

**CENTRAL ADMINISTRATIVE TRIBUNAL
CALCUTTA BENCH, KOLKATA**

LIBRARY

O.A. 1538 of 2013

**Coram : Hon'ble Ms. Bidisha Banerjee, Judicial Member
Hon'ble Dr. N. Chatterjee, Administrative Member**

Shri Dipak Kumar Bhattacharjee,
Son of Lage D. Bhattacharjee,
Aged about 55 years,
Ex-UDC, National Test House (ER),
Kolkata,
Residing at 175, Baraipur Ukil para,
P.O. Baraipur,
Kolkata 700 144.

..... Applicant.

Versus

1. Union of India
Through the Secretary,
Department of Consumer Affairs,
Ministry of Consumer Affairs,
Food and Public Distribution,
New Delhi.

2. The Director,
National Test House (ER),
Block - CP, Sector - V,
Kolkata 700 091.

..... Respondents.

For the applicant : Mr. A. Chakraborty, Counsel

For the respondents : Mr. B.B. Chatterjee, Counsel

Reserved on : 05.09.2019

Date of Order : 15.11.19.

ORDER

Per : Bidisha Banerjee, Judicial Member

The Application in this O.A. has sought for the following reliefs:

"8.1. Office order dated 25.03.2013 issued by respondent No. 2 cannot be tenable in the eye of law and therefore the same may be quashed;

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II. An order do issue directing the respondent No. 2 to grant the benefit of 2nd financial upgradation under ACP Scheme with effect from 29.07.2006 and also to re-fix pension and other pensioner benefits and also to grant all consequential benefits."

2. The applicant to contest the claim of the respondents that the 2nd ACP was not granted due to adverse grading, would rely on the decision rendered by Hon'ble Apex Court in *Abhijit Ghosh Dastidar -vs- UOI & Ors.* reported in 2009 (16) SCC 146, which is extracted as under:

"5. According to the appellant, the adverse entries, namely, "good" were not communicated. The said aspect ought not to have been considered while considering his promotion. In support of the above claim, he relied on the decision of this Court in *Dev Dutt v. Union of India* (2008) 8 SCC 725.

8. Coming to the second aspect, that though the benchmark "very good" is required for being considered for promotion, admittedly the entry of "good" was not communicated to the appellant. The entry of "good" should have been communicated to him as he was having "very good" in the previous year. In those circumstances, in our opinion, non-communication of entries in the annual confidential report of a public servant whether he is in civil, judicial, police or any other service (other than the armed forces), it has civil consequences because it may affect his chances of promotion or getting other benefits. Hence such non-communication would be arbitrary and as such violative of Article 14 of the Constitution. The same view has been reiterated in the above referred decision (*Dev Dutt* case 1, SCC p. 738, para 41) relied on by the appellant. Therefore, the entries "good" if at all granted to the appellant, the same should not have been taken into consideration for being considered for promotion to the higher grade. The respondent has no case that the appellant had ever been informed of the nature of the grading given to him.

9. Learned counsel appearing for the appellant has pointed out that the officer who was immediately junior in service to the appellant was given promotion on 28-8-2000. Therefore, the appellant also be deemed to have been given promotion from 28-8-2000.

10. Since the appellant had retired from service, we make it clear that he is not entitled to any pay or allowances for the period for which he had not worked in the Higher Administrative Grade Group A, but his retrospective promotion from 28-8-2000 shall be considered for the benefit of refixation of his pension and other retiral benefits as per rules.

11. The appeal is allowed to the above extent. No costs."

3. To refute his claim for 2nd ACP etc., the respondents would plead as under:

The applicant Shri Dipak Kumar Bhattacharya, Ex-UDC, National Test House (ER), Kolkata was in Govt. service during the year 2004. He was involved in the case of falsification, forgery, tampering and using office seal with false and fake signature of gazetted Govt. Officers and using his designation for obtaining huge amount of Bank's Loan (from different Nationalized Banks) for House Building purpose of more or less Rs.

24,00,000/- (twenty four lacs) approximately from different banks, without the knowledge of the Competent Authority of National Test House (ER).

Such information was received by the office in the year 2004 through SBI, Shibpur Branch vide their letter No. 26/218 dated 07.11.2006 under reference letter No. E/3416 dated 22.11.2004 (issued by Shri D.K. Bhattacharya), accordingly, the office started primary enquiry for its authenticity from different banks during the year 2005-06 and received such information and allegation notice from the different banks against group of officials (10 numbers) of National Test House (ER) including Shri D.K. Bhattacharya.

During the month of November 2006 onwards, the Office processed the DPC for grant of 2nd financial up-gradation under ACP. Shri D.K. Bhattacharya was eligible for the same. The competent authority sought for vigilance clearance from the Vigilance Section, National Test House (ER). On 02.01.2007 Vigilance Section, National Test House submitted vigilance clearance certificates in a note-sheet dated 02.01.2007 before the AVO, National Test House (ER) as desired by the concerned authority, in respect of the following officials along with Shri D.K. Bhattacharya, then then UDC, for grant of 2nd Financial Upgradation under ACP.

- 1) Smt. Sutapa Chowdhury, UDC - Free from Vigilance angle.
- 2) Shri Dipak Kr. Bhattacharya, UDC - Not free from vigilance angle.
- 3) Shri Avik Kumar Basu, UDC - Not free from vigilance angle.
- 4) Shri Sailesh Kr. Gupta, UDC - Free from Vigilance angle.
- 5) Shri Prabir Kr. Chakraborty, UDC - Free from Vigilance angle.
- 6) Shri Sudip Kr. Saha, UDC - Free from Vigilance angle.
- 7) Shri Bharat Ch. Dutta, UDC - Free from Vigilance angle.

He was thus not free from vigilance angle.

On 10.11.2006, the office had officially received complaint from SBI, Shibpur Branch vide their letter/Notice No. E/3416 dated 22.11.2004, against Shri D.K. Bhattacharya, about his involvement in misconduct, as reported by the bank for obtaining a huge amount of Rs. 4,53,391/- from SBI and thereafter from Central Bank of India, Subhasgram Branch, Dist. 24 Parganas, Kolkata - 146 for obtaining Rs. 7,50,000/- against the mortgage of his property at Ukipara, Baruipur, without the knowledge of the prescribed authority of National Test House which was unbecoming of a Govt. Servant as per CCS (Conduct) Rules, 1964.

Accordingly, on the basis of said documents relevant papers, the disciplinary authority issued an Order of suspension against Shri D.K. Bhattacharya and held departmental inquiry against him during the year 2008. The Article of Charges as framed against him were proved. The disciplinary authority finally awarded him major penalty for compulsory retirement from the Govt. Service with effect from 16.07.2010 vide NTH (ER)/D.P/DKB/2006-07 dated 16.07.2010.

Shri Dipak Kumar Bhattacharya, Ex-UDC, NTH (ER) applied/ claimed for grant of his 2nd financial up-gradation under ACP in the year 2013 after 8 years. It may be noted that "during the currency of penalty" which is restricted 5 years for major penalty as per DoP&T O.M. No.11012/11/2007-Estt.(A) dated 14.12.2007 for promotion/financial up-gradation will not be granted.

In his ACRs for the years 2002-2003, 2003-04 and 2004-05, his final grading stood as "Average" and for that reason his case was not considered by the DPC Authority for grant of financial up-gradation under 2nd ACP and in response to his application, the Competent Authority issued a Speaking Order vide No. NTH(ER)/APAR/2012-13, dated 25.03.2013.

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That he had no performance to challenge the 'average' grading, nor could he substantiate any point of 'malice' against the Reporting and the Reviewing officers. Therefore, the Competent Authority met the point of justice by providing him reasonable opportunity under the Article 311 of the Constitution of India. Instead of contesting the gradings he merely pleaded to "be excused" which inter-alia reconfirmed that he did not have any point to agitate and as such there was no need to take up the relevant ACRs for reconsideration at the end of the respective Reporting and the Reviewing officer as per the extant Government Rule as laid down by DoPT O.M. No. 21011/2010-Estt. A dated 13th April, 2010 for upgrading or otherwise of his final grading in the ACRs of 2002-03, 2003-04 and 2004-05.

Under such circumstances, the final grading for the year 2002-03, 2003-04 and 2004-05 remained the same and as it did not meet the prescribed bench mark "good" for the purpose of his 2nd financial upgradation, he was not found eligible for 2nd financial upgradation.

That, in the compliance of the Hon'ble Supreme Courts direction, circulated vide DOPT O.M. No. 21011/1/2010-Estt. A dated 27.04.2010, the respective three (3) ACRs for the years 2002-03, 2003-04 and 2004-05 were made available to him inviting his comments on the below benchmark grading.

Whereas the applicant in his reply dated 15.03.2013 has not contested the average grading his ACRs for the year 2002-03, 2003-04 and 2004-05.

Therefore, the judgment of Abhijit Ghosh Dastidar does not apply here, as ACRs for the years 2002-03, 2003-04 and 2004-05 were made available to Sri Dipak Kumar Bhattacharjee inviting his comments on the below benchmark grading, but in his reply dated 15.03.2013 the applicant has not contested the average grading in his ACRs for the year 2002-03, 2003-04 and 2004-05. Under such circumstances the O.A. is liable to be dismissed.

4. We heard the Ld. Counsels and perused the materials and record.

It appears to be a case where due to poor gradings in the ACRs for the years 2002-03, 2003-04, 2004-05, the 2nd ACP, due in 2006, was not granted to the applicant.

5. The DOPT OM of 27.4.2014 is explicit that,

"On Below Benchmark gradings in ACRs prior to the reporting period 2008-09 and objective consideration of representation by the Competent Authority against remarks in the APAR or for upgradation of the final grading". – It stipulates that it is directed to say that prior to the reporting period 2008-09, only the adverse remarks in the ACRs had to be communicated to the concerned officer for representation, if any, to be considered by the Competent Authority. The question of treating the grading in the ACR which is below the benchmark for next promotion has been considered in this Department and it has been decided that if an employee is to be considered for promotion in a future DPC and his ACRs prior to the period 2008-09 which would be reckonable for assessment of his fitness in such future DPCs contain final grading which are below the

benchmark for his next promotion, before such ACRs are placed before the DPC the concerned employee will be given a copy of the relevant ACR for his representation, if any, within 15 days of such communication. It may be noted that only below benchmark ACR for the period relevant to promotion need be sent. There is no need to send below benchmark ACRs of other years.

2. As per existing instructions, representations against the remarks or for upgradation of the final grading given in the APAR (previously known as ACR) should be examined by the Competent Authority in consultation, if necessary, with the Reporting and the Reviewing Officer, if any. While considering the representation, the Competent Authority decides the matter objectively in a quasi-judicial manner on the basis of material placed before it. This would imply that the Competent Authority shall take into account the contentions of the officer who has represented against the particular remarks/grading in the APAR and the views of the Reporting and Reviewing Officer if they are still in service on the points raised in the representation vis-a-vis the remarks / gradings given by them in the APAR. The UPSC has informed this Department that the Commission has observed that while deciding such representations, the competent authorities sometimes do not take into account the views of Reporting / Reviewing Officers if they are still in service. The Commission has further observed that in a majority of such cases, the Competent Authority does not give specific reasons for upgrading the below benchmark ACR / APAR gradings at par with the benchmark for next promotion.

3. All Ministries / Departments are therefore requested to inform the competent authorities while forwarding such cases to them to decide on the representations against the remarks or for upgradation of the grading in the APAR that the decision on the representation may be taken objectively after taking into account the views of the concerned Reporting / Reviewing Officers if they are still in service and in case of upgradation of the final grading given in the APAR, specific reasons therefor may also be given in the order of the Competent Authority.

[GI, Dept. of Per & Trg., O.M. No. 21011/1/2010-Estt. A, dated the 13th April, 2010.]

Pursuant thereto, the applicant was duly forwarded copies of ACRs for the period 2002-03, 2003-04 and 2004-05, seeking his representation. He responded as under:

"Director,
National Test House,
Salt Lak,
Kol -91

Sub: - Advance entry in ACR for the period 2002-2003, 2003-2004, 2004-2005

Ref. : Your letter No. NTH/KOL/DDC/Policy/2013

Dt. 15-3-2013

Sir,

I have retired from service w.e.f. 16.7.2010 under provision a compulsory retirement.

So there is no scope to rectify myself for the average grading for the year 2002-2003, 2003-2004, 2004-2005.

I may be excused and kindly consider my candidature for 2nd Financial upgradation under A.C.P.

I think your honour will kind enough inform do me.

Thanking you.

Yours faithfully,

Dipak Kumar Bhattacharjee

EX- U.D. Clerk

N.T.H (ER) Kol.

Dt. 15.03.2013

It is evident that he failed to seek upgradation of his "average" gradings to that of "good" to meet the benchmark for grant of ACP.

6. Having considered the rival contentions and having noted the fact that the applicant was admittedly and indubitably served with the copies of ACRs for the relevant years, in accordance with law, and even permitted to represent against the "average" gradings but he chose not to seek upgradation to "good" or justify why he deserved an upgradation, his claim for grant or 2nd ACP w.e.f. 29.7.06 raised in 2013 without upgradation of his gradings from "average" to that of "good", fails and therefore the O.A. is dismissed. No costs.

(Dr. N. Chatterjee)
Administrative Member

(Bidisha Banerjee)
Judicial Member

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