

CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH, MUMBAI.

ORIGINAL APPLICATION No.62 OF 2016

Dated this Friday, the 05th day of April, 2019

CORAM: DR. BHAGWAN SAHAI, MEMBER (ADMINISTRATIVE)
RAVINDER KAUR, MEMBER (JUDICIAL)

L.M.Pandurang, Age 44 years,
Working as Sr. Manager (Production),
Taloja Copper Project (TCL),
Residing at B-1007, Arihant Anaya,
Sector 35G, Kharghar,
Navi Mumbai 410 210
(By Advocate Shri Vicky Nagrani) ... Applicant

VERSUS

1. Union of India, Through the Secretary,
Ministry of Mines, North Block, New Delhi 110 001.

2. The Chairman cum Managing Director,
Hindustan Copper Limited, Tamra Bhawan,
1, Ashutosh Chowdhury Avenue,
Kolkata 700 019. ... Respondents

(By Advocate Ms. Leena Patil, respondent No.2)

Order reserved on 11.02.2019

Order delivered on 05.04.2019

O R D E R

Per : Dr. Bhagwan Sahai, Member (Administrative)

This OA has been filed on 02.02.2016 by Shri L.M.Pandurang, then working as Senior Manager (Production), Taloja Copper Project (Hindustan Copper Limited). He has sought quashing and setting aside of order dated 15.10.2015 (Annex A-1, page Nos.11 to 15) along with consequential benefits. He

has also sought direction to the respondents to ignore Performance Appraisal Gradings given to him from 2010-2011 to 2014-2015 and allow him to make a representation against such gradings and after considering his representation, the respondents should conduct review DPC for his promotion to the post of Chief Manager as per the rules and if found fit to promote him on that post from 01.04.2013 with all consequential benefits such as seniority, etc.

2. Brief facts :-

2(a). The applicant has stated that he was selected as Graduate Engineer Training by the respondents vide order dated 08.04.1997 (Annex A-2, page 16 to 21). He was then promoted to the post of Assistant Manager in 2002 and on his request, his cadre was changed and he was transferred as Assistant Manager (Commercial) at Bengaluru Office of Hindustan Copper Limited on 02.06.2003 in Commercial Marketing cadre (Annex A-3).

2(b). On the basis of his seniority as Assistant Manager (Commercial), he was promoted as Manager on 31.01.2007 at the

Bengaluru Office itself. Then in 2010, the applicant was promoted as Senior Manager. On 09.09.2011, he was transferred from Bengaluru Office to Taloja Copper Project, district Thane.

2(c). He claims that instead of posting him in the commercial cadre, he was illegally posted to Industrial cadre, his juniors in the commercial cadre have been considered and promoted to the post of Chief Manager and he is due for promotion to the post of Chief Manager with effect from 01.04.2013. However, the DPC conducted in 2013, 2014 and 2015 for promotion to the post of Chief Manager, had not recommended him for that promotion. For this he was not communicated any reason, and thus he has been deprived of his promotion.

2(d). As per Executive Promotion Policy and Rules, 2011 (Annex A-5, page 24 to 35), after completing three years of qualifying service, the executives shall be considered for promotion to the next higher grade. The applicant claims that he is eligible for promotion to the post of Chief Manager (E5

Grade) and when he came to know about promotion of his juniors, he made a representation on 29.01.2015 requesting for holding of review DPC to consider him for promotion post of Chief Manager from 01.04.2013 (Annex A-6, page 36 and 37). When he did not get a response, he filed a OA No.452/2015 which was disposed of on 20.08.2015 directing the respondent No.2 i.e. CMD, Hindustan Copper Limited, Kolkata to consider the pending representation of the applicant for promotion to the post of Chief Manager in accordance with law (Annex A-7, page 38 and 39).

2(e). In compliance with the direction of this Tribunal, the respondent No.2 issued the impugned order on 16.10.2015 (Annex A-1) rejecting the applicant's case for promotion to the post of Chief Manager on the ground that Performance Appraisal Gradings earned by the applicant from 2010 to 2015 are either fair or poor and the three DPCs held for three years, against the prescribed benchmark of 15 Average Appraisal Value (AAV) for eligibility for promotion, the

applicant had earned AAV of only 1.67.

2(f). The applicant claims that the reason for rejecting his case is illegal and against the law laid down by the Apex Court in case of ***Sukhdev Singh Vs. Union of India***, ***Civil Appeal No.5892/2006 decided on 23.04.2013*** holding that every entry in ACR - (poor, fair, average, good or very good) must be communicated to him/her within a reasonable period and non-communication of entries in the ACRs/APAR of a public servant has civil consequences as it may affect his chances for promotion or other benefits. Therefore, this OA.

3. Contentions of the parties :-

The applicant has contended that -

3(a). the action of the respondents in promoting his juniors and not considering his case because of below benchmark AAV, which was not communicated to him, is illegal and arbitrary;

3(b). provisions of Recruitment Rules must be strictly implemented, the reason given in the impugned order by the respondents for his non-promotion that he was not found fit

for promotion due to adverse remarks in ACRs from 2010-2011 to 2014-2015 is not correct because he had not been communicated any adverse remarks in his ACRs which contained below benchmark gradings during that period. Therefore, the non communicated remarks of ACRs have to be ignored while considering him for promotion along with others;

3(c). the Apex Court decision in case of *Dev Dutt Vs. Union of India and others, (2008) 8 SCC 725* and *Abhijit Ghosh Dastidar Vs. Union of India and others (2009) 16 SCC 146* held that every entry in the ACR of a public servant must be communicated within a reasonable period or time as grading below the benchmark become adverse for that person. In view of non-communication of ACRs of the year 2010-2011 to 2014-2015 and not providing opportunity to him to make representation against them, the present OA should be allowed;

3(d). the claim of the respondents that the applicant had not submitted any representation before 29.01.2015 and that the representation of that date was not

given through appropriate authorities is a wrong statement of the respondents;

3(e). Rotational Transfer Policy was applied against the applicant to isolate or remove him from the Marketing Department to harass him. He has also mentioned two cases i.e. one of Sri D.Dey, Ex-DGM (Concentrator) claiming that he served for entire 29 years at Malanjkhand Copper Project, Malanjkhand (Madhya Pradesh) and only one year at Khetri Copper Complex, Khetrinagar (Rajasthan). Another of Sri S.Bhaskar Rao, AGM (Chem) stating that he has served his entire service at one place. But in those cases the Rotational Policy was not found suitable but it was applied only to the applicant to remove him from Marketing Department; and

3(f). the respondents have got confused about communication of adverse entry in ACR / APAR with non-payment of Performance Related Pay (PRP) to the applicant. The claim of the respondents that non-receipt of PRP amounts by the applicant amounted to communication of adverse remarks in his assessment is illegal and irrational.

Hence, the OA be allowed.

In their reply and sur-rejoinder, the respondents have contended that -

3(g). the respondent No.2 in the OA i.e. CMD, Hindustan Copper Limited, Kolkata is strongly objecting to and resisting the present OA, but only upon preliminary hearing the Tribunal admitted this OA. The OA is not maintainable because the applicant has never agitated the issue of discrepancy in promotion before the appropriate forum. The present applicant was recruited on 12.05.1997 as Graduate Engineer Training (Concentrator) in Khetri Copper Complex, Khetrinagar (Rajasthan). He remained at the Khetri Copper Complex up to 2003, when he was posted at Assistant Manager (Commercial) at the Bengaluru Office;

3(h). based on request of the applicant, he was posted as Senior Manager (Project) at the Taloja Copper Project vide order dated 25.08.2011. The representation dated 29.01.2015 claimed to have been made by the applicant was received neither by any key personnel of the Human Resource or Personnel

Department. However, in pursuance to the orders of the Tribunal in earlier OA, the respondent No.2 has passed the reasoned and speaking order dated 15.10.2015 (the impugned order);

3(i). the cadre of the applicant was not changed, only his designation was changed by maintaining his seniority as per the rules and depending upon the requirement of the company, the Competent Authority can decide about which posts are to be manned by which persons in the cadre. Therefore, in posting him at Taloja Copper Project, there was no illegality and the allegation of the applicant in this regard is unfounded;

3(j). as per para No.10.2 of the Executive Promotion Policy and Rules of HCL 2011, the executives shall be considered for promotion on attaining the prescribed Average Appraisal Value (AAV) in the present grade i.e. pre-promoted grade. This shall be arrived at by considering the appraisal gradings of all the years counted towards eligibility and an executive must secure for consideration for promotion to higher grade

up to E5, AAV 15, which is corresponding to average good for all categories of executives i.e. General, Scheduled Caste, Scheduled Tribes, etc;

3(k). as per the para 6 of the above rules, for promotion of Senior Manager (E4) to General Manager (E5), the qualifying period of service is minimum three years in the lower grade. For determining suitability of a candidate for promotion, the DPC is required to consider qualification, service record, Annual Performance Reports and clearance from Disciplinary and Vigilance angle, along with the qualifying period of service;

3(l). the DPC held for the years 2013, 2014 and 2015 considered the appraisal grading of the applicant for relevant preceding three years. Based on it the DPC held for all the three years 2013, 2014 and 2015 evaluated the AAV of the applicant only as 1.67 as against the minimum required AAV of 15. This is because his Appraisal Gradings from the years 2010-2011 to 2014-2015 had to consistently been either poor or fair.

Therefore, the applicant was considered for promotion by all the three DPCs, but he could not secure the benchmark Average Appraisal Value of 15 and could not be promoted;

3(m). Performance Related Pay (PRP) is linked with the performance appraisal and based on evaluation score in the appraisal gradings, the PRP is paid to an individual executive. As per the rules, no PRP was paid to the applicant as his appraisal gradings for the year 2010-2011 to 2013-2014 was poor. Therefore, the applicant was fully aware of non-payment of PRP to him and his Appraisal Gradings. In spite of this and several counselings session held for him, he failed to achieve the expected result and improvement in his performance;

3(n). since the applicant is again agitating on the same issue which was dealt with earlier by the Tribunal in the OA No.453/2015, pleading to be a victim of social background pleading that he is being harassed just because he belongs to Scheduled Caste Community cannot be

entertained. Therefore, this OA should be dismissed; and

3(o). since the applicant did not submit his representation through proper channel, it remained unattended but subsequently as per the directions of the Tribunal, it has been decided with reasons. In view of this facts, the OA should be dismissed.

4. Analysis and conclusions -

We have perused the OA memo and its annexes, rejoinder of the applicant, reply and sur-rejoinder filed by the respondents, various case laws cited by the parties and considered the arguments advanced by both of them on 11.02.2019.

4(a). On examination of the contentions of the parties and the case record, it is clear that the Appraisal Grading of the applicant during the relevant period for consideration for promotion to the post of Chief Manager by the DPC in 2013, 2014 and 2015 was only fair or poor and Average Appraisal Value as evaluated by the three DPCs was only on 1.67 as against the minimum required AAV of 15 for promotion. While that is correct, it is

also a fact that the poor or fair grading earned by the applicant during those years were not communicated to him by the respondents.

4(b). In this regard, the contentions of the respondents that non-payment of PRP on time to the applicant was in fact communication of his poor grading is not fully acceptable. Even if, he was not paid PRP, as per the settled position in law by the Apex Court in the cases of **Sukhdev Singh, Dev Dutt and Abhijit Ghosh Dastidar** (supra), it is necessary to communicate remarks / entries in all the ACRs / APARs of the concerned employee within a reasonable period of time which may afford the concerned employee an opportunity of making representation, if any, for consideration of and decision thereon by the concerned authorities (the respondents in the present case).

4(c). Since the poor / fair appraisal gradings earned by the applicant during the years 2010-2011 to 2014-2015 were not communicated to him, although he was considered for promotion by the three DPCs,

it has deprived him of the aforesaid opportunity of making representations against them;

4(d). it seems that the representation of the applicant was not made by him through proper channel but in the impugned order dated 15.10.2015 and the position as contended by the respondents in the preceding paragraphs has been explained bringing out as to why during the three DPCs held in 2013, 2014 and 2015, the applicant was not found suitable for promotion.

4(e). However, as stated above, in fairness to the applicant, in our opinion it will be necessary for the respondents to afford him an opportunity for making a fresh representation on those gradings as sought by him in the present OA, which should then be considered by the respondents, appropriate reasoned decision be taken thereon and communicated to the applicant.

4(f). On such consideration of his representation, if the appraisal gradings of the applicant for the year 2010-2011 to 2014-2015 get upgraded / improved to the

minimum required standard of 15 AAV for promotion to the post of Chief Manager, the respondents should hold a review DPC for those three years to consider his case afresh for promotion to the post of Chief Manager as per the applicable law, rules and instructions on the subject. In view of these conclusions, the OA deserves to be allowed.

5. Decisions -

The OA is allowed in terms of the observations recorded above in paragraph No.4 above. The parties to bear their own costs.

(Ravinder Kaur)
Member (Judicial)

(Dr. Bhagwan Sahai)
Member (Administrative)

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