

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 8052 OF 2004

Navodaya Vidyalaya Samiti & Ors.	...Petitioners
Versus	
K. S. N. Bhatt & Ors.	...Respondents

Mrs. Neeta Masurkar with Mr. V. S. Masurkar and Ms Nieyaati Masurkar for Petitioners.
Mr. S. P. Saxena with Mr. A. S. Rao for Respondents.

**CORAM : SMT. V. K. TAHILRAMANI, Acting C.J. &
M. S. SONAK, J.**

Date of Reserving the Judgment : 26 July 2018
Date of Pronouncing the Judgment : 31 July 2018

JUDGMENT :

- 1] Heard the learned counsel for the parties.

- 2] The challenge in this petition is to the judgment and order dated 18th June 2004 made by the Central Administrative Tribunal (CAT) allowing Original Application No. 525 of 2003 instituted by the respondent no. 1 Mr. K. S. N. Bhat. The operative portion of the impugned judgment and order reads as follows :

“10. In the conspectus of the facts and circumstances of the case, we hereby direct the respondents to convene a Review D.P.C. and reconsider the case of the applicant ignoring the ACRs of the year 1990-91 and 1992-93 and if

he is found fit for promotion to the post of Assistant Director he may be promoted to the said post with effect from the date on which his juniors were promoted with all consequential benefits. The above exercise shall be completed within a period of three months from the date of receipt of a copy of this order. In the result, the O.A. is allowed. No order as to costs."

3] Ms Neeta Masurkar, the learned counsel for the petitioners has made basically two submissions in support of the present petition:

(A) That at the relevant time i.e. in the years 1990-91 and 1992-93 there was no requirement of communicating down graded remarks as long as they were not adverse to the concerned government official. Therefore, there was no infirmity in the action of the petitioners in not communicating the down graded remarks to the respondent no. 1;

(B) In any case, as a result of the impugned directions, the petitioners will have to consider the ACRs of the respondent no. 1 for only one year, even though, the recruitment rules require consideration of ACRs for 5 years preceding the date of consideration for promotion. Mrs. Masurkar submits that in terms of the executive instructions as applicable, the CAT should have at least granted liberty to the petitioners to consider ACRs for additional 2 years, in lieu of the ACRs for the years

1987-88 and 1988-89 which were not available at a relevant time.

4] Mr. Saxena, the learned counsel for the respondent no. 1 contests both the contentions raised by Mrs. Masurkar. He submits that the view taken by the CAT is entirely consistent with the law laid down by the Hon'ble Supreme Court in the matter of ***Dev Dutt vs. Union of India (2008) 8 SCC 725***, ***Sukhdev Singh vs. Union of India (2013) 9 SCC 566*** and ***more recently Prabhu Dayal Khandelwal vs. Chairman, Union Public Service Commission & Ors. (2015) 14 SCC 427***. He further submits that the ACRs for the years 1987-88 and 1988-89 were not traceable on account of default on the part of the petitioners themselves. In such circumstances, Mr. Saxena submits that the respondent no. 1 cannot be made to suffer. For these reasons, Mr. Saxena submits that the present petition be dismissed.

5] Rival contentions now fall for our determination.

6] In the present case, as is clear from the operative portion of the impugned judgment and order, the CAT has directed the petitioners to consider the case of the respondent no. 1 for promotion by ignoring the ACRs for the years 1990-91 and

1992-93. This was because for these 2 years, even though, the respondent no. 1 had in fact been graded as 'good', such remarks were down graded to 'average' by the reviewing officer. On the basis of such down grading, the DPC, concluded that the respondent no. 1 does not meet with the bench mark 'good' required for promotion to the post of Assistant Director. In these circumstances, the CAT, has held that since there was no communication of the down graded remarks, it is only appropriate that such down graded remarks be excluded from consideration.

7] There is no merit in the first contention raised by Mrs. Masurkar that there was no requirement of communicating the down graded remarks to the respondent no. 1, even though, the record indicates that it is on the basis of such down graded remarks that the respondent no. 1 was denied promotion to the post of Assistant Director.

8] In *Dev Dutt* (supra), the Hon'ble Supreme Court has held that fairness and transparency in public administration requires that all entries whether poor, fair, average, good or very good in the Annual Confidential Report of a public servant, whether in civil, judicial, police or any other State service must be communicated to him within a reasonable period so that he can make a representation for

its upgradation. Nomenclature of the entry is not relevant, it is the effect which the entry is having which determines whether it is an adverse entry or not. It is thus the rigours of the entry which is important, not the phraseology. The grant of a 'good' entry is of no satisfaction to the incumbent if it in fact makes him ineligible for promotion or has an adverse effect on his chances. Communication of entries and giving opportunity to represent against them is particularly important on higher posts which are in a pyramidal structure where often the principle of elimination is followed in selection for promotion, and even a single entry can destroy the career of an officer which has otherwise been outstanding throughout. This often results in grave injustice and heart-burning, and may shatter the morale of many good officers who are superseded due to this arbitrariness, while officers of inferior merit may be promoted.

9] The aforesaid position of law has again been affirmed by the Hon'ble Supreme Court in the case of *Sukhdev Singh* (supra) by holding that the view taken in *Dev Dutt* (supra) that every entry in ACR of public servant must be communicated to him / her within a reasonable period is legally sound and helps in achieving three fold 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. The Hon'ble Supreme Court finally held that every entry in ACR - poor, fair, average, good or very good – must be communicated to him / her within a reasonable period.

10] Again, in *Prabhu Dayal Khandelwal* (supra), the Hon'ble Supreme Court once again reiterated that non communication of entries in ACRs affect employee's chances of promotion is arbitrary and violating Article 14 of the Constitution. This was a case of promotion from post of Commissioner of IT to post of Chief Commissioner of IT. The bench mark for the promotional post was 'very good' in 5 ACRs. The appellant graded as 'good' for 3 years but such entries were not communicated to him and 'very good' for 2 years. The Hon'ble Supreme Court held that the claim of appellant for promotion could not have been denied by taking into consideration un-communicated ACRs wherein he was assessed as

'good'. The respondents were directed to consider the appellant's claim for promotion on the basis of communicated entries only.

11] From the perusal of the impugned judgment and order, we find that the view taken by the CAT is in consonance with the law laid down by the Hon'ble Supreme Court in *Dev Dutt* (supra), *Sukhdev Singh* (supra) and *Prabhu Dayal Khandelwal* (supra). Accordingly, we are unable to uphold the first contention of Mrs. Masurkar.

12] In so far as Mrs. Masurkar's second contention is concerned, at the outset, we may state that Mrs. Masurkar has not produced for our consideration any statutory rule or even executive instructions which permits the DPC to take into consideration the ACRs for the previous years in lieu of the missing ACRs. Secondly, it is not some case where the officer concerned is himself responsible for the non availability of his ACRS for some of the relevant years. There is not even any allegation that the respondent no. 1 had any truck with the fact that his ACRs for 2 out of the relevant 5 years were found to be missing or unavailable. Thus, Mr. Saxena is right that the fault in respect of the missing ACRs lay clearly with the petitioners themselves. In such circumstances, obviously, the petitioners, cannot seek to either draw some advantage or in any case prejudice the respondent no. 1. Thus construed, we see no merit in the second

contention of Mrs. Masurkar.

13] Nevertheless, we clarify that in case there exist any rules or executive instructions which permit the DPC to take into consideration the ACRs for the previous years in lieu of the missing ACRs, then, the DPC in compliance with the directions contained in the impugned judgment and order will be at liberty to follow such rule or executive instructions, if any. To this extent, the impugned judgment and order shall stand modified.

14] We therefore dispose of the Rule with the following order :-

(A) The direction to the DPC to consider the case of the respondent no. 1 for promotion by ignoring the ACRs for the years 1990-91 and 1992-93 is upheld;

(B) However, if at all there are any statutory rule or executive instructions which permit the DPC to take into consideration the ACRs for previous years in lieu of the missing ACRs for the years 1987-88 and 1988-89, then, the DPC may, consistent with such rules or executive instructions, if any, take into consideration the ACRs for the previous years;

(C) The impugned judgment and order is modified to the aforesaid extent only;

(D) The directions in the impugned judgment and order, as modified above, to be complied within three months from today;

(E) Rule is disposed of in the aforesaid terms. There shall be no order as to costs.

(M.S. SONAK, J.)

(ACTING CHIEF JUSTICE)

CHANDKA

**Sunita
Kishandas
Chandka**

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Sunita Kishandas
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