

**Central Administrative Tribunal
Principal Bench, New Delhi.**

OA-3275/2015

Reserved on : 13.07.2016.

Pronounced on : 23.07.2016.

Hon'ble Sh. Shekhar Agarwal, Member (A)

Sh. Puneet Garg, 30 years
S/o Sh. Brij Mohan,
143 Afganan Street Delhi Gate,
Ghaziabad-201001.

.... **Applicant**

(through Ms. Charu Gupta with Sh. Shanker Gupta Jha, Advocate)

Versus

Delhi Metro Rail Corporation Limited
Through Managing Director,
Fire Brigade Lane,
Barakhamba Road,
New Delhi-100001.

.... **Respondents**

(through Sh. R.N. Singh, Advocate)

O R D E R

The applicant joined Delhi Metro Rail Corporation (DMRC) on 19.02.2007 as Jr. Executive Legal/Assistant Law Officer/Assistant Manager. According to him from 2007 to 2015 he had been performing his duties diligently and honestly and has dealt with several cases requiring legal opinion. He was, however, given 'average' grading in his APAR for the year 2011-2012. He made a representation on 10.01.2013 in which he requested that the entire ACR for the year 2011-2012 be expunged and fresh APAR be got

written for this period. In reply to his representation, the respondents upgraded his APAR grading to 'good' vide their letter dated 28.10.2013. The applicant again represented to the respondents on 21.05.2015 praying that APAR for the year 2011-2012 be declared non-est and should be got written again. The respondents, however, rejected his request vide their communication dated 29.06.2015 stating that his case cannot be considered after a lapse of three years. The applicant has now filed this O.A. before this Tribunal seeking the following relief:-

- "(a) To set aside the impugned APAR 2011-12 and declare it non-est and void.
- (b) To set aside note/order dated 28.10.2013 & 29.06.2015.
- (c) To direct the respondent to consider the applicant retrospectively for promotion.
- (d) To pass any such other and further orders as it deems fit and proper in the facts and circumstances of the case."

2. Learned counsel for the applicant submitted that the applicant had all along been working honestly and to the best of his ability and discharging work to the satisfaction of his superior. This is evident from the gradings he got in his APAR for previous years. Thus, for the year 2008-2009 he was graded as 'very good', for the year 2009-2010 he was graded 'outstanding' and for the year 2010-2011 he was graded as 'very good'. However, in the year 2011-2012, he was graded as 'average'. According to the applicant, this happened because he was working directly under one Mr. N.P. Singh, General

Manager (Legal), who was accused of sexually harassing one of the lady employees of the respondent Corporation and the applicant was cited as a witness in that case. This incident occurred in the year 2010-2011 and Sh. N.P. Singh was charge sheeted for the same on 07.07.2010. Before that Sh. N.P. Singh had recommended the applicant for several awards and had commended his performance (pages 64-80 of the paper-book). However, once the applicant was cited as a witness in the sexual harassment case against Sh. N.P. Singh, his attitude changed. Apprehending that the applicant may be victimized by Sh. N.P. Singh, the applicant made a representation on 12.10.2010 to the Executive Director/HR, DMRC for protection to him. However, no action was taken by the respondents. Sh. N.P. Singh wrote his APAR for the year 2011-2012 and gave appalling remarks to him. However, Director (Works), who reviewed the report written by Sh. N.P. Singh upgraded the APAR to 'very good'. On 20.09.2011 the applicant again made a representation to Mrs. Tripta Khurana, Chairman of the Disciplinary Enquiry Committee, who was conducting enquiry against Sh. N.P. Singh, in which the applicant had stated that he was apprehending vindictiveness from him. However, no action was taken by the respondents. Thereafter, for the year 2011-2012 Mr. N.P. Singh acting in a vindictive manner got Mr. Jaswant Singh, the then Sr. Law Officer, to write the report of the applicant as reporting officer. This was done with the sole intention

of making Sh. N.P. Singh the reviewing officer. Thus, Sh. Jaswant Singh graded the applicant as 'average' and Sh. N.P. Singh acting as a reviewing officer reviewed that report. The applicant has submitted that the applicant was working directly under General Manager (Legal) i.e. Sh. N.P. Singh. Therefore, Sh. Jaswant Singh was not competent to record remarks in his APAR. Since his APAR was written by an incompetent authority, he had been representing to the authorities to declare it as a non-est and get it written again. Learned counsel for the applicant argued that Sh. N.P. Singh was dismissed from service on 15.04.2013 when the charge of sexual harassment levelled against him was proved. After his termination the post of General Manager (Legal) was vacant and the work of that post was being looked after directly by Director (Works). Thus, for the year 2012-2013, there was no reporting officer for the applicant, as has been admitted by the respondents themselves in their counter-affidavit in reply to para-6.4 of the grounds. Learned counsel argued that this clearly establishes that Sh. Jaswant Singh was not competent to write the APAR of the applicant. Had he been competent then he would have been written the APAR of the applicant for the year 2012-2013 as well.

3. In their reply, the respondents have taken preliminary objection that this O.A. was barred by limitation. According to them the representation dated 10.01.2013 of the applicant against his APAR of

the year 2011-2012 was disposed of by the respondents on 28.10.2013. The limitation period for the applicant starts from that date as repeated representations do not extend the period of limitation. Thus, the contention of the applicant that his second representation dated 21.05.2015 was rejected by the respondents on 29.06.2015 and that limitation should count from that date was not acceptable. Learned counsel for the respondents stated that law in this regard is well settled that repeated representations cannot extend the period of limitation or revive a stale issue. In this regard, learned counsel for the respondents has relied on the decision of Hon'ble Supreme Court in the case of **UOI & Ors. Vs. M.K. Sarkar**, (2010)2 SCC 59.

3.1 The next preliminary objection taken by the respondents was that this O.A. was bad for non-joinder of parties inasmuch as the applicant has levelled serious allegations and alleged mala fide on the part of General Manager (Legal) Sh. N.P. Singh as well as Sr. Law Officer Sh. Jaswant Singh without impleading them as parties.

4. On merits, learned counsel for the respondents argued that the main argument of the applicant was that in previous years he had been graded as 'very good' and 'outstanding', therefore, his

grading for the period 2011-2012 was not justifiable. This was not an acceptable argument as performance of an officer can deteriorate at any time. Learned counsel also disputed the applicant's contention that he was working directly under General Manager (Legal) and, therefore, Sh. Jaswant Singh, Sr. Law Officer, was not competent to write his APAR. He argued that the applicant was Asstt. Law Officer whereas Sh. Jaswant Singh was Sr. Law Officer thus was holding a position senior to the applicant and was therefore competent to record remarks in his APAR.

5. I have heard and perused the material placed on record. I first deal with preliminary objection raised by the respondents. The first objection was that OA was time barred because the representation of the applicant was rejected by the respondents on 28.10.2013 and limitation counts from that date. Since this O.A. had been filed on 28.08.2015, there has been delay of about 10 months in its filing, which is unexplained. It was also argued that limitation cannot count from the date of rejection of the second representation of the applicant on 29.06.2015 as repeated representation do not extend the limitation period. Learned counsel for the applicant, however, argued that applicant had been denied promotion due to this APAR. Thus, the cause of action for the applicant was recurring. In this regard he has relied on the judgment of this Tribunal in the case of **Sh. Sukomal Das Vs. UOI & Ors.** (OA-1074/2009) dated 08.10.2010.

Thus, he was suffering from continuing wrong and this gives rise to recurring cause of action. He has also relied on the decision of Hon'ble High Court of Judicature at Bombay in the case of **UOI & Ors. Vs. Narendra Gupta & Ors.** (Writ Petition No. 7301/2002) dated 03.02.2006 and also on the judgment of this Tribunal in OA-1268/2011 dated 06.03.2012.

6. I have considered the submissions of both sides on the issue of limitation. I do not agree with the learned counsel for the applicant that denial of promotion gives rise to recurring cause of action. Promotion is a onetime event and denial of promotion gives rise to cause of action on the date when such promotion is denied. The lower pay which the applicant would draw after denial of promotion cannot be said to give rise to recurring cause of action. This is because lower pay is only a consequence of denial of promotion, which is a onetime event. The judgments relied upon by the applicant in this regard would not be of any help to him.

6.1 However, I find from the material placed before me that the applicant's prayer in representation dated 10.01.2013 was that his APAR for the year 2011-2012 may be entirely expunged and got written afresh. The respondents instead of dealing with his prayer for expunction of the entire APAR upgraded the APAR from 'average' to 'good'. Clearly, this was not the prayer made by the applicant.

Moreover, the order passed by the respondents is non-speaking and cryptic and does not disclose the reason as to why the prayer of the applicant for expunction of entire APAR has not been considered and how the respondents have come to the conclusion that mere up-gradation of the APAR from 'average' to 'good' would suffice. Under these circumstances, in my opinion, the applicant was justified in making a second representation. When the respondents rejected that representation as well on the ground that it was belated, the applicant has approached this Tribunal. Considering the facts and circumstances of the present case, I am not inclined to dismiss this O.A. only on the ground of limitation and deny substantive justice to the applicant. I find sufficient justification in his making a second representation to the respondents and waiting for decision on the same. I, therefore, hold that this O.A. is not barred by limitation.

6.2 The second preliminary objection taken by the respondents was that although several allegations have been levelled against the then General Manager (Legal) Mr. N.P. Singh and Sr. Law Officer Sh. Jaswant Singh, yet none of them has been impleaded as party in this case. Thus, O.A. was bad for non-joinder of parties. In response to this argument, learned counsel for the applicant stated that no relief was being sought against Sh. N.P. Singh or Sh. Jaswant Singh. Hence, it was not necessary to implead them as parties. In my opinion while there is merit in the argument of the applicant that

since no relief was being sought against Sh. N.P. Singh and Sh. Jaswant Singh, the O.A. does not become bad in law because of non-joinder of parties. However, the charge of mala fide levelled against Sh. N.P. Singh and Sh. Jaswant Singh cannot be considered since they have not been given an opportunity to rebut the same. Thus, O.A. can be considered on all other grounds except the ground of mala fide levelled against Sh. N.P. Singh and Sh. Jaswant Singh. In this regard, I place reliance on the judgment of Hon'ble High Court of Punjab and Haryana at Chandigarh in the case of **Anil Gour Vs. Punjab and Haryana High Court at Chandigarh and Ors.** (Civil Writ Petition No. 4567/2011) dated 27.09.2013 in which the following has been held:-

"The allegations levelled by the petitioner are intended to impinge upon the integrity of the adverse report etc. and as a necessary consequence upon the integrity of the Administrative Judge. The petitioner was, therefore, required to implead the author of the adverse report as a pre-condition to consideration of his allegation of malafide, bias or the possibility of bias. The failure of the petitioner to implead the author of the adverse report, disentitles the petitioner to urge malafide, bias or the possibility of bias."

7. The two grounds that survive for consideration are the following:-

- (i) That the APAR has been written by an incompetent authority.
- (ii) That the remarks written in the APAR were not an objective assessment of the applicant's performance as in all

other APARS prior to the one in question, the applicant has been graded 'very good' to 'outstanding'.

7.1 As regards the first ground the applicant has submitted that he was working directly under General Manager (Legal). His earlier years APARS were also written by General Manager (Legal) as reporting officer. It was only in the year 2011-2012 that APAR was written by Sh. Jaswant Singh even though he was not supervising the work of the applicant. This is clear from the fact that in a subsequent year when General Manager (Legal) had been removed from service and no other officer had been appointed in his place the performance of the applicant was evaluated directly by Director (Works). Thereafter, when another General Manager (Legal) was appointed in the year 2013, for the financial year 2013-2014 the APAR of the applicant was again initiated by General Manager (Legal). Learned counsel for the applicant argued that this has been admitted by the respondents themselves in their counter-affidavit. Thus, in their reply under the caption "Reply to Grounds", in reply to para-6.4 the following has been stated:-

"That in reply to the contents of the corresponding para, it is submitted that during that particular year 2012-13, there was an absence of reporting authority, hence the whole Legal Department was being looked after directly by Director/Works(DW) and hence the performance of the applicant was evaluated by DW. Thereafter, with appointment of GM/Legal in 2013, for the financial year 2013-14, the APAR was initiated by GM/Legal."

7.2 After considering the aforesaid submission of the applicant, I am satisfied that the competent authority to initiate the APAR of the applicant was General Manager (Legal). Sh. Jaswant Singh was not competent to write his APAR as Sh. Singh was not his supervisory officer and consequently had no authority to record remarks in the APAR of the applicant. Since it is not disputed that the APAR in question of the applicant was initiated by Sh. Jaswant Singh as reporting officer, I come to the conclusion that this APAR was not written in accordance with the rules. As such it is non-est in the eyes of law and, therefore, deserves to be expunged.

7.3 In view of this finding, it is not necessary now to give finding on the second ground taken by the applicant, namely, that the remarks in the APAR do not reflect objective assessment of his performance.

8. I, therefore, allow this O.A. and quash the impugned orders dated 28.10.1993 and 29.06.2015. I further direct that the APAR of the applicant for the year 2011-2012 be expunged and got written by competent authority afresh. The applicant shall also be entitled to consequential benefit of review of all DPCs held for promotion qua the applicant in which the aforesaid APAR of the applicant was considered. If the applicant is found fit he shall be promoted from the date of promotion of his immediate junior with consequential

benefit of pay fixation and seniority. The respondents shall extend the above benefits to the applicant within a period of 08 weeks from the date of receipt of a certified copy of this order. No costs.

**(Shekhar Agarwal)
Member (A)**

/Vinita/