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**CENTRAL ADMINISTRATIVE TRIBUNAL
CHANDIGARH BENCH
CHANDIGARH**

O.A. No.060/00363/2014

**Pronounced on: 20.1.20
Reserved on: 12.01.2016**

**Coram: Hon'ble Mr. Justice L.N. Mittal, Member (J)
Hon'ble Mrs. Rajwant Sandhu, Member (A)**

Sukhdev Singh son of Shri Jaswant Singh, Joint Director of Trainin Director General of Employment and Training, Ministry of Labour, Shram Shakti Bhawan, Rafi Marg, New Delhi, resident of Kirpal House, 465, Phase II, Urban Estate, Patiala -147001.

.....**Applicant**

Versus

- 1. Union of India through the Secretary, Government of India, Ministry of Labour, Shram Shakti Bhawan, Rafi Marg, New Delhi.**
- 2. The Director General of Employment and Training, Ministry of Labour, Shram Shakti Bhawan, Rafi Marg, New Delhi.**
- 3. Union Public Service Commission through its Secretary, Shah Jahan Road, New Delhi.**
- 4. The Director of Advanced Training Institute, Department of Labour, Government of India, Gill Road, Ludhiana- 141003.**
- 5. Sh. N.K. Chattarji, Joint Director of Training, Advanced Training Institute, Department of Labour, Government of India, Das Nagar, Howrah.**
- 6. Shri R. Senthil Kumar, Joint Director of Training, Advanced Training Institute, Department of Labour, Government of India, Guindy Chennai – 600002.**
- 7. Sh. N. Aswatha Narayaappa – Deleted vide order dated 29.04.2015**

.....**Respondents**

Present: Mr. G.K.S. Taank, counsel for the applicant
Mr. Ram Lal Gupta, counsel for the respondents No. 1, 2 & 4
Mr. B.B. Sharma, counsel for Resp. No. 3
None for Respondents No. 5 and 6

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OrderBy Hon'ble Mrs. Rajwant Sandhu, Member(A)

1. This O.A. has been filed by the applicant under Section 19 of the Administrative Tribunals Act, 1985, seeking the following relief:-

- (i) Direction be issued to the respondents to convene special DPC to consider the applicant for promotion to the next higher grade of Joint Director with effect from the date on which his immediate junior was promoted ignoring the down- graded ACRs of the applicant for the years 1998-99, 1999-2000, 2000-01 and 2001-02 which were not communicated to the applicant as per law and treating the downgraded ACR at par with the ACR of last three years.
- (ii) The respondents be directed as per law and the judgment passed by Hon'ble Supreme Court of India in Civil Appeal No. 5892 of 2006 dated 23.05.2013, to consider the case of applicant to give the benefit of promotion to the applicant with effect from the date on which his immediate junior was promoted as Joint Director and the benefit of subsequent promotions with effect from the date when the immediate junior of the applicant has been promoted.
- (iii) Quash the order dated 18.07.2013 denying the promotion to the applicant.

2. The background of the matter is that on being recommended by Union Public Service Commission (Respondent No. 3), the applicant was appointed as Deputy Director of Training in the pay scale of Rs.3000-4500 on 13.11.1992(Annexure A-3) and was posted at Advanced Training Institute, Mumbai, and thereafter was transferred to Ludhiana where he joined on 13th of February 1995 in the office of Respondent No. 4. The applicant was senior most in seniority of the Deputy Directors of Training among the Respondents No. 5,6 & 7(private respondents) who were admittedly junior to him. The next post is Joint Director Training which is selection post and the selection is made on the basis of the ACRs by DPC. The benchmark for promotion to the post of Joint Director of Training is "Very Good" and the procedure to be observed by DPC for selection post has been laid down by Government of India, Department of Personnel and Training OM No. 350347/7/1997

Estt 9 D dated 08.02.2002 which has again been reiterated in DOP&T O.M. No. 22011/3/2007- Estt (D) dated 18th February 2008. The relevant portion of the O.M. reads as under:-

"3.2 Benchmark for promotion:-

The DPC shall determine the merit of those being assessed for promotion with reference to the prescribed benchmark and accordingly grade the officers as 'Fit' or 'Unfit'. Only those officers who have been graded as "Fit" (i.e. who made the prescribed benchmark) by the DPC shall be included in the selection panel in order of their inter-se seniority in the feeder grade. Those officers who have been graded 'unfit' (in terms of the prescribed benchmark) by the DPC shall not be included in the select panel. Thus there shall be no supersession in promotion among those who are graded 'Fit'(in terms of prescribed benchmark) by the DPC.

3.3. Promotion to the revised pay scale (grade) of Rs.12,000-16,500 and above

- (iv) The mode of promotion, as indicated in para 3.1 above shall be selection.
- (v) The benchmark of promotion as it is now shall continue to be 'very good' as it will ensure element of higher selectivity in comparison to selection promotion to the grades lower than the aforesaid level where the benchmark shall be 'good' only.
- (vi) The DPC for promotion to the said pay scale (grade) and above, grade officers as 'Fit' or 'Unfit' only with reference to the bench-mark of "very good." Only those who are graded as 'Fit' shall be included in select panel prepared by DPC in order of their inter-se seniority in the feeder grade. Thus, there shall be no super session in the promotion among those who were found fit by the DPC in terms of the aforesaid prescribed benchmark of "very good".

3. The reviewing authority for the purpose of writing of the ACR(who expired on 16.09.2003) had suo moto reviewed and downgraded the entries in all confidential reports of the applicant by assessing his ACRs for the period 2000-2001 and 2001-2002 as "Good"/"Average" respectively. These downgraded entries were never communicated to the applicant. The applicant was eligible/entitled for promotion and was within the zone of consideration for promotion to the

post of Joint Director of Training in the pay scale of Rs.12,000-16,500/-.

The name of the applicant was considered by Respondent No. 3 (the Union Public Service Commission) in its DPC along with the private respondents. However, in view of downgrading ^{of} entries in the ACRs made by Respondent No. 4, the applicant was denied the promotion to the post of Joint Director of Training, whereas the private respondents who were junior to the applicant were promoted as Joint Directors vide order dated 24.12.2002 (Annexure A-8). The applicant was informed that the DPC convened by Respondent No. 3 had not recommended the case of the applicant for promotion to the grade of Joint Director of Training (Annexure A-8/A). The applicant made a representation to the Respondents No. 1 and 2 as he was denied promotion and his juniors were allowed to score a march over him. It was categorically written that the downgraded entries from excellent/very good to good/average for the years 1998-99, 1999-2000, 2000-01 and 2001-02 respectively were not communicated to the applicant but were considered by DPC at the time of promotion and it was requested for reconsidering the case ignoring the said ACRs. The representation of the applicant was rejected by the respondents vide Annexure A-1.

4. The applicant had earlier filed O.A. No. 287/PB/2007 before this Tribunal which was dismissed vide order dated 03.04.2003 (Annexure A-10) holding that "benchmark for promotion post was 'very good'. Since the applicant could not reach the benchmark, he was found unfit for consideration to the promotional post of Joint Director of Training...The adverse remarks were required to be communicated and not the remarks which are not adverse." In April, 2003, the applicant filed Civil Writ Petition No. 6620/CAT/ 2003 in the Punjab and Haryana High Court at Chandigarh challenging the said order which was dismissed vide order dated 04.07.2005 (Annexure A-11) holding as under:-

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"In the index the learned counsel for petitioner has mentioned that this matter was identical to Civil Writ Petition No. 18833 of 2002 (Union of India Vs. Col Tilak Raj). As per Annexure R-1 appended with reply, the aforesaid writ petition had already been dismissed at a time when the present writ petition came up for motion hearing. We accordingly dismiss the writ petition."

The applicant challenged this order of the Hon'ble High Court by filing a Civil Appeal No. 5892/2006 before the Hon'ble Supreme Court of India which was disposed of vide order dated 23.04.2013 (Annexure A-12) holding as under:-

"9. The decision of this court in Satya Narayan Shukla vs. Union of India and Others (2006 9 SCC 69 and K.M. Mishra Vs. Central Bank of India and others (2008) 9 SCC 120 and the other decisions of this court taking a contrary view is declared as not to be laying down a good law.

10. Insofar as the present case is concerned, we are informed that the appellant has already been promoted. In view thereof, nothing is required to be done. Civil Appeal is disposed of with no order as to costs. However, it will be open to the appellant to make a representation to the concerned authorities for retrospective promotion in view of the legal position stated by us. If such a representation is made by the appellant, the same shall be considered by the concerned authorities appropriately in accordance with law.

11. I.A. No. 3 of 2011 for intervention is rejected. It will be open to the appellant to pursue his legal remedy in accordance with law."

In view of the order/judgment aforesaid, the applicant submitted a representation (Annexure A-2) to the Respondents No. 1 and 2 but the same was rejected by Respondent No. 2 vide Annexure A-1. Hence this O.A.

5. In the grounds of relief, it has inter-alia been stated that

- (i) The judgment of Hon'ble Supreme Court in Civil Appeal No. 5892 of 2006 filed by applicant has not been followed by the respondents.
- (ii) As per law settled by the Hon'ble Supreme Court, entries in the ACRs whether outstanding, very good, good, average or below average or adverse should be conveyed to the government officers.
- (iii) The reason given for rejection of the representation (Annexure A-2) of the applicant vide Annexure A-1 has already been rejected by the Hon'ble Supreme

Court in Civil Appeal No. 5892/2006 filed by the applicant.

(iv) Rejection of the representation (Annexure A-2) vide impugned order Annexure A-1 is based on O.M. No. 21001/1/2010 Estt. Dated 13.04.2010 which has effectively been rejected by the Hon'ble Supreme Court vide order dated 23.04.2013 in civil Appeal No. 5892 of 2006 filed by the applicant.

(v) The impugned order is against the law laid down by the Hon'ble Supreme Court in Annexure A-12 and also the other judgments of the Hon'ble Supreme Court referred to therein.

(vi) The procedure laid down by the Government of India vide instructions issued from time to time on the subject has not been followed by the reviewing authority while downgrading the entries in the ACRs of the applicant.

(vii) The law is settled that all the entries in ACRs whether below the benchmark or not to be considered for promotion of the Government officers in the selection posts or non selection posts should be conveyed to the government officer.

(viii) The appointing authority of the applicant is Hon'ble President of India but his representation (Annexure A-2) has been rejected by the officers of the rank of Additional Secretary who is neither competent to consider such a representation and nor to reject the same at his own.

6. In the written statement filed on behalf of the respondents 1,2 & 4, the facts of the matter have not been disputed. It has, however, been stated that the ACR gradings of the applicant for the period 1999-2000 to 2002-2003 are "average" while DPC may consider promotion only for cases where grading is as per the benchmark. As per DoPT's rules at that time (Annexure R-2), 'Average' by itself is not considered as adverse. Only 'adverse' entries in the confidential report of government servant, both on performance as well as on basic qualities and potential should be communicated. That is why, the grading of ACRs of the applicant for the period 1999-2000 to 2002-2003 were not communicated to him. The applicant was found 'unfit' by DPC held in UPSC in the years 2002-2007 and 2008. The applicant was found

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fit by the DPC held in 2010 in UPSC and he was then promoted to the post of Joint Director of Training.

7. It is further stated that all the ACRs/APARs are being disclosed to all the employees keeping in view the DoPT's Office Memorandum dated 13.4.2010 (Annexure R-3) as it says that "if an employee is to be considered for promotion in a future DPC and his ACRs prior to the period 2008-09 which would be reckonable for assessment of his fitness in such future DPCs contain final grading which are below bench mark for his next promotion, before such ACRs are placed before the DPC, the concerned employee will be given a copy of the relevant ACR for his representation, if any, within 15 days of such communication. It may be noted that only below bench mark ACRs for the period relevant to promotion need to be sent. There is no need to send below benchmark ACRs of other years."

8. It is also stated that Hon'ble Supreme Court disposed of Civil Appeal No. 5892/20065 vide order dated 23.04.2013 holding "the appellant has already been promoted and in view thereof, nothing more is required to be done. However, it will be open to the Appellant to make a representation to the concerned authorities for retrospective promotion in view of the legal position stated by us. If such a representation is made by the appellant, the same shall be considered by the concerned authorities appropriately in accordance with law". Subsequently, the applicant i.e. Shri Sukhdev Singh, made a representation to DGE&T. DGE&T considered his representation keeping in view the extant rules and rejected his request for promotion with retrospective effect. The DGE&T consulted the DoP&T on the issue for holding a review DPC on the basis of non communication of ACRs' grading which were graded as 'average' for the period 1999-2000 to 2002-2003 of the applicant. The DoP&T tendered their considered advice that Union of India should initiate immediate action to file a

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Review Petition in the Hon'ble Supreme Court. After consulting the Additional Solicitor General, Government of India, the DGE&T filed a Review Petition in the Hon'ble Supreme Court vide its Diary No. 10304/2014 on 27.03.2014 considering the fact that such a dispensation, if allowed, will lead to a complete chaos wherein a large section of serving as well as retired employees would be engaged in revising their seniority position and consequential benefits, administratively as well as through litigations, which may have adverse consequences for the smooth functioning of the administration. Allowing Review DPC of the DPCs held prior to 13.04.2010, consequent upon up-gradation of ACRs on the basis of opportunity granted under the DoP&T's OM dated 13.04.2010 would take the situation anterior to 13.04.2010 where no such relief was available to any similarly placed employee. This would amount to giving retrospective effect to DoP&T's O.M. dated 13.04.2010 and also to the OM dated 14.05.2009 which was not the intention of the Government while issuing these OMs for the reason that such a dispensation has the potential of destabilizing and unsettling the already settled positions with regard to seniority and promotions across all the Ministries / Departments; and would have a cascading effect across all the cadres of the Ministries / Departments and structure of all grades / posts in Central and State Governments.

9. Respondent No. 3, the UPSC did not file separate reply but had asked Respondents No. 1, 2 and 4 to defend UPSC also.

10. Rejoinder has been filed on behalf of the applicant rebutting the written statement and reiterating the contents of the O.A.

11. Arguments advanced by learned counsel for the parties were heard. Learned counsel for the applicant mainly relied on judgment in the case of **Dev Dutt Vs. Union of India & Others** (2008) 8 SCC 225 to press that the ACRs of the applicant for the period 1999-2000 to 2002-03 had been downgraded to below benchmark level by the

Reviewing Officer while these were material to his consideration for promotion in DPC held in 2002 and thereafter. He stressed that since below bench-mark gradings in these ACRs had not been conveyed to the applicant, these should have been ignored by the DPC and assessment made on the basis of ACRs of earlier years. Learned counsel also stated that although judgment in the case of Dev Dutt (supra) was of 2008 and DOP&T issued guidelines regarding communication of APARs in 2010, the Apex Court had earlier also laid down the law in this regard through the judgment in the case of **UP Jal Nigam and Others Vs. Prabhat Chander Jain** (1996) 2 SCC 363.

12. Learned counsel for the respondents reiterated the content of the written statement. He stated that the respondent Department as well as the UPSC had held the DPCs for consideration of the applicant and others for promotion keeping in view the extant instructions of the DoP&T regarding ACRs and prescribed bench-mark. Learned counsel also stated that if past cases were to be re-opened ignoring the DoP&T's O.M. of 14.05.2009 and 13.04.2010, complete chaos would be created, settled issues would be un-settled and the Department would find it difficult to function. Since prior to 14.05.2009, there was no requirement that grading below bench-mark had to be conveyed to the employees and the gradings of the applicant during the years 1999-2003 were "average" which was not considered as "adverse", these gradings had not been conveyed to the applicant. Since the respondent department as well as the UPSC had implemented the DoP&T guidelines issued from time to time, the applicant being an employee of the Govt. was also bound by these guidelines. There was no merit in the claim of the applicant for re-opening the whole matter and hence the O.A. deserved to be dismissed.

13. We have given our careful consideration to the matter. It is quite clear from the material on record that the grading in the ACRs that

were down-graded in respect of the applicant for the years 1999-2000 and 2002-2003 were not conveyed to the applicant. The applicant has been representing in this regard and regarding being overlooked for promotion ever since result of the DPC held in 2002 was declared. The judgment in the case of UP Jal Nigam(supra), as cited by the applicant, appears to be relevant to the claim of the applicant since if the down-graded ACRs had been conveyed to the applicant, he would have had an opportunity to represent against the same. The DoP&T's OM dated 13.04.2010 deals with the directions issued in the case of Dev Dutt (supra) and it has been directed therein that with prospective effect, the contents of the APARs will be conveyed to the concerned employees. In respect of past ACRs, it has been held that where these had to be considered for DPCs held from 2009 onwards, such ACRs where the grading is below the benchmark, should be conveyed to the concerned employees so that they may represent against the same, if they wish. Representations are to be decided within the prescribed time-frame and only after the ACRs are finalized, these are to be taken into account by the DPC for assessing an employee. Neither in UP Jal Nigam (supra) nor in Dev Dutt (supra), specific reference has been made as to how past cases are to be dealt with. We are of the view that if the employees were to be conveyed their APARs for all the preceding years prior to 2009, this would unsettle settled issues and hence we would not wish to issue any general direction in this regard.

14. Moreover in UP Jal Nigam (supra) which was relevant for consideration at the time when the applicant was considered for promotion as Joint Director in 2002, it has not been held that the ACRs that have not been conveyed to the employee should be ignored for assessment of his performance by the DPC. Hence in the special circumstances of the applicant, the ends of justice will be met, if the ACRs for the years 1999-2000 onwards are conveyed to the applicant in

toto within a period of one month and he will be allowed further one month to represent against any of these ACRs, if he so wishes. The representation of the applicant may be considered by the Competent Authority and a view be taken regarding change in the grading of the ACR for the years regarding which representation is filed. After this exercise is completed, if there is a change in grading of the applicant in the relevant year and the same is brought above the bench-mark prescribed for promotion, the respondents may hold a review DPC to consider the case of the applicant for promotion as Joint Director from the year 2002 onwards. If the applicant's claim for promotion in any year prior to 2010, when he was actually promoted, succeeds, he shall be entitled to all consequential benefits.

15. The O.A. is disposed of with the above directions while observing that decision in this O.A. shall not be cited as a precedent in other cases that come before the Tribunal. No costs.

(RAJWANT SANDHU)

MEMBER (A)

(JUSTICE L.N. MITTAL)

MEMBER (J)

PLACE: Chandigarh

Dated: 20.1.2016

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