

CENTRAL ADMINISTRATIVE TRIBUNAL
JAIPUR BENCH, JAIPUR

ORDERS OF THE BENCH

Date of Order: 22.01.2013

OA No. 80/2010

Mr. Vinod Goyal, counsel for applicant.
Mr. Mukesh Agarwal, counsel for respondents.

Heard learned counsel for the parties.

O.A. is disposed of by a separate order on the separate sheets for the reasons recorded therein.

Anil Kumar
(ANIL KUMAR)
MEMBER (A)

K. S. Rathore
(JUSTICE K.S. RATHORE)
MEMBER (J)

Kumawat

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL,
JAIPUR BENCH, JAIPUR.

Jaipur, the 22nd day of January, 2013

CORAM :

HON'BLE MR.JUSTICE K.S.RATHORE, JUDICIAL MEMBER
HON'BLE MR.ANIL KUMAR, ADMINISITRATIVE MEMBER

1. ORIGINAL APPLICATION No. 80/2010

Govind Prasad Goyal son of Shri Bhagwat Lal Goyal, aged 56 years, resident of 274, Devi Nagar, Sodala, Jaipur. Presently posted as AO in the PAG Civil Audit, Rajasthan, Jaipur.

... Applicant

(By Advocate: Mr. Vinod Goyal)

Versus

1. Union of India through the Comptroller & Auditor General of India, 10, Bahadur Shah Zafar Marg, New Delhi.
2. The Principal Accountant General (Civil Audit), Rajasthan, Janpath, Near Statue Circle, Jaipur.
3. The Senior Deputy Accountant General (Admn.), AG Office, Janpath, Near Statue Circle, Jaipur.

... Respondents

(By Advocate: Mr. Mukesh Agarwal)

2. ORIGINAL APPLICATION No. 220/2010

Pokar Mal son of Shri Jeevan Ram, aged 54 years, resident of 82/13, Mansarovar, Jaipur. Presently posted on the post of Accounts Officer (AO) in the office of PAG (Civil Audit), Rajasthan, Jaipur.

... Applicant

(By Advocate: Mr. Vinod Goyal)

Versus

1. Union of India through the Comptroller & Auditor General of India, 10, Bahadur Shah Zafar Marg, New Delhi.
2. The Principal Accountant General (Civil Audit), Rajasthan, Janpath, Near Statue Circle, Jaipur.

3. The Deputy Accountant General (Admn.), AG Office, Janpath, Near Statue Circle, Jaipur.

... Respondents
(By Advocate: Mr. Mukesh Agarwal)

ORDER (ORAL)

Since the facts and legal position of both these OA No. 80/2010 (Govind Prasad Goyal vs. Union of India & Others) and OA No. 220/2010 (Pokar Mal) are similar, therefore, these are being disposed of by a common order.

2. In OA No. 80/2010 (Govind Prasad Goyal), the applicant has claimed that the benefit of financial upgradation under MACP be given to him w.e.f. 01.09.2008, the date from which his juniors have been given this benefit vide order dated 12.08.2009 (Annexure A/2).

3. In OA No. 220/2010, the applicant (Pokar Mal) has also requested that he should be given promotion to the post of Audit Officer w.e.f. 16.06.2009 in addition to the benefit of MACP w.e.f. 01.09.2008.

4. These OAs were decided by this Tribunal vide order dated 08.08.2011. Order passed in OA No. 80/2010 (Govind Prasad Goyal) was challenged by the respondents before the Hon'ble Rajasthan High Court by way of filing DB Civil Writ Petition No. 4031/2012. The Hon'ble High Court vide its order dated 08.05.2012 set aside the order passed by this Tribunal and directed the Tribunal to decide the OA in terms of the

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observations made in the aforesaid order. Similarly, the order passed in OA No. 220/2010 (Pokar Mal) was challenged by the respondents before the Hon'ble Rajasthan High Court by way of filing DB Civil Writ Petition No. 4081/2012. The Hon'ble High Court vide its order dated 29.03.2012 set aside the order passed by this Tribunal and directed the Tribunal to decide the OA in terms of the observations made in the aforesaid order.

5. Learned counsel for the applicant argued that the applicant had completed more than 10 years of service as on 01.09.2008. Therefore, he should be given the benefit of Modified Assured Career Progression Scheme (MACP) as this has been extended to similarly situated persons, out of which many are juniors to the applicant vide order dated 12.08.2009 (Annexure A/2).

6. He also submitted that earlier junior employees to the applicant were promoted to the post of Audit Officer, Group 'B' Gazetted vide order dated 16.06.2009 (Annexure A/3) but the applicant was not promoted. Therefore, the applicant represent before the respondents and he was informed that DPC did not recommend his case for promotion vide letter dated 13.07.2009 (Annexure A/4).

7. He further submitted that the applicant was never communicated any ACR of the previous years. It is settled law that uncommunicated ACRs cannot be taken into consideration by the DPC. The applicant was only allowed to inspect the ACR

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Dossiers for the period 2003-04, 2004-05, 2005-06, 2006-07, 2007-08 and 2008-09. A perusal of this record would reveal that the Reporting Officer (case of Govind Prasad Goyal) reported the applicant for the period 2003-04 as 'Average' worker. This entry was made in the ACR without providing any opportunity of being heard and without affording the opportunity of making representation against the adverse ACR. The Reviewing Authority also maintained the ACR of the applicant for the year 2003-04 as 'Average'.

8. In the case of Pokar Mal (OA No. 220/2010), the ACR was 'Very Good' as written by the Reporting Officer but the Reviewing Officer downgraded the applicant from 'Very Good' to 'Average'. This was never communicated to the applicant. Once the Reporting Officer has given applicant as 'Very Good' then the downgrading this ACR to 'Average' by the Reviewing Authority is arbitrary and cannot be taken into consideration by the Screening Committee.

9. The learned counsel for the applicant further submitted that below bench mark entry cannot be taken into consideration by the Screening Committee unless an opportunity has been given to the applicant to represent against such entries and to support his averments, learned counsel for the applicant referred to the following judgments of the Hon'ble Supreme Court:-

- (i) Dev Dutt vs. Union of India
2008 (8) SCC 725
- (ii) Abhijit Ghosh Dastidar vs. Union of India & Others

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2009 (16) SCC 146

He further referred to the following orders of the Hon'ble High Court of Rajasthan (Jaipur Bench):-

- (i) Satish Kumar Khurana vs. the State of Raj. & Others
2009 (2) WLC (Raj.)756
- (ii) Ashok Iyer vs. State of Rajasthan & Others
2010 WLC (Raj.) UC 119

10. Therefore, he argued that the respondents be directed to give promotion to the applicant on the post of Audit Officer from the date his juniors have been given promotion and to grant MACP w.e.f. 01.09.2008, the date from which many of their juniors have been given the benefit of MACP Scheme.

11. On the other hand, learned counsel for the respondents submitted that as per the Scheme of MACP, the bench mark of 'Good' is applicable till the grade pay of Rs.6600/- and the case of the applicants in both these OAs are covered under this provision.

12. That the case of the applicant being eligible officer for grant of financial upgradation under the MACP Scheme was considered by the Screening Committee and they observed that the officer had 'Average' ACR during the period 2003-04. The Committee had taken into account the instructions contained in OM No. 22011/5/86/Estt.(D) dated 10.04.1989, which inter-alia provides that the Committee should not be guided merely by the over-all grading, but should make own assessment on the basis

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of entries in the ACR. Besides this, the Committee observed that 'Average' grading was justified and, therefore, the Committee did not recommend for upgradation to grade pay of Rs. 5400/- in PB-2 w.e.f. 01.09.2008 under MACP Scheme. He further argued that the applicant was given an opportunity to see his ACRs under the RTI Act.

13. With regard to the case law referred to by the learned counsel for the applicant, the learned counsel for the respondents argued that the DOPT has issued the OM No. 21011/1/2010-Estt. (A) dated 27.04.2010 enclosing a copy of Hon'ble Supreme Court order dated 29.03.2010, passed in Civil Appeal No. 2872/2010, **Union of India vs. A.K. Goel**, wherein the Hon'ble Supreme Court after noticing the apparent conflict between the judgment in Dev Dutt vs. Union of India & others, 2008 (8) SCC 725, on one hand and **Satya Narain Shukla vs. Union of India**, 2006 (9) SCC 69 and **K.M. Mishra vs. Central Bank of India & Others**, 2008 (9) SCC 120, has referred the matter to the Larger Bench. The judgment in case of Dev Dutt vs. Union of India (supra) is, therefore, not final and the matter is sub-judice before the Hon'ble Supreme Court (Annexure R/1).

14. With regard to the promotion of the applicant to the post of Audit Officer, the learned counsel for the respondents argued that the ACR covering the period 2003-2004 to 2007-2008 were considered by the Departmental Promotion Committee, which prepared the main and supplementary panel in the year 2009.

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The Bench mark for promotion to the post of Audit Officer is 'Good' and since the ACR of the applicant for the period 2003-04 was average, which was fully supported by various other documents, therefore, the DPC did not recommend Shri Govind Prasad Goyal (applicant in OA No. 80/2010) for promotion to the Audit Officer for the panel year 2009.

15. The applicant preferred a representation dated 03.07.2009 for not granting him promotion to the post of Audit Officer. The representation of the applicant was duly considered and rejected and reasons for not granting him promotion to the post of Audit Officer were conveyed vide order dated 13.07.2009 (Annexure A/4). Thereafter, the applicant preferred a Mercy Appeal, which was also carefully considered and rejected. He further submitted that the applicant has been promoted as Audit Officer w.e.f. 01.01.2010.

16. In the case of Pokar Mal (applicant in OA No. 220/2010), the applicant made a representation dated 19.06.2009 for granting him promotion to the post of Audit Officer. His representation was duly considered and rejected. The reasons for not granting promotion to him on the post of Audit Officer was conveyed vide letter dated 13.07.2009 (Annexure A/3 of OA No. 220/2010). He also filed a Mercy Appeal dated 15.12.2009 (Annexure A/8 of OA No. 220/2010), which was duly considered and reasons for not allowing promotion to the post of Audit Officer were conveyed vide letter dated 15.03.2010 (Annexure

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A/2 of OA No. 220/2010). Learned counsel for the respondents further submitted that the applicant has been promoted to the post of Audit Officer w.e.f. 01.02.2010 (Annexure A/9).

17. Heard the rival submissions of the learned counsel for the parties, perused the documents on record and the case law referred to by the learned counsel for the parties. It is not disputed that the entry of the applicant (Govind Prasad Goyal) was 'Average' for the year 2003-04 both by the Reporting as well as Reviewing Officer. In the case of Pokar Mal (applicant in OA No. 220/2010), the ACR for the year 2003 was 'Very Good' by the Reporting Officer but it was downgraded to 'Average' by the Reviewing Officer. It is also not disputed that for giving the benefit of MACP Scheme, the bench mark is 'Good'. It is also not disputed that for giving promotion to the post of Audit Officer, the Bench mark is 'Good'. Under the MACP Scheme, the financial upgradation is purely personal and has no relevance to the employee's seniority position.

18. With regard to the submission of the learned counsel for the applicant that the below bench mark should have been communicated before they were considered by the Screening Committee/ Departmental Promotion Committee as per the ratio decided by the Hon'ble Supreme Court in the case of Dev Dutt (supra) and Abhijit Ghosh Dastidar (supra), the learned counsel for the respondents submitted that Hon'ble Supreme Court vide order dated 29.03.2010 passed in 2872/2010 in the case of

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Union of India vs. A.K. Goel & Others (Annexure R/1) has referred the matter to the Larger Bench after noticing apparent conflict in the judgment in Dev Dutt's case (supra) and Satya Narain Shukla's case, 2006 (9) SCC 69 and K.M. Mishra vs. Central Bank of India & Others, 2008 (9) SCC 120. Therefore, he argued that this matter is sub-judice before the Hon'ble Supreme Court. We are inclined to agree with the averments made by the learned counsel for the respondents that the ratio decided by the Hon'ble Supreme Court in the case of Dev Dutt (supra) is, therefore, not final.

19. Learned counsel for the respondents further drew our attention to DOPT Office Memorandum dated 14.05.2009 (Annexure R/9) wherein it has been stated that "the new system of communicating the entries in the APAR shall be made applicable prospectively only with effect from the reporting period 2008-09 which is to be initiated after 1st April, 2009." He submitted that since in the present case, the ACR for the period 2003-2004 to 2007-2008 were considered for granting the MACP and promotion, therefore, the instructions as contained in DOPT OM dated 14.05.2009 are not applicable under the facts of the present case. We are in agreement with the averments made by the learned counsel for the respondent on this point.

20. We have carefully perused the order of the Hon'ble Rajasthan High Court (Jaipur Bench) in the case of Ashok Iyer vs. State of Rajasthan & Others (supra). We are of the opinion

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that in view of the position explain in Para Nos. 18 & 19 of this order, the ratio decided by the Hon'ble Rajasthan High Court (Jaipur Bench) in this case is not applicable under the facts & circumstances of the present case. In this judgment, the Hon'ble High Court has placed reliance on the judgment of the Hon'ble Supreme Court in the case of Dev Dutt vs. Union of India & Others (supra). We have also carefully read the order of the Hon'ble Rajasthan High Court (Jaipur Bench) in the case of Satish Kumar Khurana vs. the State of Raj. & Others (supra) and we are of the view that the facts & circumstances of Satish Kumar Khurana vs. the State of Raj. & Others (supra) were different than facts of the present OA. In that case, the adverse remarks were made in 1994 were not communicated to the petitioner till the same were considered by the Departmental Promotion Committee on 23.11.1995 but in the present OAs remarks in the ACRs were 'Average' which are not 'Adverse' and therefore, they were not required to be communicated to the applicants as per the instructions applicable ^{at} ~~as~~ that point of time. Therefore, the ratio decided by the Hon'ble High Court (Jaipur Bench) in the case of Satish Kumar Khurana vs. the State of Raj. & Others (supra) is also not applicable in the present OAs.

21. Considering the facts of the case, documents on record and the case law referred to by the learned counsel for the parties, we are of the opinion that the applicants have failed to make out any case for our interference in both the OAs. We find

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no infirmity/illegality in the decision taken by the respondents in not giving the benefit of MACP w.e.f. 01.09.2008 and promotion to the post of Audit Officer w.e.f. 16.09.2009 to the applicants. Both the applicants have been given the benefit of MACP w.e.f. 01.07.2009 (Annexure A/6 of OA No. 80/2010). As per the respondents, Shri Govind Prasad Goyal (OA No. 80/2010) and Pokar Mal (OA No. 220/2010) have been promoted to the post of Audit Officer w.e.f. 01.01.2010 and 01.02.2010 respectively.

22. In view of the above discussions, we are of the considered ^{have} ~~opinion~~ ^{Anil Kumar} that the present OA ~~has~~ ^{have} no merit and, therefore, these are dismissed being devoid of merit with no order as to costs.

23. The copy of this order shall be placed in file of OA No. 220/2010 (Pokar Mal vs. Union of India & Others).

Anil Kumar
(Anil Kumar)
Member (A)

K. S. Rathore
(Justice K.S.Rathore)
Member (J)

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