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

+ **W.P.(C) 8687/2017 and CM APPL. 35657/2017 (stay)**

UNION OF INDIA

..... Petitioner

Through: Ms. Rashmi Malhotra, Advocate.

versus

DR. RAJENDRA PRASAD

..... Respondent

Through: Respondent in person.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE TALWANT SINGH

ORDER

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06.12.2019

Dr. S. Muralidhar, J.:

1. The present petition by the Union of India is directed against an order dated 6th February, 2017 passed by the Central Administrative Tribunal ('CAT'), Principal Bench, New Delhi disposing of OA No.456 of 2014 filed by the Respondent and directing that he should be granted Senior Administrative Grade ('SAG') with effect from 23rd January, 2007 i.e. the date when his juniors were so promoted, ignoring the two Annual Confidential Reports ('ACRs') for the years ending in March 2001 and March 2003. The Respondent was held entitled to all consequential benefits. The said impugned order was to be complied with within 3 months.

2. This is the 7th round of litigation as far as the Respondent is concerned. He joined the Indian Railway Medical Service ('IRMS'), which is a Group

‘A’ Service, on 8th March, 1979. He was promoted to the Junior Administrative Grade (‘JAG’) in 1990 and to the Selection Administrative Grade (‘SAG’) on 6th June, 2000. He was placed in the SAG on 7th January, 2009. He superannuated from the services of the Railways on 31st December, 2012 from the same grade.

3. For the first time, the Respondent filed OA No.588 of 1988 when he was not appointed to the upgraded post of Divisional Medical Officer (‘DMO’), whereas his juniors have been given that upgraded post. This was denied to him on the ground that his ACRs were below the benchmark. His OA was disposed of on 5th March, 1991 with directions to the Petitioner to review his ACRs for 3 consecutive years 1984-85, 1985-86 and 1986-87 and thereafter, assess his fitness for the upgraded post.

4. For the second time, the Respondent filed OA No.959 of 1992 when 186 Assistant Divisional Medical Officers (‘ADMOs’), including his juniors were promoted but he was left out. This OA was disposed of on 19th September, 1997, directing the matter to be placed afresh before the Departmental Promotion Committee (‘DPC’) with the direction that they would not take into account the remarks ‘not yet fit’ in the ACRs for the years 1984-85 and 1985-86 and also ignore the remarks of the Accepting authority in the ACR for 1987-88.

5. Pursuant thereto, the Respondent was granted senior time scale notionally with effect from the date when his juniors were promoted. However, he was denied the arrears of pay and allowances. This led the Respondent to

approach the CAT for the third time with OA No.2782 of 1999. This was allowed by the CAT on 13th November, 2000 with the direction to the Petitioner to pay him arrears with interest.

6. When 130 officers junior to him were promoted to SAG, but he was denied the same on account of his ACRs being below benchmark, the Respondent for the 4th time filed OA No.2670 of 2008. This was disposed of by order dated 19th August, 2009, the operative portion of which reads as under:

“3. Admitted position is that such reports were taken into consideration in the years 2006 and 2007, which were below the prescribed benchmark of 'Very Good' and that the same were not communicated to the applicant. That being so, in the light of the decision of Hon'ble Supreme Court in *Dev Dutt Vs. Union of India and others*, (2008) 8 SCO 725 and the decision of the Full Bench of this Tribunal in *A.K. Aneja Vs. Union of India & Ors.*, OA No.24/2007, decided on 7.05.2008, directions need to be issued. The respondents would communicate to the applicant all the concerned ACRs of the applicant, which maybe below benchmark, under consideration of the DPC held in 2006 and 2007 within 15 days from today and if the applicant makes a representation, the same would be disposed of by the respondents within a period of four weeks from the date of receipt of such representation. If the representation of the applicant may find favour with the respondents and his below benchmark reports are upgraded, commensurate to meet the benchmark, a review DPC may be held. Such a review DPC shall meet within four weeks from the date the reports of the applicant are upgraded.

4. Before we part with this order, we may mention that it is conceded position that the representation aforesaid of the applicant under rules has to be considered by an authority above the reviewing authority.”

7. Pursuant to the above directions issued by the CAT, the Respondent supplied copies of the two ACRs for the years that ended in March 2001 and March 2003. By his representation dated 10th November, 2009, the Respondent requested that both the below benchmark ACRs should be ignored as they had not been communicated to him in the past. He relied upon the decision in *Dev Dutt v. Union of India (2008) 8 SCC 725*.

8. When this was declined by the Petitioner by an order dated 26th November, 2010, the Respondent for the 5th time filed OA No.983 of 2012 which was disposed of by the CAT on 6th December, 2012, the operative portion of which reads as under:

“14. Looking to all aspects of the matter and keeping in view the facts and circumstances of the case, we are of the considered view that the impugned orders cannot sustain for the reasons indicated above. In the result, the impugned letters dated 20.11.2007 (Annexure A-1), 23.01.2007 (Annexure A-2) and 26.05.2010 (Annexure A-3) are quashed and set aside and the matter is remitted back to the respondents to reconsider the applicant's representation by the competent authority, i.e., the authority higher than the accepting authority.

15. The exercise, as ordained above, shall be completed as expeditiously as possible and preferably within a period of nine weeks from the date of receipt of a certified copy of this order. In case the applicant succeeds in upgrading his ACRs for the year ending March, 2001 and March, 2003, a review DPC needs to be Convened to consider the case of the applicant for promotion to the SAG level with effect from the date when his juniors have been promoted. In case the adverse order is passed against the applicant either in upgrading the ACRs or in review DPC, the applicant would be entitled to get a reasoned and speaking order.”

9. Consequent thereto, an order dated 7th May, 2013 was passed by the Railway Board holding that no revision in the entries/remarks in the ACRs for March 2001 and March 2003 is justified. This led the Petitioner to file, for the 6th time before the CAT, OA No.456 of 2014, seeking *inter alia* quashing of the above order dated 7th May, 2013 and a direction to the Petitioner to ignore all below benchmark ACRs of the Respondent which were not communicated but were taken into account as adverse for promotion to the SAG “even if the Appellant was ever informed of the grading”.

10. It must be mentioned that by interim orders dated 10th September, 2014 and 13th November, 2014 passed by the CAT, the Respondent submitted a fresh representation dated 28th November, 2014 against the below benchmark ACRs for the years 2000-01 and 2002-03. This was disposed of by the Member Staff, Railway Board by a speaking order dated 1st April, 2015, where *inter alia* it was concluded as under:

“On the whole the officer has failed to bring out any reasonable ground for changing the remarks/grading in his ACR for the year 2000-01 and 2002-03 or for treating these ACRs as null and void I have come to the conclusion that no revision of entries and remarks in the ACR for March 2001 and 2003 is justified.”

11. Before the CAT it was contended by the Respondent that it was mandatory for the below benchmark grading of ‘good’, for the years that ended in March 2001 and March 2003, to be communicated to the Respondent and that therefore in terms of the judgment of the Supreme Court in *Abhijit Ghosh Dastidar v. Union of India (2009) 16 SCC 146*,

such below benchmark grading was required to be ignored for the purpose of considering him for promotion to the post of SAG. He also referred to the OM dated 13th April, 2010 of the Department of Personnel and Training ('DoPT') which mandated the communication of the below benchmark ACRs within a reasonable period of time after they were returned by the concerned authorities. He pointed out that the officers who had written the ACRs in their capacities as Reporting/Reviewing/Accepting authorities had retired long back and that therefore, the speaking order dated 1st April, 2015 passed by the Member Staff Railway Board declining upgradation of the ACRs was meaningless.

12. The Petitioner, on the other hand, submitted that the ACRs for the period ending in March 2001 and March 2003 had in fact been communicated to the Respondent pursuant to the directions of the CAT issued on 19th August, 2009; his representations against the below benchmark ACRs for the aforementioned 2 periods had been considered by the Member Staff, Railway Board and rejected by a speaking order dated 1st April, 2015. Therefore, he could not be promoted as SAG with effect from 23rd January, 2009 as prayed for by him.

13. The CAT has in the impugned order referred to the judgment of the Supreme Court in *Abhijit Ghosh Dastidar v. Union of India* (*supra*) and held that the below benchmark ACRs for the 2 years had to necessarily be ignored and that the Respondent should be granted promotion to SAG from the date his juniors were so granted.

14. When the present petition was first heard on 26th September, 2017, while directing notice to issue to the Respondent, this Court stayed the operation of the impugned order.

15. This Court has heard the submissions of Ms. Rashmi Malhotra, learned counsel appearing for the Petitioner and the Respondent who appears in person.

16. Ms. Malhotra reiterated the submission made before the CAT, namely, that the below benchmark ACRs had indeed been communicated to the Respondent and that his representation against them had been rejected by a speaking order dated 1st April, 2015.

17. What has been overlooked by the Petitioner is the fact that the below benchmark ACRs for the periods that ended in March 2001 and March 2003 were not communicated to the Respondent soon after they were written. At the relevant point in time, since the gradings were 'good', they were not considered to be adverse. However, the fact remains that the 'good' grading was a below benchmark grading. While it is true that it is only after the judgment in *Dev Dutt (supra)* that the DoPT issued the OM dated 13th April, 2010, making it mandatory for below benchmark ACRs to be communicated, the legal position as explained in *Abhijit Ghosh Dastidar v. Union of India (supra)* is that the negative consequence to the officer of such below benchmark gradings being relied upon for denying him SAG, cannot be overcome merely by communicating it to him much later and his representations against such below benchmark gradings being considered by

officers who had no opportunity to watch his performance. The following observations in *Abhijit Ghosh Dastidar v. Union of India* (*supra*) explain this position:

“4) It is not in dispute that the CAT, Patna Bench passed an order recommending the authority not to rely on the order of caution dated 22.09.1997 and the order of adverse remarks dated 09.66.1998. In view of the said order, one obstacle relating to his promotion goes. 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 ACR 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 for promotion or get 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 above referred decision 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.

5) 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 28.08.2000. Therefore, the appellant also be deemed to have been given promotion from 28.08.2000. 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 28.08.2000 shall be considered for the benefit of re-fixation of his pension and other retrial benefits as per rules.

6) The appeal is allowed to the above extent. No costs.”

18. In the present case also a speaking order was passed by the Member Staff, Railway Board who had no occasion to watch the performance of the Respondent when the below benchmark ACRs were written i.e. the periods that ended in March 2001 and March 2003. His declining to revise the grading is, therefore, to no avail.

19. Consequently, no interference is called for with the impugned order of the CAT. The petition is dismissed. The interim order is vacated and the application is disposed of.

S. MURALIDHAR, J.

TALWANT SINGH, J.

DECEMBER 06, 2019

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