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OPEN COURT

**CENTRAL ADMINISTRATIVE TRIBUNAL,
ALLAHABAD BENCH, ALLAHABAD.**

ORIGINAL APPLICATION NO. 336 of 2002.

ALLAHABAD THIS THE 06^H DAY OF JANUARY 2009.

Hon'ble Mr. Justice A.K. Yog, Member (J)

Hon'ble Mr. S.N Shukla, Member (A)

Baldya Nath Tiwary, S/o late Sita Ram Tiwary, resident of C-3/4, Lakha Nagar, Varanasi Cantt.

.....Applicant

By Advocate: Shri H.S. Srivastava

Versus.

1. Union of India through Secretary, Ministry of Defence (Finance), New Delhi.
2. The Controller General of Defence Accounts, West Block- V, R.K. Puram, New Delhi.
3. The Principal Controller of Defence Accounts, Central Command, Carriappa Road, Lucknow Cantt.

.....Respondents

By Advocate: Shri Rajiv Sharma/Shri S. Srivastava

ORDER

Delivered by Justice A.K. Yog, Member (J)

Heard Shri H.S. Srivastava, Advocate and Shri Saurabh Srivastava, Advocate learned counsel for the applicant and respondents respectively. Perused the pleadings.

2. Briefly stated; applicant was initially appointed as Upper Division Clerk on 3.6.1963 by respondent NO. 2/ Controller General of Defence Accounts, New Delhi. In due course, he was promoted to the post of Assistant Accounts Officer (group 'B') on 1.4.1987. There is no dispute that applicant had completed requisite number of service as Assistant Accounts Officer and was thus within the field of eligibility of candidates to be considered for promotion to the next higher post i.e. Accounts Officer

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(Group 'B'). There is also no dispute that 33 1/3% of vacancies was to be filled up by selection and remaining 66 2/3% of those vacancies was to be filled up by seniority cum fitness. D.P.C. (Departmental Promotion Committee) was convened on 31.10.2000, which ~~was~~ considered candidates who were within eligibility field. Admittedly, name of the applicant was not cleared by the DPC whereas some persons junior to him (in the category of Assistant Accounts Officer) were found eligible and therefore recommended and promoted by the D.P.C.

3. Feeling aggrieved, applicant filed objection/representation dated 27.11.2000/Annexure A-IV. There is no dispute about seniority/placement of the applicant in the roster. According to the applicant, his name appeared at serial No. 124 in the seniority list/Annexure A-II to the O.A. In response to the objection/representation (noted above) respondents informed that name of the applicant was considered by the DPC but it found him 'not yet fit' vide order dated 18.5.2001/Annexure A-V to the O.A.

4. Notice was issued to the respondents, who ~~was~~ submitted their defence by filing counter affidavit (sworn by Smt. Kavita Garg the then Assistant Controller of Defence Accounts). Relevant paras 12 to 17 of the counter affidavit are reproduced for ready reference:-

- "12. That the contents of paragraphs NO. 4.10 and 4.11 of the O.A. is not admitted as stated. The applicant was duly considered by the DPC alongwith other eligible officers in accordance with the instructions but not recommended him for promotion. Therefore, he was not promoted.
13. That the contents of paragraph No. 4.12 of the O.A. is not admitted. Since the applicant did not meet the guidelines

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prescribed promotion to the grade of Accounts Officer, he was not promoted to the grade of Accounts Officer.

14. *That the contents of paragraph NO. 4.13 of the O.A., is not admitted. It is also not disputed that no adverse remarks had been reported in his ACRs. Therefore questions of communicating the same did not arise. However, this cannot be taken a ground to justify his eligibility and fitness for promotion. As the per the existing instructions on the subject he should have the minimum benchmark for promotion to next higher grade which is assessed by the DPC based on service records/Annual Confidential Reports.*
15. *That in reply to the contents of paragraph Nos. 4.14 and 4.15 of the O.A., it is stated that the ground advanced in this para the prescription of the applicant. The DPC has to follow the guidelines laid down even in the cases of Promotion by Seniority-cum-fitness apart from looking into account the seniority.*
16. *That in reply to the contents of paragraphs NO. 4.16 of the OA, it is stated that as per extent orders of DOP & T only the ACRs containing adverse entries are to be communicated to the official concerned.*
17. *That the contents of paragraph NO. 4.17 of the O.A. is not admitted. Non promotion of the applicant is not a superssion. Only those who reached the benchmark were promoted"*

5. Applicant has filed rejoinder affidavit denying the contention of the respondents.

6. Criterion for promotion is contained in para 83 of office Manual part 1 as stated in para 4.V of the O.A. and the relevant extract of it is being reproduced:-

"83. The number of vacancies of Accounts Officers due to arise is computed, and based on this data and other relevant factors, the number of Assistant Accounts Officers to be considered for promotion is arrived at.

The Departmental Promotion Committee scrutinizes the confidential report of Asstt. Accounts Officer who fall within the promotion zone and draws up a list of Assistant Accounts Officers selected for promotion by the selection method and a list of Assistant Accounts Officers selected for promotion on the basis of seniority - cum- fitness. 33 1/3% of the vacancies will be filled by selection and the remaining 66 2/3% on the basis of Seniority-cum-fitness... .."

7. Earlier Bench had directed the respondents to place record of D.P.C, respondents has placed Photostat copy of record of DPC held on 31.10.2000. Learned counsel

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for the applicant has perused the same (In our presence) and made submissions.

8. Learned counsel for the applicant argued that in the case of the applicant, who ^{was} never in the past communicated with adverse entry' in ACR (Annual Confidential Report) during relevant period could not be held to be 'Not Fit' and the candidature of the applicant could not be rejected by the D.P.C.

9. Learned counsel for the applicant referred to para 6.2.2 of Guidelines on Departmental Promotion Committees contained in part 1 of Swamy's Compilation on Seniority and Promotion in Central Government Service June 1989 edition; which reads as follows:-

"6.2.2 Grading of Officers- In the case of each officer on overall grading should be given. The grading shall be one among (i) Outstanding, (ii) Very Good, (iii) Good, (iv) Average, (v) Unfit".

10. Relying upon aforequoted para of Guidelines, it is being argued that DPC has erred in law in rejecting the candidature of the applicant by ignoring entries in the category of average. In support of his contention, he has relied upon following judgments:-

1. *Final Order of C.A.T. Allahabad Bench dated 29.11.2008 in O.A. No. 03 of 2002- Shri Krishna Kumar Jaiswal Vs. Union of India and others.*
2. *U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and others- 1996 Supreme Court Cases (L&S) 519.*
3. *Smt. T.K. Aryavir Vs. Union of India and others- 2003 (1) Administrative Total Judgments 130.*
4. *Dev Dutt Vs. Union of India and others- JT 2008 (7) SC 463 decided on 12.5.2008.*

9. We need not dilate upon the facts and 'ratio descendi' of the aforequoted judgments, except to note

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that all the decisions lay down that (Good or Average) entry cannot be ignored or treated as adverse to the prejudice of the employee in question without affording opportunity.

10. Perusal of 'DPC record' show that the DPC has not treated 'average entries' as 'adverse' but in its exercise as per the principle laid down in the M.O. issued by the DOP&T taken into account the gradation of entries into consideration while finalizing select list. DPC has to arrange the name of eligible persons-as per objective satisfaction-on the basis of assessment as per 'gradation of entries' and then accommodate required candidate under requisite quota. There is no element of punishment as such. Further, criterion of promotion is ^{alone} 'seniority cum fitness;- and not, "Seniority" ^{above} subject to rejection of Unfit. Requirement of assess 'Fitness' could not be ignored by the D.P.C

11. Shri Saurabh Srivastava, Advocate appearing on behalf of the respondents, however, placed reliance upon the final order of C.A.T. Allahabad Bench (of which one of us was a Member) decided on 29.11.2008 in O.A. NO. 03/02- Shri Krishna Kumar Jaiswal Vs. Union of India and others. Relevant paras 17, 18, 19 and 20 of the aforesaid final order are being reproduced:-

"17. The respondents in their counter affidavit raised a preliminary objection that the applicant has not impleaded two officers S/Shri Jayant Misra and K.M Dixit, junior to him in the Civil List annexed as Annexure No.2 to Compilation No.II, who have superseded him as per the impugned promotion order dated 27.06.01 and who are bound to be affected by any relief (s) granted in this O.A. Respondents submit that the O.A. is liable to be rejected on this ground alone. In support of their stand they have placed reliance on the following judgements:-

"(i) 1997 (5) Supl SCR 604-611 Arun Tiwari Vs. Zila Mansavi Shikshak Sangh and Ors. etc.

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- (ii) (1984) 4 SCC 251 *Prabodh Verma and others Vs. State of Uttar Pradesh and others* (at page 273 para-28 and 50).
- (iii) (1996) 3 SCC 587, *J. Jose Dhonapaul Vs. S. Thomas and others*.
- (iv) (2006) 6 SCC 395 *K.H Siraj Vs. High Court of Kerala and others*.

In all the above judgements it has been held that Courts should not decide cases without the persons or at least some of them in a representative capacity who would be vitally affected by its judgment being before it as respondents. The applicant in his rejoinder reply has held that the parameters on which the DPC made its recommendation was fault as they did not comply with the relevant guidelines of DOPT; therefore, the said recommendation of not recommending the applicant for promotion is erroneous, and it is not his case that he should be promoted in place of some other officer. His view is that it is an individual's grievance that this name has illegally been dropped causing injustice to him when the posts are lying vacant. Under these circumstances, there appears no reason to implead those officers who were given promotion or have superseded him in the promotion. The Supreme Court in *Prabodh Verma and others* (supra) has observed as under:-

".....that in the case before them there was a serious defect of non-joinder of necessary parties and the only respondents to the Sangh's petition were the State of Uttar Pradesh and its concerned officers. The employees who were directly concerned were not made parties not even by joining some of them in a representative capacity, considering that their number was too large for all of them to be joined individually as respondents. This court observed that High Court ought not have decided a writ petition under Article 226 of the Constitution without the person who would be vitally affected by its judgment being before it as respondents or at least some of them before it as respondents in a representative capacity".

There are similar observations of the Supreme Court in the several other Judgments some of which are cited above. These observations apply with equal force here. The relief that the applicant prays for will impact the interest of all those juniors who have superseded him in the promotion list. Since this number is very large he should have therefore impleaded at least some of them in a representative capacity. The applicant's submission that since he is seeking his promotion only and has not challenged the promotion order there is no need to implead others who have superseded him is not tenable as the applicant has challenged the DPC proceedings/recommendations which has given rise to the promotion order dated 27.06.2001. We are therefore of the considered view that this entire exercise becomes infructuous because of this omission and the applicant's arguments in his rejoinder reply has to be rejected.

18. The learned counsel for the applicant Shri Shyamal Narain very vehemently espoused the applicant's case in the context of the issue of below the benchmark grading not being communicated to the applicant. The argument is that when the grading given in

'Good' and it is below the benchmark, then the authorities ought to have communicated this to the applicant as it has an effect on his promotion in the same manner as an 'adverse' or 'Average' entry would have had. The applicant had an impeccable record throughout and had every reason to believe that his performance was good enough for a promotion in the absence of any thing to the contrary being communicated to him. The sudden denial of promotion on the basis of obtaining a grading of 'Good' which was below the benchmark of 'Very Good' has effected his career prospects considerably besides he was not even given an opportunity to give his views in the matter before a final decision was taken. The learned counsel has cited the following Judgments/Orders in support of his contention:-

- (i) CAT Mumbai Ram Babu Vs. Union of India and others (OA NO. 925 of 1999) dated 31st March 2000.
- (ii) Civil Appeal NO. 7631 of 2002 Dev Dutt Vs. Union of India and others.
- (iii) (2006) 1 SCC 368 Union of India Vs. Major Bahadur Singh.
- (iv) AIR 1996 SC 1661 U.P Jal Nigam and others Vs. Prabhat Chandra Jain and others".

Besides a lot of other Orders/Judgments of the Central Administrative Tribunal and Supreme Court. The basic position held in these judgments is that any adverse entry/grading which is below the benchmark prescribed for promotion purposes should be communicated to the applicant and a final decision be taken after taking into consideration the views expressed by the individual concerned. This opportunity was denied to the applicant, hence the respondents have clearly violated the law and Article 14 of the Constitution of India. The applicant's counsel relied heavily on the latest Judgment in Civil Appeal NO. 7631 of 2002 Dev Dutt (supra) wherein the Supreme Court has held:-

"11. Hence, in our opinion, the 'good' entry should have been communicated to the applicant so as to enable him to make a representation praying that the said entry for the year 1993-94 should be upgraded from 'good' to 'very good'. Of course, after considering such a representation it was open to the authority concerned to reject the representation and confirm the 'good' entry (though of course in a fair manner), but at least an opportunity of making such a representation should have been given to the appellant, and that would only have been possible had the appellant been communicated the 'good' entry, which was not done in this case. Hence, we are of the opinion that the non-communication of the 'good' entry was arbitrary and hence illegal, and the decisions relied upon by the learned counsel for the respondents was distinguishable".

19. Admittedly, the grading of 'Good' which was below the benchmark of 'Very Good' was not communicated to the applicant. This was not done keeping in view the existing Government of India Rules and instructions on the subject at that point in time when the decision was taken. While we respectfully acknowledge the observations of the Supreme Court in Dev Dutt's case, we would like to point out that the DPC was held in February 2001, while the

Supreme Court Judgment in Dev Dutt's case came in May 2008. The DPC/respondents cannot therefore be faulted for not complying with rules and judgments, which were not in existence when such decision were taken. Moreover the DPC had followed the DOP & T Office Memorandum dated 11.9.1987 in Dev Dutt's case and the Supreme Court has set aside the aforesaid Memorandum, whereas in the instant case the DPC has followed the DOP & T Office memorandum dated 10.4.1989, which has not been set aside by the Supreme Court in Dev Dutt's case. The judgment of the Supreme Court in Dev Dutt's case is therefore, not applicable in the applicant's case. At this juncture we would like to refer the relevant observations of the Supreme Court in (1999) 3 SCC 362 Babu Ram Vs. Jacob and others, which reads as under:-

"The prospective declaration of law is a device innovated by the Apex Court to avoid reopening of settled issues and to prevent multiplicity of proceedings. It is also a device adopted to avoid uncertainty and avoidable litigation. By the very object of prospective declaration of law, it is deemed that all actions taken contrary to the declaration of law prior to the date of declaration are validated. This is done in the larger public interest. Therefore, the subordinate forums which are legally bound to apply the declaration of law made by the Supreme Court are also duty-bound to apply such dictum to the cases which would arise in future only. In matters where decisions opposed to the said principle have been taken prior to such declaration of law, cannot be interfered with on the basis of such declaration of law".

In the instant case and in view of the above observations we are constrained to observe that the judgment in Dev Dutt's case will not apply to the instant case.

20. In view of the above we are of the opinion that this O.A. is not maintainable for non-joinder of necessary parties besides on merit as no valid ground has been made out warranting any interference by this Court at this stage. The O.A is therefore liable to be dismissed being devoid of merits".

Reasons and conclusions:

1. Having given due consideration to the respective submission made at the bar from either side, we find no escape to ignore Ratio-Descendi said in the decision taken in the case of Krishna Kumar Jaiswal (supra) re finding the Applicant- 'Not Yet Fit'.

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2. In the instant case, also, as in the case of Krishna Kumar Jaiswal (*supra*), the applicant has not impleaded necessary and proper parties.
3. DPC record (referred to earlier), show that under promotional quota 66 2/3% only those candidates who have been awarded outstanding and/or very good entries (as compared to all the entries of Average-except one 'Good', have much better claim than the applicant.
4. Requirement of Rule to promote criterion of seniority cum fitness (for 66 2/3 years promotion quota). DPC is under an obligation to undertake requisite exercise as per service record, (as note above) keeping in view the limited number of vacancies to be filled up.
5. We are supported in our view by the Apex Court judgment- (1998) 6 Supreme Court Cases 720- B.V. Sivaiah and others VS. K. Addanki Babu and others, Para 18 of the said judgment is being reproduced:-

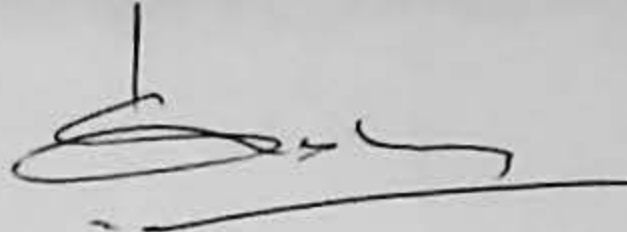
"18. We thus arrive at the conclusion that the criterion of 'seniority-cum-merit' in the matter of promotion postulates that given the minimum necessary merit requisite for efficiency of administration, the senior, even though less meritorious, shall have priority and a comparative assessment of merit is not required to be made. For assessing the minimum necessary merit, the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employee who is eligible for consideration for promotion. Such assessment can be made by assigning marks on the basis of appraisal of performance on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be promoted on the basis of seniority-cum-merit".

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12. We are informed by the learned counsel for the applicant that applicant has already retired on 31.1.2002.

13. In view of the above, we find no ground to interfere with the promotion in question. O.A. has no merit and it is accordingly dismissed.

14. No order as to costs.



Member (A)



Member (J)

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