

(Reserved on 21.03.2013)

**CENTRAL ADMINISTRATIVE TRIBUNAL
ALLAHABAD BENCH ALLAHABAD**

ALLAHABAD this the 18th day of June, July, 2013

ORIGINAL APPLICATION NO. 1356 of 2004 (U)

**HON'BLE MR. SHASHI PRAKASH, MEMBER-A
HON'BLE MS JASMINE AHMED, MEMBER- J**

N.K. Agarwal, S/o Late Prem Chandra Agarwal, Resident of 69, Shiwalikpuram (near Ann Mary School), G.M.S Road, Dehradun - 248001. At present posted as Geologist Sr., Uttarakhand Unit, Geological Survey of India, NR, 251/II, Vasant Vihar, Dehradun - 248001.

.....Applicant.

V E R S U S

1. Union of India through the Secretary, Government of India, Ministry of Mines, Department of Mines, Shastri Bhawan, New Delhi - 110001.
2. The Director General, Geological Survey of India, 27, J.L. Nehru Marg, Kolkata - 700016.
3. Shri R. Jaya Kumar, C/o The Director General, Geological Survey of India, 27, J.L. Nehru Marg, Kolkata - 700016 .
4. Shri R.N. Patra, C/o The Director General, Geological Survey of India, 27, J.L. Nehru Marg, Kolkata - 700016 .

..... Respondents

Present for the Applicant: Sri Shyamal Narain

Present for the Respondents: Sri S.N. Chatterjee

O R D E R

By Hon'ble Mr. Shashi Prakash, AM

By way of the instant original application filed under section 19 of Administrative Tribunals Act 1985, the applicant has sought the following main reliefs: -

"(a).to quash the impugned order dated 30.09.2004 (Annexure No. A-1) to the extent of promotion of respondents no. 3 and 4 on the post of Director in the

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pay scale of Rs. 12000-16500/- ;

- (b). A direction may be issued to the respondent no. 2 to hold the Departmental Promotion Committee in view of vacancies on the post of Director according to the policy laid down by the Ministry of Personnel wherein it has been held that every year Departmental Promotion Committee should be held and vacancies may not be clubbed;
- (c). A direction may be issued to respondent no. 2 to give promotion to the applicant on the post of Director from the date when his junior has been given, with all consequential benefits;
- (d). A direction may be issued to respondents no. 1 and 2 to give promotion to applicant on the post of Director from retrospective effect when his term comes for consideration for promotion according to his seniority."

2. Briefly, the facts of the case, as stated in the O.A, are that the applicant joined as Geologist (Junior) in the year 1977 and was promoted as Geologist (Senior) after completion of seven years of service in 1984. It is averred in the O.A that the applicant should have been promoted to the post of Director in the year 1990 having rendered qualifying service in the capacity as Geologist (Senior). However, due to inordinate delay in holding of the meeting of the D.P.C in time the consideration of the applicant for promotion in the next scale could not take place. The DPC met some time in August 2004, 19 years after the applicant had become eligible for promotion. As a result of the recommendation of the DPC three lists of promotions to the post of Director (Geology) were issued. The first list came out on 13.08.2004 with 64 names of persons

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senior to the applicant. The second list came out on 31.08.2004 in which three persons senior to the applicant were promoted. However, in the third list, which came out on 30.09.2004 containing three names, two names were of persons who were junior to the applicant. As per the O.A, the criteria for promotion to the post of Director (Geology) from the post of Geologist (Senior) is seniority cum selection where the DPC prepares a list of candidates based on seniority according to available vacancies and remarks made in the ACR of the preceding five years of the candidates for selection. In August 2000, a seniority list of Senior Geologist was published. In this list while the applicant finds place at Sl. No. 250 Shri R. Jaya Kumar and Shri R.N. Patra, who had been promoted by order dated 30.09.2004, were placed at Sl. No. 251 and 252 respectively.

3. Attention has also been drawn to a circular issued by the Geological Survey of India (hereinafter referred to 'G.S.I') dated 26.02.2004 (Annexure A-3) relating to procedure of forwarding of confidential report and communication of entries thereof. This circular is based upon the decision of the Apex Court given in the case of U.P. Jal Nigam & Ors. Vs. Prabhat Chandra Jain & Ors in 1996. Taking into account the observation of the Apex Court it has been stated in the aforementioned circular that "where the overall performance rating of the reportee is of a category below than given to him in the preceding year, then, after affording him the opportunity of representing against the downgradation in accordance with the principles of natural justice, if the

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downgradation is retained, this decision as well as the reasons for the same must be clearly recorded in the personal file of the reportee concerned'. In this circular the bench mark for promotion of a candidate for selection has also been indicated. For promotion to the revised pay scale (grade) of Rs. 12000-16500/- and above, the bench mark was fixed as "Very Good". As the post of the Director (Geology) was in the pay scale of Rs. 12000-165000, the bench mark for selection to the aforesaid post was "Very Good". It has been averred by the applicant that in 19 years of his career preceding 2004 when the DPC was held, no adverse entry regarding any C.R was communicated to the applicant. For this reason the applicant submitted a representation on 03.10.2004 to respondent No. 2 stating that since he had not been communicated any adverse entry he has not been able to understand as to why his name did not figure in the promotion list issued on 30.09.2004 whereas two officers junior to him were promoted. He also stated that no vigilance case was also pending against him. No response to the aforesaid representation submitted by the applicant has been received so far. Aggrieved by the non-action on the part of the respondents the applicant has filed the instant Original Application.

4. Respondents have filed Counter Affidavit. It is stated that the post of Director (Geology) in the G.S.I is a selection post and as per the instruction issued by the Department of Personnel & Training dated 08.02.2002, the bench mark for the post of Director (Geology) is "Very Good". It is stated that the applicant alongwith other

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eligible candidates was considered by the DPC held on 10.08.2004 for promotion to the post of Director (Geology) but on the basis of confidential reports for the year 1998-99 to 2002-03, he was not found fit hence could not be recommended for the post of Director (Geology). It is further stated that the order issued on 26.02.2004 has no relevance for the DPC regarding the post of Director (Geology) and the orders issued by the D.O.P&T for DPC are only relevant. It is also stated that the DPC meetings were held at regular intervals in the year 1990, 1991, 1992, 1993, 1996, 1998, 2000, 2001, June 2002, December 2002 and 2004. As the applicant was not within the zone of consideration in the DPC held since 1990 and he became eligible for consideration only against the vacancies for the year 2004-2005 in which he was considered but he was not found fit on the basis of confidential report hence he could not be recommended for promotion to the post of Director (Geology). In para 26 of the CA it has been stated that as per the DPO&T instructions dated 10.04.1989 even there is no provision to communicate 'Average' confidential report. Since the applicant was awarded 'Good', which is not an adverse entry, therefore, it was not communicated to the applicant.

5. Rejoinder and Suppl. Counter have been filed by the either sides in which nothing new has been brought on record.

6. Heard Shri Shyamal Narain, learned counsel for the applicant and Shri S. N. Chatterjee, learned counsel for respondents and perused the pleadings.



7. Shri S. Narain, counsel for the applicant argued that the main grievance of the applicant is against the third promotion list for the post of Director (Geology), which was taken out on 30.09.2004 giving promotion to two officers junior in the gradation list to the applicant. As the assessment of performance in DPC is based on ACR entries apparently the only possible reason for superseding the applicant could have been in relation to his ACR's grading. He contended that during past 19 years of period as Senior Geologist no adverse ACR had been communicated to the applicant, what to take about 5 preceding years, which form the basis for assessment of eligibility of a person for promotion. He argued that unless any adverse ACR is communicated, it is to be presumed that there are no adverse materials against him and the concerned employee is to be treated eligible for the benefit of promotion.

8. Aggrieved by the order dated 30.0.2004 denying him promotion the applicant submitted a representation on 03.10.2004 to the respondent No. 2 seeking reasons for his exclusion from the list of promotion as Director (Geology). No response to the aforesaid representation has been received so far by the applicant from respondents. In this regard, the learned counsel for the applicant drew attention of the Tribunal to the case of **Dev Dutt Vs. Union of India & Ors -2008 (7) Scale 403** and judgment dated 22.10.2008 passed in Civil Appeal No. 6227/2008 -**Abhijit Ghosh Dastidar Vs. Union of India & Ors** wherein the Apex Court

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has laid down the ratio in connection with the action to be taken in cases of ACR entries which are below the bench mark. Referring to the case of Dev Dutt (Supra) he stated that it has been clearly laid down by the Apex Court in that in case , in the ACR, if a person has been given grading below the bench mark for any of the years for which his ACRs have been taken into account for consideration in D.P.C, it is essential for the employer to communicate such remarks / grading to the concerned person and after receiving his representation decide his case accordingly. He stated that if such entry is un-communicated then it would be unfair and violative of natural justice. The learned counsel went on to submit that this judgment was followed by the Hon'ble Apex Court in the case of Abhijit Ghosh Dastidar Vs. U.O.I (Supra) wherein it has been held that in the event below bench mark grading is given in ACR, such ACR's are to be ignored. In view of the above position, it has now become incumbent upon the respondents to communicate any entry of any of the years to be taken into account for consideration by the DPC, which is below the bench mark prescribed for the promotion. The fact that the applicant was not promoted in 2004 obviously implies that he has been deprived of promotion on account of some entries which were below the bench mark grading and which have not been communicated to the applicant. In the light of the judgment given by the Apex Court in the case of Dev Dutt and Abhijit Ghosh Dastidar, the respondents are required to take action in accordance with the principle as laid down therein and take a final decision in the matter regarding the promotion of the applicant in 2004.

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9. The learned counsel also refuted the plea taken by the respondents in the Suppl. Affidavit filed on 30.04.2008 that since the applicant had been promoted by order dated 29.02.2008 and assumed the charge on 03.03.2008 the O.A has become infructuous. He said this averment cannot be accepted in view of the fact that the applicant was eligible for promotion in the year 2004 and his subsequent promotion in 2008 does deprive him the benefit of promotion which was due to him in the year 2004.

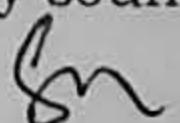
10. Shri S.N. Chatterjee, counsel for the respondents reiterated that since the applicant has been promoted to the post of Director (Geology) in the year 2008 he does not have any cause of action and the O.A has been rendered infructuous. The respondents at the relevant point of time had acted in accordance with the rules which had been prescribed by the DOPT vide Circular dated 10.04.1989 in relation to the ACR. In these rules, only adverse entries were required to be communicated to the officer concerned and it is in accordance with these rules. Under these Rules only adverse entries were required to be conveyed to the concerned employee. Although it is a fact that the applicant had obtained "Good" entry, which while being below the bench mark was not communicated since it was not considered to be adverse entry in terms of the provision of DOPT Circular. The judgments cited by the learned counsel for the applicant are the later judgments and do not apply in the instant case and the present O.A. is an after thought. Given this position the O.A is not maintainable.

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11. We have considered the rival submissions and perused the pleadings on record.

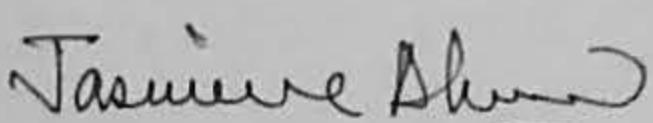
12. Before proceeding further in the matter we would like to deal with the objection raised by the respondents regarding applicability of the principles laid down by Hon'ble Apex Court in the case of Dev Dutt (Supra) with retrospective effect. In this regard, the Hon'ble Apex Court has clearly laid down in the case of **P.V. George & Ors. Vs. State of Kerala & Ors. – AIR 2007 Supreme Court 1034**, the law declared by a court will have the retrospective effect , if not otherwise stated so specifically. In view of this clear position settled by the Apex Court, the procedure laid down in the case of Dev Dutt is squarely applicable in the present O.A. In fact in Civil Appeal No. 6227/2008 –Abhijit Ghosh Dastidar Vs. Union of India & Ors Hon'ble Apex Court has followed the principles laid down in the case of Dev Dutt (Supra) while disposing of a matter pertaining to the year 1993.

13. Another issue raised by the respondents that the matter relating to the communication of ACR grading below the bench mark had been referred to a large bench of Hon'ble Supreme Court in view of difference of opinion. It needs to be stated that the verdict of larger bench has now been received in the case of Sukhdev Singh Vs. Union of India & Ors – Civil Appeal No. 5892/2006 wherein the aforesaid bench has unequivocally held that the view taken in the case of Dev Dutt (Supra) is legally sound.

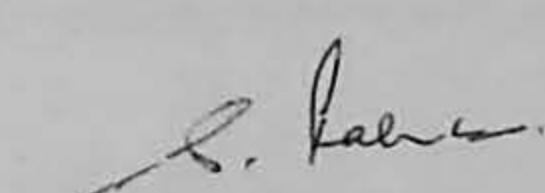


14. Taking into account the facts of this case and the ratio laid down by the Hon'ble Apex Court in the case of Dev Dutt (Supra) upheld by the larger bench in the case of Sukhdev Singh (Supra), the case of the applicant deserves consideration. Accordingly the respondents are directed to reconsider the claim of the applicant for promotion to the post of Director (Geology) in 2004 in the light of the procedure / methodology approved in the case of Dev Dutt (Supra) and shall be entitled for all consequential benefits, if found eligible for promotion. The above exercise shall be completed within two months from the date of receipt of certified copy of the order.

15. Subject to above direction the O.A is disposed of. No costs.



(Ms. Jasmine Ahmed)
Member-J



(Shashi Prakash)
Member-A

Anand....