

**IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
HYDERABAD BENCH
HYDERABAD**

O.A. No.020/00388/2014

Date of CAV:29.11.2019.

Date of pronouncement : 24. 12.2019.

CORAM:

**THE HON'BLE MR.JUSTICE L.NARASIMHA REDDY, CHAIRMAN
THE HON'BLE MR.B.V.SUDHAKAR, MEMBER (ADMN.)**

Between :

Mrs.Janaki Arun Kumar, w/o M.N.Arun Kumar,
Aged about 57 yrs, Occ:Commissioner of Customs,
Central Excise and Service Tax, Tirupathi, O/o the
Commissioner of Customs, Central Excise and
Service Tax, Tirupathi.

...Applicant

(By Mr.J.Sudheer, Counsel for the Applicant)

And

1. Union of India, rep., by its Secretary,
M/o Finance, Department of Revenue,
North Block, New Delhi.

2. Central Board of Excise and Customs,
Rep., by its Chairman, North Block,
New Delhi.

3. Union Public Service Commission, rep.,
By its Secretary, Dholpur House,
Shahjahan Road, New Delhi.

... Respondents

(By Mrs.K.Rajitha, Sr.CGSC for R-1 & R-2 and
Mr.B.N.Sharma, SC for UPSC (R-3))



: ORDER:

(As per Hon'ble Mr.Justice L.Narasimha Reddy, Chairman)



The applicant is an IRS officer of 1979 batch. After initially being recruited as Assistant Commissioner, she was promoted to the post of Deputy Commissioner, Additional Commissioner and Commissioner in the Customs and Central Excise Department by the year 2002. She became eligible to be considered for promotion to the post of Chief Commissioner in the year 2011. The ACRs of officers for the preceding 5 years were called for. It is stated that the ACRs of the applicant for the years 2005-06 and 2007-08 (for short "two years") were rated as "Good". Since the benchmark for promotion was "Very Good", those two ACRs were communicated to the applicant. On a representation made by the applicant to the competent authority, the ACRs were upgraded to the level of "Very Good", vide proceedings dated 11.02.2011.

2. The DPC, which met on 11.05.2011, did not find the applicant fit for promotion. On a representation made by the applicant, she was informed that the DPC downgraded the ACRs for the two years, to the level of "Good" by observing that the competent authority has upgraded those two ACRs even while the assessment on various attributes remained the same. Several officers, who were junior to the applicant, were promoted as Chief Commissioners.



3. The applicant filed OA.No.1184/2011 before this Tribunal with a prayer to call for the records pertaining to the DPC held on 10.05.2011, where she was declared as unfit; and to declare them as illegal, arbitrary and violative of the principles of natural justice. A direction was also sought for her promotion to the post of Chief Commissioner, on par with her juniors and for consequential benefits. The said OA was allowed through an order dated 16.04.2011, holding that the steps taken by the DPC for downgrading the ACRs of the applicant for two years, was not proper. Direction was also issued to the respondents to convene a Review DPC, to consider the case of the applicant, afresh. A Review DPC was convened on 12.11.2013 and declared the applicant as not fit for promotion. Feeling aggrieved, the applicant challenged the proceedings dated 12.11.2013, issued by the Respondent No.1 with a prayer to set aside the said proceedings, and sought a direction to the respondents to promote her as Chief Commissioner of Customs and Central Excise with effect from the date on which her juniors were promoted for the year 2011, duly declaring the rejection of her case as illegal, arbitrary and unconstitutional.

4. The applicant contends that in OA.No.1184/2011, filed by her, this Tribunal dealt with every aspect and held that downgradation of her two ACRs from "Very Good" to "Good" was not proper and

despite that the Review DPC has virtually done the same thing. She contends that the action of the respondents amounts to disregarding of the various findings recorded and directions issued in O.A.No.1184/2011. It is stated that though the applicant had a bright career throughout, the ACRs were deliberately assessed a bit low and that at a stage when she was about to earn promotions, that wrong was corrected by the competent authority, but the DPC as well as the Review DPC have disregarded the same without any basis. It is also stated by the applicant that soon after the case was rejected for promotion, the department extended the benefit of non-functional upgradation and almost the same parameters that are applicable to regular promotion would apply for this also.

5. Reliance is placed upon the order of this Tribunal dated 16.04.2012 in OA.No.1184/2011 and certain OMs issued by the DOP&T, and other precedents also.

6. The Respondent Nos.1 and 2, and Respondent No.3 have filed their separate reply statements. According to them, the DPC is conferred with power to make its own assessment at the time of examining the cases of officers for promotion and the Hon'ble Supreme Court, time and again, held that the Tribunal or Courts




cannot sit as Appellate Authority over the conclusions arrived at by the DPC. It is stated that after the non-selection of the applicant for the year 2011 was set aside by this Tribunal, a Review DPC was convened and that the non-selection was on account of the ACRs, particularly, of the two years.

7. The respondents contended that the occasion to interfere with the decision of the DPC would arrive only when any malafides are alleged and any aspect of illegality is found out. In the instant case, no such factors exist.

8. Mr.J.Sudheer, learned counsel for the Applicant, has expanded the points urged in the OA and those, which are extracted in the preceding paragraphs, in the course of his arguments. He submits that in the earlier round, this Tribunal has noticed two infirmities viz., the defect in consideration by the DPC and the procedure adopted by it, and without rectifying the same, the Review DPC reached the same stage as the earlier DPC.

9. Mrs.K.Rajitha, learned senior standing counsel, appearing for the Respondents 1 and 2, submits that the DPC or Review DPC are





conferred with power to select the candidates for promotion and the subjective satisfaction arrived at by them, is not amenable to judicial review. She contends that the proceedings of the DPC, which met in the year 2011, in the case of the applicant, were set aside mostly on the ground that the two members thereof were part of the committee, which decided to upgrade the ACRs of the applicant and thereby the proceedings are vitiated. She further contended that the Tribunal has taken note of the judgments of the Hon'ble Supreme Court in (1) *Union of India v. A.K.Narula* (2007 (3) SCT 524/2007 (4) Recent Apex Judgments (RAJ) 34); (2) *Union of India v. S.K.Goel & Others* (2007 (2) SCT 171/2007 (1) Recent Apex Judgmnts (RAJ) 801); (3) *Dalpat Abasaheb Solunke & Others v. Dr.B.S.Mahajan & Others* (1990 (1) SCC 305/AIR 1990 SC 434); (4) *Nutan Arvind v. Union of India & Another* (1996 (2) SCC 488), and other similar judgments and taken a view that a selection committee is not placed under obligation to record reasons for its conclusions and that there is no rule or regulation reserving the selection committee to record reasons and in that view of the matter, the applicant cannot insist on recording of reasons by the Review DPC.

10. This is the second round of litigation initiated by the applicant in the context of consideration of her case for promotion to the post of Chief Commissioner.

11. The career of the applicant ever since she joined service was smooth till she fell for consideration for promotion to the post of Chief Commissioner in the year 2011. The benchmark for promotion to that post was "Very Good". In view of the judgment of the Hon'ble Supreme Court in *Dev Dutt vs Union of India & Ors* (2008 (8) SCC 725), the two ACRs of the applicant, which are below the benchmark i.e., "Good", those of the years 2005-06 2007-08, have been communicated to the applicant. On a representation made by the applicant, those two ACRS were upgraded to the level of "Very Good" by the Competent Authority. The profile of the applicant, together with the upgraded ACRS, was forwarded by the DPC. The DPC, however, took the view that the upgradation of ACRS for the two years, by the Competent Authority, to the level of "Very Good" did not record the attributes of the applicant, for those two years. Another important aspect is that the Competent Authority, which upgraded the ACRs of the applicant, comprised of 5 officers. The DPC also comprised the same number of officers, and two were common in both of them.

12. In OA.No.1184/2011, this Tribunal noticed the said anomaly and by mentioning certain other reasons, allowed the OA by setting aside the recommendations of the DPC, which met on 10.05.2011, insofar as it relates to the applicant, and directed the respondents to convene a Review DPC.



13. In compliance with the directions, a Review DPC was convened. The concluding paragraph of the minutes of the Review DPC, which met on 12.11.2013, reads as under:



“6. Now, therefore, in compliance with the order dated 16/04/2012 of Hon’ble CAT, Hyderabad Bench in O.A.No.1184/2011, meetings of the Review Departmental Promotion Committee (DPC) were held in UPSC on 07.10.2013, 17.10.2013 and 31.10.2013 to review the recommendations of the DPC meeting held on 10.05.2011 for promotion to the post of Chief Commissioner of Customs & Central Excise for the vacancy years 2009-10, 2010-11 and 2011-2012. The Review DPC considered the observations/order of Hon’ble Tribunal and examined the case records carefully. The Committee, in compliance with the orders of Hon’ble Tribunal, re-examined the relevant ACRs in respect of Ms.Janaki Arunkumar and records based on which speaking orders upgrading the overall grading from “Good” to “Very Good” were called by the competent authority. The Committee came to the conclusion that the overall grading in the ACRs of Ms.Janaki Arunkumar for the period 2005-06 and 2007-08 should be rated as ‘Good’. Consequently, the Committee graded her as ‘Good’. In view of the above, the Committee recommended ‘no change to the recommendations of the regular DPC held on 10.05.2011’.”

The earlier part of it is only narrative.

14. From a perusal of the same, it becomes clear that the Review DPC has taken into account, the ACRs of the applicant including those that were upgraded and ultimately observed that the overall grading in the ACRS of the applicant for the period for those two years must be rated as “Good”, and having assigned that grade, they found the applicant as not fit, for promotion.

15. The first ground urged by the applicant is that the exercise undertaken by the Review DPC is contrary to the specific directions issued by this Tribunal in OA.No.1184/2011, and the second is that the view taken by the respondents is contrary to law, particularly for its failure to record reasons in support of its conclusion for downgrading the ACRs to the level of “Good”.

16. In case, the order passed by the Review DPC was in violation of the orders of this Tribunal in OA.No.1184/2011, the course open to the applicant was to file a Contempt Petition. It is stated that a Contempt Petition was in fact filed and that the same was closed leaving it open to the applicant to challenge the impugned order.





17. In O.A.No.1184/2011, this Tribunal was mostly impressed of the fact that the two members were common to the Competent Authority on the one hand and the DPC on the other hand. An issue was framed as to whether the DPC has power to downgrade the ACRs when they were upgraded by the Competent Authority. That was answered in affirmative. After discussion on this issue, this Tribunal reached the conclusion as under:

“Accordingly, we hold that the DPC can make its own assessment on the basis of the entries in the ACRs, if the overall grading is inconsistent with the gradings on the various parameters or attributes. The first issue is decided accordingly.”

18. The next issue discussed by this Tribunal was about the power of the Tribunal to review the actions of the DPC. There again, the limitations in this behalf as laid down by the Hon’ble Supreme Court in *Dalpat Adasaheb Solunke v. B.S.Mahajan* (1996 (1) SCC 305), and *Nutan Arvind (Smt.) v. Union of India*, (1990 (2) SCC 488), were noticed. Para 9 of the order reads as under:

“9. The Hon’ble Supreme Court has held in a number of cases that it is not the function of the Court to hear appeals over the decisions of the Selection Committees and to scrutinise the relative merits of the candidates



Dalpat Adasaheb Solunke Vs. B.S.Mahajan (1996 (1) SCC 305 and *Nutan Arvind (Smt.) Vs. Union of India*, (1990 (2) SCC 488), etc.). But the Hon'ble Supreme Court has also provided for judicial review of the merits on the ground of it being arbitrary" (1997 (1) SLR153: *Smt.Anil Katiyar Vs. Union of India*). In *National Institute of Mental Health & Neuro Sciencies Vs. Dr.K.Kalyana Raman & Others* (1992 SCC (L&S) 959), though the Hon'ble Supreme Court upheld the contention of the Hon'ble High Court that the function of the Selection Committee being administrative in nature, it is under no obligation to record the reasons for its decision when there is no rule or regulation obligating the Selection Committee to record the reasons, the learned Judges indicated as to what is expected of the Selection Committee in the following words:-

"We may state at the outset that giving of reasons for decision is different from, and in principle distinct from, the requirements of procedural fairness. The procedural fairness is the main requirement in the administrative action. The 'fairness' or 'fair procedure' in the administrative action ought to be observed. The Selection Committee cannot be an exception to this principle. It must take a decision reasonably without being guided by extraneous or irrelevant consideration."

In Dalpat Abasaheb Solunke (supra), the Hon'ble Supreme Court also observed that the decision of the Selection Committee can be interfered with only on limited grounds such as illegality or patent material irregularity in the Constitution of the Committee or its procedure vitiating selection or proved malafides affecting the selection etc.,. Therefore, the only grounds on which the decision of the Selection Committee can be interfered with are (a) malafides; (b) arbitrariness; (c) illegality or (d) patent material irregularity in the constitution of the Committee or its procedure vitiating the selection."

19. The DPC, which met on 10.05.2011, took the view that the upgradation of the ACRs, even while the other attributes were intact, was not correct. Relating to the same, the Tribunal held that the Competent Authority may have simply upgraded the ACRs without touching the attributes. What impressed the Tribunal was that the 2nd respondent figured in the Competent Authority as well as the DPC. The relevant sentence reads as under:

“It is all the more surprising that the DPC came to this conclusion despite the 2nd Respondent who upgraded the ACRs being a Member of the Committee. In our considered view the action of the DPC is arbitrary and unfair.”

Once the Review DPC was convened, we do not find that the proceedings impugned in this OA are contrary to the adjudication undertaken in OA.No.1184/2011.

20. Coming to the second aspect urged in this OA, it is fairly well established that the DPC has every right to arrive at its own conclusion and that it is not under obligation to record reasons in support of its conclusion. The occasion to interfere with the proceedings of this nature would arise only when malafides against the members of the DPC are attributed and are proved, or




the proceedings of the DPC are found to be contrary to any specific provision of law. None of these grounds are pleaded in this case. The emphasis is mainly on the exercise of the power by the Review DPC, to downgrade the ACRs and the absence of reasons in support of that conclusion.

21. The DPC or the Review DPC is conferred with the power not only to downgrade the upgraded ACRs, but also the ACRs, which remained intact. Hardly any doubt exists about this. The only requirement is that such downgradation or upgradation must not be arbitrary or on the ipse dixit of the members. That again would depend upon the nature of allegations made by the aggrieved parties. The mere fact that the ACR of any particular year is downgraded, does not by itself lead to its conclusion that the exercise is arbitrary.


22. So far as the requirement of recording of reasons is concerned, the issue is fairly well settled. No DPC is under obligation to record reasons in support of its conclusions. If any obligation is placed in that behalf, the whole exercise becomes impossible or unworkable. Reasons, if furnished, their very nature, are capable of being interpreted or understood differently by various persons connected with the entire process.





23. Take for instance, the case where an officer under consideration for promotion has taken an initiative to protect the interests of the State, but in the process, has deviated from the prescribed procedure. His Recording or Reviewing Officer may reward him for the initiative taken by him, or find fault with him for deviating with the procedure. Similarly, the DPC may assess the ability and competence of the officer by taking those aspects into that account. If reasons are mentioned either for rewarding or reprimanding the officer for one and the same event, the Court or Tribunal may have its only perception on the same. The conflicting views become possible on the same issue, but on account of different perceptions. It is with a view to avoid these uncertainties that the law concedes power, to DPC, to take its own decision without feeling the requirement of recording reasons.

24. Here, itself, a subsidiary principle of administrative law, which needs to be taken note of. The first is that unless the law places an obligation on an authority to record reasons, the order passed by it cannot be found fault with on the sole ground that it is not supported by any reasons. However, if the authority volunteers to record reasons, they are amenable to scrutiny and judicial review and the decision is liable to be tested on the touchstone thereof reasonableness etc.,.



25. In the instant case, the Review DPC has applied its mind, examined the record of the applicant, and felt that the upgradation of the ACRs for two years i.e., 2005-06 and 2007-08, was not proper, and accordingly downgraded the same. That in turn kept the applicant outside the benchmark. It cannot be said that there any illegality or infirmity has crept into the proceedings.

26. Though the applicant was extended the benefit of Non-Functional Upgradation (NFU), the parameters for grant of benefit of NFU, on one hand, and promoting the officer are substantially different. The conferment of power of a superior officer, cannot be equated to mere extension of the salary attached to that post.

27. Viewed from any angle, we do not find any merit in this OA. The OA is accordingly dismissed. There shall be no order as to costs.

(B.V.SUDHAKAR)
MEMBER (ADMN.)

(JUSTICE L.NARASIMHA REDDY)
CHAIRMAN

Dated: this the 24th day of December, 2019

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