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**CENTRAL ADMINISTRATIVE TRIBUNAL
CHANDIGARH BENCH
CHANDIGARH**

O.A. No.060/00496/2014

Orders reserved on: 16.02.2015

Pronounced on: 12.3.2015

**Coram: Hon'ble Mr. Sanjeev Kaushik, Member (J)
Hon'ble Mr. Uday Kumar Varma, Member (A)**

Bachan Singh son of Shri Kaka Ram, age 60 years, now resident of K.
No. 33, Sector 10, Panchkula (Haryana)

.....Applicant

Versus

1. Union Territory, Chandigarh through its Secretary, Food & Supplies, UT Secretariat, Sector 9, Chandigarh.
2. Deputy Commissioner-cum-Director, Food & Supplies, UT Chandigarh.

.....Respondents

Present: Mr. D.R. Sharma, counsel for the applicant
Mr. Amit Jhanji, counsel for the respondents

Order

By Hon'ble Mr. Sanjeev Kaushik, Member(J)

1. The present O.A. is directed against an order dated 08.05.2014 whereby the claim of the applicant for promotion to the post of District Food & Supplies and Consumer Affairs Officer, Union Territory, Chandigarh has been rejected.
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2. The facts which led to the filing of the present case are as under. 10

3. The applicant joined the respondents department as Clerk on 21.03.1974, promoted as Inspector and Assistant Food & Supplies Officer (referred to as "AFSO" hereinafter) in the year 2008. As per the Punjab Food & Supplies Department (State Service Class II) Rules, 1966 (referred to as "Rules 1966" hereinafter), the AFSO with two years of service will become eligible for promotion to the post of District Food & Supplies and Consumer Affairs Officer (referred to as "DFSCAO" hereinafter). It is the case of the applicant that he became entitled to promotion to the post of DFSCAO on 16.02.2010 as per Rules, 1966 but instead of giving him promotion he had been given additional charge of that post in addition to his own duties on 01.07.2011, which was subsequently made regular, and he worked as such till 30.04.2012 when he retired on attaining the age of superannuation. It is submitted that as per the instructions dated 01.01.1975 and 15.05.1980 issued by the Chandigarh Administration, the eligible officers of the UT cadre are to be considered for promotion in preference to appointment of deputationists. As per the instructions dated 10.04.1989 and 04.05.2005 issued by the Chandigarh Administration, the Competent Authority is to initiate action to fill up the existing as well as anticipated vacancies well in advance and convene DPC two months prior to the date of vacancy. But since the applicant, instead of being given promotion to the post of DFSCAO, was given additional charge of that post, he filed O.A. No. 474/HR/2012 which

was disposed of vide order dated 08.02.2013, with a direction to the respondents to pay him salary for the period he worked on the post of DFSCAO and to convene a DPC for making promotion to the post of DFSCAO and to promote the applicant, if he is found entitled to, from the date the post fell vacant. The Chandigarh Administration filed a CWP (NO. 11971/13) against the orders aforementioned, which was dismissed on 29.05.2014, and it was in pursuance thereof that the respondents considered the case of the applicant for promotion to the post DFSCAO and rejected it vide order dated 08.05.2014 on the ground that the DPC did not find the applicant suitable for the post as he could not secure minimum 12 marks for his ACRs to meet the bench mark required for promotion to the said post. Hence the O.A.

4. The respondents contested the claim of the applicant by filing a detailed written statement wherein they did not dispute the factual accuracy of the averments made in the O.A. He submitted that in terms of the circular letter dated 12.05.2009 regarding promotion to the group-A and Group -B posts, the minimum bench mark is "very good" with at least 12 marks which the applicant could not score as he could gather only 11 marks, therefore, he was not found suitable for promotion to the post of DFSCAO and hence his case for promotion has rightly been rejected vide impugned order.

5. Applicant has filed rejoinder wherein he contradicted the averments made in the written statement. He submitted that the

respondents have considered those adverse ACRs of the applicant, which were not communicated to him, for which he secured less marks and could not meet the bench mark and that un-communicated below bench mark could not be taken into consideration by the DPC to deprive the rightful claim of the applicant for promotion, therefore, the action of the respondents is in clear violation of the law laid down by the Hon'ble Supreme Court in the following cases:-

1. **Dev Dutt Sharma Vs. Union of India & Others (2008(7) Scale 403)**
2. **Abhijit Ghosh Dastidar Vs. Union of India & Others(2009) 16 SCC146**
3. **Sukhdev Singh Vs. Union of India & Others(J.T. 2013(8) SC 270)**

6. We have heard learned counsel for the parties.

7. Learned counsel for the applicant vehemently argued that the action of the respondents in considering the un-communicated adverse ACRs in the deliberations is bad in view of the settled proposition of law on the subject, therefore, the impugned order may be quashed and set aside and the applicant may be considered and declared fit for promotion from the date the relevant post became available. Learned counsel argued that since he was eligible for promotion to the post of DFSCAO, therefore, he was given additional charge of that post which he successfully performed till he attained the age of superannuation and now

his case for promotion has been rejected on the ground that he is not having bench mark ACRs, which has not even been communicated and thus the action of the respondents is illegal and arbitrary.

8. Learned counsel for the respondents argued that in terms of the circular issued by the Chandigarh Administration for considering the cases for promotion to Group - A and Group B posts, his case was considered but he could not secure bench mark of 12 marks, therefore, his case for promotion has been rejected vide impugned order. He submitted that for the period the applicant performed the additional duties of the post of DFSCAO, he has been paid the salary of the higher post and such working ipso facto would not make him fit for promotion.

9. The solitary contention in the hands of the applicants which is to be answered is whether entries either good or adverse recorded in ACR's of an employee is to be communicated to the public servant or not?

10. Before, we answer the above poser, let the entire law on the issue be discussed first. Prior to **Dev Dutt v. Union of India, 2008(8) SCC 725**, there was no requirement of communicating the entries which were below the Bench mark or the non-communicated ACR had an adverse impact on the promotion of an employee. This issue was thoroughly considered by the lordships in the case of Dev Dutt's case (supra), wherein it has been held that if any entry in ACR has bad effect while assessing an employee for promotion where there is certain benchmark, then the same is to be communicated for fairplay. This view was

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subsequently approved by the three Judges Bench in the case of Abhijit

● Ghosh Dastidar v. Union of India 2009(16) SCC 146 where the lordships held as under:-

"Learned counsel appearing for the appellant has pointed out that the officer who was immediately junior in service to the appellant was given promotion was 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 retiral benefits as per rules."

11. This issue has, in fact, been referred to a Larger Bench by the Supreme Court of India in case of Union of India v. A.K. Goel and others, (C.A. 2872 of 2010) which was also decided on 20.11.2013.

The observation in this judgment showed that the reference arose out of a perceived conflict of the judgment in Dev Dutt's case (supra) and another two judgments, but it was opined that the view expressed by the three Judges Bench in Sukhdev Singh v. Union of India and others, 2013(9) SCC 566, squarely dealt with the issue and affirmed the view expressed in Dev Dutt's case (supra) wherein the lordships have held that communication of the entries helps a public servant in achieving threefold objects- (i) to enable a public servant to improve his work and give better result, (ii) to enable him to make a representation for up gradation

of the remarks entered in the ACR, if he feels dissatisfied, and (iii) to bring transparency in the recording of the remarks relating to public servant. Suffice it to state here that by now the settled law of the land is that every entry in ACR has to be communicated to an employee. It is one of the submissions made by the learned counsel for the applicant that entries prior to Dev Dutt case are also to be communicated which become instrument in denial of promotion; whereas learned counsel appearing for the respondents submitted that it is to be applied prospectively i.e. from the date it was pronounced i.e. 12.5.2008. We may record here that there is not a whisper in the case of Dev Dutt's case (supra) that it will apply prospectively. It is a well settled law that unless it is held that the Judgment has its applicability prospective by the Court it will always have retrospective effect. This issue has also been answered by the jurisdictional High Court in the case of **Prithi Pal Singh Danjal v. CAT and others, Civil Writ Petition No. 19559-CAT of 2003 decided on March 24, 2014.** The relevant reads as under:-

"On analysis of all the aforesaid decisions, we are of the view that it is not as if no prejudice was caused by non-communication of A.C.R. remarks. The law stands settled in **Dev Dutt's case** (supra) that all ACRs must be communicated. This position would ensure for the benefit of all public servants to whom the ACRs were not communicated unless, of course, there is a lis which has attained finality. This is not the position in the present case where the list was pending. The judgment in **Dev Dutt's case (supra)** has not been made applicable prospectively by anything observed in the same and, thus, must be deemed to apply retrospectively.

The judgment in V.S. Arora's case (supra) clinches the issue. The concerned public servant was in the same cadre and junior to the petitioner. The result of the judgment would

be that while the junior of the petitioner has got the benefit, the petitioner is being denied the same. We may say that after the judgment in V.S. Arora's case (supra), it was the bounden duty of Respondents No. 2 and 3 to apply the ratio across the board and at least to the persons who were already agitating a grievance. Forget that, despite the judgment, respondents No. 2 and 3 persist in opposing the relief to the petitioner, inter alia, consuming valuable judicial time for no purpose.

The aspect of making any judgment only prospectively applicable has already been explained by the two judgments cited by the learned counsel for the petitioner. We do not see how the constitution Bench judgment in B. Karunakkar's case (supra) comes to the aid of the learned counsel for Respondents No. 2 and 3 when it specifically talks about a situation where a particular judgment has been made prospectively applicable. There is quibble with the proposition that the Court, in a given situation, may make the applicability of a judgment prospectively. There is equally no quibble that the judgment would apply retrospectively, unless its prospective application is specifically indicated in the decision itself.

We, thus, set aside the impugned order of the Central Administrative Tribunal dated 06.06.2003, direct the respondents to consider the case of the petitioner for promotion to the posts of Additional Chief Engineer and Chief Engineer, ignoring the ACR for the period from 01.04.1995 to 06.03.1996. If the petitioner is found eligible, no monetary benefits would be paid to him for the period he has not worked on those post(s). The petitioner having retired would, however, be entitled to all the consequential pensionary benefits including arrears. The needful be done within three months from today."

From the above authoritative law, it can safely be culled out that in a case of a serving employee, whose case for promotion has been rejected on account of not meeting Bench mark on the basis of un-communicated adverse entries, the respondents could be directed to communicate those adverse entries in ACRs and if the same are upgraded upon filing of a representation there against, his case may be re-considered for

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promotion. The other eventuality is in the case of retired employees- their case, as per dictum in the case of **Abhijit Ghosh Dastidar (supra)** by the Hon'ble Apex Court and the Jurisdictional Hon'ble High Court in the case of **Prithi Pal Singh Dhanjal (supra)**, be considered after ignoring the un-communicated ACR's, and they would also be entitled for all the consequential pensionary benefits including arrears.

12. In view of the above authoritative law, the above poser is answered in affirmative. Accordingly, the impugned order is hereby quashed and set-aside, the matter is remitted back to the respondents to consider the case of the applicant for promotion to the post of DFSCAO from the due date by ignoring the un-communicated adverse ACRs. The applicant, if found eligible to the promotion, shall be entitled to all the consequential pensionary benefits including arrears as laid down by the Hon'ble Supreme Court in the case **Abhijit Ghosh Dastidar (supra)** and the Hon'ble Jurisdictional High Court in the case of **Prithi Pal Singh Dhanjal (supra)**. The above exercise shall be carried out by the authorities within a period of three months from the date of receipt of a certified copy of this order. No other point argued, No costs.

(UDAY KUMAR VARMA)

MEMBER (A)

PLACE: Chandigarh

Dated: 12.3.2015

MW

(SANJEEV KAUSHIK)

MEMBER (J)