CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

O.A. No. 447/2014

Reserved on : 03.11.2015
Pronounced on : 17.11.2015

HON'BLE MR. JUSTICE SYED RAFAT ALAM, CHAIRMAN
HON'BLE MR. P.K. BASU, MEMBER (A)

Rakesh Kumar, Age 34 years,
S/o Shri Birender singh,
L.D.C.
R/o RZH-719, Street No.5,
Raj Nagar Part-II, Palam,
New Delhi-45. .. Applicant

(By Advocate : Shri Sachin Chauhan)

Versus

1. Union of India, through
   Its Secretary
   Ministry of Tourism
   Transport Bhawan
   Sansad Marg,
   New Delhi-110 001.

2. The Additional Director General
   Institute of Hotel Management
   Catering & Nutrition
   (Ministry of Tourism)
   Pusa, New Delhi.

3. The Principal
   (Reviewing Officer)
   Institute of Hotel Management
   Catering & Nutrition
   (Ministry of Tourism)
   Pusa, New Delhi.

4. The Accountant
(Reporting Officer)
Institute of Hotel Management
Catering & Nutrition
(Ministry of Tourism)
Pusa, New Delhi.

5. The Superintendent
(Reporting Officer)
Institute of Hotel Management
Catering & Nutrition
(Ministry of Tourism)
Pusa, New Delhi. ... Respondents

(By Advocate : Ms. Worthing Kasar)

ORDER

By Hon'ble Mr. P.K. Basu

The applicant is a Lower Division Clerk (LDC) working in the Institute of Hotel Management (IHM) which is a Society registered under Society Registration Act, 1860 and comes under the jurisdiction of Ministry of Tourism, i.e. respondent No.1.

2. The grievance of the applicant is that he has been denied the benefit of 1st upgradation under MACP Scheme w.e.f. 15.07.2013 on the ground that he has got below benchmark ACRs for the period 2006-07, 2007-08, 2008-09, 2009-10 and 2010-11. The applicant's grounds for claiming the 1st MACP are as follows:

(i) These ACRs were never communicated to him, therefore, according to the judgment of the Hon'ble Supreme Court in **Dev Dutt Vs. Union of India**, 2008 (8) SCC 725, since the ACRs have

not been communicated, they have to be communicated first and thereafter if the applicant wishes to represent against the below benchmark CRs, those representations have to be disposed of and only thereafter the DPC can take a view.

(ii) In the case of **Union of India & Another Vs. V.S. Arora & Ors.**, WP(C) No.5042/2002, similar issue was before the Hon'ble High Court and the High Court after considering **Dev Dutt (supra)** and **Abhijit Ghosh Dastidar Vs. Union of India**, 2009 (16) SCC 146, concluded that below benchmark ACRs, which have not been communicated, cannot be considered by the DPC and the DPC is then to follow the same procedure which is already cited above, i.e. to go back to the preceding years' ACRs. It is stated that in view of these judgments, the respondents should ignore the below benchmark ACRs and take up CRs of preceding years.

(iii) However, it is pointed out that in O.A. No.2349/2011 – Govind Singh Khairwal Vs. Govt. of NCT of Delhi, this Tribunal vide order dated 15.04.2015 allowed the O.A. and directed the respondents to hold a Review Departmental Screening Committee for considering the applicant therein for grant of 2nd financial upgradation under the ACP Scheme ignoring the uncommunicated below benchmark ACRs during the relevant period and follow the procedure as in the event when some of the ACRs have not been written or declared non est, i.e. to go back in time and consider the ACRs of the years

preceding to the ACRs in question. The applicant also relies on order dated 01.05.2014 of the Tribunal in O.A. No.2148/2013. This O.A. was filed for expunging remarks of the reviewing & reporting authority and the O.A. was allowed. Thus, the facts of O.A. No.2148/2013 are different to the one in hand.

(iv) It is further argued that in the years when below benchmark ACRs were recorded, no warnings were issued to him though this was required by the respondents as held by Hon'ble Justices in **V.S. Arora's** case that communication of CR (i) involves an element of natural justice (ii) it also informs and warns the officer that his performance is not upto the mark so that he may improve himself. Therefore, by not communicating to the officer that his work is not upto the mark, the basic ingredient has been violated and, thus, these offending CRs should be ignored.

(iv) It is further pointed out that all the CRs have been recorded by one Shri Alok Shivpuri as Principal, either as Reporting Officer or as Reviewing Officer, and it appears that he carried a bias against the applicant.

3. The learned counsel for the respondents stated that respondent No. 3 is an autonomous body and is not *ipso facto* governed by the Govt. orders unless Ministry of Tourism directs so to the Institution. In fact, it is stated that MACP Scheme was made applicable to the Institution only in the year 2011.

4. It is also argued that this O.A. is premature as the applicant has not approached the respondents through an appeal and has straightway filed the O.A. before this Tribunal and as per Section 20 of the Administrative Tribunals Act, 1985, the departmental remedy has to be first exhausted before approaching this Tribunal. It is, thus, argued that on this very ground, the O.A. should be dismissed.

5. Lastly, it is argued that it is incorrect on the part of the applicant to state that he has never been warned. In fact, the respondents issued various memos to the applicant between the years 2006 and 2012 (Annexure R-4 colly.) for his acts of omission and commission and those in brief relate to :

(i) absenting from duty without intimation to office.

(ii) taking leave without prior sanction.

(iii) not showing any improvement in his attendance.

(iv) leaving headquarters without information.

(v) intimating incorrect residential address.

(vi) extending leave without intimation and prior permission.

(vii) non-completion of work allotted to him.

(viii) non-submission of relevant office record, when asked to do so.

(ix) non-submission of reports on time.

(x) not updating the status in certain cases, etc.

Learned counsel for the respondents, therefore, argued that the applicant has been given several opportunities to improve his conduct and, therefore, it is incorrect on the part of the applicant to say that he has never been issued any warning and he had no inkling why his performance has been rated as below par.

6. In reply, learned counsel for the applicant pointed out that memorandum which has been issued to him in the year 2012 is of no significance as the CR for that year is already "Good". Moreover, it is pointed out that memorandum dated 28.06.2010 is not a memorandum but a direction to take on some additional work. Similarly, memorandum dated 18.01.2010 does not get reflected in the CR for the year 2009-10 as against work and conduct, he has been rated as "Good".

7. We have heard the learned counsel for the parties and perused the record.

8. There is no doubt that the Department for the period of six years, i.e. from 2006 to 2012, kept on pulling up this official for not being upto the mark and taking work very casually. Therefore, the main objection of the applicant that he was not warned is not substantiated and it is clear that he had never tried to improve himself. Therefore, the facts of the judgment of **V.S. Arora** (supra) are different from the facts of the present case.

9. As regards, whether the orders/judgments cited by the applicant as precedents would apply in the present case, we refer to the judgment of the Hon'ble Supreme Court in **Bharat Petroleum Corporation Ltd. and another Vs. N.R. Vairamani and another**, JT 2004 (8) SC 171 and specifically to paragraphs 8 and 10 of the judgment where their Lordships have discussed the principle of precedent as follows:

> "8. Courts should not place reliance on decisions without *discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are neither to be read as Euclid's theorems* nor as provisions of a statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes....."
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> "10. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper."

Again in **Shikshan Prasarak Mandal Vs. State of Maharashtra**, the Hon'ble Bombay High Court vide its judgment dated 17.09.2009 in Writ Petition No.4835/2002 held as follows:

> "11. It is clear from the above dictum that precedents are to be applied with due regard to facts while adhering to the principles of "ratio decidendi". Procedents are described as, "Authorities to follow in determinations in Courts of Justice". Precedents have always been greatly regarded by the Sages of the Law. The Precedents of Courts are said to be the laws of the Courts; and the Court will not reverse a

judgment, contrary to many Precedents. Even for a precedent to be binding, it cannot be without judicial decision or arguments that are of no moment. To be a good precedent, it has to be an adjudged case or decision of a court of competent jurisdiction considered as furnishing an example or authority for an identical or similar case or a similar question of law afterward arising. It is the ratio understood in its correct perspective that is made applicable to a subsequent case on the strength of a binding precedent. In a recent judgment, a Full Bench of this court in the case of State of Maharashtra v. Prashram Jagannath Auti, 2007(5) Mh. L.J. 403 : 2007 (5) BCR 847, while referring to the binding precedents, held as under: -

> "The ratio is variously defined to be the relation between two magnitudes of the same kind in terms of quality and quantity. Ratio decidendi is the reason for deciding as reasoning is the soul of decision making process. It is formulation of an opinion by the Judge which is necessary in the facts of the case for determination of the controversy. In the case of C.D. Kamdar v. State of Orissa, (1985) Tax L.R. 2497, expressing its views in relation to the binding precedents, the Court held as under: -
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> "Mr. R. Mohanty, the learned counsel for some of the petitioners submitted that the power of the Board under section 90(7) of the Act is to levy fees simpliciter. He cited the case reported in (1978) 34 Cut LT 122 (SC) (Laxmidhar Sahu v. Supdt. of Excise Berhampur) in support of the contention. Reading the entire judgment, the contention as raised by Mr. Mohanty, is not spelt out. A Decision is an authority only for what it actually decided and not for what may logically follow from it. Every judgment must be read as applicable to the particular factors proved, or assumed to be proved, since the generality of the expressions, which may be found there, are not intended to be expositions of the whole law but governed or qualified by particular facts of the case in which such expressions are to be found. See AIR 1983 SC 1246. (Sreenivasa General Traders etc v. State of Andhra Pradesh). The case of Laxmikanta Sahu (supra) was considered by the Supreme Court in AIR 1975 SC 1121 : (1975 Tax LR 1569) (Harsankar v. Dy. Excise and Taxation Company). In para 61 at page 1134 it has been observed that in that case it was expressly contended on behalf of the State of Orissa that the levy was a tax and not a fee. The decision being based on a concession did not involve the determination of the point whether the fee levied under section 90(7) of the Act is a fee simpliciter."

> "12. This is extremely pertinent especially in the current era of globalisation where the entire philsophy of society, on the economic front, is undergoing vast changes. Besides this well accepted precept, there are exceptions to the rule of precedent. There are judiciously accepted exceptions to the rule of precedent and they are decisions per incuriam, sub-silentio and stare decisis. These principles explain when and where a precedent, which is otherwise a good law, necessarily need not be accepted in subsequent judgments if it fully satisfies essentials of these exceptions."
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> "16. The analysis of the above enunciated principles show that a judgment would be applicable as precedent to the subsequent case only where ratio decidendi is squarely applicable to the facts of a subsequent case. The Courts or Tribunals are expected to follow the law of precedent subject to well accepted limitations."

Also in **Divisional Controller, K.S.R.T.C. Vs. Mahadeva Shetty and another**, AIR 2003 SC 4172, the Hon'ble Supreme Court held as follows:

> "23. The decision ordinarily is a decision on the case before the Court, while the principle underlying the decision would be binding as a precedent in a case which comes up for decision subsequently. Therefore, while applying the decision to a later case, the Court dealing with it should carefully try to ascertain the principle laid down by the previous decision. A decision often takes its colour from the question involved in the case in which it is rendered. The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation. The only thing binding as an authority upon a subsequent Judge is the principle upon which the case was decided. Statements which are not part of the ratio decidendi are distinguished as obiter dicta and are not authoritative. The task of finding the principle is fraught with difficulty as without an investigation into the facts, it cannot be assumed whether a similar direction must or ought to be made as measure of social justice. Precedents sub silentio and without argument are of no moment. Mere casual expression carry no weight at all. Nor every passing expression of a Judge, however eminent, can be treated as an ex cathedra statement having the weight of authority."

Further in **Bank of India and another Vs. K. Mohandas and others**, (2009) 5 SCC 313, it has been held as follows:

> "54. A word about precedents, before we deal with the aforesaid observations. The classic statement of Earl of Halsbury, L.C. in Quinn vs. Leathem, 1901 AC 495, is worth recapitulating first:
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> > "Before discussing Allen v. Flood (1898) AC 1 and what was decided therein, there are two observations of a general character which I wish to make; and one is to repeat what I have very often said before -that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logically at all."
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> This Court has in long line of cases followed the aforesaid statement of law.
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> 55. In State of Orissa vs. Sudhansu Sekhar Misra, AIR 1968 SC 647, it was observed:
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> > "…. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it."
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> 56. In the words of Lord Denning:
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> > "Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

> 57. It was highlighted by this Court in Ambica Quarry Works Vs. State of Gujarat, (1987) 1 SCC 213:
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> > "18....The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it."
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> 58. In Bhavnagar University vs. Palitana Sugar Mill (P) Ltd., (2003) 2 SCC 111, this Court held that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.
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> 59. This Court in Bharat Petroleum Corporation Ltd. vs. N.R. Vairamani, (2004) 8 SCC 579, emphasized that the Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which the reliance is placed. It was further observed that the judgments of courts are not to be construed as statutes and the observations must be read in the context in which they appear to have been stated. The Court went on to say that circumstantial applicability, one additional or different fact may make a world of difference between conclusions in two cases."

In **B. Shama Rao Vs. The Union Territory of Pondicherry**, (1967) 2 SCR 650, a five Judge Bench of the Hon'ble Supreme Court held as follows:

> "In view of the intense divergence of opinion except for their conclusion partially to uphold the validity of the said laws it is difficult to deduce any general principle which on the principle of *stare decisis* can be taken as binding for future cases. It is trite to say that a decision is binding not because of its conclusion but in regard to its ratio and the principle laid down therein."

Further in **General Manager Northern Railways and another Vs. Sarvesh Chopra**, JT 2002 (2) SC 445, their Lordships held as follows:

> "9……. A decision of this Court is an authority for the proposition which it decides and not for what it has not decided or had no occasion to express an opinion on……."

In this regard, we also refer to judgment of the Hon'ble Supreme Court in **Chandra Prakash and others Vs. State of U.P. and another**, AIR 2002 SC 1652 and specifically to para 22 of the judgment which reads as follows:

> "22. A careful perusal of the above judgments shows that this Court took note of the hierarchical character of the judicial system in India. It also held that it is of paramount importance that the law declared by this Court should be certain, clear and consistent. As stated in the above judgments, it is of common knowledge that most of the decisions of this Court are of significance not merely because they constitute an adjudication on the rights of the parties and resolve the disputes between them but also because in doing so they embody a declaration of law operating as a binding principle in future cases. The doctrine of binding precedent is of utmost importance in the administration of our judicial system. It promotes certainty and consistency in judicial decisions. Judicial consistency promotes confidence in the system, therefore, there is this need for consistency in the enunciation of legal principles in the decisions of this Court. It is in the above context, this Court in the case of Raghubir Singh held that a pronouncement of law by a division bench of this Court is binding on a division bench of the same or similar number of Judges. It is in furtherance of this enunciation of law, this Court in the latter judgment of Parija (supra) held that:
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> > "But if a bench of two learned judges concludes that an earlier judgment of three learned judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is to refer the matter before it to a bench of three learned judges setting out the reasons why it could not agree with the earlier judgment. If, then, the bench of three learned judges also comes to the conclusion that the earlier judgment of a bench of three learned judges is incorrect, reference to a bench of five learned judges is justified."

In view of these judgments, O.A. No. 2148/2013 cannot be taken as precedent for the reason that the facts in that case is different. In O.A. No. 2148/2013, the Tribunal found that the CRs were based

on personal impression. The judgments cited, in our view, have no application on the facts of the present case and, therefore, reliance on the same is misconceived and, as such, no such conclusion can be drawn in the present case. Moreover, in this case, the below par performance of the applicant comes out clearly from the numerous memos issued.

10. As regards the objection of the learned counsel for respondents that the Application is premature as the applicant has not exhausted alternative remedy of an appeal before the respondents, we think it is too late in the day to raise such an objection now and, therefore, we overrule this objection.

11. However, the fact remains that in order to satisfy the principles of natural justice and as initiated by the Hon'ble Supreme Court in **Dev Dutt (supra) and Abhijit Ghosh Dastidar (supra),** the applicant must get an opportunity to represent himself against his below benchmark CRs and a final decision taken by the DPC only thereafter. However, in Khairwal's case (supra), this Tribunal has answered the question on what lies ahead in case we ignore these CRs by holding that the same procedure as prescribed in paragraph 6.2.1(c) of the DoPT OM dated 06.10.2000, which reads as follows, should be followed:

> "(c) Where one or more CRs have not been written for any reason during the relevant period, the DPC should consider the CRs of the years preceding the period in question and if in any

> case even these are not available, the DPC should take the CRs of the lower grade into account to complete the number of CRs required to be considered as per (b) above. If this is also not possible, all the available CRs should be taken into account."

12. Therefore, in the interest of justice, we remand the matter back to the respondents with a direction to ignore the below bench ACRs and then follow the procedure as laid down in para 6.2.1(c) of DoPT O.M. dated 06.10.2000 and hold a review DPC to consider the case for grant of MACP to the applicant. The time frame will be three months.

13. With the above directions, O.A. stands disposed of. No costs.

(P.K. Basu)
Member (A)

(Syed Rafat Alam)
Chairman

/Jyoti/