

(2016) 04 J&K CK 0011

In the Jammu And Kashmir High Court

Case No : S.W.P. No. 3046 of 2001 and M.P. No. 3059 of 2001

Kamal Kishore Sharma

APPELLANT

Vs

National Bank for Agricultural & Rural Development

RESPONDENT

Date of Decision : 21-04-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2017) 153 FLR 7 : (2016) 3 JKJ 33 : (2016) 4 LLN 706

Hon'ble Judges : N. Paul Vasanthakumar, CJ.

Bench : Single Bench

Advocate : Sunil Sethi, Senior Advocate with Ankesh Chandel, Advocate, for the Petitioner; V.R. Wazir, Senior Advocate with Vinayak Phull, Advocate, for the Respondents

Final Decision : Allowed

Judgement

N. Paul Vasanthakumar, C.J. - This Writ Petition is filed praying to quash Order dated 27.11.2011 passed by Respondent No.2 as well as

Orders dated 18.2.1997 & 1.7.1997 and for directing the Respondents to promote the Petitioner as Clerk Grade-I w'e.f. 1.2.1997 with all

consequential benefits of Seniority and Promotion.

2. The case of the Petitioner is that he was given an Order dated 18.2.1997 stating the postponement of the Promotion as Clerk Grade-I due to

adverse remarks in the Performance Appraisal Report recorded for the period ended 30.6.1996, which read thus:

(i) Due to his insubordination always he has shown disrespect to Senior Officers.

(ii) Though he is having abilities and knowledge about working but due to his disinclination for section work he has put his competencies to astray.

It is also stated in the said communication that his promotion as Clerk Grade-I is

postponed upto 17.8.1997 without prejudice to his seniority. The

Appeal was preferred against the said Order and without any speaking Order the Petitioner was informed that his Appeal is rejected. Thereafter a

Writ Petition was filed bearing SWP No. 1748/1997 before this Court against the Order of the Appellate Authority and this Court by Order dated

31.5.2001 set aside the Order of the Appellate Authority and remanded the matter to the Appellate Authority for passing a speaking Order by

giving reasons. Thereafter the Appellate Authority by a speaking Order dated 27.11.2001, stating about the adverse entries, rejected the Appeal.

3. Learned Senior Counsel appearing for the Respondents produced the entire file wherein performance of the Petitioner was reviewed

periodically and entries were made. However, the file did not reflect communication of the adverse remarks to the Petitioner at any point of time

except in the Order dated 18.2.1997. Order 18.2.1997 is an order informing the Petitioner about postponement of his promotion due to adverse

entries and not communicating the adverse entries and calling for objections/representation.

4. Learned Senior Counsel appearing for the Petitioner argued that uncommunicated adverse entries cannot be relied on to deny or postpone

promotion or for denying ACP benefits or any other benefits.

5. I have considered the said submissions.

6. It is well settled proposition of law that on entering adverse remarks in the Service Register, the Govt, servant concerned should be

communicated the adverse entry(ies) and he/she should be given opportunity to represent about the adverse entry made and unless adverse

entry(ies) is/are communicated and opportunity is given and review was made and communicated, the said adverse entry(ies) cannot be relied on

for the purpose of denying promotion or getting other benefits.

7. The said issue has been considered by Hon'ble the Supreme Court in decision reported as *Gurdial Singh Fijji v. State of Punjab*, 1980 (2)

LLN 143 (SC): AIR 1979 SC 1622, and held that:

The principle is well-settled that in accordance with the Rules of Natural Justice, an Adverse Report in a confidential roll cannot be acted upon to

deny promotional opportunities unless it is communicated to the person concerned so1 that he has an opportunity to improve his work and conduct

or to explain the circumstances leading to the Report. Such an opportunity is not an empty formality, its object, partially, being to enable the

superior Authorities to decide on a consideration of the explanation offered by the person concerned, whether the adverse Report is justified

Hon'ble the Supreme Court in its decision reported as *Dev Dutt v. Union of India and others*, 2008 (3) LLN 621 (SC): 2008 (8) SCC 725,

held thus:

In our opinion, every entry in the A.C.R. of a Public servant must be communicated to him within a reasonable period, whether it is a poor, fair,

average, good or very good entry. This is because non-communication of such an entry may adversely affect the Employee in two ways:

(1) Had the entry been communicated to him he would know about the assessment of his work and conduct by his superiors, which would enable

him to improve his work in future.

(2) He would have an opportunity of making a Representation against the entry if he feels it is unjustified, and pray for its up-gradation. Hence,

non-communication of an entry is arbitrary, and it has been held by the Constitution Bench decision of this Court in *Maneka Gandhi v. Union of*

India, AIR 1978 SC 597, that arbitrariness violates Article 14 of the Constitution.

Hon'ble the Supreme Court in Para 8 of the Judgment reported as *Abhijit Ghose Dastidur v. Union of India and ors.*, 2009 (16) SCC 146,

held thus:

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 Applicant. The entry of 'good' should have been communicated to him, as he was having "very good" in the

previous year, 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 any other service (other than the armed forces), it has Civil consequences because it may affect his chances for 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*, 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

8. A Larger Bench of the Hon'ble Supreme Court, in the case of Sukhdev Singh v. Union of India and others, 2013 (2) LIN 578 (SC) : 2013

(9) SCC 566. held that the view taken in Dev Dutt's case, that every entry in ACR of a public servant must be communicated to him/her within a

reasonable period is legally sound and helps in achieving three fold objectives; first, the communication of every entry in the ACR to a Public

servant helps him/her to work harder and achieve more that helps him in improving his work and give better results; secondly, on being made

aware of the entry in the ACR, the Public servant may feel dissatisfied with the same and communication of the entry enables him/her to make

representation for up-gradation of the remarks entered in the ACR; thirdly, communication of every entry in the ACR brings transparency in

recording the remarks relating to a Public servant and the system functions more in conformity with the Principles of Natural Justice. Accordingly

the Hon'ble Supreme Court held that every entry in the ACR, namely, poor, fair, average, good or very good, must be communicated to the

Employee concerned, within a reasonable time. At this juncture, it would be beneficial to refer to the relevant Paragraphs of the said Judgments,

which reads as follows:

8. In our opinion, the view taken in Dev Dutt v. Union of India, 2008 (8) SCC 725 : 2008 (2) SCC (L&S) 771, that every entry in the ACR

of a Public servant must be communicated to him/her within a reasonable period is legally sound and helps in achieving threefold objectives. First,

the communication of every entry in the ACR to a public servant helps him/her to work harder and achieve more that helps him in improving his

work and give better results. Secondly and equally important, on being made aware of the entry in the ACR, the Public servant may feel

dissatisfied with the same. Communication of the entry enables him/her to make representation for up-gradation of the remarks entered in the

ACR. Third, communication of every entry in the ACR brings transparency in recording the remarks relating to a Public servant and the system

becomes more conforming to the Principles of Natural Justice. We, accordingly,

hold that every entry in the ACR-poor, fair, average, good or very good-must be communicated to him/her within a reasonable period.

9. The decisions of this Court in *Satya Narain Shukla v. Union of India*, 2006 (9) SCC 69 : 2006 SCC (L&S) 1599, and the other decisions

of this Court taking a contrary view are declared to be not laying down good law.

9. In the case of *Union of India v. A.K. Gael & ors.*, C.A. No.2872 of 2010, which was referred to the Larger Bench, came up before the

Hon'ble Supreme Court and the same was disposed of, by Order dated 20.11.2013, wherein the Hon'ble Supreme Court observed that, the

reference has been correctly and squarely answered by the Larger Bench decision in *Sukhdev Singh's case* (cited supra) and therefore, held that

since the question has already been answered, there is no necessity for further consideration by the Larger Bench.

10. Before the Larger Bench of the Hon'ble Supreme Court, in *Union of India v. A.K. Gael & ors.*, C.A. No.2872 of 2010, on behalf of the

Union of India, it was pointed out that there was no cut-off date intimated, as regards the applicability of the decision in *Dev Dutt's case* (cited

supra), and this aspect needs to be decided by the Larger Bench. Rejecting the submission of the Union of India, it was pointed out that the only

point, on which reference is made stands answered in *Sukhdev Singh's case* (cited supra) and there is no necessity for any further consideration by

the Larger Bench.

11. A Division Bench of Madras High Court in W.P. Nos.33792 & 33829 of 2013 *Bharat Sanchar Nigam Limited and others v. The*

Registrar, Central Administrative Tribunal and others, 2014 (2) LLN 219 (DB) (Mad.), following the above cited Judgments by Order

dated 16.12.2013 upheld the Order of the Central Administrative Tribunal allowing the O.A. and directed to consider the promotion claim by

convening the DPC and decide without reference to the non-communicated ACR entries.

12. In light of the said undisputed fact namely adverse entries were not communicated to the Petitioner prior to Order dated 18.2.1997,

postponement of promotion for six months based on the Circular issued by the Bank dealing with the postponement of promotion for six months to

the person, whose service shows adverse entries can not be sustained

Consequently the impugned Order is set aside. By following the decisions cited supra the Petitioner shall be promoted as if he was not suffering with any disqualification for deferring his promotion when his juniors were promoted with consequential benefits. Necessary Orders are directed to be passed by the concerned Respondent within a period of three months from the date of receipt of copy of this Order.

13. Writ Petition is allowed with above directions. No costs.