CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A. NO. 369 OF 2010

O.A. NO. 360 OF 2010

AND

O.A. NO. 410 OF 2010

Tuesday, this the 17th day of August, 2010.

CORAM:

HON'BLE Mr. GEORGE PARACKEN JUDICIAL MEMBER
HON'BLE Ms. K.NOORJEHAN, ADMINISTRATIVE MEMBER

O.A. 369/2010

Smt. N.O. Sali, W/o K.A Ittyerah,
Deputy General Manager (TR),
O/o the PGMT, BSNL, Ernakulam,
Catholic Centre, Broadway, Ernakulam,
residing at 'Kottayil House', P&T Colony,
Kachappilly Road, Vytilla, Cochin – 19. ... Applicant

(By Advocate Mr.Shafik M.A)

Versus

1 Union of India, represented by
the Secretary Department of
Telecommunications,
Ministry of Communications,
Sanchar Bhavan, New Delhi.

2 The Chairman cum Managing Director,
Bharat Sanchar Nigam Limited,
Sanchar Bhavan, New Delhi.

3 The Chief General Manager, Telecom,
BSNL, Kerala Circle, Trivandrum. ... Respondents

(By Advocate Mr. Thomas Mathew Nellimoottil)

O.A. 360/2010

K. Sasidharan, S/o. Late Kesavan,
Deputy General Manager (Finance),
O/o the GM, Mobile Services,
RTP Building, Lukes Lane,
GPO Lane, Trivandrum – 695 001.
residing at 'H.N. 29, Gowri Nagar,
Pongummoodu, Medical College (P.O.)
Trivandrum. ... Applicant

(By Advocate Mr. Shafik M.A)

Versus

1 Union of India, represented by
the Secretary Department of
Telecommunications,
Ministry of Communications,
Sanchar Bhavan, New Delhi.

2 The Chairman cum Managing Director,
Bharat Sanchar Nigam Limited,
Sanchar Bhavan, New Delhi.

3 The Chief General Manager, Telecom,
BSNL, Kerala Circle, Trivandrum. ... Respondents

(By Advocate Mr. Thomas Mathew Nellimoottil (R2-3)
(By Advocate Mr. A.D. Raveendra Prasad (R1)

O.A. 410/2010

D. Pushparaj, S/o. Late D. Devasundaram,
Chief Accounts Officer, O/o the GMT, Palakkad,
residing at 'Flat No. 10, Block I, Capital Heritage,
Noorani, Palakkad 678 004.

2 Smt. Alice Francis, W/o P.S. Francis,
Chief Accounts Officer (TR), O/o the PGMT,
Trivandrum. Residing at Nelluvelil House,
41-Kakkanadu Lane, Kesavadasapuram,
Trivandrum – 695 004.

3 Smt. Mallika T. Divakaran, W/o. T. Divakaran,
Chief Accounts Officer, O/o the PGMT, Trichur
residing at "Tharayathody House," Poothole,
Trichur – 4.

(By Advocate Mr. Shafik M.A)

Versus

1 Union of India, represented by
the Secretary Department of
Telecommunications,
Ministry of Communications,
Sanchar Bhavan, New Delhi.

2 The Chairman cum Managing Director,
Bharat Sanchar Nigam Limited,
Sanchar Bhavan, New Delhi.

3 The Chief General Manager, Telecom,
BSNL, Kerala Circle, Trivandrum. ... Respondents

(By Advocate Mr. Thomas Mathew Nellimoottil)

These applications having been heard on 17.08.2010, the Tribunal on the same day delivered the following:

ORDER

HON'BLE Mr. GEORGE PARACKEN JUDICIAL MEMBER

These Original Applications are identical in nature and therefore, they are disposed of by this common order.

2. Facts: The applicant in O.A. No.359/10, Smt. N.O. Sali is a Senior Time Scale (STS for short) Officer and she is presently working as Deputy General Manager (TR) (DGM for short) in the office of the PGMT, Ernakulam SSA. Her name is at Sl. No. 142 in the provisional Seniority list of STS Regular Executives as on 15.04.2010 published by the BSNL Corporate office vide their letter No. 2-7/2010-SEA-BSNL dated 27.04.2010. She was in the zone of consideration for promotion to the next higher post of Junior Administrative Grade (JAG for short). The applicant in O.A. No. 360/10, Shri K. Sasidharan, presently working as the Deputy General Manager in the office of the GM, Mobile Services, Trivandrum is a similarly placed officer. His name is at Sl. 38 in the aforesaid provisional Seniority list. Similarly, the applicants in O.A.410/10, Shri.D.Pushparaj, Smt.Alice Francis and Smt. Mallika T Divakaran are presently working as regular Chief Accounts Officers (STS) and they find their places at Sl. No. 242, 285 & 299 respectively in the same List. As per the "BSNL Management Services" Recruitment Rules, 2009, applicable in the case of these applicants, the bench mark required for a promotion and posting to JAG is "Very Good, no adverse, not more than one good". The Corporate Promotion Committee (CPC for short) for promotion of the STS to JAG was held on 30.03.2010. Pursuant to their recommendations, the respondents have issued the impugned Order No.

I-II/2009 SEA-BSNL (Part I) dated 28.04.2010 promoting 269 STS officials to the grade of JAG on officiating basis. While the names of the applicants have been omitted from the said promotion list, many of their juniors from Sl. No. 25 onwards have been promoted. Further, the applicant in OA 360/10 has been reverted from the post of DGM Finance to the level of Chief Accounts Officer (CAO for short), which is in the grade of STS. The applicants presume that their exclusion from the promotion list was for the reason that they did not get the aforesaid benchmark prescribed for the promotion as no adverse remarks or gradings in their confidential reports have ever been communicated to them. They have, therefore, filed these Original Applications seeking a direction to the respondents to grant them promotions on officiating basis in JAG of the Telecom Finance, without taking into account the uncommunicated grading below the benchmark, if any.

3. In this regard, the learned counsel for the applicant, Shri.Shafik MA, has relied upon the judgment of the Supreme Court in **Dev Dutt v. Union of India** [**2008 (7) SCALE 403**] wherein it has been held that any entry in the ACR below the prescribed bench mark amounts to an adverse entry and the same needs to be communicated. The relevant para of the judgment is as under :-

> "10. In the present case the bench mark (i.e. the essential requirement) laid down by the authorities for promotion to the post of Superintending Engineer was that the candidate should have 'very good' entry for the last five years. Thus, in this situation the 'good' entry in fact is an adverse entry because it eliminates the candidate from being considered for promotion. Thus, nomenclature is not relevant, it is the effect which the entry is having which determines whether it is an adverse entry or not. It is thus the rigors of the entry which is important, not the phraseology. The grant of a 'good' entry is of no satisfaction to the incumbent if it in fact makes him ineligible for promotion or has an adverse effect on his chances."

4. Mr. Shafik M.A., has also relied upon the judgment in **Abhijith Ghosh Dastidar v. Union of India & Others Civil Appeal No. 6227 of 2008** arising **out of SLP(C) No. 26666 of 2004 dated 22.10.2008** wherein the Apex Court reiterated its earlier position in Devdutt's case (supra) and held that uncommunicated entry below the bench mark should not have been taken into consideration for promotion. The said judgment reads as under :-

> 1) Leave granted.
>
> 2) The applicant was Post Master General during the relevant period and was eligible to be promoted to the Higher Administrative Grade of Indian Postal Service Group-A and to be posted as Chief Post Master General. His claim for promotion was considered by the D.P.C. On 15.12.1999 and again on 28.02.2001. The appellant was not found eligible for promotion to the Higher Administrative Grade-A. He filed an Original Application before the Central Administrative Tribunal (hereinafter referred to as "CAT") at Patna alleging that he was not considered for promotion for the reason that there were two entires in his C.R. i.e one on 22.09.1997 and another on 08.02.1998. It was pointed out that the CAT, Patna Bench by order dated 27.05.2002 directed the authority not to take note of "the order of caution dated 01.04.1997" and "the order of adverse remarks dated 09.06.1998" for the period 01.04.1997 to 13.10.1997 while considering the appellant for promotion. In the light of the said order, the appellant contented that these two adverse entires should not have been considered by the D.P.C. He further contented that through out the period he was given entry of "good". The respondent-Department alleged that the appellant was not considered for promotion as he was not having the benchmark of "very good". According to the appellant, the adverse entires namely "good" were not communicated. The said aspect ought not to have been considered while considering his promotion. In support of the above claim, he relied on the decision of this Court in Dev Dutt vs. Union of India & Ors., 2008(7) Scale 403.
>
> 3) Pursuant to the direction of the CAT, Patna Bench on 09.09.2002 review of D.P.C was held and the appellant was not found suitable for promotion. In March, 2003, there was a regular D.P.C and the appellant was found fit for promotion with the same entries and accordingly promoted to Higher Administrative Grade Group-A and later retired from service.
>
> 4) It is not in dispute that the CAT, Patna Bench passed an order recommending the authority not to rely on the order of caution dated 22.09.1997 and the order of adverse remarks dated 09.06.1998. In view of the said order, one obstacle relating to his promotion goes. Coming to the second aspect, that though the benchmark "very good" is required for being considered for promotion admittedly the entry of "good" was not communicated to the appellant. The entry of 'good' should have been communicated to him as he

was having "very good" in the previous year. In those circumstances, in our opinion, non-communication of entries in the ACR of a public servant whether he is in civil, judicial, police or any other service (other than the armed forces), it has civil consequences because it may affect his chances for promotion or get other benefits. Hence, such non-communication would be arbitrary and as such violative of Article 14 of the Constitution. The same view has been reiterated in the above referred decision relied on by the appellant. Therefore, the entries "good" if at all granted to the appellant, the same should not have been taken into consideration for being considered for promotion to the higher grade. The respondent has no case that the appellant had ever been informed of the nature of the grading given to him.

5) Learned counsel appearing for the appellant has pointed out that the officer who was immediately junior in service to the appellant was given promotion on 28.08.2000. Therefore, the appellant also be deemed to have been given promotion from 28.08.2000. Since the appellant had retired from service, we make it clear that he is not entitled to any pay or allowances for the period for which he had not worked in the Higher Administrative Grade Group -A, but his retrospective promotion from 28.08.2000 shall be considered for the benefit of re-fixation of his pension and other retrial benefits as per rules.

6) The appeal is allowed to the above extent. No costs."

5. Respondents in their reply statement submitted that the CPC has considered the Annual Performance Appraisal Report (APAR for short) gradings of the STS official including those of the applicants for the period from 2004-2005 to 2008-2009 for promotion to the JAG grade. They have also confirmed that the benchmark for promotion of a STS to JAG is "Very good, no adverse, not more than one good". However, the applicants have not been recommended for promotion to JAG Grade by the CPC due to grading in their APARs containing more than one 'Good'.

6. Mr. Thomas Mathew Nellimoottil, the learned counsel for the respondents has further submitted that the earlier guidelines in this matter was that only adverse entries need to be communicated to the officials concerned. The Department of Personnel and Training has revised those guidelines only on 13.04.2010 making it necessary to communicate the overall gradings also,

in addition to the adverse entries. However, according to him, those instructions will not be applicable for the CPC already held in BSNL on 30.03.2010 in the present case and it will be applicable only for any future promotions.

7. We have considered the rival contentions of Shri. Shafik M.A., learned counsel for the applicant and Shri. Thomas Mathew Nellimoottil, learned counsel for the respondents. There cannot be any dispute that the principles laid down by the Apex Court in its both judgments in **Dev Dutt (supra) and Abhijit Ghosh Dastidar (supra)** will apply in the cases of the applicants also.

8. As regards the retrospectivity of the Apex Court's judgments are concerned, the Apex Court has clarified in its judgment in **P.V. George vs. State of Kerala & Ors. AIR 2007 SC 1034** that "The law declared by a Court will have a retrospective effect if not otherwise stated to be specifically."

9. The aforesaid position has been reiterated by the Apex Court in the case of **Uttranchal Jal Sansthaan Vs. Laxmi Devi (2009) 7 SCC 206**, wherein it has been held that "judicial decisions unless otherwise specified are retrospective. They would only be prospective in nature if it has been provided therein."

10. We have also considered a similar case recently in O.A 900/09 and passed following orders on 10.06.2010 :-

4. We have heard Shri.R.Sreeraj for the applicant and Shri.Rajesh on behalf of Shri.Sunil Jacob Jose,SCGSC for the respondents. We have also perused the ACR dossier of the applicant which were under consideration of the DPC. It is found that among the 5 ACRs considered by the DPC, in the ACR for the period from 1.4.2005 to 31.3.2006, the Reporting Officer has graded him as 'very good' but the Reviewing Officer has downgraded it to 'good'. Again, the ACR for the period from 1.4.2006 to 31.3.2007 was written in two parts, while for the first part ie. up to 31.12.2006 he was graded as 'very good', for the rest of the period he was graded as only 'good'. Thus it is seen that the DPC has declared the applicant as 'unfit' for promotion only because of the reason that he has earned only 'good' entries for two years whereas the benchmark was 'very good'. The issue involved in this case is no more in dispute. The Apex Court in Dev Dutt Vs. Union of India [2008 (7) SCALE 403] has held that every entry (and not merely a poor or adverse entry)relating to an employee under the State or an instrumentality of the State, whether in civil, judicial, police or other service (except the military) must be communicated to him, within a reasonable period, and it makes no difference whether there is a bench mark or not. Even if there is no bench mark, non-communication of an entry may adversely affect the employee's chances of promotion (or getting some other benefit), because when comparative merit is being considered for promotion (or some other benefit) a person having a 'good' or 'average' or 'fair' entry certainly has less chances of being selected than a person having a 'very good' or 'outstanding' entry. Later, the Apex Court in the case of Abhijit Ghosh Dastidar Vs. Union of India & Ors decided on 22.10.2008 considered the same issue and held that though the benchmark 'very good' is required for being considered for promotion, admittedly the entry of 'good' was not communicated to the employee. The entry of 'good' should have been communicated to him as he was having 'very good' in the previous year. In those circumstances, it was held that the non communication of entires in the ACR of a public servant whether he is in civil, judicial, police or any other service (other than the armed forces) it has civil consequences because it may affect his chances for promotion or get other benefits. Hence such non communication would be arbitrary and as such violative of Article 14 of the Constitution. Therefore, the entries 'good' if at all granted to the employee the same should not have been taken into consideration for being considered for promotion to the higher grade.

"5. In our considered opinion, the Apex Court judgments in Dev Dutt (supra) and Abhijit Ghosh Dastidar (supra) squarely apply in this case also. The respondents shall, therefore, convene a review DPC ignoring the ACRs of the applicant having gradings below the benchmark and if he is found otherwise suitable, he shall deemed to have been promoted from the date his immediate junior has been promoted on the recommendations of the DPC held on 8.9.2009. The respondents shall carry out the aforesaid directions within a period of two months from the date of receipt of a copy of this order. Accordingly, this OA is allowed. There shall be no order as to costs."

11. In view of the aforesaid settled position of law, we allow these O.As and direct the respondents to convene a review DPC and consider the cases of the applicants afresh ignoring their below benchmark gradings. If they are found otherwise suitable, they shall deemed to have been promoted from the date their immediate juniors have been promoted on the recommendation of the CPC held on 30.03.2010. As held by the Apex Court in the case of **Abhijith Ghosh Dastidar (supra)** they will not be entitled for any pay or allowances for the period for which they had not worked in the Junior Administrative Grade but their retrospective promotion shall be considered for the benefit of fixation of their pay. The respondents shall comply with the aforesaid directions within a period of two months from the date of receipt of a copy of this order. There shall be no order as to costs.

(Dated, the 17th August, 2010.)

K NOORJEHAN
ADMINISTRATIVE MEMBER

GEORGE PARACKEN
JUDICIAL MEMBER

ax