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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on : 20.11.2019

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Judgment pronounced on : 04.12.2019

+ LPA 160/2019, CM Appl. 10499/2019

PUNJAB NATIONAL BANK & ANR

..... Appellants

Through Mr. Rajesh Gautam & Ms. Sakshi
Gaur, Advocates.

versus

S K KARDAM

..... Respondent

Through Mr. Raman Gandhi & Ms. Harsha
Sharma, Advocates.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

1. The present appeal assails the order dated 06.02.2019 passed by a Learned Single Judge of this Court whereby the Learned Single Judge has allowed the writ petition filed by the respondent and has directed the appellants herein to promote the respondent with all consequential benefits with effect from the date other officers were promoted pursuant to the DPC held in 2015.
2. Shorn of unnecessary details the relevant facts necessary for adjudication of the present appeal are that the respondent herein was initially appointed as a clerk-cum-cashier on 12.02.1981. He was promoted to the post of Scale I officer on 17.10.1988, Scale II officer

on 20.08.1988, Scale III officer on 13.07.2004 and finally to Scale IV on 30.08.2010. The case of the respondent as set out in the writ petition was that he had an unblemished record of service to his credit throughout his service of 36 years.

3. A promotion policy by way of Circular No. 252 was issued on 11th March, 2015 for regulating promotions for the year 2014-15. The same policy was followed for the promotion process held for the year 2015-16 and thereafter. This policy governed the selection process from Scale IV to Scale V. As per the said policy there was only one channel of promotion from SMG Scale IV to SMG Scale V i.e. based on merit. A minimum experience of 3 years' service in Scale IV with 12 years as minimum length of service was the eligibility criteria. In addition experience of three years as Branch Head in any scale was mandatory.
4. Selection parameters for the promotion process 2015-16 were as under:

Performance	50
Interview (minimum qualifying Marks 30%)	30
Group Discussions	20
Total	100

- (i) From amongst the applicants, the number of candidates to be called for group discussion and interview were to be determined in terms of the procedure given in clause 11 of the Policy. The eligible candidates were to be called in the order of seniority.
- (ii) The marks for performance of the 5 preceding years were to be reckoned. Weightage for Performance Appraisal Form (PAF)

parameters was to be assigned as illustrated in para 4(a) of the policy.

5. It was the case of the respondent that since he was called for the Written Test, Interview and Group Discussion, relevance of Clause 11 of the policy became immaterial.
6. Another promotion policy was circulated vide Circular No.741 dated 30.03.2016 for regulating promotions from Scale IV to Scale V for the year 2016-17. As per this policy also average of marks obtained as per Performance Appraisal Form—Annual Performance Appraisal Report (PAF-APAR) for the previous 5 years, was a contributory factor for promotion. As per the said policy, vacancies in SMG Scale V were to be filled up by promotion from SMG-IV, again on the basis of merit only. The marks allocated under various selection parameters were as under:

ANNUAL PERFORMANCE APPRAISAL REPORT(APAR)	50
WRITTEN TEST	20
INTERVIEW	25
GROUP DISCUSSION	05
Total	100

Minimum Qualifying Marks For Written Test	30%
Minimum Qualifying Marks For Interview	50%

7. Number of candidates to be called for the written test was to be decided as per Clause 11 of the policy. Candidates who obtained minimum qualifying marks in written test were to be called for interview and group discussion.
8. The respondent averred that the respondent appeared in the written test, interview and group discussion for promotion for the year 2015-16. The main criteria for assessing was the APARs for the last five years i.e. from 2009 to 2014 for the promotion year 2015-16 and APARs from 2010-2015 for the promotion year 2016-17.
9. The promotion process for promotion from Scale IV to Scale V was held for the year 2015-16 and the appellants brought out a list of empanelled and waitlisted officers recommended for promotion with effect from 25.04.2015. The name of the respondent was shown at serial No. 109 in the category of waitlisted Executives.
10. The respondent was never communicated the marks allotted to him in the APARs for the concerned years. He thus applied under the RTI and obtained information with regard to his score in the APARs from the year 2009-10 to 2013-14. The information given under the RTI indicated the following:

“7. Learned counsel further submitted that the Performance Appraisal Form—Annual Performance Appraisal Report (PAF-APAR) score of the petitioner, for the previous five years for promotion in the year 2015, as obtained through RTI (Annexure P-9) were as under:

2009-2010	81
2010-2011	65*

2011-2012	87
2012-2013	80
2013-2014	81
Total	394

11. Aggrieved by the downgrading in the ACR for the period 2010-11 the respondent made a representation to the Managing Director and CEO of the appellant bank and raised a grievance that the low score of 65 in the said ACR was not in consonance with his achievements during the said period. By this detailed representation the respondent requested the authority to review his ACR in terms of his achievements and grant redressal. The representation was however rejected by the Committee, by an order dated 17.01.2017.
12. In the year 2017-18 respondent was again considered for promotion from SMG IV to SMG V, but was not promoted as he obtained 67.57 marks in different parameters laid down in the policy whereas the last promoted candidate had obtained 74.90 marks. Yet again the respondent was unsuccessful for promotion even in the year 2018-19 as he scored 67.93 marks which were below the last waitlisted candidate having 70.57 marks.
13. In May, 2018 the respondent filed a writ petition bearing WP(C) No. 7325/2018, before this Court and prayed for quashing the Performance Appraisal Report (PAR) for the year 2010-11 and the promotion process held in the year 2015-16. A prayer was also made to promote him with effect from 25.04.2015 i.e. the date from which other candidates considered in the DPC of 2015 along with the respondent, were promoted. The said petition was allowed as mentioned above.

The present appeal has been filed assailing the said judgment of the Learned Single Judge dated 06.02.2019. Operative para of the judgement reads as under :

“39. In view of above discussion and settled law, the petitioner is entitled for the promotion in question in the year 2015. Consequently, the respondents are directed to promote the petitioner with all consequential benefits w.e.f. the date other officers were promoted pursuant to DPC held in 2015. To this effect, an order for promotion shall be issued within four weeks from the receipt of this order.”

14. The Learned Single Judge has primarily based its judgment on the plea of the respondent that the ACR for the period 2010-11 had been downgraded to a low score of 65. The said ACR had an impact on the average marks of the respondent and was a cause for his non-promotion. The Learned Single Judge came to a finding that the downgraded ACR had never been communicated to the respondent before holding the DPC for the promotion in question. Reliance was placed on the law laid down by the Apex Court in the case of ***Dev Dutt Vs. Union of India & others***, reported in ***AIR 2008 SC 2513*** and the three Bench judgment in the case of ***Sukhdev Singh Vs. Union of India & others***, reported in ***2013 (9) SCC 566*** for the proposition that an ACR which is below the bench mark or is downgraded requires to be communicated to the employee before it is considered in the DPC for promotion. An opportunity of representation must be afforded to the employee against the downgraded ACR. Reliance was also placed on the judgment of the Apex Court in ***Abhijit Ghosh Dastidar Vs. Union***

of India & others reported as **2009 (16) SCC 146** which was followed by a Co-ordinate Bench of this Court in the case of *Vs. V.S. Arora*, reported in **2012 (8) AD (Delhi) 365** for the proposition that if an ACR is uncommunicated the same must be ignored and should not be taken into account by the DPC.

15. Learned Single Judge also agreed with the contention of the respondent that since he belonged to SC category, there was a bias against him and deliberately a low score had been given to him in that particular year, in the ACR. The Court came to a conclusion that the reporting authority was biased, from the fact that the performance of the respondent in all the other years i.e. 2009-10, 2011-12, 2012-13 and 2013-14 was correctly assessed and the marks scored were much higher while for the same job and identical performance, a low score had been given in the impugned ACR. The Learned Single Judge thereafter made a calculation of the average of the ACRs of four years in the reckoning for the promotion and arrived at a figure of 82.25 as marks to be considered for the year 2010-11. Thereafter another calculation was arrived at by taking these as the marks for 2010-11 and a figure of 82.3 was arrived at out of 100 marks being the overall marks for the five years. By this methodology, the Single Judge came to a finding that if the impugned ACR did not have a low score, the respondent would have been promoted.
16. Learned counsel for the appellants submits that the Learned Single Judge has wrongly applied the law laid down in the following cases –
(i) *Dev Dutt (supra)*, (ii) *Sukhdev Singh (supra)* (iii) *Abhijit Ghosh Dastidar (supra)* and (iv) *V.S. Arora (supra)*.

17. Mr. Gautam, counsel for the appellants submits that while deciding the case of ***Sukhdev Singh*** (*supra*), the Supreme Court held that they were in complete agreement with the view taken in the case of ***Dev Dutt*** (*supra*). He further submits that in ***Dev Dutt*** (*supra*) the Court only laid down the law that downgraded ACRs should be communicated and the employee could make a representation thereafter.
18. Paras 8, 22, 37 & 41 of ***Dev Dutt***'s case (*supra*) relied upon by the appellants are reproduced as under:

“8. Learned counsel for the respondent relied on a decision of this Court in Vijay Kumar v. State of Maharashtra [1988 Supp SCC 674 : 1988 SCC (L&S) 42 : (1988) 8 ATC 790] in which it was held that an uncommunicated adverse report should not form the foundation to deny the benefits to a government servant when similar benefits are extended to his juniors. He also relied upon a decision of this Court in State of Gujarat v. Suryakant Chunilal Shah [(1999) 1 SCC 529 : 1999 SCC (L&S) 313] in which it was held: (SCC p. 542, para 25)

“25. Purpose of adverse entries is primarily to forewarn the government servant to mend his ways and to improve his performance. That is why, it is required to communicate the adverse entries so that the government servant to whom the adverse entry is given, may have either opportunity to explain his conduct so as to show that the adverse entry was wholly uncalled for, or to silently brood over the matter and on being convinced that his previous conduct justified such an entry, to improve his performance.”

On the strength of the above decisions learned counsel for the respondent submitted that only an adverse entry needs to be communicated to an employee. We do not agree. In our opinion every entry must be communicated to the employee concerned, so that he may have an opportunity of making a representation against it if he is aggrieved.

22. It may be mentioned that 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.

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.

41. In our opinion, non-communication of entries in the annual confidential report of a public servant, whether he is in civil, judicial, police or any other service (other than the military), certainly has civil consequences because it may affect his chances for promotion or get other benefits (as already discussed above). Hence, such non-communication would be arbitrary, and as such violative of Article 14 of the Constitution.”

19. Para 8 of **Sukhdev Singh**’s case (*supra*) is reproduced 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.”

20. It is contended that the law which has been laid down in the case of ***Dev Dutt*** (*supra*) was that the downgraded ACRs must be communicated to the officer concerned. ***Dev Dutt*** (*supra*) in fact does not lay down the procedure to be followed at the time of the consideration by the DPC. It is contended that in this LPA by an order dated 07.03.2019, the predecessor of this court had followed the path laid down by the Supreme Court as also by a Division Bench of this court in the case of ***Anil Kumar Vs. Union of India & others***, reported in **2019 SCC Online SC 86** and ***Sukhdev Singh*** (*supra*). It is submitted that following the law laid down, the Division Bench had directed the appellants to consider the representation of the respondent again and pass a speaking order. Counsel submits that this is clearly reflected in the order dated 07.03.2019. Once the representation has been rejected and the order is not challenged, the effect would be that the ACR in which respondent has been downgraded would be considered in the DPC. He further contends that thus the law as laid down in ***Dev Dutt*** (*supra*) and ***Sukhdev*** (*supra*) has been followed in letter and spirit.
21. Mr. Gandhi, learned counsel for the respondent, on the other hand, has relied upon the decisions rendered in the cases of (i) ***V.S. Arora*** (*supra*), (ii) ***Abhijit Ghosh Dastidar*** (*supra*), (iii) ***Union of India & others Vs. R.N. Kurmi & others***, SLP (CC) no.23481/2012 order dated 14.01.2013, (iv) ***Union of India & another Vs. Govind Jha & another***, SLP (CC) no.3482/2013 dated 09.04.2013, (v) ***Rukhsana Shaheen Khan Vs. Union of India & others***, Civil Appeal no.32/2013 judgment dated 28.08.2018 and (vi) ***Prabhu Dayal Khandelwal Vs. Chairman, UPSC & others***, reported in **AIR 2015 SC 3057**.

22. Mr. Gandhi submits that in view of the said judgements the only option available with the appellants would be to ignore the ACR of 2010-11 and rely upon the ACRs for the years 2008-09, 2009-10, 2011-12, 2012-13 and 2013-14 and hold a Review DPC. Strong reliance is placed on the concluding paragraphs 8, 9 and 10 in the case of **Abhijit Ghosh Dastidar** (*supra*). Counsel further submits that the case of the respondent would be squarely covered by the proposition so laid down. Paras 8, 9 and 10 of the judgment rendered in the case of **Abhijit Ghosh Dastidar** (*supra*), read 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 annual confidential report 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 of 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 [(2008) 8 SCC 725 : (2008) 2 SCC (L&S) 771 : (2008) 7 Scale 403] , 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.

9. Learned counsel appearing for the appellant has pointed out that the officer who was immediately junior in service to the appellant was given promotion on 28-8-2000. Therefore, the appellant also be deemed to have been given promotion from 28-8-2000.

10. Since the appellant had retired from service, we make it clear that he is not entitled to any pay or allowances for the period for which he had not worked in the Higher Administrative Grade Group A, but his retrospective promotion from 28-8-2000 shall be considered for the benefit of refixation of his pension and other retiral benefits as per rules.”

23. We have heard the learned counsels for the parties and examined their contentions.
24. The main plank of argument of the respondent before the Learned Single Judge was that in the impugned ACR for the year 2010-11 he has been given a low score of ‘65’ and this is the only aberration in his entire ACR profile. Respondent had thus relied on the judgment in the case of **Dev Dutt** (*supra*) referred to above for the proposition that uncommunicated ACRs cannot be considered by a DPC. Reliance was placed on the judgment of the Apex Court in the case of **Abhijit Ghosh Dastidar** (*supra*) to claim that the impugned ACR being uncommunicated, should have been ignored by the DPC.
25. Having traversed the various judgments, referred to by learned counsel for the respondent, there is hardly any doubt that the said judgments clearly lay down a proposition that if there is a downgrading in any ACR of an employee from its earlier profile or the ACR is below the Benchmark required for promotion of an employee, then the ACR must be communicated, before the said ACR is considered for his promotion.

This was on the premise that the ACR would have an adverse effect on the promotion viz the comparative profiles of those being considered along with him. In fact, in the case of *Dev Dutt (supra)*, the Apex Court went a step ahead to hold that all ACRs of the employees must be communicated as a routine, since the object of an ACR is to judge the performance and the employee must know if he is lacking in any aspect and is able to improve his performance. After the ACR is communicated the employee can give a representation to the Competent Authority against the ACR. On receipt of the representation the Competent Authority would consider the ACR along with comments of the reporting officers, taking into account the grievance raised by the employee. None of the said cases deal with the second stage, i.e. after the ACR is communicated and the representation received from the employee, is considered and rejected.

26. In the present case, it is an admitted fact that the respondent had earlier made a representation dated 21.06.2016 as he had learnt about the downgrading in his ACR. This was rejected by the Committee. Significantly, even thereafter this Court vide order dated 07.03.2019 had directed the appellants to consider the representation again and pass a speaking order. The said order is extracted below:-

“10. The Court further notes that the entire ACR for the year 2010 - 2011 has already been communicated to the Respondent and now in fact forms part of the record of the case.

11. In these circumstances, the Court directs that the said representation dated 21st June 2016, will be considered by the Chairman of the Appellant Bank and a reasoned decision thereon rendered by 30th April 2019. In doing

so, the Chairman will treat the representation dated 21st June 2016 as a representation against the downgrading of the Petitioner for the year 2010- 11 and not as a representation against his non-promotion. The reasoned decision thereon of the Chairman of the Bank will be communicated to the Respondent within one week thereafter and a copy thereof also be placed before this Court by the next date.”

Respondent chose to accept this order. The representation was rejected by the appellants by their order dated 23.04.2019. For reasons best known to the respondent he did not opt to challenge the said speaking order by way of a fresh petition, despite the Court giving him an option to do so, before the start of the arguments in this Court.

27. In our view the law as laid down in **Dev Dutt** (*supra*) and the subsequent judgments has been followed in letter and spirit since the ACR stands communicated. Respondent has made a representation, which stands rejected, and the rejection orders are unchallenged.
28. The Learned Single Judge has directed the petitioner to grant promotion to the respondent on the sole basis that the ACR was not communicated. In view of what has been observed above this finding cannot stand as even in 2016 the respondent had made a representation and this fact was before the Learned Single Judge. In our view, the Learned Single Judge has thus gone wrong in holding that the ACR was uncommunicated and law laid down in **Dev Dutt** (*supra*) has not been followed. The judgment thus deserves to be set aside.
29. Learned counsel for appellants is also right in his contention that in judicial review Courts cannot direct the employer to grant promotion to

the employee as this is the prerogative of and in the domain of the employer. The direction to grant promotion is beyond the scope of the jurisdiction of the Court. Even in a case where the ACR is uncommunicated or there is any illegality in the action of an employer in non-grant of promotion, the court can only direct reconsideration. No direction to promote the employee can be passed.

30. We thus find merit in the appeal. Judgment of the Learned Single Judge dated 06.02.2019 is set aside.

31. The appeal is allowed in the aforesaid terms.

CM Appl. 10499/2019

32. In view of the order passed in the main appeal, this application stands disposed of.

JYOTI SINGH, J

G.S. SISTANI, J.

DECEMBER 4th, 2019
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