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

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+ **W.P.(C) 9694/2017 & CM APPL. 39466/2017 (stay)**

UNION PUBLIC SERVICE COMMISSION

..... Petitioner

Through: Mr Naresh Kaushik with Ms Vibhuti
Tyagi and Mr Tapasvi Raj,
Advocates.

versus

RASIKA CHAUBE AND ORS.

..... Respondents

Through: Respondent No.1 in person.
Mr Akshay Makhija, CGSC for UOI
with Ms Seerat Deep Singh,
Advocates.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE TALWANT SINGH

ORDER
05.11.2019

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Dr. S. Muralidhar, J.:

1. This petition by the Union Public Service Commission ('UPSC') is directed against an order dated 18th August, 2017 passed by the Central Administrative Tribunal ('CAT'), allowing OA No.3345/2015 filed by Respondent No.1, and setting aside the assessment made by the Second Review Departmental Promotion Committee ('Review DPC') held on 16th May, 2014, and directing that a fresh DPC be convened to reassess Respondent No.1, in light of the impugned order, within a period of 12 weeks from the date of the receipt of the order. It further directed that if Respondent No.1 succeeded, her position in the Junior Administrative Grade

(‘JAG’) panel would be accordingly determined and she would also be entitled to consequential benefits.

2. The facts in brief are that Respondent No.1 is an officer in the Indian Defence Accounts Service (‘IDAS’). She was appointed to the IDAS with effect from 28th August, 1986 based on the results of the Civil Services Examination held in 1985. Nine persons were appointed to the IDAS. Respondent No.1 was the senior-most and placed in Junior Time Scale of the IDAS. She retained her senior most position at Sl. No.1, even after her promotion to Senior Time Scale on 7th January, 1991.

3. In a DPC held in the UPSC on 19th December 1995, Respondent No.1 was considered for promotion to the JAG of the IDAS. The assessment matrix was the grading in the Annual Confidential Reports (‘ACRs’) for the period 1990-91 to 1994-95. Apparently, in the ACRs for the period 1991-92 to 1993-94, although there were no adverse remarks, the Reviewing Officer downgraded Respondent No.1 from ‘outstanding’ to ‘very good’. Thus, while she was granted the JAG, she was assessed as ‘very good’, whereas four others junior to her were assessed as ‘outstanding’. Therefore, in the seniority in the JAG grade, Respondent No.1 was superseded.

4. In terms of the extant guidelines contained in the Office Memorandum (‘OM’) No.22011/5/86-Estt (D) dated 10th April, 1989, issued by the Department of Personnel and Training (‘DoPT’), the above downgraded ACR was not treated as ‘adverse’ and therefore not communicated to Respondent No.1. Had it been communicated, Respondent No.1 would have

had an opportunity of representing against the downgrading even prior to the DPC.

5. The impact of the 'very good' grading was that Respondent No.1 lost her seniority from the No.1 position in the batch to No.5. Respondent No.1 was unable to access her ACRs. It is only through an application under the Right to Information Act, 2005 ('RTI Act') made in 2009, that Respondent No.1 was given access to her ACRs for 1990-91 to 1994-95. According to Respondent No.1, she noticed irregularities committed by the Reviewing Officer in downgrading the 'outstanding' grading given by two different Reporting Officers, to 'very good' in the three ACRs from 1991-92 to 1993-94, without assigning any reasons. As regards the ACR for 1994-95, there was a procedural lacuna, as the ACR was written without following the laid down procedure.

6. Respondent No.1 filed a representation dated 19th November, 2009 before the Controller General of Defence Accounts ('CGDA'), i.e. the Competent Authority ('CA') against the downgrading in her ACRs from 1991-92 to 1994-95. The CA passed an order on 30th November 2009 as under:

"The downgrading of 'Outstanding' gradings given by the reporting officer (s) all through these years have been undertaken by the same reviewing officer (Shri A.K. Lal) without assigning any reasons. Therefore, the remarks/grading of the review/accepting authorities in these CRs may be treated as non est and the grading given by the reporting officer (s) as 'Outstanding' shall prevail."

7. Thereafter on 5th January, 2012, a Review DPC was held. However,

instead of ignoring the 'very good' grading for the years 1991-92 to 1993-94, on account of their expunction by the CA, the DPC took it into account. The Review DPC accordingly decided not to recommend any change to the proceedings of the DPC held on 19th December, 1995. This was conveyed to Respondent No.1 by the CGDA by a letter dated 20th January, 2012.

8. Respondent No.1 then filed OA No. 749 of 2012 before the CAT. By a judgment dated 3rd January, 2013, the CAT allowed the OA and quashed the order dated 20th January, 2012, and the minutes of the Review DPC dated 5th January, 2012, as being 'illegal, arbitrary, and violative of Article 14 of the Constitution'. The Respondents in the said OA i.e. the Secretary, Ministry of Defence (Finance), the Secretary, DoPT, the CGDA and the UPSC were directed to call for a Review DPC, to consider the case of Respondent No.1 for promotion to the JAG grade from the date her juniors were promoted, by considering the modified ACR gradings for the period 1991-92 to 1993-94. Consequently, the decision of the CA dated 30th November 2009, declaring the 'very good' ACR gradings given by the Review and Accepting Authorities as *non est*, was upheld, with all consequential benefits, including restoration of her position in the panel for promotion as JAG retrospectively in accordance with law. The arrears of pay and allowances, in the event of Respondent No.1's promotion from the above date were restricted from the date of the Review DPC i.e. 5th January, 2012.

9. In its judgment dated 3rd January 2013, the CAT held that the supersession of Respondent No.1 by her juniors was in violation of the principles of natural justice. Further, the 'very good' grading in her ACRs for the

aforementioned three years i.e. 1991-92, 1992-93 and 1993-94 was '*non est*' and yet the DoPT was not ready to accept the expunction and the upgrading by the CA only on the ground that they were not done on the basis of any existing orders/instructions requiring communication of the ACRs that did not contain 'adverse remarks'. The DoPT agreed that a Review DPC could be held on the limited ground that the ACR for 1994-95 was '*non est*'. The CAT held that the above approach of the DoPT as well as the UPSC as "not positive" as it had resulted in injustice to Respondent No.1. The CAT also applied the ratio of the judgment of the Supreme Court in ***Dev Dutt v. Union of India (2008) 8 SCC 725***, on the basis of which fresh DoPT instructions dated 14th May 2009, were issued, requiring the entire ACRs/Annual Performance Appraisal Review ('APAR'), including the overall grading and assessment to be communicated to an officer to enable such officer to make a representation against the entries and gradings. The CAT rejected the plea that the said OM would only apply prospectively.

10. The judgment dated 3rd January, 2013 of the CAT was challenged by the Union of India in this Court in W.P.(C) No.5453/2013. This Court dismissed the said writ petition by an order dated 5th September 2013 in which it noted that the judgment in ***Dev Dutt v. Union of India (supra)*** had been reiterated by the Supreme Court ***Sukhdev Singh v. Union of India (2013) 9 SCC 566***. It was observed by this Court in para 6 of its order as under:

"6. This Court is of the opinion that having conceded to the applicant's request for revisiting the original ACR gradings which resulted in administrative injustice to her, the further view taken by the Departmental Promotion Committee - and sought to be tenaciously argued before the Tribunal and later today before this Court - that in the absence of any DoPT

instructions the said benefit would remain ineffective, is stated to be rejected. What essentially the Union seems to be urging in these proceedings is that even though it is its duty to do proper justice and is in fact so done while upgrading the ACR upon representation of the employee who deserves it, it would yet not give full effect and further benefit to the employee due to its own lack of communication/or failure to issue the necessary instructions. The palpable arbitrariness of this argument is writ large. That such an argument can even be made before the Courts much less countenanced, has to be highlighted as an example of sheer obduracy.”

11. No Special Leave Petition (‘SLP’) was filed in the Supreme Court against the order of this Court dated 5th September 2013, which affirmed the order of the CAT passed in 2013. The said orders, therefore, became final.

12. Respondent No.1 filed Contempt Petition No.396/2013 for implementation of the order of the CAT. In the said contempt petition, the CAT granted four weeks’ time, on 12th September 2013, for compliance. On 18th October, 2013, the DoPT advised as under:

“.....In view of these developments, we may agree to holding of the Review DPC in the matter in compliance with the directions dated 3/1/2013 of Hon'ble CAT (PB) in the subject OA. The recommendations of the Review DPC, however, would be subject to the outcome of the proposed SLP being filed by the Administrative Department.”

13. A Second Review DPC was held on 16th May, 2014. It noted that the DoPT had advised on 9th October 2013, that an SLP be filed against the order of this Court. It further noted that “the administrative Ministry is in the process of filing an SLP”. This was almost more than a year after the order of this Court, and yet no SLP had been filed.

14. The Second Review DPC again took note of the DoPT's OM dated 10th April 1989 and in particular paras 6.2.1(e) and (f) which read as under:

“(iv) 6.2.1 (e) – The DPC should not be guided merely by the overall grading, if any, that may be recorded in the CRs but should make its own assessment on the basis of entries in the CRs , because it has been noticed that sometimes the overall grading in a CR may be inconsistent with the grading under various parameters or attributes.

(v) 6.2.1 (f) – If the Reviewing Authority or the Accepting authority as the case may be has overruled the Reporting Officer or the Reviewing authority as the case may be, the remarks of the latter authority should be taken as the final remarks for the purposes of assessment provided it is apparent from the relevant entries that the higher authority has come to a different assessment conclusively after due application of mind. If the remarks of the Reporting Officer, Reviewing Authority and Accepting authority are complementary to each other and one does not have the effect of overruling the other, then the remarks should be read together and the final assessment made by the DPC.”

15. The Second Review DPC also took into account an OM dated 17th December 1986 issued by the DoPT in terms of which, it was noted as under:

“a government servant should not be graded as 'Outstanding' unless exceptional quality and performance has been noticed in him. Grounds for giving such grading should be clearly brought out.”

16. According to the Second Review DPC, the CA's order dated 30th November 2009 was not a “speaking order.” The Second Review DPC, therefore, decided to “carefully” go through “the ACRs of the three relevant

years and the specific comments of the reporting, reviewing and accepting authorities.”

17. The Second Review DPC picked up the ACR for 1991-92 and reproduced the Reviewing Officer’s assessment which simply stated that the Reporting Officer had been ‘too generous’ and that at this stage her performance cannot be rated as ‘outstanding’ and as a result the Review DPC again assessed the Respondent’s ACR for 1991-92 as ‘very good.’ The same exercise was undertaken for 1992-93 and 1993-94 by reproducing the Reviewing Officer’s remarks. In other words, the Review DPC ignored the fact that the CA had overruled those remarks and that both the CAT and this Court had treated such downgrading by the Reviewing Officer as *non est*. As a result, the Second Review DPC in its proceedings of 16th May 2014 did not recommend any change in the proceedings of the DPC held on 19th December 1995, and the First Review DPC held on 5th January 2012.

18. Interestingly, two months prior to the Second Review DPC when an opinion was sought of the Additional Solicitor General of India (ASG) on 14th March 2014 for filing an SLP against the order dated 5th September 2013 of this Court, he gave an opinion that it was not a fit case for filing an SLP. The same issue was again taken up with another ASG on 12th June 2014 only on the basis that yet another ASG had advised filing an IA for clarification of the directions issued in **Sukhdev Singh** (*supra*). The third ASG who considered this, was of the opinion that the filing of IA in **Sukhdev Singh** ‘will have no bearing on this case’. He noted that the specific challenge was to the First Review DPC’s decision dated 5th January,

2012 which ignored the order dated 30th November, 2009 by the CA by which the grading of the Respondent was restored as 'outstanding'. He observed as under:

“In the teeth of such a decision, the Review DPC had to take cognizance of the renewed ACR. This is what the High Court directed. These facts are very distinct from that of the principle laid in *Sukhdev Singh* case.

I am therefore, of the opinion that it is not a fit case to file SLP.”

19. With the Second Review DPC reiterating the view of the First Review DPC, Respondent No.1 for the second time had to approach the CAT with OA No.3345 of 2015. After noting the entire sequence of events, the CAT in the impugned order dated 18th August 2017 concluded that the Second Review DPC had erred in simply reiterating the First Review DPC by considering the 'very good' grading which had already been declared '*non est*'. According to the CAT:

“The implication of ignoring the order of the competent authority was as if the representation of the applicant had been rejected by the competent authority whereas the factual position was not so. The representation had been allowed by the competent authority and remarks of reviewing and accepting authorities were declared as non est.

8.2 By doing so, the review DPC has acted as an authority superior to the competent authority and has assessed the order passed by the competent authority on its merits. This was clearly beyond the purview of the second review DPC.”

20. The CAT also held that the Second Review DPC had acted against the directions given by the CAT in its order dated 3rd January 2013 upheld by

this Court by its judgment dated 5th September 2013.

21. At the first hearing of the present petition on 2nd November, 2017 while directing notice to issue to the Respondents, this Court stayed the operation of the impugned order dated 18th August, 2017 of the CAT. Thereafter, a reply has been filed by Respondent No.1 and a rejoinder thereto by the UPSC. It must be noted that the MoD and the CGDA have supported the case of Respondent No.1. It is only the UPSC which is persisting with its challenge to the impugned order of the CAT.

22. Mr. Naresh Kaushik, learned counsel for the UPSC, submitted that the Second Review DPC was not bound by the opinion of the CA. He submitted that it was open to the Second Review DPC to form an independent view. He further submitted that this Court will not sit in appeal over the view formed by the Second Review DPC which was made on the basis of overall assessment of the ACRs of Respondent No.1. Reliance was placed on the decisions in *UPSC v. M. Sathiya Priya AIR 2018 SC 2790*, *UPSC v. Arun Kumar Sharma (2015) 12 SCC 600*, *Union of India v. S.P. Nayyar (2014) 14 SCC 370* and the decisions of this Court in *Ram Nath v. Union of India* (decision dated 17th May 2016 in W.P.(C) 8403 of 2014), *UPSC v. Sugan Singh* (decision dated 2nd December 2015 in W.P.(C) 447 of 2014), *Union of India v. Hoshiyar Singh* (decision dated 1st May 2015 in W.P.(C) 2558 of 2015).

23. This Court has also heard the submissions of Respondent No.1, who appeared in person.

24. While the general proposition in the aforementioned decisions that the question of assessment of candidates by a selection committee on an overall view of the ACRs should not be interfered with by a Court is unexceptionable, in the present case the issue is distinctly different. It appears to the Court that the Second Review DPC misconstrued the scope of its exercise as a result of the orders of the CA, which had been upheld both by the CAT by its order dated 3rd January 2013 and by this Court by its judgment dated 5th September 2013, both of which had attained finality. Although the First Review DPC characterised the decision of the CA to restore the 'outstanding' grading of the Respondent No.1 for 1991-92, 1992-93 and 1993-94 as a 'non speaking order' i.e. an order without reasons, both the CAT and this Court disagreed with that assessment and upheld the 'outstanding' grading given to the Respondent No.1 for the aforementioned years. With no SLP having been filed against the judgment of this Court, it was not open to the Second Review DPC to ignore the judgments of the CAT and this Court and simply reiterate what the First Review DPC had opined.

25. This is not an instance of the Court sitting in appeal over the grading given by the Selection Committee. Rather it is an instance where the Second Review DPC chose to ignore the binding judgments of the CAT and this Court, which had upheld the grading given by the CA. The Second Review DPC dismantled the binding decisions of the CAT and this Court by reiterating the gradings which had already been declared '*non est*'. This is, therefore, a case of the Second Review DPC acting in defiance of the binding judgments of the CAT and this Court.

26. The settled legal position is that a grading that has been declared '*non est*' ought not to be considered while considering a case of the candidate for promotion. The mandate of a Review DPC was to simply examine if on the basis of the grading of the Respondent No.1 being 'outstanding' for the aforementioned 3 years, she could be denied her rank in promotion to JAG from the very date her juniors were granted that grade. However, the Second Review DPC did not perform that exercise and took it upon itself to again assess Respondent No.1 for the aforementioned 3 years for the purposes of grading her. Thus, for the second time the Review DPC overlooked its primary mandate and fell into error.

27. The Court, therefore, concurs with the view expressed by the CAT in the impugned order and is of the view that it calls for no interference.

28. The petition is accordingly dismissed but in the circumstances no order as to costs. The interim order dated 2nd November 2017 is hereby vacated. The application for stay is disposed of.

S. MURALIDHAR, J.

TALWANT SINGH, J.

NOVEMBER 05, 2019

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