

(2)

Reserved

CENTRAL ADMINISTRATIVE TRIBUNAL
ALLAHABAD BENCH
ALLAHABAD

Original Application No. 03 of 2002

Monday, this the 29th day of September, 2008

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

Shri Krishna Kumar Jaiswal, I.R.S. son of Shri R.P. Jaiswal, R/o E-5, Income Tax Colony, 7/112, Swaroop Nagar, Kanpur and presently posted as Deputy Commissioner of Income Tax, Kanpur.

Applicant

By Advocate: Sri Shyamal Narain

Vs.

1. Union of India, through Secretary Ministry of Finance, Department of Revenue, North Block, Central Secretariat, New Delhi.
2. Central Board of Direct Taxes through its Chairman, Central Secretariat, North Block, New Delhi.
3. The Union Public Service Commission, through its Chairman, Dholpur House, Shahjahan Road, New Delhi.
4. Chief Commissioner of Income Tax, Income Tax Office, Civil Lines, Kanpur.

Respondents

By Advocates: Sri Saumitra Singh (for respondent No. 1, 2 and 4)
Sri Satish Chaturvedi (for respondent No. 3)

ORDER

By K.S. Menon, Member (A)

The applicant has filed the present Original Application against the promotion order dated 27.06.2001 issued on behalf of respondent No. 1 in which name of the applicant does not find mention for promotion to the post of Joint Commissioner of Income Tax while certain juniors of the applicant find mention and they have accordingly been promoted (copy of impugned order at annexure A-1 to Compilation No. I). Through this O.A., applicant also challenges the proceedings of Departmental Promotion Committee (for short DPC) which met from 23.02.2001 to 25.02.2001 at Agartala to consider selection of officers for promotion to the grade of Joint Commissioner of Income Tax.

E

(2)

2. The facts of the case in brief are that: the applicant joined the department of Income Tax on 23.08.1989 as Assistant Commissioner of Income Tax after passing the All India Civil Services Examination held in 1988. After completion of four years, the applicant was placed in the senior scale on 01.10.1993 as Assistant Commissioner (senior scale). The post of Assistant Commissioner was subsequently re designated as Deputy Commissioner of Income Tax and the applicant was posted as Deputy Commissioner, Income Tax at Kanpur Nagar, Kanpur where he has been working till date. The applicant submits that his service records were impeccable throughout. The respondent No. 1 vide Order No. 79 of 2001 dated 27.06.2001 (impugned order) circulated a list of 562 Deputy Commissioners who were posted to officiate on regular basis in the grade of Joint Commissioner of Income Tax in the pay scale Rs.12375-16500/- (annexure A-4). The applicant's name was not on the said list though that of his juniors did find place in the said list.
3. The applicant's contention that D.P.C. instead of relying on the Indian Revenue Service Recruitment Rules, 1988 issued by the Ministry of Finance dated 12.05.1988, relied on the instructions contained in the guidelines of Department of Personnel & Training (for short D.O.P. & T) dated 10.04.1989 as amended on 27.03.1997. The DPC while screening has applied a benchmark of 'Very Good' for the purposes of promotion whereas I.R.S. Recruitment Rules, 1988 does not mention anything about benchmarks to be applied for purposes of promotion. He, therefore, submits that the DPC was wrong in applying the benchmark rule contained in the aforesaid D.O.P. & T guidelines and further submits that when the DPC has applied wrong guidelines/rules in screening, it is bound to give wrong and perverse results. It is evident that the applicant was not considered by the D.P.C. in its deliberations as the applicant had not achieved the benchmark of 'Very Good' but only 'Good' and hence his name was not considered for being selected and empanelled for promotion. The applicant has also tried to bring out the fact that an average remark is not considered as adverse but at the same it cannot be regarded as complimentary to the officer as 'Average' performance should be regarded as routine and undistinguished. It, therefore stands to reason that any categorization above 'Average' would tantamount to noteworthy performance which should entitle

(23)

an officer to recognition and suitable rewards in the matter of promotion. Reaffirming this point, applicant states that promotion is a civil right of an employee as laid down in 1975, S.L.J. (F.B.) [full citation has not been given] and therefore, the DPC by applying erroneous guidelines has illegally deprived the applicant and taken away his rightful claim to the next higher post.

4. The applicant has also drawn reference to the DOP & T guidelines dated 28.03.2000 in connection with permission in various grades of I.A.S. wherein it has been mentioned that the DPC is required to give an over all 'Average' grading whether he is either fit or unfit and there shall be no benchmark for assuming suitability for promotion. The applicant has also relied on Circular dated 08.12.1999 issued by the Appointment Committee of Cabinet, which clearly postulates that "there shall be no supersession. Inter-se seniority among all the officers who are considered fit for promotion and inter-se seniority shall be maintained as before." Referring to the issue of benchmark applicant maintains that when the benchmark is prescribed as 'Very Good' for promotion than the Report/Reviewing Authority is obliged to communicate to the applicant if the entry in his ACR is 'Good' and hence below the benchmark. This is necessitated as such gradation which is below the benchmark will have an adverse effect on the promotion of Officer hence it is imperative that such below benchmark gradation should have been communicated to the applicant and should have been taken into consideration by the DPC only after obtaining his comments.

5. In view of the above and well settled principles asserted by the Apex Court time and again that 'in accordance with the Rules of Natural Justice an adverse report in the ACR cannot be acted upon to deny promotional opportunities unless it is communicated to the person concerned. Such an opportunity is not an empty formality, its job being to enable the superior officer to decide on consideration of the explanation offered by the person concerned that whether adverse report is justified or not'.

6. The applicant, therefore, submits that the impugned order dated 27.06.2001 issued on the basis of recommendation of DPC are illegal, unlawful and cannot be acted upon to deny him promotion to

e

next higher grade and adversely affect his career prospects in future.

He has therefore sought the following relief: -

- "1) That the appropriate respondent authorities may be directed to promote the applicant for the post of Joint Commissioner, Income Tax/Joint Director of Income Tax in the pay scale of Rs.12000-375-16500 from the date of issuance of the order No. 79/2001 dated 27th June, 2001 with all consequential benefits viz. salaries, seniority and others, reckning/computing the same from the aforesaid date, while ignoring the impugned recommendation of Departmental Promotion Committee by passing the applicant's name from the said list."**

7. The respondents on notice have filed their detailed counter affidavit. They state that there is no dispute regarding the fact that applicant's case was considered by the DPC for selection to the post of Joint Commissioner of Income Tax. The department had indicated 675 vacancies pertaining to the year 2000-2001. The applicant whose name was at serial No. 222 of the eligibility list, provided by the department, was duly considered by the DPC and the Confidential Reports for the relevant five years period were examined and based on the over all grading of 'Good' for the said five years period, the DPC found applicant unfit as he did not attain the prescribed benchmark of 'Very Good'. He was, therefore, not recommended for promotion.

8. The respondents have referred to the allegation of the applicant made in the O.A. regarding the procedure followed by the DPC for promotion to the post of Joint Commissioner of Income Tax, which was stated to be in violation of provisions of Indian Revenue Services regarding Rules of 1988 (as amended from time to time). In the said recruitment rules, method of recruitment prescribed to the post of Joint Commissioner Income Tax by promotion on the basis of selection on merit from the feeder grade prescribed, which is senior time scale of the Indian Revenue Service with five years regular service in the grade. Admittedly, while the recruitment rule lays down the provisions for eligibility and other criteria required for promotion, said recruitment rules do not lay down any detailed guidelines regarding the actual procedure to be followed by the DPC for consideration of cases of promotion to various grades of service. The respondents highlight the fact that the position in recruitment rules for all Central Civil Services of the Union of India is the same

and in order to supplement this recruitment rules, detailed guidelines/instructions, for holding the DPC meeting, have been issued by the DOP & T, which is the nodal department for the Government of India in service matters. The latest consolidated instructions/guidelines to be followed by the UPSC for holding the DPC meeting and at that point of time was the DOP & T Office Memorandum dated 10.04.1989, as amended from time to time. The DPC had followed the aforesaid instructions in the instant case of promotion of the Deputy Commissioner of Income Tax to the post of Joint Commissioner of Income Tax. They, therefore, hold the view that no irregularity has been committed by the DPC, as alleged by the applicant.

9. Adverting to the applicant's claim that Indian Administrative Service and the Indian Revenue Service have recruitment rules which are almost at par and hence the DPC should have applied the guidelines issued by the DOP & T on 28.03.2000 pertaining to promotion to various grand in Indian Administrative Service. The respondents submitted that Indian Administrative Service is an All India service while the Indian Revenue Service is the Central Civil service and the rules governing the recruitment and condition of service of these two services under the Union are framed under different Articles of Constitution of India and hence they are distinct. In that view of the matter, the guidelines issued by the DOP & T on 28.03.2000 regarding promotion to various grades in the Indian Administrative Service has been framed keeping in view the different requirement in the service to be followed by the Central Government/State Government concerned for holding the DPC meeting and cannot therefore be applied mutatis mutandis for promotion under Central Civil Services in this case the Indian Revenue Service, for being considered by the DPC. It is only the provisions contained in Office Memorandum dated 10.04.1989, as amended from time to time alone which is to be considered by the DPC.

10. The respondents submitted that the applicant was duly considered by the DPC for promotion but was not recommended as he failed to hold the prescribed benchmark of 'Very Good'. His juniors were recommended for promotion to the grade of Joint

Commissioner of Income Tax because they attained the prescribed bench mark and were also covered under the available vacancies. It is, therefore, clear that the panel recommended by the DPC, which met on 23.02.2001 to 25.02.2001, was strictly as per rules, procedure and instructions issued by the DOP & T on the subject, at that point of time.

11. On the issue of non-compliance of directions of Appointment Committee of Cabinet (for short ACC), the respondents submit that decision of Appointment Committee of Cabinet was taken in earlier cases relation to the promotion to the post of Joint Commissioner of Income Tax in which some officers, who assessed by the DPC as 'Outstanding' were placed above the Officers who have been assessed as 'Very Good'. It is in this context that the ACC had directed that super session should not take place and they had disagreed with the recommendation of the UPSC. The ACC had also observed that the Department of Revenue should expeditiously undertake amendment of Recruitment Rules to bring it at par with All India Services to avoid super session. The respondents submitted that observations of the ACC are only advisory in nature and unless and until the statutory Recruitment Rules for the Indian Revenue Service and/or the DPC instructions/guidelines issued by the DOP & T vide their Office Memorandum dated 10.04.1989 are amended by the Government of India in consultation with the Commission, the existing Recruitment Rules/Instructions will continue to be applicable for promotion to various grades in the Indian Revenue Service.

12. The above observations/contentions by the respondents have also been reiterated in the counter affidavit filed by respondent No. 3 i.e. U.P.S.C.

13. The respondents, therefore, denied that recommendations of the DPC are illegal, arbitrary or ultra vires of the Constitution. It is also submitted by the respondents that the applicant has not been able to make out a case for any relief, as claimed or otherwise. In the interest of justice, they have prayed that the O.A. be dismissed with cost.

14. Heard Sri Shyamal Narain, learned counsel for the applicant, Sri Saurabh holding brief of Sri Saumitra Singh, learned counsel for the respondent No. 1, 2 and 4 and Sri Pankaj Srivastava holding brief of Sri Satish Chaturvedi, learned counsel for the respondent No.3 and perused the pleadings.

15. There is no dispute that the applicant was superseded for promotion to the post of Joint Commissioner of Income Tax from Deputy Commissioner of Income Tax based on the recommendations of the DPC that the applicant was unfit for promotion as he has not achieved the bench mark of 'Very Good' as prescribed in DOP & T Office Memorandum dated 10.04.1989. The applicant's counsel has interestingly argued that the Indian Revenue Service Recruitment Rules, 1988 should be followed. When it was pointed out that the said Recruitment Rules contained no specific guidelines for the DPC to follow regarding promotions, the applicant's counsel submitted that the IRS Recruitment Rules and the Indian Administrative Service Recruitment Rules being almost on par the detailed guidelines issued by DOP & T Office Memorandum dated 28.03.2000 in the case of Indian Administrative Service Officers under All India Service should have been followed by the DPC. The Indian Revenue Service comes under the category of Central Civil Services, framed under Article 309 of the Constitution, while the Indian Administrative Service, which covers under the category of All India Services, is governed by Article 312 of the Constitution. It is clear that these two services are entirely different class of services and distinct from each other. Therefore the rules governing recruitment, conditions of service, conduct, discipline and appeal are totally different from each other and the DOP & T instructions/guidelines contained in their O.M. dated 28.03.2000 are meant only for the All India Service and the applicant's claim that the DPC should have followed the aforesaid guidelines dated 20.03.2000 is totally misplaced. It is also observed that Recruitment Rules general stipulate the provisions regarding eligibility in terms of Educational Qualifications, experience and other parameters for purposes of recruitment and does not lay down detailed guidelines as to actual procedure to be followed by the DPC for considering cases of promotion to various grades of Service. Since this position is the same in the Recruitment Rules of all Central Civil Services of the Union of India, DOP & T the nodal department of the Government of

India in service matters issued detailed guidelines/instructions for holding DPC meetings to supplement the Recruitment Rules vide its Office Memorandum dated 10.04.1989 to cover all Central Civil Services, including the Indian Revenue Service. It cannot therefore be said that the DPC which met on 23.02.2001 to 25.02.2001 for considering selection of officers to be promoted as Joint Commissioner of Income Tax followed the wrong guidelines as alleged by the applicant. This allegation of the applicant is therefore without any basis and cannot be accepted.

16. In para-4 XIV and XV of the O.A., the applicant has relied upon a circular of the ACC dated 08.12.1999 which stipulates "that there shall be no super session Inter-se seniority among all the officers who are considered fit for promotion and inter-se seniority shall be maintained as before." He also holds the view that this direction of the ACC overrides the instructions/guidelines of the DOP & T. Applicant has therefore held that the deliberations and recommendations of the DPC and the action of the respondents in not adhering to the instructions of the ACC are flawed. The applicant appears to have confused the issue. The directions of the ACC referred to by the applicant was taken by the Committee in an earlier case relating to promotion to the post of Joint Commissioner of Income Tax, wherein some officers who were assessed as 'Outstanding' were placed above those who were assessed as 'Very Good'. It was this super session that was not agreed to by the ACC and gave rise to the above mentioned direction. Besides a simple reading of the said direction of the ACC shows that it is applicable to only those who were found **fit** by the DPC and from amongst those found fit by the DPC there should not be any super session of those graded 'Very Good' by those graded 'Outstanding'. It is clear that the applicant who was found **unfit** is not covered by the above case and since it is not applicable, the reliance on the aforesaid ACC direction is misplaced and hence not accepted.

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

27.06.2001 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 Judgments: -

- (i) 1997 (5) Supl SCR 604-611 Arun Tiwari vs. Zila Mansavi Shikshak Sangh and Ors. Etc.**
- (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 Dhanapaul vs. S. Thomas and others.**
- (iv) (2006) 6 SCC 395 K.H. Siraj vs. High Court of Kerala and others.**

In all the above Judgments 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 interests 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 is '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 (O.A. 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 appellant 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 respondent are 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 decisions were taken. Moreover, the DPC had followed the DOP & T Office Memorandum dated 11.09.1987 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 10.04.1989, 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

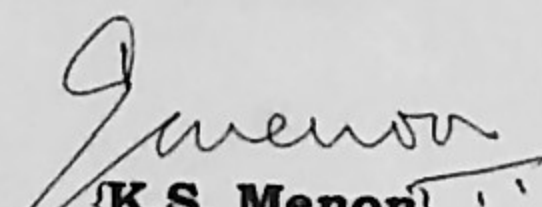
observations of the Supreme Court in (1999) 3 SCC 362 Babu Ram vs. CC Jacob and others, which reads as under: -

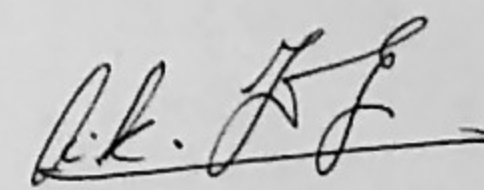
"The prospective declaration of law is a device innovated by the Apex Court to avoid reopening of settled issues and to prevent multiplicity of proceedings. It is also a device adopted to avoid uncertainty and avoidable litigation. By the very object of prospective declaration of law, it is deemed that 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.

21. The O.A. is accordingly dismissed. No costs.


{K.S. Menon}
Member [A]


{Justice A.K. Yog}
Member [J]

/M.M/