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**(2015) 08 AHC CK 0148**

**In the Allahabad High Court**

**Case No :** Civil Misc. Writ Petition (S/B) No. 1825 of 2009

Arun Kumar Goel

APPELLANT

Vs

Union of India and Others

RESPONDENT

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**Date of Decision :** 06-08-2015

**Acts Referred:**

**Citation :** (2015) 8 ADJ 732 : (2015) 113 ALR 30 : (2016) 1 ESC 60 : (2016) 148 FLR 598

**Hon'ble Judges :** Narayan Shukla and Akhtar Husain Khan, JJ.

**Bench :** Division Bench

**Advocate :** R.C. Saxena and Anurag Shukla, for the Appellant; Ashok Nigam and Neerav Chitravanshi, for the Respondent

**Final Decision :** Allowed

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## Judgement

Narayan Shukla, J.—Heard Mr. Anurag Shukla, learned counsel for the petitioner and Mr. Neerav Chitravanshi, learned counsel for the respondent Nos. 2 and 3. The petitioner, while he was posted as Telecom District Manager, Hisar was subjected for a disciplinary proceeding, which culminated into the penalty of reduction of salary at two stages vide order dated 22.9.2003 for a period of two years. The petitioner had challenged the order of punishment dated 22.9.2003 before the Central Administrative Tribunal through Original Application No. 577 of 2005. The learned Central Administrative Tribunal set aside the punishment order dated 22.9.2003 and allowed the application with all consequential benefits. The respondents had challenged the order of the Tribunal before this Court through writ petition No. 1534 (SB) of 2007, which was dismissed by this Court vide judgment and order dated 1.4.2008. In the mean while the petitioner's juniors were promoted to Group A. The petitioner filed a writ petition being writ petition No. 635 (SB) of 2008 before this Court. This Court passed an interim order, consequently the respondents promoted the petitioner to Senior Administrative Grade (SAG) of Indian Telephone Service Group "A" vide order dated 12.11.2008 w.e.f. 24.4.2001.

2. On the basis of date of promotion, the petitioner was placed in the seniority list below to his juniors. Therefore, he filed the present writ petition challenging the seniority list published on 15.9.2009 as also the order dated 12.11.2008, whereby his seniority was fixed at Serial No. 123-A below to Mr. Ashok Kumar Pathak and Sri S.B. Nag.

3. When the respondents proceeded to hold a meeting of departmental promotional committee on 17/18 June 2009 without fixing the petitioner's seniority in proper manner, the petitioner filed a writ petition being writ petition No. 845(SB) of 2009 in which this Court vide order dated 16 June 2009 issued direction to the respondents to take decision on the petitioner's representation. The respondents rejected the petitioner's representation vide order dated 13.7.2009, thereafter the respondents issued a tentative seniority list on 15.9.2009. The petitioner submitted an objection to correct his placement at due place in the seniority list. However, the respondents without correcting the petitioner's placement at the seniority list promoted his junior to SAG vide order dated 21.10.2009, whereas the petitioner was promoted to SAG vide order dated 12.7.2011.

4. The opposite parties 1 and 2 have stated that the petitioner was considered for promotion to the post of Senior Administrative Grade (SAG) of Indian Telephone Service Group "A" against the vacancies of the year 1996-97, 1997-98, 1998-99 and 1999-2000 in the meeting of Departmental Promotion Committee held from 27 to 29 March and on 5 April 2001. Since the disciplinary proceeding was pending against the petitioner the recommendations of the Departmental Promotion Committee were kept in sealed cover in terms of DoP&T OM No. 22011/4/91-Estt. A dated 14.9.1992. On conclusion of disciplinary proceedings the petitioner was awarded penalty of reduction of pay by two stages vide order dated 22.9.2003. The petitioner had challenged the order of punishment before the Central Administrative Tribunal through OA No. 577 of 2005. The learned Tribunal set aside the punishment order which was challenged before this Court through the writ petition, but the writ petition was dismissed. Therefore, ultimately the punishment awarded to the petitioner was set aside by the department also vide order dated 26.9.2008. After the aforesaid order the sealed cover was opened. On opening of the sealed cover, it was found that the petitioner was not recommended for regular promotion by the Department Promotion Committee against the vacancies of the year 1997-98 and 1998-99, whereas his name was recommended for promotion by Departmental Promotion Committee against the vacancy of 1999-2000. Accordingly, vide order dated 12.11.2008 the promotion order was issued promoting him as SAG to ITS Group-A and accordingly his seniority was fixed between Shri Ashok Kumar Pathak and Shri S.B. Nag.

5. We summoned the confidential report of the petitioner, upon perusal of the petitioner's original service record, we found that against the vacancy of the year 1997-98 the petitioner's annual character roll of preceding five years i.e.

1993-94, 1994-95, 1995-96, 1996-97 and 1997-98 were considered. Against the vacancies of the year 1998-99 the annual character roll of preceding five years i.e. 1994-95, 1995-96, 1996-97, 1997-98 and 1998-99 were considered. Similarly against the vacancies of the year 1999-2000 the petitioner's annual character roll of preceding five-years i.e. 1995-96, 1996-97, 1997-98, 1998-99 and 1999-2000 were considered. The petitioner has submitted that since October 1992 to December 1993 he was allowed for study of special courses in Germany and that period should have been treated on deputation, but the assessing officer had not considered the said period to award any remark in his character roll. In 1994-95 he was awarded "average" entry, however, the same was not approved by the reviewing officer and further nor was it communicated to the petitioner. In the year 1995-96 he was awarded "Good" entry and in the year 1996-97 and 1997-98 he was awarded "Very Good" entry, in the year 1998-99 he was awarded "Outstanding" entry, in the year 1999-2000 he was awarded "Very Good" entry. It has been stated that if the entries of the year 1993-94 and 1994-95, which are not readable against the petitioner, are not taken into consideration, the petitioner's over all performance since 1995-96 to 1999-2000 has to be assessed as "Very Good".

6. In the case of *State of Orissa Vs. Dr. (Miss) Binapani Dei and Others*, , the Hon"ble Supreme Court has held that material adverse to the petitioner which is not communicated to him, cannot be relied upon adversely affecting his civil rights. The same proposition has been laid down by the Hon"ble Supreme Court in subsequent decisions. Those are referred as under:

- (1) *Gurdial Singh Fijji Vs. State of Punjab and Others*, .
- (2) *U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and others*,
- (3) *Dev Dutt Vs. Union of India (UOI) and Others*, .

7. The petitioner's service record also contain one certificate issued by the Director (Staff) Department of Telecom, New Delhi, which has certified that ACRs in respect of Shri Arun Kumar Goel, Staff No. 630 for the period 1.11.1992 to 20.9.94 have not been written for the reason that officer was on foreign deputation from 1.11.92 to December 93 and then he was on medical leave from December 93 to 20.9.94.

8. On the basis of aforesaid certificate the learned counsel for the petitioner submitted that in consideration of petitioner's promotion against the vacancy of 1997-98, the petitioner's performance could not have been termed as average and since the annual character roll of 1994-95 marked as "Average" was not approved by the reviewing officer nor was it communicated to the petitioner, had the petitioner's performance being assessed by the Departmental Promotion Committee properly he would have been promoted against the vacancy of the year 1997-98 as in the year 1995-96 the petitioner was awarded "Good" entry, in the 1996-97 "Very Good" entry and in the year 1997-98 "Very Good" entry. Accordingly, the petitioner's over all performance would have been assessed

Very Good", but deliberately the petitioner's entries of his annual character rolls discussed above had not been considered in proper manner.

9. The record produced before this Court also contain the entries of year 1994-95, upon perusal of which we found that the reporting officer had reported the entries in the petitioner's character roll as "Average". However, the reviewing officer had not approved it, inasmuch as there is no signature of reviewing authority on the entry awarded to the petitioner for the year 1994-95.

10. The Office Memorandum dated 10 April 1989 has provided the consolidated instructions for the Departmental Promotion Committee. Clause 4.4 deals with the consideration of officers on study leave, which is extracted below:

4.4. An officer proceeding on study leave should be treated on the same basis as an officer proceeding on deputation if the study leave was duly sanctioned by the competent authority and the competent authority certified that he would have continued to officiate but for his proceeding on study leave. Such a certificate would not be necessary if he was holding the said departmental post substantively. These instructions would also apply in the cases of Government servants who are granted special leave for training abroad under the various training schemes."

11. It is stated by the petitioner that he was only candidate who was selected from amongst all the ITS Group A of the department of Telecommunication on the basis of excellent performance in the department and meritorious academic record and for being sent to federal republic of Germany for a log term management course. He was deputed there from October 1992 to December 1993. The petitioner secured first position amongst the candidates of the various countries of the world in all the five examinations held during the period of the course. It is further stated that keeping in view the petitioner's outstanding performance for the year 1992-93 and 1993-94 in completion of above course the petitioner was entitled to be awarded the excellent entry, but was not awarded any entry in his character roll for the above years.

12. In reply the learned counsel for the respondents has submitted that since the Departmental Promotion Committee has considered the petitioner's case for promotion to the post of SAG ITS Group A only against the vacancies of 1999-2000 the petitioner has been promoted against those vacancies.

13. The learned counsel for the respondents has further stated that under the departmental instructions the Departmental Promotion Committee was free to decide its own method and procedure for objective assessment of the suitability of the candidate where promotions are to be made by selection method. The post of SAG is a selection post and the Departmental Promotion Committee had discretion to device its own method and procedure for objective assessment of the suitability of the candidates, who are to be considered by them.

14. Paragraph 6.2.1 of the instructions provides that the confidential rolls are the

basic inputs on the basis of which assessment is to be made by each DPC. The evaluation of CRs should be fair, just and non-discriminatory. Hence:

(a) The DPC should consider CRs for equal number of years in respect of all officers considered for promotion subject to (c) below.

(b) The DPC should assess the suitability of the officers for promotion on the basis of their service record and with particular reference to the CRs for 5 preceding years. However, in cases where the required qualifying service is more than 5 years, the DPC should see the record with particular reference to the CRs for the years equal to the required qualifying service. (If more than one CR has been written for a particular year, all the CRs for the relevant year shall be considered together as the CR for one year).

(c) Where one or more CRs have not been written for any reason during the relevant period, the DPC should consider the CRs of the years preceding the period in question and if in any case even these are not available the DPC should take the CRs of the lower grade into account to complete the number of CRs required to be considered as per (b) above. If this is also not possible, all the available CRs should be taken into account.

(e) The DPC should not be guided merely by the overall grading, if any, that may be recorded in the CRs but should make its own assessment on the basis of the entries in the CRs, because it has been noticed that some times the overall grading in a CR may be inconsistent with the grading under various parameters or attributes.

15. The learned counsel for the respondents has relied upon a decision of Hon"ble Supreme Court rendered in the case of Union of India and another v. S.K. Goel and others, Appeal (Civil) 689 of 2007, in which the Hon"ble Supreme Court has held that it is now more or less well-settled that the evaluation made by an expert committee should not be easily interfered with by the Courts which do not have the necessary expertise to undertake the exercise that is necessary for such purpose.

16. The issue for determination centers around the assessment of petitioner's performance and entries recorded in his character roll to be considered for the DPC for his promotion to the post of SAG. The Office memorandum dated 10 April 1989 has provided instructions for the DPC to evaluate the performance of the employee to be considered for his promotion to the higher post. In the instructions it has been provided that the DPC should not be guided merely by the over all grading, if any, that may be recorded in the CRs, but should make its own assessment on the basis of the entries in the CRs. It further reads that when one or more character rolls are not written for any reason during the relevant period, the DPC should consider the CRs of the years preceding the period in question. It has further provided that the DPC should assess the suitability of the officers for promotion on the basis of their service record and with particular reference to the CRs for 5 preceding years.

17. Paragraph 6.2.1 of the instructions reads that the confidential rolls are the basic inputs on the basis of which assessment is to be made by each DPC. The evaluation of CRs should be fair, just and non-discriminatory.

18. Paragraph 4.4 reads that an officer proceeded on study leave should be treated on deputation if the study leave was duly sanctioned by the competent authority. It is settled law that the entries which have not been reviewed or if adverse have not been communicated to the employee shall not be read over against the employee.

19. The petitioner was permitted to proceed for study leave duly sanctioned by the competent authority, therefore, the period spent on study leave, as per instructions of the department, shall be treated as period of deputation and his performance shall be assessed as he was on duty. But during the period i.e. 1.11.1992 to 20.9.1994 when the petitioner was on study leave, no entries have been recorded in his CRs. In the year 1994-95 he was awarded the "Average" entry, but the same was not reviewed by the reviewing officer nor was it communicated to the petitioner, therefore, it could not be read over against the petitioner. In the year 1995-96 he was awarded the "Good" entry. In the year 1996-97 and 1997-98 he was awarded "Very Good" entries and in the year 1998-99 he was awarded the "Outstanding" entry. For the selection year 1997-98 the petitioner's character roll entries recorded in the preceding five years i.e. 1993-94, 1994-95, 1995-96, 1996-97 and 1997-98 ought to have been considered, but the petitioner was not considered by the DPC only for the reason that in the year 1993-94 no entry was recorded in his CR and in the year 1994-95 the entry was recorded as "Average". Since the entries of the year 1994-95 being awarded as "Average" was not reviewed by the reviewing officer nor was it communicated to the petitioner, it could not have been read over by the DPC. In the year 1995-96 he was awarded the "Good" entry, in the year 1996-97 and 1997-98 he was awarded "Very Good" entry. Accordingly, his over all performance was "Very Good" and as per instructions of the department the DPC should have considered all the entries together and assessed the performance of the petitioner.

20. Paragraph 6.2.1 of the instructions reads that the DPC should assess the suitability of the officers for promotion on the basis of their service record and with particular reference to the CRs for five preceding years. However, in the case where the required qualifying service is more than 5 years, the DPC should see the record with particular reference to the CRs for the years equal to the required qualifying service. It is further provided that if more than one CR has been written for a particular year, all the CRs for the relevant year shall be considered together as the CR for one year.

21. In view of aforesaid discussion, we are of the view that the petitioner's entries recorded in his character roll had not been considered properly in accordance with the departmental instructions. We find that against the vacancy of the selection year 1997-98 entries of only 1995-96, 1996-97 and 1997-98

were required to be considered. In 1995-96 the petitioner was awarded "Good" entry and in the year 1996-97 and 1997-98 he was awarded Very Good" entries. Thus over all performance should have been assessed as Very Good". Accordingly, the petitioner was entitled to be considered for promotion against the vacancies of the selection year 1997-98 when his juniors were promoted. Thus, it is obvious that the DPC has not considered the petitioner's character roll in accordance with the departmental instructions. We are not oblivious with the fact that the evaluation of the performance is the job of the expert body. It was the duty of the DPC to examine the character rolls in proper perspective in terms of guidelines, in which it has failed.

22. Therefore, the direction dated 12.11.2008 (Annexure No. 1) issued by the respondents to fix the petitioner's seniority below to Shri Ashok Kumar Pathak, in the seniority list of SAG published on 15.9.2009 (Annexure No. 2) as well as the order dated 13.7.2009 (Annexure No. 15), whereby the petitioner's representation to fix his seniority below to Shri Ashok Kumar Pathak are hereby quashed.

23. Regard being had to the aforesaid discussions a direction is issued to the respondents to consider the petitioner's matter for promotion to the higher post i.e. SAG on the basis of his character roll entries in the relevant year in view of the departmental instructions against the vacancy of the selection year 1997-98 within a week and communicate the result thereof to the petitioner immediately thereafter. The writ petition stands allowed. The relevant record is returned to the learned counsel for the respondents to keep it in office.