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

+ **W.P.(C) 4970/2010**

R NAIR

.....Petitioner

Through: Mr. Karan Luthra and Mr. Yogesh
Malik, Advocates.

versus

**FOOD CORPORATION OF INDIA
AND ANR**

.....Respondents

Through: Mr. Anil K. Sharma, Advocate.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

ORDER

08.10.2024

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1. This writ petition has been filed on behalf of the Petitioner under Article 226 of the Constitution of India for setting aside order dated 04.11.2009 passed by the Respondents whereby representation dated 17.09.2009 made by the Petitioner for grant of promotion to the post of Deputy Manager (General) [later re-designated as Assistant General Manager (AGM)] w.e.f. 23.04.1993 with consequential benefits, was rejected.

2. Facts to the extent necessary are that Petitioner joined Food Corporation of India ('FCI') on the post of Assistant Grade-III and was promoted as Assistant Manager (General) in 1976. On 13.03.1990, FIR No. 45/1990 was registered against the Petitioner under Sections 468/420/120B IPC. Petitioner was suspended on 13.04.1990 under Regulation 66(2)(a) of the FCI (Staff) Regulations, 1971 ('FCI Regulations') *albeit* the formal order is stated to have been passed on 03.07.1990. Suspension was revoked on 04.01.1996 and Petitioner re-joined on 11.11.1996.



3. It is the case of the Petitioner that between 1994-1998, his case was considered by the DPC but he was not granted promotion as the findings were kept in a sealed cover. Petitioner did not know the recommendations of the DPCs as the minutes were not given to him. Petitioner filed W.P.(C) No. 2337/1998 before this Court on 11.05.1998 claiming promotion from 1993 with consequential benefits. Pursuant to a DPC held on 27.09.2002, Petitioner was granted promotion to the post of AGM (General) against the vacancy of the year 1998 with notional pay fixation from 1998 but actual financial benefits only from 02.04.2003 i.e. the actual date of joining. After a full-fledged trial, Petitioner was acquitted in the criminal case by the Trial Court vide judgment dated 19.05.2005.

4. Petitioner avers that treating the Petitioner as honourably acquitted, his suspension period was treated as 'spent on duty' and he was paid full salary for the said period under Regulation 66(8)(a) of FCI Regulations. In view of this, the writ petition was disposed of by the Court on 11.09.2009 directing the Petitioner to make a representation to the Respondents for the benefits sought and a direction to the Respondents to decide the same by a speaking order. Pursuant to the said order, Petitioner represented on 17.09.2009 and by the impugned order dated 04.11.2009, the representation was rejected.

5. In a nutshell, learned counsel for the Petitioner raises two-fold questions: (a) whether the Petitioner could be denied promotion from 1994, contrary to DoPT O.M. dated 14.09.1992; and (b) whether Petitioner could be denied actual financial benefits from December, 1998 on his notional promotion. It is urged that promotion of the Government servant in respect of whom criminal/disciplinary proceedings are pending is governed by O.M.



dated 14.09.1992, as per which during the pendency of the said proceedings, promotion is not to be stalled and the assessment/recommendation of the DPC is to be placed in a sealed cover, which is not opened till termination of the proceedings. In case the government servant is completely exonerated, the due date of promotion will be determined with reference to the position assigned in the findings of the DPC and with reference to the date of promotion of his next junior on the basis of such promotion. It is submitted that Petitioner was entitled to be considered in the DPC convened on 24.06.1994 and granted promotion. It is further argued that while it was earlier not known to the Petitioner but during the pendency of this petition, from the chart placed on record by the Respondents it is now evident that in the said DPC, ACRs for the period 1985 to 1989 were considered and on account of a 'Fair' grading in the ACR of 1987, he was granted overall grading of 'Good' and this was possibly the reason why Petitioner was not recommended for promotion. It was not open to the Respondents to consider the 1987 ACR which had been downgraded but was never communicated to the Petitioner. The argument is that it is this ACR which has adversely impacted the promotion of the Petitioner in the DPC convened on 24.06.1994 and the same position continued in the DPC convened on 06.07.1995, wherein again 1987 ACR was considered resulting in the DPC awarding a grading of 'Good', on account of which the others who were assessed as 'Very Good' have stolen a march over the Petitioner.

6. Learned counsel places reliance on the judgment of the Supreme Court in *Dev Dutt v. Union of India and Others*, (2008) 8 SCC 725, wherein the Supreme Court observed that non-communication of gradings in the ACRs is violative of Article 14 of the Constitution as it has civil



consequences and this law will apply with greater vigour if the non-communicated ACR has 'Fair' grading. Reliance is also placed on the judgment of the Supreme Court in ***Prabhu Dayal Khandelwal v. Chairman, Union Public Service Commission and Others, (2015) 14 SCC 427***, where the Supreme Court held that non-communication of below benchmark gradings is arbitrary and an employee cannot be denied promotion by taking into consideration uncommunicated below benchmark ACRs. Reliance is also placed on a judgment of this Court in ***Sarita Tyagi and Another v. Shaheed Raj Pal Dav Public School and Others, 2023 SCC OnLine Del 3452***, for the same proposition. Relying on the judgment of the Supreme Court in ***Abhijit Ghosh Dastidar v. Union of India and Others, (2009) 16 SCC 146*** as well as judgment of the Division Bench of this Court in ***UOI & Anr. v. V.S. Arora & Ors., 2012 SCC OnLine Del 3193***, it is urged that the uncommunicated ACR of 1987 be ignored and direction be issued to the Respondents to conduct Review DPCs of the DPCs held on 24.06.1994 and 06.07.1995 and consider the case of the Petitioner ignoring the 1987 ACR.

7. Be it noted that during the course of hearing of this writ petition, Court had directed the Respondents to produce the ACR dossier of the Petitioner and was informed that the dossier has been weeded out. Pursuant to a direction of this Court, an affidavit dated 04.10.2024 has been filed by the Respondents stating that Sh. Mukesh Singh, the then Manger (Estt.) and now Assistant General Manager (General) posted at regional office Bhopal had authored a note that no case was pending relating to the Petitioner and therefore as a routine practice, ACR dossiers of 147 employees of the Respondents were weeded out in 2015, which inadvertently included the ACR dossier of the Petitioner.



8. Arguing on behalf of the Respondents, learned counsel submits that Petitioner was placed under suspension due to his arrest on 30.04.1990 and the suspension was revoked on 04.01.1996, whereafter Petitioner rejoined service on 11.11.1996. Case of the Petitioner was considered during the pendency of the criminal proceedings in the DPCs held on 24.06.1994 and 06.07.1995 along with the other employees for promotion to the post of AGM (General) but he was found unfit. Due to the pendency of the criminal case, findings of the DPCs were kept in a sealed cover. In 2002, Petitioner was empanelled for promotion as AGM (General) subject to review of the criminal case against the vacancy of 1998. On 19.05.2005, Petitioner was acquitted in the criminal case by giving him benefit of doubt and his suspension period was treated as 'period spent on duty'. Petitioner superannuated on 31.05.2005 and thereafter, on 29.11.2005, Review DPC considered the case of the Petitioner for promotion and he was granted promotion notionally from 1998. On the basis of Circular No. 36/1992, pay of the Petitioner was revised giving him notional pay fixation from December, 1998 and actual financial benefits from 02.04.2003 i.e. the actual date of joining as AGM (General). Case of the Petitioner is not covered under Regulation 66(8)(a) of FCI Regulations and moreover, it is open to the employer to examine all facts and circumstances under which the employee has been exonerated/acquitted in departmental or criminal proceedings respectively and then determine whether he is entitled to any arrears of pay for the period of notional promotion preceding the date of actual promotion.
9. Heard learned counsels for the parties and examined their rival contentions.



10. It is not disputed that Petitioner was placed under suspension on 30.04.1990 under Regulation 66(2)(a) of FCI Regulations, on account of his arrest in FIR No. 45/1990 and the suspension was revoked on 04.01.1996, whereafter, Petitioner re-joined service on 11.11.1996. During the pendency of the criminal proceedings, case of the Petitioner was considered for promotion to the post of AGM (General) for the first time by a DPC held on 24.06.1994. Since Petitioner was under suspension from 1990 to 1996, no ACRs were rendered for this period and therefore, the DPC considered five ACRs for the period 1985 to 1989. As per the chart filed by the Respondents, ACRs for the years 1985/1986 were 'Good' while those for the years 1988/1989 were 'Very Good' and the 1987 ACR was 'Fair'. The DPC assessed the Petitioner as 'Good' and the recommendation was placed in a sealed cover. In the next DPC held on 06.07.1995, the same position obtained. Once the sealed cover was opened, Petitioner was not granted promotion against the vacancies considered by the two DPCs on account of his overall grading as the promotion to the post of AGM (General) is based on merit-cum-seniority. It is explained by the Respondents that pursuant to the DPC held on 24.06.1994, the last officer promoted was at position No.55 with a grading of 'Very Good' while Petitioner was at No. 83 and thus even otherwise, he could not have come up for promotion, based on his seniority position. With respect to the DPC held on 06.07.1995, it is brought forth that Petitioner was at position No. 34 while the last officer promoted with the 'Very Good' grading, was at serial No. 33. Petitioner was later granted promotion but against the vacancy of 1998.

11. The question that arises for consideration is whether Petitioner is entitled for consideration by Review DPCs for the DPCs held on 24.06.1994



and 06.07.1995. There is no dispute that Petitioner was acquitted in the criminal proceedings and therefore following the DoPT O.M. dated 14.09.1992, the sealed cover was required to be opened and given effect to in consonance with the recommendations of the DPCs. It is equally undisputed that amongst the five ACRs considered by both the DPCs, one of the ACRs for the year 1987 was 'Fair' and was never communicated to the Petitioner. It is no longer *res integra* that all ACRs irrespective of the gradings have to be communicated to the concerned employee and non-communication is contrary to Article 14 of the Constitution of India and opposed to principle of fairness, transparency and equal opportunity as held by the Supreme Court in the celebrated judgment of *Dev Dutt (supra)*. In *Abhijit Ghosh Dastidar (supra)*, the Supreme Court held that if the below benchmark grading is not communicated, the same should not be taken into consideration by the DPC for promotion. In *V.S. Arora (supra)*, the Division Bench of this Court held that below benchmark gradings cannot be considered by the DPC, if they are uncommunicated and in that event, DPC should consider ACRs of the years preceding the year in question and if they are not available, ACRs of the lower grade should be taken into account. In the present case, the 1987 ACR with a 'Fair' grading was never communicated to the Petitioner and therefore, the DPCs were not justified in taking the said uncommunicated grading into consideration. There is no doubt that consideration of this ACR has led to the Petitioner being graded/assessed as 'Good' and his consequent non-promotion from 1994/1995. Ordinarily, Court would have directed FCI to communicate the downgraded 1987 ACR to the Petitioner for him to represent against the same, but with the passage of time this would be a futile exercise as neither



of the Reporting/Reviewing officers may be available. In the peculiar circumstance that the ACR dossier has been weeded out by FCI, no direction can be issued to ignore the 1987 ACR and consider the ACR for the year preceding 1985. Hence the only direction that can be passed is to direct FCI to convene Review DPCs of DPCs held on 24.06.1994 and 06.07.1995 taking into consideration ACRs for the years 1985, 1986, 1988 and 1989 and ignoring the 1987 ACR.

12. Insofar as the argument of the Respondents that Petitioner would not have come up for promotion even otherwise on account of his position vis-à-vis the last promoted officers is concerned, the same has no merit for the reason that promotion to the post of AGM (General) was based on merit-cum-seniority and in 1994, when supersession was permissible, Petitioner had a fair chance of promotion if he was assessed as 'Very Good' by the DPC, as he was admittedly in the zone of consideration and which is why the recommendations of the DPCs were placed in a sealed cover.

13. In view of the above, this writ petition is disposed of directing FCI to convene Review DPCs of the DPCs held on 24.06.1994 and 06.07.1995 taking into consideration ACRs for the years 1985, 1986, 1988 and 1989 and ignoring the 1987 ACR, within a period of six weeks from the date of receipt of this order. Needless to state that consequential benefits shall be granted to the Petitioner in case he is recommended for promotion. If for any reason, Petitioner is not recommended for promotion, a reasoned and speaking order shall be passed and communicated to the Petitioner, who will be at liberty to take recourse to legal remedies, if so advised.

JYOTI SINGH, J

OCTOBER 08, 2024/shivam