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

Reserved:31st October, 2018

Pronounced on:13th November,2018

+ W.P.(C) 7237/2014 & CM APPL. 18481/2014

MURLI DHAR SHARMA

..... Petitioner

Through : Mr. Anunaya Mehta with Mr. Akshay Deep
Singhal, Advocates

versus

GOVERNMENT OF NCT OF DELHI & ORS.

.... Respondents

Through : Mr. Devesh Singh, ASC (Civil) GNCTD with
Ms. Sukriti Ghai, Advocate for R-1
Mr. Vinay Sabharwal, Advocate for R-2
Mr. Vijendra Pal Singh, Advocate for R-16
Mr. Joginder Singh, Advocate for R-18

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T

1. Vide the present petition, the petitioner has prayed as under :-

(A) "Issue a writ of certiorari quashing the ACR of the petitioner for the period 2009-2010 initiated by Sh. R K Singh.

(B) Issue a writ of certiorari quashing the order dated 21.03.2013 in so far as it excludes the name of the petitioner for promotion to the post of Controller;

(C) Issue of a writ of mandamus directing the respondents no.1 and 2 to reconsider the case of the petitioner for promotion to the post of Controller by ignoring his ACR for the period 2009-2010 initiated by Sh. R K Singh and reviewed by Sh. Harish Kumar and by

considering his ACR for the same period initiated by Sh. B S Puria and reviewed by Sh. Santosh Kumar and if found fit, grant him all consequential benefits.”.

2. The brief facts of the case are that the petitioner joined respondent no.2 about 20 years ago and presently working as an Assistant Controller. Vide order dated 16.7.2007, the petitioner was promoted from the post of Technical Assistant Grade-I to the post of Assistant Controller (E/M) and was placed at serial no. 8 in promotion order. Thus, the petitioner was senior to respondent nos. 3 to 13 amongst the 22 Technical Assistant Grade-I promoted as Assistant Controller.

3. Pursuant to aforesaid order dated 16.7.2007, on 9.5.2008, the petitioner was posted to Coal Handling Plant (CHP) Section after being relieved from the post of the Dy. General Manager (Operations) vide order dated 5.5.2008, and accordingly, he reported to Shri B.S.Puria, Manager (CHP) for taking the charge of his new assignments and a joining letter dated 13.5.2008 was issued by Shri B.S.Puria. Accordingly, the petitioner was working in CHP section from 1.4.2009 to 11.12.2009, where Shri G K Sharma was the Assistant Manager and Mr. B. S. Puria was the Manager. On 11.12.2009, the petitioner was removed from CHP section and transferred to the store Section where Shri B S Puria was the Manager and Shri Santosh Kumar (Dy. Manager), where he remained posted from 12.12.2009 to 28.5.2010. While, the petitioner was working as Assistant Controller, the respondent no.2 issued an office order dated 21.3.2013 promoting 23 persons from the post of Assistant Controller to Controller, however, the petitioner has been superseded and respondent no. 3 and other officers junior to him were placed at serial no. 8 onwards in the said orders.

Thereafter, the petitioner made inquiries as to reasons for his supersession,

but he was not informed anything. Consequently, he was constrained to make an application on 28.3.2013 under RTI Act seeking copies of his ACRs from April, 2008 to March, 2012 and also made an application to the Director (HR) dated 5.4.2013 requesting him to consider his case for promotion or at least inform him the reasons for his non-promotion.

4. Mr. Anunaya Mehta, learned counsel appearing on behalf of the petitioner submits that though the petitioner is not seeking any relief against respondent no.3, but since he is seeking his retrospective promotion with effect from the same date i.e. 21.3.2013 vide which the respondent no.3, who was also junior to him had been promoted along with 15 other officers junior to him as Controller, the petitioner has impleaded initially respondent no.3 in his representative capacity as senior to those 16 persons is likely to be affected in the case if the petitioner succeeds before this Court. However, vide order dated 8.5.2018, this Court directed, let all the affected persons be impleaded as respondents. Consequently, the petitioner has impleaded respondent nos. 4 to 18 and all have filed their counter affidavit stating that they have been promoted to the post of Assistant Controller from the post of Technical Assistant Grade-I in the year 2007. The next promotional post is Assistant Manager (Technical) and as per the recruitment Rules, both Assistant Controller and Controller are eligible to be promoted as Assistant Manager (Technical) with 7/5 years experience respectively to their best knowledge, to which, approximately 40 numbers of posts of Assistant Manager (Technical) are lying vacant and are not being filled up in the years due to interim order passed by this Court.

5. It is further stated that if this Hon'ble Court is gracious enough and allow promotion, the petitioner and other respondents/employees may be

promoted to the post of Assistant manager (Technical). In case, any benefit is given to the petitioner, the same may be given to the petitioner without any damage/loss to them as they are working at the post of Contractor on regular basis for the last 5-6 years to the entire satisfaction of their superiors.

6. Learned counsel appearing on behalf of the petitioner submits that it is an admitted fact that the respondent nos. 3 to 18 have not disputed the fact that the petitioner was promoted vide order dated 16.7.2007 from the post of Technical Assistant (Grade-I) to the post of Assistant Controller and was placed at serial no. 8 in promotion order and was thus senior to respondent nos. 3 to 18. The aforesaid respondents nowhere stated in the counter affidavits that the petitioner is not senior to them in terms of promotion order dated 16.7.2007.

7. Learned counsel for the petitioner submits that the petitioner submitted an application dated 4.5.2013 requesting the respondent that his ACR forwarded by Mr. B S Puria and reviewed by Shri Santosh Kumar may be considered for promotion from the post of Assistant Controller to Controller as per his seniority, but received no reply. Thereafter, sent a reminder dated 5.6.2013, in addition, submitted an application dated 12.8.2013 under RTC Act for knowing the status of his earlier application dated 5.4.2013.

8. Subsequently, the respondents issued a memorandum dated 11.9.2013 to the petitioner allowing therein that the petitioner was working under Shri R K Singh with effect from 9.5.2008 to 11.12.2009 and therefore the facts stated in his representation dated 4.5.2013 were not correct and asked the petitioner to justify his claim with documentary proof regarding his plea that

he was working under Shri G K Singh and Mr. B S Puria in the CHP section. Accordingly, the petitioner submitted reply dated 21.9.2013 to the memorandum dated 11.9.2013 and similarly made an application dated 13.9.2013 under the RTI Act for supply of copies of ACRs for the year 2009-2010 and also sought to know as to who has signed his leave applications from January, 2009 to March, 2010. Further, requested for copy of office orders in the year 2009-2010 under which he was allegedly directed to work under the control of Shri R K Singh.

9. In response to his reply dated 21.9.2013, the petitioner was vide letter dated 22.10.2013 provided a copy of his ACRs for the period 2009-2010 and on 17.12.2013, after filing an appeal was informed that there was no copies/data available to show that in the year 2009-2010 he was directed to work under the control of Shri R K Singh.

10. Learned counsel submits that vide memorandum dated 5.12.2013, the petitioner was asked to make representation against his ACRs for the period 2009-2010 and 2010-2011, if he so desires and accordingly, the petitioner submitted detailed representation dated 21.12.2013. However, the petitioner received no reply and therefore, he submitted an application dated 29.4.2014, wherein he pointed out the injustice done to him. Vide office memorandum dated 5.9.2014, the petitioner was informed that his case was examined by the competent authority and there was no change in his earlier ACR for the following period :

2009-2010 with effect from 1.4.2009 to 11.12.2009 – “Average”.

2010-2011 with effect from 21.10.2010 to 31.3.2011 - “Average”.

11. Being aggrieved, the present petition has been filed.

12. Learned counsel appearing on behalf of the petitioner submits that every entry in the ACR of a public servant must be communicated to him within a reasonable period whether it is poor, fair, average, good or very good entry. This issue has already been decided by the Supreme Court in case of Dev Dutt Vs. Union of India (2008) 8 SCC 725. It is further held that 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 principles of fairness, which is the sole of natural justice. Even, an outstanding entry should be communicated since that would boost the morale of employee and made him to do best.

13. In case of Sukhdev Singh Vs. Union of India & Others (2013) 9 SCC 566, which is decided by Full Bench of the Supreme Court and their Lordships were in complete agreement with view taken in Dev Dutt (Supra).

14. It is important to note that in Sukhdev Singh (Supra), the Hon'ble Supreme Court considered the case of Abhijit Ghosh Dastidar Vs. Union of India (UOI) and Ors, (2009) 16 SCC 146, wherein held that the entries could if at all granted to the employee, the same should not have been taken into consideration for being considered promotion to the higher grade, if the entry in the ACR has not communicated to the employee.

15. The similar issue came before this Court in case of Union of India Vs. V S Arora recorded as 2012 (8) AD (Delhi) 365. The issue before this Court in the said case was with regard to the below benchmark ACRs, which were not communicated to the employee. The question was whether when the DPC meets, what does it have to do with regard to those below

benchmark and non- communicated ACRs ? Does it consider those ACRs or is it the requirement of law that the ACRs should be communicated to the concerned employees even at that stage and that they be given an opportunity to move representation against the same and after the representation are disposed of, the DPC should be reconvened to consider the case of the employees for promotion ?

16. The said issue has answered by this Court in para 14 as under :

“however, the Supreme Court in Abhijit Ghosh Dastidar (supra) went further and observed categorically that, therefore, the entries “good”, if at all granted to the appellant, ought not to have been taken into consideration for being considered for promotion to the higher grade. What this meant was that the below benchmark ACRs, which had not been communicated to an employee, ought not to be taken into consideration for the purposes of considering the promotion of that employee to a higher grade. We must also distinguish between the stage when ACRs are written and the stage when they are considered by the DPC. What Dev Dutt (supra) and, indeed, Abhijit Ghosh Dastidar (supra) hold in unison is that the ACRs must be communicated to the concerned employee/officer soon after it is written. Because, its non-communication is contrary to the provisions of article 14 of the Constitution. But, this is at the stage when the ACRs are recorded or shortly thereafter. The objective of communicating the ACRs is two-fold. In the first place, as an element of natural justice, the officer concerned gets an opportunity of representing against the ACR before it is too late. Secondly, it also informs and warns the officer concerned that his performance is not upto the mark so that he may improve himself in the next year. However, at the stage of the DPC, the ACRs already stand crystallized and their communication then may not serve any fruitful purpose apart from informing the concerned employee/officer and, perhaps, enabling him to represent against it. But, the second aspect of improvement is lost. Consequently, at the stage of the DPC meeting the practical approach would be to not consider the un-communicated ACRs as held in Abhijit Ghosh Dastidar (Supra).”

17. On the other hand, Mr. Vinay Sabharwal, learned counsel appearing on behalf of the respondent no. 2 argue that the case of the petitioner is for promotion from Assistant Controller to Controller and the ACRs for the period April, 2009 to March, 2010 is in dispute. The postings of the petitioner during the period 9.5.2008 to 11.12.2009 was in Coal Handling Plant and from 12.12.2009 to 31.3.2010 was in stores. On account of his postings in different departments, during parts of relevant period, two ACRs were written in this case. The details of two ACRs are as under :-

<i>Period</i>	<i>Department of Posting</i>	<i>Reporting Officer</i>	<i>Reviewing Officer</i>	<i>Ranking</i>
<i>01.04.09 to 11.12.09</i>	<i>Coal Handling Plant</i>	<i>Sh.R.K.Singh-DM (T)</i>	<i>Sh.Harish Kumar-MGR (T)</i>	<i>Average</i>
<i>12.12.09 to 31.03.10</i>	<i>Stores</i>	<i>Sh.B.S.Puria-MGR(T)</i>	<i>Sh.Kumar (Santosh Kumar)DGM</i>	<i>Good</i>

18. Mr. Sabharwal further submits that for the posting of the petitioner in Coal Handling department;

(A). Shri R K Singh- AM (T) was not his reporting officer, Shri G K Sharma – AM was his reporting officer.

(B) Shri Harish Kumar – Manager (T) was not his reviewing officer, but Shri B S Puria – Manager in Coal Handling Plant was the Reviewing Officer. For his postings in stores, Shri B S Puria Manager (T) was working as Manager of stores and he was his reporting officer and Shri Santosh Kumar DGM was his Reviewing Officer.

19. He further submits that the allegation of the petitioner is that both Shri B S Puria and Shri Santosh Kumar were also his superiors in Coal Handling Plant. Moreover, on petitioner's representation, inquiries were initiated wherein Shri Jagdish Kumar - Director (Technical) observed as under :

"Sh. M. D. Sharma, Asstt. Controller alongwith the reply of Memorandum, Sh. B. S.Puria, signed as Manager (CHP) IP Stn. On the joining report of Sh. M. D. Sharma on 13.05.2008. But the period under question is from 01.04.2009/09.05.09 to 11.12.2009. therefore, the claim of Sh. M. D. Sharma that Sh. B.S.Puria was his Manager is seems to be not tenable.

Moreover, ACR of Sh. M.D.Sharma for the period from 01.04.2009 to 31.03.2010 was reported by Sh. R.K.Singh on 06.04.2010 whereas again. ACR for the same period is filled up by Sh. B.S.Puria on 29.04.2010 so after filign the first ACR. At that time Sh. Santosh Kumar was working as DGM and he was given the final rating on the second ACR."

Sh. Jagdish Kumar-Director (Technical) gave further directions as under:-

"Therefore, Sh. Santosh Kumar, now GM(T) IP Stn. Is instructed to put on record the name of immediate officers of Sh. M.D.Sharma, Assistant Controller, during the period from 01.04.2009 to 31.03.2010 and posting of Sh. B.s.puria and Sh. R.K.Singh during this period to ascertain the authenticity of both the ACRs of the same period,

*Sd/-
09.01.2017
Jagdish Kumar
Director (T)"*

20. Learned counsel further submits that the conclusions of Shri Santosh Kumar now GM (T) IP Station were given as under:-

“In reference to the noting of Dir (T) on page-19/N, the clarification in chronological order is as under:-

Sh. M.D.Sharma joined his duty as Asstt. Controleer in Coal Handling Plant at IP Station on 09.05.2008 and his immediate Reporting Officer was Sh. R.K.Singh, AM (CHP) and Sh. B.S.Puria was Manager (CHP) who later on transferred to Store Department IP Station on 03.08.2009 and since then Sh.R.K.Singh was the AM(I/C) CHP, IP Station (circular at page-25/Cr.).

Sh. M.D.Sharma, Asstt. Controller, transferred to Store, IP Station on 11.12.2009 (page-30 b/Cr.) under the control of Sh. B.S.Puria, Manager (Store).

From the above fact, it is revealed that from 01.04.2009 to 11.12.2009, Sh. R.K.Singh was the Reporting Officer of Sh. M.D.Sharma and from 12.12.2009 to 31.03.2010 Sh. B.S.Puria was the Reporting Officer of the Sh.M.D.Sharma (since there was no Asstt. Manager available in store). Hence, ACR for the period from 01.04.2009 to 11.12.2009 was reported by Sh.R.K.Singh and ACR for the period from 12.12.2009 to 31.03.2010 was reported by Sh.B.S.Puria, Manager (Store).

Submitted Please

*Sd/- 25.01.2014
(Er.Santosh Kumar)
General Manager (T) RPH”*

21. While concluding, learned counsel for the respondent no. 2 has argued that as per the finding, ratings of Shri Murlidhar Sharma for the relevant period were as under :

- “1. 2009-10-Period w.e.f. 01.04.2009 to 11.12.2009- Average.*
- 2. 2009-10 – period w.e.f. 12.12.2009 to 31.03.2010 –Good.*
- 3. 2010-11 – period w.e.f. 02.06.2010 to 31.03.2011-Average.*
- 4. 2010-11 – period w.e.f. 1.0.2010 to 20.10.2010 – Good.”*

22. Thus, on account of his average ratings, he was found unfit for promotion. He further submits that the petitioner himself represented against the ACRs in question for twice which were sent to their Reporting and Reviewing Officer again to look/re-look. Accordingly, the Functional Director being the competent authority for final review has rated to the petitioner as '**Average**' for the period 2010 i.e. 1.4.2009 to 11.12.2009 and 2010-2011 (period 21.10.2010 to 31.3.2011 as **Average**) and further Functional Director/Competent Authority has mentioned in his note that the petitioner worked at Coal Handling Plant at IP Station and also at Bawana Plant and he does not deserve any review for the betterment rating, since he was uncomfortable to the work requirement and also took the opportunity of his medical treatment either not to working in shift or to other department or station. Accordingly, his final rating has not been considered for up-gradation by the competent authority. Thus, the judgments relied upon by the petitioner are of no help to the petitioner in the present facts and circumstances of the case.

23. Admittedly, the entries made in ACR of 2009-10 and 2010-11 have not been communicated to the petitioner before holding DPC for the promotion in question. Therefore, there is no necessity to discuss that who was Reporting Officer and Reviewing Officer of the petitioner for the year 2009-2010. However, for the sake of repetition, from the period from 1.4.2009 to 11.12.2009 his ACR was Average, but from 12.12.2009 to 31.03.2010 was good. So for the period 2.6.2010 to 31.03.2011, 'Average' and 1.04.2010 to 20.10.2010 was good. Undisputedly, both the ACR not communicated to the petitioner.

24. In case of *Sukhdev Singh (supra)*, it is held that the entries not be taken into consideration if not communicated to the employee. In the case in hand, the entries of the year 2009-2010 and 2010-11 have not been communicated but considered for promotion, which is against the settled law.

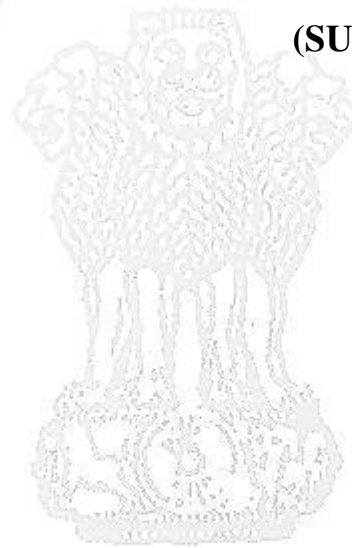
25. In view of above discussion and settled law, the petitioner is entitled for the promotion in question. Consequently, the respondents are directed to promote the petitioner with all consequential benefits w.e.f. the date his junior was promoted.

26. The writ petition is allowed accordingly, with no order as to costs.

27. Pending application, if any, is also disposed of.

November 13, 2018/p

**(SURESH KUMAR KAIT)
JUDGE**



नित्यमेव जयते