



2024:DHC:762-DB



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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision:- 02.02.2024

+ W.P.(C) 10292/2015
UNION OF INDIA & ANR Petitioners
Through: Mr. Harish Vaidyanathan Shankar,
CGSC with Mr. Srish Kumar Mishra, Mr.
Alexander Mathai Paikaday and Krishnan V.,
Advs. for UOI.

versus

D.B. ARORA Respondent
Through: Mr. A.K. Behra, Sr. Advocate with
Ms. Supriya Juneja, Mr. Amarendra Singh,
Advocates..

CORAM:
HON'BLE MS. JUSTICE REKHA PALLI
HON'BLE MR. JUSTICE GIRISH KATHPALIA

REKHA PALLI, J(ORAL)

1. The present writ petition under Articles 226 & 227 of the Constitution of India seeks to assail the order dated 24.12.2014 passed by the learned Central Administrative Tribunal (hereinafter referred to as 'the learned Tribunal') in O.A. No.4250/2013. Vide the impugned order, the learned Tribunal has, by relying on its earlier decision dated 09.01.2007 in *OA No.673/2004 titled Shri A.P. Srivastava vs. Union of India & Ors.*, allowed the claim of the respondent/applicant by holding that her Annual Performance Assessment Report (hereinafter referred to as 'APAR') for the period between 01.04.2009 to



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28.02.2010, having not been reviewed by any reviewing officer, was liable to be treated as non est.

2. Learned counsel for the petitioner submits that the impugned order is wholly perverse as the learned Tribunal has, while allowing the O.A of the respondent, erred in relying on its earlier decision in ***Shri A.P. Srivastava (Supra)***, without appreciating the fact that the factual matrix of the two cases was different. Unlike in the present case, where the respondent's aforesaid APAR written by the reporting officer was considered by a Referral Board, in ***Shri A.P. Srivastava (Supra)***, the APAR of the concerned employee was not examined/considered by any Referral Board. He submits that as per rules, the Referral Board is the final authority for considering representations against APARs and therefore, once the Referral Board had considered the representation of the respondent against the aforesaid APAR, it could not be said that the APAR, having written only by the reporting officer, was *non-est*.
3. On the other hand, Mr. A.K. Behra, learned senior counsel for the respondent supports the impugned order. He submits that taking into account that this APAR, wherein the respondent was, for the first time, downgraded to 'Good' as against her 'Outstanding' or 'Very Good' gradings during her entire service career, was written only by a reporting officer, the learned Tribunal was justified in relying on its earlier decision in ***Shri A.P. Srivastava (Supra)*** to hold the same as *non-est*. This decision was not only unsuccessfully assailed before the Apex Court but was also followed by the learned Tribunal in ***Ashok Kumar Aneja vs. Union of India, O.A. No. 24/2007 and Mrs. Swati***



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S. Patil vs. Union of India, O.A. 2033/2010. Once it is an admitted position that this APAR of the respondent was not considered by any reviewing authority as is mandated under the rules, the mere consideration of the respondent's representation against the said APAR by the Referral Board would not cure the infirmity in the APAR. He, therefore, prays that the writ petition be dismissed.

4. In order to appreciate the aforesaid rival submissions of the parties, we may begin by noting the relevant extracts of the impugned order, paragraph nos. 8 to 10, whereof read as under:

“8. The applicant has, however, submitted that it was the reviewing officer who had watched her performance and was in a position to assess the remarks given by the reporting officer. As none of the members of the Referral Board had the opportunity to watch the performance of the applicant in proximity, the question of absence of remarks of the reviewing officer does not get cured by a decision of the Referral Board.

9. We have examined the pleadings and the documents submitted by the rival parties and have also, considered the oral submissions made by the respective counsels. The only issue that arises for our determination is that whether the absence of remarks of reviewing officer amounts to single step APAR and would stand cured by a decision of the Referral Board?

10. In this regard, we find that a coordinate Bench of this Tribunal in Shri A.P. Srivastava versus Union of India & Ors. (supra) has examined the issues involving recoding of AGRs including the rational, the process, the infirmity and the cure therefor. After having gone through a series of decisions of the Hon'ble Supreme Court including that of State Bank of India etc. versus Kashinath Kher & Others (supra), the coordinate Bench has culled out the



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basic principle, which, for the sake of clarity, is reproduced as below:-

"35. Ranchi circuit bench of Patna Bench of the Tribunal in OA 3/200S to which Member (A) is a party., was considering the first question. It referred to the decisions of Apex Court in Amar Kant Chaudhary vs. State of Bihar, AIR 1994 SC 531, State of Baryana vs. P.C. Wadhwa, AIR 1987 SC 1201, Union of India Vs. E.G. Nambudiri, AIR 1991 SC 1216, S.Ramachandra Raju vs. State of Orissa, 1994(5) SLR 199, SH Rajasekhar vs. State of Karnataka, 1996; (S) SLR 643, State Bank of India vs Kashinath Kher, AIR 1996 SC 1328, State of UP. vs. Ved Pal Singh, AIR 1997 SC 608, Swatantar Singh vs. State of Haryana, AIR 1997 SC 2105, Union of India vs. N.R. Banerjee, 1997 SCC (L&S) 1194, State of U.P. vs. Yamuna Shanker Misra, 1997(4) SCC 7, State of Gujarat vs. Suryakant Chunilal Shah, 1999(1) SCC 529, P.K. Shastri vs. State of MP & Ors., 1999(7) SCC 329, B.P. Singh vs. State of Bihar, 2001 SCC (L&S) 403, and stated that following principles can be discerned from these judgments:

(i) Article 51(A)(j) enjoins upon every citizen to constantly endeavour to prove excellence individually and collectively. Given an opportunity an individual employee strives to improve excellence and thereby efficiency of administration would be augmented.

(ii) The object of writing confidential reports is twofold i.e., to give an opportunity to the officer concerned to remove the deficiencies, to improve his performance and to realize his potential



and secondly to improve the quality & efficiency of the administration.

(iii) The object of communicating adverse ACR to the officer concerned is to enable him to make amends, to reform, to discipline himself and show improvement towards efficiency, excellence in public administration.

(iv) One of the uses of ACR is to grade him in various categories like outstanding, very good, good, satisfactory and average etc.

(v) Purpose of adverse entries is to forewarn an employee to mend his way and improve his performance.

(vi) The ACRs must be recorded at two levels.

(vii) The ACRS must be recorded objectively and after a careful consideration of all the materials. It should not be a reflection of personal whims or fancies or prejudice, likes or dislikes of a superior.

(viii) The Apex Court in Nambudiri's case after referring to the Constitution Bench decision in Mohinder Singh Gill and G.S. Fijji has held that principles of natural justice apply to administrative orders if such orders inflict civil consequences. Civil consequences mean anything which affects a citizen in his civic life. Unjust decision in an administrative enquiry may have more far reaching consequences than a decision in a quasi-Judicial enquiry.

(ix) The Apex Court in Amar Kant Chaudhary and Yamuna Shankar Misra's case has emphasized the need for sharing information before forming an adverse opinion. The Apex Court in Amar Kant



Choudhary had asked the Executive to re-examine the existing practice of writing of ACRs to find a solution to the misuse of these powers by officers, who may not be well disposed.

(x) The Apex Court in Major Bahadur Singh has noted that promotions upto the post of Major are of length of service provided the officer fulfills the requirement. However, promotions above that rank are through process of selection.

The Apex Court further held:

“A reading of the instructions clearly indicates that there are different stages; first is the counseling, second is guidance and third is the consequence of the officer failing to show the desired improvement. Only when an officer fails to show the desired improvement the adverse/ advisory remarks are included in his confidential report so that cognizance is taken of his weakness while planning his future placements.”

36. The said Bench has also referred to the decision of the Apex Court in R.Viswanathan vs. Rukh-Ul-Mulk Syed Abdul Wajid, (1963) 3 SCR 22, Mohinder Singh Gill vs. The Chief Election Commissioner & Ors., AIR 1978 SC 851, Union of India vs. Tulsiram Patel, AIR 1988 SC 1416, Olga Tellis & Ors., vs. Bombay Municipal Corporation & Ors., AIR 1986 SC 180, East India Commercial Co. vs. Collector of Customs, AIR 1962 SC 1893, D.K. Yadav vs. JMA Industries Ltd., (1993) 3see 259, Canara Bank & Ors. vs. Debasis



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Das & Ors., 2000(3) SCC (L&S) 507, Canara Bank vs. V.K. Awasthy, (2005) 6 SCC 321, Mohd. Sartaj & Anrs. vs. State of U.P. & Ors., (2006)2 SCC 315 and discerned the following principles:

(a) The principles of natural Justice are not a straight Jacket formula.

(b) There are three matters which should always be borne in mind while considering whether the principle audi alteram partem should be complied with or not. First, what is the nature of property, the office held, the status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measures of control entitled to intervene. Thirdly, when the right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other. It is only upon a consideration of all these matters that the question of the application of the principle can properly be determined.”

c) Whether there was a right or interest or some legitimate expectation which it would not be fair to deny.

(d) An 'order involving civil consequences must be made consistent with the principles of



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natural Justice Everything that affects a citizen in his civil life inflicts civil consequences.

(e) Notice is the first requirement of Audi Alteram Partem rule.

One should not be deprived of an opportunity to present his side of the case,

(f) A corollary to the rules of natural Justice particularly the audi alteram partem rule is that justice should not only be done but should manifestly be seen to be done.

(g) A departure from Audi Alteram Partem may be presumed to have been intended by the legislature only in circumstances which warrant it. Such circumstance must be shown to exist, when so required, the burden being upon those who affirm their existence.”

This we find supported by decisions in Ashok Kumar Aneja versus Union of India & Others (supra) and Mrs, Swati S. Patil Versus Union of India & Others (Supra).

5. What emerges from the aforesaid findings of the learned Tribunal is that the learned Tribunal has accepted the respondent's plea that the defect in the recording of her APAR on account of the reviewing



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officer's failure to review the remarks endorsed by the reporting officer, was fatal and could not be cured on account of the consideration of her representation by the Referral Board. Taking into account that both the reporting officer and reviewing officer are expected to put their remarks in the APAR after watching the performance of the employee during the relevant period, we are inclined to accept the respondent's plea that the consideration of the APAR by the Referral Board cannot be a substitute for the remarks of the reviewing officer. The Referral Board, howsoever impartial, does not have the opportunity to watch the performance of the employee during the relevant year and therefore, their consideration of the APAR would be based only on the remarks given by the reporting officer as also by the reviewing officer.

6. In a case like the present, where there was no reviewing officer, the consideration of the respondent's representation by the Referral Board would naturally be based only on the remarks by the reporting officer, thereby defeating the very purpose of having a two-tier system for recording of an APAR. A two-tier system, in our view, not only ensures objectivity in the recording of the APAR, but also acts as a cushion from subjective remarks of one officer harming the employee. We have, therefore, no hesitation in concurring with the view taken by the learned Tribunal that the defect in the respondent's aforesaid APAR, on account of the absence of remarks by the reviewing officer, could not be cured by a mere consideration of her representation against the APAR by a Referral Board, who admittedly did not have personal knowledge about her performance.



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7. For the aforesaid reasons, we find no merit in the petition, which is, accordingly, dismissed. The petitioner is directed to comply with the directions issued in the impugned order within six weeks from today.

(REKHA PALLI)
JUDGE

(GIRISH KATHPALIA)
JUDGE

FEBRUARY 2, 2024

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