. In view of the aforesaid position, we do not think the petitioner's challenge to the order dated 3rd June, 2016 by which review application No. 256/2015 has been allowed has any merit and can be sustained. The writ petition should be dismissed.

13. The petitioner submits that he was granted promotion as senior scale of Indian Foreign Service in the recruitment year 2009-10 and ACRs for the period December 2005 to March 2006 and November 2006 to March 2007 should have been taken into consideration. We would not like to comment on the same as the promotion granted to the petitioner in the recruitment year 2009-10 is not the subject matter of challenge before us. As far as the recruitment year 2008-09 is concerned, the DPC in their meeting held on 6th

May, 2009 had opined that the petitioner was unfit for promotion. Several other officers were also declared unfit for promotion. The benchmark as noted by the DPC for promotion by way of selection was 'good'. Moreover, in view of the order dated 5th July, 2010 passed by the Delhi High Court in Writ Petition (C) No. 1653/2010, the issue regarding adverse entries in the ACRs was re-examined and rejected by the appellate authority vide order dated 20th September, 2010. The order dated 20th September, 2010 has not been challenged by the petitioner. The adverse entries have not been erased and set aside and have become final.

14. Noting the aforesaid, the writ petition is dismissed. There will be no order as to costs.

SANJIV KHANNA, J.

CHANDER SHEKHAR, J.

JANUARY 24, 2017
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