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CENTRAL ADMINISTRATIVE TRIBUNAL
CALCUTTA BENCH
KOLKATA

OA No. 871 of 2011

Reserved on : /09/2016

Dated of order: 29.01.2016

5.10.2016

PRESENT:

THE HON'BLE MR. JUSTICE VISHNU CHANDRA GUPTA, JUDICIAL MEMBER

THE HON'BLE MS. JAYA DAS GUPTA, ADMINISTRATIVE MEMBER

.....

Sri Gobinda Halder, son of Late Haripada Halder, aged about 59 years, working as Joint General Manager, Ordnance Factory, Dum Dum, residing at Quarter No.J-5, Rajabagan Estate, Ordnance Factory, Dum Dum, Kolkata-700 028.

.....Applicant

For the Applicant: Mr.A.Chakraborty, Counsel

-Versus-

1. Union of India through the Secretary to the Govt. of India, Ministry of Defence, Department of Defence Production & Supplies, DHQ, Post Office, South Block, New Dehi-110 011.
2. The Secretary to the Government of India, Ministry of Defence, Department of Defence Production & Supplies, DHQ Post Office, South Block, New Dehi-110 011.
3. The Director General of Ordnance Factories/Chairman, Ordnance Factory Board, 10A, S.K.Bose Road, Kolkata-700 001.
4. The General Manager, Ordnance Factory, Nalanda, Bihar.
5. The General Manager, Ordnance Factory, Dum Dum, Kolkata-700 028.

.....Respondents

For the Respondents: Mr. M.S.Banerjee &
Mr.L.K.Chatterjee,
Counsel.

JW

ORDER

MS.JAYA DAS GUPTA, AM:

The applicant in this case namely Shri Gobinda Halder, has filed this Original Application under section 19 of the Administrative Tribunals Act, 1985 and in his amended Original Application the reliefs sought by him are as under:

- a) An order quashing and/or setting aside the impugned ACR for the period from 14th August, 2007 to March, 2008;
- (b) For an order quashing and/or setting aside the communications dated 25.5.2010, 28.9.2010 and 10.5.2011 made Annexure-A/15, A/16 and A/20 respectively to this application;
- (c) An order directing the respondents to review the case of the applicant in the matter of financial up gradation (non functional) at par with his juniors as granted by order dated 19.02.2010 and further directing the respondents to reconsider and/or review the case of promotion of the applicant to the Senior Administrative Grade at par with his batch mates/juniors who are granted promotion by order dated 3.11.2010 ignoring the impugned ACR as a consequential relief/benefit;
- (d) An order directing the respondents to produce/cause production of all relevant records;
- (e) Any other order/orders as to this Hon'ble Tribunal may seem fit and proper."

(Extracted as such)

2. Originally, this case was adjudicated upon by the Division Bench of this Tribunal but for the divergent views

JW

reference was made to a Third Member. The order of the third Member dated 21.2.2013 is set out below:

**"CENTRAL ADMINISTRATIVE TRIBUNAL
CALCUTTA BENCH**

No. O.A.871 of 2011

Present:

Hon'ble Mr Mukesh Kumar Gupta, Judicial Member

**GOBINDA HALDER
VS
UNION OF INDIA & ORS.**

For the applicant Mr M.S.Banerjee along with
Mr S.K. Dutta, Counsel

For the Respondents: Mr L.K. Chatterjee, Senior
Counsel along with Mr M.K. Ghara, Counsel.

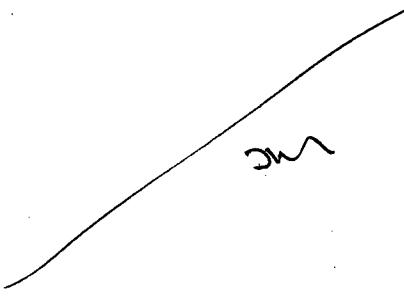
Heard on 24.01.2013 Order on 21st February, 2013.

ORDER
Per Mr Mukesh Kumar Gupta, J.M.

On divergent views taken by Hon'ble Members of Division Bench, reference of following questions, has been made to Third Member, which read as under :-

1. Whether the DOPT OM referred to above provides for filing of appeal within six months?
2. Whether the respondents were required to give reasons for rejecting the representation against below bench mark APAR?
3. Whether in the facts and circumstances of this case the OA was required to be allowed ?

2. Before proceeding further brief facts which are essential to be noticed to appreciate the reference made are as under :-



Initially adverse shortcomings were communicated to applicant vide Memo dt. 11th May, 2009, against which he preferred detailed representation dt. 8th June, 2009 stating that there had been undue delay in communicating the same, his controlling officer Sh. Bhoop Singh was psychologically influenced, gloomy disturbed & helpless, no warning or counselling was ever made. On consideration made, vide communication dt. 24.8.2009, said representation was rejected holding that the remarks conveyed be taken in correct spirit. Thereafter, after judgment of Hon'ble Supreme Court in *Dev Dutt vs. Union of India & Ors.* {(2008) 2 SCC (L&S) 771}, which led to DOPT OM dated 13th April, 2010, on the subject of ACR below the Bench Mark, said ACR along with many other ACRs of previous year was made available to him. He again preferred representation dt. 4th May, 2010, which was rejected vide Memo dt. 25th May, 2010. An appeal filed against it on 11th August, 2010, was rejected vide communication dt. 28th September, 2010 holding that his representation dt. 8.6.2009 was rejected on 24.8.2009, while appeal had been preferred only on 11.8.2010, which is beyond the limitation & rule. Appeal ought to have been preferred within six months. It is thereafter he preferred present OA. Sh M.S.Banerjee appearing along with Sh S.K.Dutta, Counsel appearing for applicant submitted as under :-

a) DP & AR OM dt 30th Jan, 1978, as extracted at Serial 27 of Chapter 53, Confidential Reports, in Swamy's Complete Manual on Establishment & administration (10th Edn. 2006), provides for filing for an appeal against the rejection of representation submitted against Memo conveying adverse CRs. For sake of brevity, the same is noted as under :-

"No memorial or appeal against the rejection of the representation against adverse remarks entries should be allowed six months after such rejection."

b) Fair play in action and the principles of natural justice demands that the order passed by the concerned authorities should contain cogent reasons.

SVM

It is contended that as the above questions are required to be answered in his favour, claim laid in present OA should be allowed.

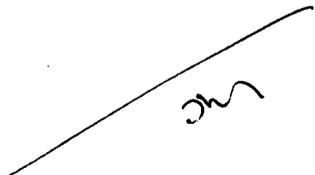
4. On the other hand Sh L.K.Chatterjee, Ld. Sr. Counsel appearing along with Sh. M.K.Ghara, for the respondents stated that as far as interpretation of OM is concern, this Tribunal may take a judicious view in the matter. As far as merit of claim laid is concerned it was contended that applicant was earlier conveyed deficiencies in his ACR, and a representation submitted in this regard was rejected. Later on, in view of OM issued by DOPT based on decision in *Dev Dutt's* case (supra), complete ACR was again made available to him, against which he had made representation. Rejection afresh, even on merits would not accordingly provide fresh cause of action. Thus, it was emphasized that present OA is not maintainable. Ld. Counsel further stated that as far as the second issue raised is concerned, he does not want to join issue. It was further stated that the reasons for rejecting are available on file. It is not a case of no reasons, as projected. It was also emphasized that applicant's appeal was considered in detailed by passing Memorandum dt. 10th May, 2011 which contain sufficient reasons.

However, I may at once note that said contention was strenuously disputed by Mr M.S.Banerjee, Ld. Counsel appearing for applicant stating that no such Memorandum was ever served upon him & produced earlier.

In the end, Ld. Counsel for the respondents prayed that OA deserved to be dismissed.

5. I have heard both sides at length, perused the divergent views of the Hon'ble Members, and, bestowed thoughtful consideration to the issues raised.

6. At the outset it may be noted that appeal was preferred by applicant on 11th August, 2010 against communication dt. 25th May, 2010 rejecting his representation was in the context of ACRs for the period 2002-03, 2003-04 and 2007-08. The Appellate Authority has passed the order dt 28th September, 2010 as if an appeal had been preferred against the earlier rejection, which is factually



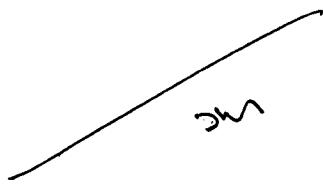
incorrect. The fact remains that his appeal dt. 11.8.2010 was preferred against the Order dt. 4.5.2010, which was well within six months period prescribed vide OM dt. 30th January, 1978.

7. Before proceeding further & to appreciate the issue objectively it would be expedient to notice the basic object behind writing ACR. In *State Bank of India & Ors. V. Kashinath Kher & Ors*, (1996) 8 SCC 762, it was observed that "The object of writing the confidential report is two fold, i.e. to give an opportunity an officer to remove deficiencies and to inculcate discipline. Secondly, it seeks to serve improvement of quality and excellence and efficiency of public service."

8. Preparation & maintenance of Annual Confidential Reports of Govt. servant is regulated by Executive order issued from time to time and not by statutory rules framed under the provisions of the Constitution of India. Fundamental Duties, as enshrined under Chapter-IV A, Article 51-A (j), provides that it shall be duty of every citizen to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.

Analysing said aspects Hon'ble Supreme Court in *State of UP v. Yamuna Shanker Misra*, (1997) 4 SCC 7 held that: "The officer entrusted with the duty to write confidential reports has a public responsibility and trust to write the confidential reports objectively, fairly and dispassionately while giving as accurately as possible the statement of the facts on an overall assessment of the performance of the subordinate officer. It should be founded upon facts or circumstances. Before forming an opinion to be adverse the reporting officers writing confidential should share the information which is not a part of the record with the officer concerned, have the information confronted by the officer and then make it part of the record."

Purpose of submitting an effective representation and its consideration thereof has been aptly worded in aforesaid judgment by stating that "thereby honesty, integrity, good conduct and efficiency get improved in the performance of public duties and standard of excellence in services



constantly rises to higher levels and it becomes a successful tool to manage the services with officers of integrity, honesty, efficiency and devotion."

9. In *M.A.Rajashekhar v. State of Karnataka & Anr.* (1996) 10 SCC 369 it was held that : "the object of making adverse remarks is to assess the competence of an officer on merits and performance of an officer concerned.....The competent authority and the reviewing authority have to act fairly or objectively in assessing the character, integrity and performance of the incumbent."

10. The language employed in the OM concerned, extracted hereinabove, which is the centre point of entire controversy in present OA, has to be examined in the context of above settled legal position. It may be noted that language employed in aforesaid OM dt. 30th Jan, 1978 is simple & clear. It carries no ambiguity.

Learned author Justice G.P.Singh in his book titled as "Principles of Statutory Interpretation" (11th Ed. 2008, at page 84) has observed that:

"VISCOUNT SIMON, L.C. said "The golden rule is that the words of a statute must *prima facie* be given their ordinary meaning".....Natural and ordinary meaning of the words should not be departed from unless it can be shown that the legal context in which the words are used requires a different meaning". Such a meaning cannot be departed from by the judges "in the light of their own views as to policy" although they can "adopt a purposive interpretation if they can find in the statute read as a whole or in material to which they are permitted by law to refer as aids to interpretation an expression of Parliament's purpose or policy."

(emphasis supplied)

At page 147, the learned author has referred to English/Indian Court decision to the effect that "Where words of a statute are clear, they must, of course, be followed but in their Lordship' opinion, where alternative constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating, and

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that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system." (emphasis supplied)

11. Apex Court in (1987) 2 SCC 262 *Sitaram Jivvabhai Gavali v. Ramjibhai Potiyabhai Mahala & Ors.*, has held that : "It is well recognized that a new service condition may be brought into effect by an executive order and such condition would remain in force as long as it is not repealed either expressly or by necessary implication by another executive order or a rule made under the proviso of Article 309 of the Constitution of India or by a statute." Such law would squarely apply in the facts of present case, and it is implied that OM dt. 30th Jan, 1978 does create a right in favour of the delinquent and unless such a view is taken the very purpose of such OM would stand frustrated.

12. Object behind communication of adverse ACR, which is a tool for human resource development, is to enable the concerned person to realize his full potential & improve his performance for the good of the organisation. The very fact that said OM in specific provides that no appeal would be entertained if not preferred within six months, thus implies that it affords an opportunity to make an appeal within a stipulated period prescribed therein. As an appeal is preferred to higher authority, it implies that further safeguard is provided to ventilate the grievance of the concerned officer. The language employed in the concerned OM which is the pivotal in present case is to afford an opportunity to prefer an appeal within the period stipulated therein. Thus, the issues referred are answered as follows :

1) DOPT OM dt 30th Jan, 1978 provides for filing an appeal against the rejection of representation made against adverse ACR.

2) As far as communication of reasons are concerned Hon'ble Supreme Court in Constitution Bench, *S.N.Mukherjee v. UOI* (1990) 4 SCC 594 after exhaustive review of earlier pronouncements & expert committees summarized & explained the law to assign reasons for a decision in the following words held that "the reasons.....if recorded would

enable this Court or the High Court to effectively exercise the appellate or supervisory powers. But this is not the sole consideration. The other considerations which have also weighed with the Court in taking this view are that the requirement of recording reasons could (i) guarantee consideration by the authority, (ii) introduce clarity in the decisions; and (iii) minimize chances of arbitrariness in decision making". Thus recording of reasons is essential as "reasons are live links between the mind of the decisions taker to the controversy in question & the decision or conclusion arrived at" {Refer (2003) 4 SCC 364 Chairman & M.D, United Commercial Bank v. P.C.Kakkar}

13. As far as third issue referred to is concerned, it would not be justified on the part of third Member to answer the same, particularly when it is to be examined in the context of factual submissions.

The OA be listed before the concerned Division Bench.

Sd/-
Member(J)"

3. Hence the point to be considered, upon reference back to the Division Bench are as follows:

- (i) The appeal of the applicant has been filed within six months and therefore, the appeal has to be considered by the Appellate Authority;
- (ii) While considering the appeal, the respondents authorities are required to give reasons for accepting/rejecting the appeal and take necessary consequential steps as prayed for expeditiously;

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4. As it appears from the record, the applicant preferred representations/appeals dated 04.05.2010 and 08.06.2009 against the below bench mark grading in his ACR for the period 2002-2003, 2003-2004 and 2007-2008 which were considered by the respondents authorities and the result of such consideration was communicated to the Applicant vide Memorandum dated 25.05.2010 and 28.09.2010 which are set out below:

“No.410/A/G
 Government of India
 Ministry of Defence,
 Ordnance Factory Board
 10-A, S.K.Bose Road,
 Kolkata-700 001.

Dated: 25.5.2010

MEMORANDUM

Subject: Below Benchmark Grading in ACRs prior to the reporting period 2008-09 and objective consideration of representation by the Competent Authority against remarks in APAR or up gradation of the final grading.

The representation dated 04/05/2010 of Shri G.Haldar, Jt.GM/OPN regarding adverse entries and below bench mark Grading in his ACR for the period 2002-2003, 2003-2004 and 2007-2008 has been carefully examined by the DGCF & Chairman, O.F.Board and it has been decided to reject the said representation based on the overall reporting of attributes performance and general assessment of the officer. The officer should take the same in the right spirit.”

“No.410/A/G
 Government of India
 Ministry of Defence,
 Ordnance Factory Board

dw

10-A, S.K.Bose Road,
Kolkata-700 001.

Dated: 28.9.2010

To
The General Manager,
Ordnance Factory,
Nalanda-803121.

Sub: Representation of Shri G.Halder,
Jt.GM/OFPN against below benchmark
grading in ACRs;
Ref: OFPN letter No.010302/ OFN/ EB/ GENL
/01 /OFB dated 12/08/10.

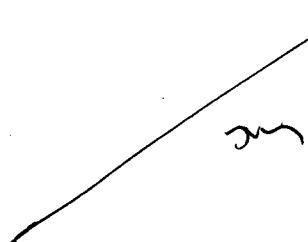
With reference to above, it is stated that the representation dated 08/06/09 of Shri G.Haldar, Jt..GM regarding adverse remarks as recorded in his ACR for the period 007-08 has already been considered by the competent authority at OFB and rejected on 04/08/09. As per rule only one representation against the adverse remarks should be considered. Further appeal or memorial if any against the rejection of the representation should be made within six months addressed to the President of India. In this instant case, the representation dated 08/06/09 of Shri Halder has already been disposed of on 04/08/09 and the officer is making his appeal against the rejection addressed to the Secretary/DP on 11/08/10 which is beyond the rule.

The officer may please be informed suitably.

Sd/- (Vineet Sharma)
Director/G

For Director General, Ordnance
Factories."

5. Though the applicant in this OA has prayed for quashing of the communications dated 25.5.2010, 28.9.2010 and 10.5.2011 under Annexure-A/15, A/16 and A/20, no such communication dated 10.5.2011 under Annexure-A/20 is available



on the record. Hence by applying the order of the third member of the bench, quoted above, the communications dated 25.5.2010 & 28.9.2010 under Annexure-A/15 & A/16 are hereby quashed and set aside. The Appellate Authority shall consider the appeal of the applicant dated 11.08.2010 afresh within a period of two months of getting the certified copy of this order and communicate the result of such consideration to the Applicant, in a well reasoned/speaking order, meeting/answering all the points raised by the applicant and the rules/law, within a period of two weeks thereafter.

6. This OA is accordingly disposed of. There shall be no order as to costs.

(Jaya Das Gupta)
Member (Admn.)

(Justice V.C.Gupta)
Member (Judl.)

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