

CENTRAL ADMINISTRATIVE TRIBUNAL
KOLKATA BENCH

OA 350/1788/2015

Heard on: 04.04.2019

Date of Order: 11.04.2019

Coram : Hon'ble Ms. Bidisha Banerjee, Judicial Member

Hon'ble Dr. Nandita Chatterjee, Administrative Member

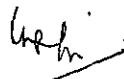
1. Smt. Mamata Mahaldar,
Widow of Bidhan Ch. Mahaldar.
2. Biplab Mahaldar,
Elder son of B.C. Mahaldar.
3. Sm. Singhdha Ghosh
Married daughter of B.C. Mahaldar.
4. Arnab Mahaldar
Younger son of Bidhan Ch. Mahaldar.

Substituted by order dated 21.2.17
in M.A. No. 43/2017

... Applicants.

Versus

1. Union of India
Service through the Secretary,
Ministry of Communication &
Information Technology,
Department of Telecommunications,
Sanchar Bhavan, 20, Ashoka Road,
New Delhi - 110 001.
2. The Director (H.R),
BSNL, Bharat Sanchar Bhawan,
Janpath,
New Delhi - 110 001.
3. The Chief General Manager(CTD),
Bharat Sanchar Nigam Ltd.,
34, B.B.D. Bag, Telephone Bhawan,
Kolkata - 700 001.



4. Deputy General Manager,
HR & Administration,
Calcutta Telephones, BSNL,
Telephone Bhawan,
Kolkata – 700 001.
5. Assistant General Manager
(Personnel-I Section),
4th Floor, Bharat Sanchar Bhawan,
Jan Path,
New Delhi – 110 001.
6. The Senior Accounts Officer
(Cash)/Accounts Officer(Cash),
Bharat Sanchar Nigam Ltd.,
CTD, DE-Block, Salt Lake,
Kolkata – 700 064.

For the Applicant(s) : Mr. B.R.Das and Mr. K.K.Ghosh, Counsel

For the Respondent(s): Ms. M.Bhattacharya, Counsel

ORDER

Per Dr. Nandita Chatterjee, Administrative Member:

Instant O.A. has been filed seeking the following relief:

"8.(i) Rescind, recall and/or withdraw the order A1 so as to allow the petitioner second-time bound upgradation in the revised IDA pay scale of Rs. 29,100-34,500/- with effect from 01.10.2009.

(ii) Rescind, recall, withdraw and/or cancel and/or modify the order being Annexure-A2 insofar as it directs a fresh DPC/screening committee to be formed to re-examine the fitness for upgradation from E2 to E4 as per status as on 25.11.2009.

(iii) Consider second time-bound IDA scale upgradation w.e.f. 01.10.2009 in according to BSNL Corporate guidelines dated 20.09.2012 (Annexure-A11) and on the basis of performance review undertaken by the appropriate screening committee prior to 01.10.2009.

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(iv) *Refix the last pay on the basis of the pay scale as referred to in (i) above and recalculate the ~~permanent~~ benefits on the basis of such pay.*

(v) *Pay all the arrears on account of reliefs (i) to (iv) above, forthwith with suitable interests thereupon.*

(vi) *Certifying and transmit the entire records and papers pertaining to the applicant's case so that after the causes shown thereof conscionable justice may be done unto the applicant by way of grant of reliefs as prayed for in (i) and (v), above.*

(vii) *Costs."*

2. The original applicant, who was an employee with the Respondent-authorities, passed away during pendency of the O.A. and his legal heirs have been substituted as applicants vide orders dated 21.02.2017 in M.A.No. 43/2017, arising out of O.A.No. 1788/2015. The legal heirs of the deceased employee have continued to pursue this O.A.

3. Heard both Ld. Counsel, examined pleadings and documents on record.

4. The submissions of the applicants are that the original applicant, who was the ex-employee of the Respondent authority, had retired from the service of the Respondent authorities as a Sub-Divisional Engineer w.e.f. 31.10.2012 in the pay scale of Rs. 24,000-50,500/-, being promoted in the said category w.e.f. 11.08.2000, while in DOT. After absorption in BSNL, he was allowed IDA pay scale effective from 01.10.2000 and was allowed first Time Bound Promotion w.e.f. October, 2004.

The ex-employee, however, was not accorded his second Time Bound Promotional Scale, namely Rs. 29,100-54,500/-, as per his entitlement w.e.f. 01.10.2009 as because he was involved in a disciplinary

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proceeding, which was initiated by way of a charge sheet dated 05.05.2010 resulting in a major penalty imposed on him on 26.10.2012.

According to the applicants, during the 5 years' review period prior to 01.10.2009, the ex-employee was free from vigilance angle, and hence, rightfully he would not be denied his second Time Bound Promotion by the DPC convened for this purpose.

That, the ex-employee had earlier approached the Tribunal in O.A. 377/2014, in compliance with whose orders, the concerned Respondent authority issued an order dated 04.07.2014, directing the concerned Screening Committee to re-examine his fitness for second Time Bound Upgradation. The Screening Committee, however, found him 'unfit' for the upgradation and hence the ex-employee, being aggrieved, and being denied his second Time Bound Upgradation had approached the Tribunal and, upon his expiry, the matter is pursued thereafter by his legal heirs.

The applicants have advanced the following grounds, inter alia, in support of their claim:-

- (a) That, the order of the Screening Committee dated 17.10.2014 is cryptic in nature.
- (b) That, although he was cleared from vigilance point of view and no disciplinary proceeding was initiated or contemplated against him during the period under review with reference to his second Time Bound Upgradation, rejection of his claim is a malafide act of the Respondent authority.
- (c) That, his Second Time Bound Upgradation should have been guided by Office Memorandum dated 29 September, 2012

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(Annexure-A/11 to the O.A.), which lays down the guidelines for consideration of period of performance review for grant of time bound IDA scale.

5. Respondents, on the other hand, have controverted the claim of the applicant by arguing that the criteria for upgradation to next higher IDA were as follows:-

(a) completion of 5 years of service for the grant of IDA scale.

(b) decision of the prescribed Screening Committee on the basis of performance rating of AGRs subject to necessary disciplinary/vigilance clearance and

(c) That, no punishment should be in currency during the material period of review.

That, in the case of the ex-employee he was proceeded against under Rule 36 of BSNL CDA Rules, 2006 and was punished for his gross misconduct during the period August, 2000-September, 2009 with penalty of reduction of pay by one stage down from Rs. 42,350/- to 41,110/- in the pay scale of Rs. 24,900-50,500/-, and that, a review DPC while re-examining his case referred to the relevant guidelines and decided not to recommend his upgradation. Further, in consequence to the speaking order issued by the Respondent authorities in compliance to directions in the O.A. 377/14, vide which the ex-employee had approached the Tribunal in first stage litigation, the Screening Committee, which met on 29.09.2014, also found him unfit for the said upgradation. According to the

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Respondents, the ex-employee's prayer, as pursued by his legal heirs, hence deserves to be dismissed ab initio.

6. The main point of determination to adjudicate the instant matter is whether the ex-employee, who was the original applicant in the O.A. until his demise, was entitled ^{to} Second Time Bound Promotional Scale w.e.f. 01.10.2009.

6.1 At the outset, we refer to the reasoned decision in the case of ex-employee, which was issued in compliance to the Tribunal's order dated 06.05.2014 in O.A.No. 377/2014. The observations of the Respondent authority issuing the said order are extracted as below:

"No. SAT-GO/EPP/Court Case/Reasoned Order. Dated at Kol-1, the 04.07.2014

Reasoned decision in the case of Shri Bidhan Chandra Mahalder, Ex.SDE/Plg./CTD in O.A. No. 350/00377/2014 Order dtd. 06.05.2014

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Followings are the observations :-

- 1) As per para 1(b)4 & 1(c)2 of BSNL EPP Circular no. 400-61/2004-Pers.1 dtd. 18/01/2007 qualifying service only enable the executive for consideration of upgradation to next higher IDA scale. Completion of such period alone shall not entitle any executive for automatic up gradation to the next higher IDA scale. And the fitness for IDA pay scale up gradation to the next higher IDA scale of the eligible executive is judged by prescribed screening committee on the basis of performance rating of ACRs, subject to necessary disciplinary/vigilance clearance and no punishment is current.

The competent authority of BSNL constituted DPC to consider the fitness of eligible candidates for upgradation from E3 to E4 (2nd time bound up gradation). The DPC meeting was conducted on 25/11/2009 for the applicant along with other eligible executives. However, the applicant's name was not recommended by the DPC/Screening Committee since there was no vigilance clearance from the Vigilance Department of the BSNL and the competent authority accepted the recommendation.

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In the subsequent DPC held on 30/11/2010 for eligible candidates upto 30/09/2010, his case was not considered. However DPC did not recommend his case observing that there was no change of vigilance status. Competent authority accepted the recommendation.

Subsequently BSNL Corporate office issued guidelines regarding consideration of the period of performance review under EPP vide its memo no. 400-164/2012-Pers-I dated 20/09/2012. In this guideline BSNL Corporate office inter alia asked field units to review past cases under the EPP effective from 01/10/2004 in accordance with this guidelines. In this guideline it was clarified that only the period of performance review leading to the due date of upgradation may be assessed for vigilance clearance.

A DPC re-examined the case of Sri Bidhan Chandra Mahaldar in the light of above referred guidelines on 13/02/2013. The committee did not recommend his upgradation as the period of misconduct of the officer lies within the period of performance reviewed for EPP promotion.

The applicant was proceeded against under rule 36 of BSNL CDA rules 2006 vide memorandum No. Vig/2008/86 dated 5/5/2010 issued by the CGM, CTD. And the applicant was punished for gross misconduct committed by him during the period from August, 2000 to September, 2009 with the following order no. Vig/2008/86 dated 26/10/2012.

".....the pay of Shri Bidhan Chandra Mahaldar (Staff No.103707, Hr.No.197800730), SDOP/Lake town, Calcutta Telephones be reduced to a lower stage by one stage in the time scale of pay of Rs. 24900/- to Rs. 50,500 with immediate effect till retirement. It is further directed that Shri Bidhan Chandra Mahaldar, SDOP/Lake town Calcutta telephones will not earn increment of pay during the period of such reduction and on expiry of the period the reduction will have the effect of postponing the future increment of his pay. This order will take effect immediately....."

However it is observed that as per Memo. No. F.No.22034/4/2012-Estt.(D) dated 2nd November, 2012 issued by Ministry of Personnel, Public grievances and Pensions (DOPT) that vigilance clearance for promotion may be denied only in the following three circumstances:-

- I. Government servant under suspension;
- II. Government servant in respect of whom a charge sheet has been issued and the disciplinary proceedings are pending; and
- III. Government servants in respect of whom prosecution for a criminal charge is pending.

In case of Shri Bidhan Chandra Mahaldar initial vigilance clearance was withheld by vigilance department on the plea that one disciplinary case is being contemplated against him vide its letter no.

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VIG/CIS/GO/10, dated 19/11/2009. However charge sheet was issued to Shri Mahalder only on 08/05/2010 long after the 1st DPC on 25/11/2009. As per para 2c(III) of memo no. 11012/11/2007-Estt(A) 14/12/2007 issued by DoPT vigilance clearance shall not be withheld unless orders for instituting disciplinary proceeding against the officer have been issued by the Disciplinary Authority provided that the charge sheet is served within three months from the date of passing such order.

So in my opinion the vigilance clearance was wrongly held up by vigilance department and the DPC could not recommend his case. Also DGM, Vigilance has opined in the file referring BSNL C.O. order no. CVO/BSNL/001/06 dated 12.09.2006 that VC as on 19.11.2009 might not be with held.

Hence in my opinion fresh DPC / screening committee be formed to re-examine the fitness of Shri Mahalder's upgradation from E3 to E4 scale as per the status as on 25/11/2009 considering the vigilance clearance has been received within 15 days time from the issue of this order. Also if competent authority approves his upgradation from E3 to E4 scale his all consequential benefits to be calculated and implemented by concerned units. The case is disposed of.

Sd/-
(K.K. Sapra)
Chief General Manager
Calcutta Telephones"

From the above reasoned decision, following are inferred:

- (a) That, the Circular dated 18.01.2007, which provides the guidelines for consideration of upgradation to next higher IDA scale lays down that completion of the relevant period alone shall not entitle any executive for automatic upgradation in next higher IDA scale, and that, fitness for IDA pay scale upgradation to next higher IDA Scale is to be judged by prescribed Screening Committee on the basis of performance rating of ACR, subject to necessary disciplinary/vigilance clearance, and that no punishment should be in currency during the material period of time.

(b) That, the ex-employee's eligibility for next higher IDA Scale was taken up for consideration in DPC meeting conducted on 25.11.2009. Pending vigilance clearance, however, the ex-employee's claim was not recommended by the said DPC/Screening Committee. That, a subsequent DPC meeting was held on 30.11.2010, but, even therein, as there was no change of vigilance status, no recommendation was made in favour of the ex-employee.

(c) Vide memo dated 20.09.2012, the Respondent authorities had asked the field units to review the past cases under EPP effect from 01.10.2004 and the guidelines clarified that only the period of performance review leading to the due date of upgradation may be assessed for vigilance clearance.

The applicant has also relied on the aforesaid circular (Annexed as A/11 to the O.A.) to argue that ex-employee's vigilance status had to be confined to only the period relating to his performance review.

(d) That, the DPC further re-examined the case of the ex-employee on the basis of guidelines dated 20.09.2012 but failed to recommend his upgradation as the period of his alleged misconduct lay within the period of performance review for EPP promotion.

It is noted here, however, that the first DPC that considered the ex-employee's scope for upgradation, was held on 25.11.2009, much before the issue of guidelines dated 20.09.2012.

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- (e) That, the ex-employee was issued a charge memorandum dated 05.05.2010 and, ultimately, he was penalized vide orders dated 26.10.2012 by reduction to a lower stage in the pay scale.
- (f) The concerned Respondent authority, issuing the reasoned order, namely, the Chief General Manager, Kolkata Telephones, referred to the DoP&T Memo dated 02.11.2012, whereby vigilance clearance for promotion may be denied only in following three cases:
- (i) When the Govt. servant is under suspension.
 - (ii) When the Govt. servant, in respect of whom, a charge sheet has been issued and the disciplinary proceedings are pending.
 - (iii) A Govt. servant, in respect of whom, prosecution of criminal charge are framed.

In the above context, as the charge sheet was issued to the ex-employee on 05.05.2010, long after the first DPC held on 25.11.2009, the respondent authority concluded that the vigilance clearance ought not to have been withheld by the Respondent authorities while considering his matter in the DPC dated 25.11.2009.

- (g) Hence, the Chief General Manager, Kolkata Telephones decided to form a Screening Committee to re-examine the fitness of ex-employee and to allow him upgradation with consequential benefits on the basis of the recommendation of that Committee.

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6.2 It is important to note that the competent Respondent authority, while conveying his reasoned decision, admitted, that the vigilance clearance was incorrectly withheld on 25.11.2009 when the DPC had first met to consider the case of the ex-employee for his second Time Bound Upgradation. It was not the Respondent's case that the ex-employee's performance review was adverse, that he was under suspension, that he was undergoing any punishment at the material point of time or that any disciplinary proceedings had been contemplated/initiated against him as on 25.11.2009.

6.3 The Respondents, particularly, the Screening Committee formed consequent to the order of the CGM, Kolkata Telephones, concluded that as the period of his misconduct was within August, 2000 to September, 2009, his performance review period could not be said to be clear from vigilance angle.

The important question herein is whether the ex-employee was actually held guilty of misconduct at the material point of time, namely, prior to the DPC meeting held on 25.11.2009.

It is a settled principle of law, as held in **Union of India Vs. Gyan Chand Chattar, (2009) 12 SCC 78**, that, before initiating any disciplinary proceedings, the employer must be prima facie satisfied that the employee has committed some misconduct. If the acts amount to misconduct under regulation which were in force, disciplinary proceedings will require to be initiated so as to establish that such conduct is actually a misconduct.

Disciplinary proceedings cannot be initiated only on the basis of suspicion as held in **Zunjarao Bhikaji Nagarkar Vs. Union of India**,

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(1999) 7 SCC 409. There must be a reasonable basis and the disciplinary proceedings are initiated by issuance of a charge sheet.

In **Delhi Development Authority Vs. H.C.Khurana**, (1993) 3 SCC 196, the Hon'ble Apex Court answered the question, namely, at what stage it can be said that a decision has been taken to initiate a disciplinary proceeding. The Hon'ble Court, in reply, has clarified as under:

"9. The question now, is: What is the stage, when it can be said, that 'a decision has been taken to initiate disciplinary proceedings'? We have no doubt that the decision to initiate disciplinary proceedings cannot be subsequent to the issuance of the charge-sheet, since issue of the charge-sheet is a consequence of the decision to initiate disciplinary proceedings. Framing the charge-sheet, is the first step taken for holding the enquiry into the allegations, on the decision taken to initiate disciplinary proceedings. The charge-sheet is framed on the basis of the allegations made against the government servant; the charge-sheet is then served on him to enable him to give his explanation; if the explanation is satisfactory, the proceedings are closed, otherwise, an enquiry is held into the charges, if the charges are not proved, the proceedings are closed and the government servant exonerated; but if the charges are proved, the penalty follows. Thus, the service of the charge-sheet on the government servant follows the decision to initiate disciplinary proceedings, and it does not precede or coincide with that decision."

While clarifying as above, the Hon'ble Apex Court, while referring to the views held in **Union of India Vs K.V.Jankiraman**, 1991(4) SCC 109, further ruled that issue of charge sheet by its dispatch indicates beyond doubt that the decision to initiate disciplinary proceeding was taken.

In **Union of India Vs. Kewai Kumar**, 1993 AIR 1585, the Hon'ble Apex Court concluded that whether the decision to initiate disciplinary proceeding had been taken or steps for criminal prosecution initiated before the date on which the DPC made the selection would depend on the facts of the case.

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In C.O.Arumugam and Ors. Vs State of Tamil Nadu and others.

1991 Supp (2) SCC 199, the Hon'ble Apex Court has observed as follows:

"it is necessary to state that every civil servant has a right to have his case considered for promotion according to his turn and it is a guarantee flowing from Article 14 and 16(1) of the Constitution. The consideration of promotion could be postponed only on reasonable grounds. To avoid arbitrariness, it would be better to follow certain uniform principle. The promotion of persons against whom charge has been framed in the disciplinary proceedings or charge-sheet has been filed in criminal case may be deferred till the proceedings are concluded. They must, however, be considered for promotion if they are exonerated or acquitted from the charges. If found suitable, they shall then be given the promotion with retrospective effect from the date on which their juniors were promoted."

7. Drawing upon the ratio in **Arumugam (supra)**, in the instant matter, the consideration of the ex-employee's upgradation could be deferred only on reasonable grounds, namely as to whether the charges were framed for disciplinary proceedings or whether charge sheet was filed in a criminal case. In the instant matter, admittedly, the charge sheet in disciplinary proceedings was issued only on 05-05-2010 and, undisputedly, no criminal case had ever been filed or contemplated against the ex-employee by the Respondents. This was the status on 29.11.2009 when the ex-employee was considered in the first DPC.

Hence, on the date of the first DPC, namely, 25.11.2009, the following status is noted with reference to the ex-employee:

- (i) That, no charge sheet had been issued to the ex-employee till 25.11.2009.

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- (ii) There is nothing on record or in the Respondents' averments to prove that any disciplinary proceedings were contemplated against the ex-employee.
- (iii) No criminal case had been registered against the ex-employee.
- (iv) There was absolutely no ground for withholding vigilance report against the ex-employee in the absence of any of the above.
- (v) Even if, the misconduct was allegedly committed by the ex-employee between 2000-2009, there was no order of the Disciplinary Authority as on 25.11.2009, which established his misconduct during this period. The Disciplinary Authority's orders dated October 2012 was finalized much after the date of the first DPC i.e. 25.11.2009.

8. Accordingly, we find that the Respondents had indeed erred in not considering his case for second Time Bound Upgradation in the first DPC by erroneously withholding his vigilance report. This fact has also been admitted by the then CGM, Kolkata Telephones, in issuing his reasoned order. The CGM, Kolkata Telephones, however, could have confirmed the findings of the DPC without any reference to another Screening committee if the DPC dated 25.11.2009 had recommended the ex-employee for upgradation on the basis of his performance review and confirmation of tenure. The action of the Chief General Manager, Kolkata Telephones, in sending the matter back to another Screening Committee was not called for and the first DPC's findings should have been confirmed by the

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Respondent authority while arriving at a reasoned decision. Accordingly, we hold that the ex-employee was eligible to be considered for his second Time Bound Upgradation w.e.f. 01.10.2009 in the first DPC meeting dated 25.11.2009 itself and that the penalty imposed on him on 26.10.2012 for reduction to one stage lower ought to have been with reference to his upgraded pay scale.

9. The O.A. is, therefore, allowed with the above observations. The Respondent authorities are directed to refix the pay scale of the ex-employee from 01.10.2009 after making adjustment for the penalty imposed on him with the consequent reduction as ordered by the Disciplinary Authority and, thereafter, recalculate the pensionary benefits accordingly. The arrears arising out of such re-fixation should be disbursed to the applicants in terms of their entitlement.

The entire exercise should be completed within sixteen weeks from the date of this order.

The O.A. is disposed of as allowed. There will be no orders as to costs.

(Dr. Nandita Chatterjee)
Member (A)

(Bidisha Banerjee)
Member (J)

RK/PS