

(2023) 07 DEL CK 0133

In the Delhi High Court

Case No : Civil Writ Petition No. 11557 Of 2021

Sunil Kumar

APPELLANT

Vs

Union Of India Through The Secretary & Ors

RESPONDENT

Date of Decision : 19-07-2023

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2023) 07 DEL CK 0133

Hon'ble Judges : Suresh Kumar Kait, J;Manoj Jain, J

Bench : Division Bench

Advocate : Jitendra Kumar Singh, Anjali Kumari, S. Aishwariya, Anshuman

Final Decision : Disposed Of

Judgement

Suresh Kumar Kait, J

1. The present petition has been preferred by the petitioner seeking issuance of direction to the respondents to promote the petitioner to the post of Executive Engineer (Civil) w.e.f. October, 2009 with all consequential benefits in view of judgment passed by this Court in the case of Prabhu Dayal Khandelwal Vs. Chairman, U.P.S.C. & Ors. (2015) 14 SCC 427.

2. The facts of the present case are that the petitioner was selected in Engineering Service Exam, 1999 conducted by UPSC and joined on the post of Assistant Executive Engineer (Civil) on 10.09.2001 in Border Road Engineering Service.

3. According to petitioner, in September, 2009, Departmental Promotion Committee (DPC) was constituted to consider promotion of Assistant Executive Engineer (Civil) to the post of Executive Engineer (Civil) and he being eligible, was in the zone of consideration. However, when the list dated 01.10.2009 of successful candidates was published his name was missing. According to petitioner, at that point of time, he had already completed more than five successful years of service in the post of Assistant Executive Engineer (Civil) and

he was at seniority position No.20. There was no communication of any adverse entry or any adverse remarks to his credit. Neither any inquiry was held against him nor was pending.

4. Petitioner is aggrieved that despite having position at No.20 on the post of Assistant Executive Engineer (Civil) as on 01.08.2008, he was deprived of his promotion vide list dated 01.10.2009 and his juniors in the inter Seniority List dated 01.08.2008 had been promoted.

5. Aggrieved against the arbitrary and mala fide action on behalf of respondents, vide order dated 01.10.2009, petitioner submitted his representation dated 10.10.2009, which according to him was never decided by the respondents. Being aggrieved, petitioner preferred a writ petition being W.P.(C) 12704/2009 before this Court challenging the promotion order dated 01.10.2009 passed by the respondents. However, petitioner could not succeed and the said petition was dismissed vide order dated 06.07.2015.

6. Thereafter, the petitioner challenged the order dated 06.07.2015 (in W.P.(C) 12704/2009) before the Hon"ble Supreme Court wherein vide order dated 30.08.2017 in Civil Appeal No. 46/2016, the Hon"ble Supreme Court in view of decision in Prabhu Dayal (Supra) directed the respondents to convey the adverse ACRs to the petitioner/appellant and consider the matter in accordance with law.

7. Pursuant to order dated 30.08.2017 passed by the Supreme Court, the respondents called upon the petitioner vide letter dated 12.10.2017 to make a representation, if any. Accordingly, the petitioner made a representation dated 15.11.2017 against the ACRs for the periods 2006-07 and 2008-09 stating that his ACRs have not been correctly and fairly assessed by IO, RO and SRO, which was rejected by the respondents vide order dated 02.05.2018.

8. During the course of hearing, learned counsel for petitioner submitted that neither the below benchmark or adverse entries of ACR were verbally or in writing communicated to petitioner prior to convening of DPC in 2009 nor he was ever called for counselling by IO, RO and SRO. Learned counsel further submitted that as per settled principles of law, petitioner should have been given a fair and reasonable opportunity to improve his performance on adverse or below benchmark entry in his ACR. However, his rights have been curtailed by the respondents, which has resulted in denial of promotion to the petitioner in the year 2009.

9. In support of petitioner"s case, learned counsel submitted that petitioner has been awarded Commendation Card in the years 2005 and 2007 with the Chief of Army Staff (COAS) and also with the DGBR Commendation Card in the year 2012. Besides he was also given appreciation letter in the year 2017 by Lt. General Suresh Sharma, AVSM, DGBR for COAS awarded in the year 2017. This shows that petitioner"s performance was wrongly assessed by the DPC and the adverse remarks in his ACRs are required to be expunged.

10. It was also submitted by the learned counsel for petitioner that respondents have arbitrarily rejected petitioner's representation against BBM ACR for the period 2006-07 and 2008-09 stating that there was no provision for reconsideration of upgradation of below benchmark grading given in the APAR by the competent authority, which is contrary to the settled principles of law enunciated by the Hon'ble Supreme Court in the Prabhu Dayal (Supra).

11. Lastly, it was submitted that the promotion is the legal right of petitioner and it is the statutory duty of the respondent-department to promote him to the post of Executive Engineer (Civil) w.e.f. October, 2009 and, therefore, the present petition deserves to be allowed.

12. To refute the claims raised by the petitioner, learned counsel appearing on behalf of respondents submitted that the petitioner was duly considered by the DPC convened for the vacancy year 2009-10, regular DPC for 2010-11 as well as additional DPC for the years 2010-11, 2011-12 and 2012-13 but he was assessed 'unfit' owing to below benchmark grading in the ACR for the years 2006-07 and 2008-09 and, therefore, he was not promoted with his juniors.

13. It was further submitted that petitioner's earlier writ petition No.12704/2009 stood dismissed vide order dated 06.07.2015 by this Court, however, since the Hon'ble Supreme Court vide order dated 30.08.2017 directed the respondents to consider the case of petitioner in view of decision in the case of Prabhu Dayal (supra), petitioner has been given a fair opportunity to represent his case. However, upon assessing petitioner's ACRs for different periods, his case was not approved for promotion owing to below benchmark entry in the ACRs for the year 2006-07.

14. Learned counsel further submitted that copy of ACRs for the period from 01.04.2006 to 31.03.2007 and 10.06.2008 to 31.03.2009 were provided to the petitioner vide letter No.16800/ACR/COMMN BBM/01/E1D dated 18.06.2010 in terms of DoPT's OM No.21011/1/2010-Esst-A dated 13.04.2010. However, since there was no provision for communicating the ACR prior to coming into force the aforesaid OM, the ACRs for the years prior thereto were not communicated to the petitioner.

15. Lastly, learned counsel submitted that appropriate provisions of law have been applied in the case of petitioner and his case has validly been rejected by the DPC in view of his below benchmark in the ACRs and juniors of him were promoted as they had secured appropriate grading required for promotion. It was further submitted that the claims raised by the petitioner are without any basis. Hence, this petition deserves to be dismissed.

16. In rebuttal, learned counsel for petitioner submitted that petitioner's case is similar to the case in Prabhu Dayal (Supra). The respondents have taken a wrong plea that there is no equivalence and respondents have followed two different yardsticks while conducting two DPCs, as in one DPC conducted in 2009 petitioner's case was rejected while in another DPC conducted in 2013, petitioner

was promoted under the same set of ACRs, facts and circumstances. Learned counsel for petitioner submitted that the respondents have violated the law laid down by the Hon'ble Supreme Court in Dev Dutt Vs. Union of India (2008) 8 SCC 725 wherein it is held that the below bench mark entries shall be communicated to the employees and on the basis of un-communicated entries, no employee can be denied promotion.

17. Learned counsel for petitioner further submitted that it has never been the case of the respondents that no vacancy was available, however, promotion has been denied. Therefore, list dated 01.10.2009 deserves to be set aside to the extent that petitioner's name is excluded. Hence, petitioner deserves to be promoted from the date his batch mates have been promoted to the post of Executive Engineer (Civil).

18. Upon consideration of rival contentions raised by the counsel for the parties during arguments and material placed before this Court, we find that this is second round of litigation on behalf of the petitioner seeking promotion to the post of Executive Engineer (Civil) w.e.f. October, 2009.

19. The petitioner was considered for promotion in the DPC convened for the vacancy year 2009-10, regular DPC for 2010-11 as well as additional DPC for the years 2010-11, 2011-12 and 2012-13 but he was assessed "unfit" owing to below benchmark grading in the ACR for the years 2006-07 and 2008-09.

20. The petitioner has claimed that the ACRs for the years 2006-07 and 2009-09 were neither communicated to him and nor he was ever verbally or orally complained or warned by his officers for improvement. In support of his claim, petitioner has placed reliance upon Supreme Court's decision in Prabhu Dayal Khandelwal (Supra).

21. In Prabhu Dayal (Supra), the Supreme Court had dealt with a case where the appellant was denied promotion by the competent authority for having obtained below bench mark as "Good" for the years 1995-96, 1996-97, 1998-99, though for the remaining two years i.e. 1997-98 and 1999-2000, he had obtained the bench mark "Very Good". The Supreme Court held that the claim of appellant therein could not be ignored due to un-communicated confidential reports and directed the respondents to reconsider the claim of appellant for promotion for the vacancy year 2011-02 itself on the basis of communicated reports.

22. On the claim of petitioner that the ACRs for the years 2006-07 and 2009-09 were not communicated to him, the respondents have taken the plea that prior to coming into force DoP&T OM No 2.1011/1/2010-Estt-A dated 13.04.2010, there was no provision of communicating below bench mark ACRs.

23. By pleading so before this Court, in our opinion the respondents have ignored the law laid down by the Supreme Court in Dev Dutt (Supra) wherein it is held that in case of adverse grading or remarks, the ACRs/ confidential reports/ grading are required to be communicated to the employees to enable them to

represent against the same.

24. The fact remains that it is only pursuant to first round of litigation in W.P.(C) 12704/2009 before this Court and in Civil Appeal No. 46/2016 before the Hon"ble Supreme Court, the respondents vide letter dated 12.10.2017 communicated the entries in the ACR to the petitioner and furnished copies of ACR for the period 2006-07 and 2008-09. The aforesaid communication dated 12.10.2017 reads as under:-

" CONFIDENTIAL

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COMMUNICATION OF ENTRIES IN THE
ICR/ACR

1. It is intimated that earlier we have communicated the adverse/ below bench mark ACRs to you vide this Dte letter No. 16800/ACR/COMMN BBM/01/1D dated 18 June 2010 and sought your representation if any on the same. On receipt of your representation, the same has been considered and rejected by the competent authority vide this Dte Office Memorandum No. 16800/ACR/Commn/13/E1D dated 28 Feb 2011.

2. However, in view of filing of SLP (C) No. 35319/2015 and with reference to the order dated 30 Aug 2017, we are once again forwarding the photo copies of adverse/below bench mark ACR for the period from 01/04/2006 to 31/03/2007 and 10/06/2008 to 31/03/2009 for your representation on it, if any."

25. The petitioner vide his representation dated 15.11.2017 pleaded that non communication of his ACRs at the relevant time is contrary to decision of Supreme Court in Prabhu Dayal Khandelwal (Supra) and he is entitled to promotion from back date.

26. In response to petitioner"s representation dated 15.11.2017, the respondents vide letter dated 02.05.2018 conveyed the petitioner that his earlier representation against the below bench mark ACRs for the year 2007-08 and 2008-09 was already rejected vide Memorandum 16800/ACR/Commn/13/E1 D dated 28.02.2011 and there was no provision for reconsideration of upgradation of below bench mark grading given in the APARs by the competent authority. The aforesaid communication dated 02.05.2018 reads as under:-

" CONFIDENTIAL

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REPRESENTATION AGAINST THE BBM
ACR FOR THE PERIOD FROM 01/04/2006
TO 31/03/2007 AND 10/06/2008 TO 31/03/2009

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2. In this regard it is intimated that representation against below bench mark grading in your ACR for the period from 01 Apr 2006 to 31 Mar 2007 and 10 Jun 2008 to 31 Mar 2009 has been already rejected vide Memorandum No. 16800/ACR/Commn/13/E1D dated 28 Feb 2011.

3. As per policy on the subject, there is no provision for reconsideration of upgradation of below bench mark grading given in the APARs by the Competent Authority when the Competent Authority has already taken a decision for rejecting the request of Govt servant for upgradation or below bench mark grading.

4. In view of the above, both the representations received vide your letter under reference for re-consideration of BBM grading has been rejected by the Competent Authority."

27. The aforesaid communication dated 02.05.2018 clearly shows that the respondents vide reply dated 02.05.2018, have blatantly refused to re-consider the case of petitioner stating that there is no provision for reconsideration, despite direction of the Supreme Court vide order dated 30.08.2017 in Civil Appeal No. 46/2016 in the case of petitioner.

28. There is no dispute to the proposition that DPC while assessing a candidates for promotion, has power to exercise full discretion to make its own assessment, however, the bench mark and remarks given in the ACR/APARs also play a significant role. As per records, petitioner in the years 2003-04, 2004-05, 2005-06 had secured the grading "Very Good" ; for the un-communicated ACR of the year 2006-07 had secured the grading "Average" and for the year 2007-08, "One part GOOD and one part Very Good". By not communicating the grading "Average" for the year 2007-08 to the petitioner, the respondents have in fact denied him the opportunity to improve or represent at the relevant time.

29. A Three Judge Bench of Supreme Court in Abhijit Ghosh Dastidar Vs. Union of India and Others (2009) 16 SCC 146, while dealing with a case of non-communicated below bench mark "good" in the ACR, observed that the said grading should not have been taken into consideration for promotion. It was held as under:-

"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) 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."

30. What is disturbing this Court is the communication dated 02.05.2018 made by the respondents to the petitioner, whereby he is informed that his ACRs have not been considered, having been earlier rejected and there-being no provision for reconsideration. In our considered opinion, instead of technical reply, the respondents should have adverted to the pleas urged by the petitioner in his representation dated 15.11.2017 challenging below bench mark grading.

31. The Courts generally refrain to interfere in the grading awarded to an official in the ACRs. Indisputably, it is the discretion of the competent authority to evaluate the working of an official and grade it, keeping in mind that such grading shall affect the future promotion prospects of the official. However, in cases like the one in hand, where out of five ACRs, the official has secured "Very Good" grading in three consecutive years and for one year, he has been awarded the grading "One part Good and One part Very Good"; on the basis one below bench grading being "Average" , that too which was never communicated and he was never ever been called upon verbally to define scope of improvement, this Court finds it would be too harsh to deprive him for his promotion. Moreover, this Court cannot ignore that in the years 2005, 2007 and 2012 petitioner has been given commendation Card and appreciation letter in the year 2017.

32. In view of afore-narrated observations and peculiar facts of this case, this Court is of the opinion that the below bench mark grading "Average" for the 2007-08 cannot be permitted to stand in the way of petitioner to have promotion to the rank of Executive Engineer (Civil) when it actually became due for him. This Court finds that petitioner deserves to be promoted from October, 2009 when his batch mates were promoted.

33. This Court was informed that petitioner has been promoted to the post of Executive Engineer (Civil) on 04.04.2013. Accordingly, respondents are directed to issue fresh order granting promotion to the petitioner from October, 2009 and grant consequential benefits within four weeks.

34. With directions as aforesaid, the present petition is accordingly disposed of.