
(2012) 12 AHC CK 0107

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 50733 of 2012

Union of India and Others

APPELLANT

Vs

Saroj Kumar and Others

RESPONDENT

Date of Decision : 19-12-2012

Acts Referred:

Citation : (2012) 12 AHC CK 0107

Hon'ble Judges : Sheo Kumar Singh, J and Virendra Vikram Singh, J

Final Decision : Allowed

Judgement

Virendra Vikram Singh, J.

Heard Sri R. B. Singhal, learned Sr. Advocate assisted by Sri Ashok Singh, who appeared for the petitioner and Sri U. N. Sharma, learned Sr. Advocate assisted by Sri Srivastava, who appeared for the respondent no. 1.

Arguments were advanced/heard from both sides for the purposes of passing appropriate orders on the stay application.

Otherwise also as affidavits are not exchanged, the Court is not in a position to finally decide the writ petition.

Challenge in this writ petition is the order passed by the Central Administrative Tribunal, Allahabad Bench, Allahabad dated 16.1.2012 passed in Original Application No. 658 of 2011.

By the aforesaid order the Tribunal has allowed the Original Application filed by the respondent no. 1 and directed the petitioners to reconstitute the D.P.C. to consider the case of the applicant for promotion on the post of Senior Administrative Grade with effect from juniors to him were promoted by ignoring uncommunicated adverse A.C.Rs. and by considering the preceding year A.C.R. in view of the law laid down by the Principal Bench in the case of H. S. Acharya Vs. Union of India and others.

Brief facts and notice of the arguments for the present purpose will suffice.

Respondent no. 1 was initially selected in Civil Services Examination and was allotted Indian Defence Accounts Service. On 12.1.1996 he was posted on the post of Junior Administrative Officer and on 10.11.2000 he was granted pay scale of Rs. 14,200 Rs. 18,200. He was processed for promotion by departmental promotion committee but was not recommended for promotion under the A.C.P. Scheme due to lacking A.C.R. criteria. Further the case of respondent no. 1 was processed for the post of Senior Administrative Grade (S.A.G.) by the D.P.C. on 21.1.2006 but he was not recommended for promotion due to lacking A.C.R. criteria and not meeting the requisite bench mark (Very Good). Aggrieved with the rejection of the claim of the promotion respondent no. 1 preferred a representation on 11.5.2006 and he filed Original Application No. 640 of 2006 before the Central Administrative Tribunal which was disposed of on 18.9.2008 and the matter was remanded to the department for considering the case of the applicant afresh in the light of the judgment of the Apex Court in the case of Dev Dutt Vs. Union of India reported in 2008 (8) SCC 725. The confidential report for the period 1999-2000, 21.6.2000-31.3.2001 and 2001-02 were considered on the representation in relation to the uncommunicated entries. The representation of the respondent no. 1 was rejected by order dated 22.1.2010 upon which he again filed Original Application No. 490 of 2010 which was allowed by the Tribunal on 27.4.2010 and the matter was again remitted for being considered afresh. Petitioner came to this Court by filing writ petition no. 8357 of 2011 but the same was dismissed on 21.2.2011. The representation of the applicant was again considered but the competent authority again rejected the same by order dated 23.3.2011 upon which third time Original Application was filed i.e. O. A. No. 658 of 2011 and this time it has been finally allowed by the order dated 16.11.2012 and final mandate is given to consider the claim for promotion by ignoring the offending entry and by taking previous entry into account. The challenge is to the final mandate given by the Tribunal.

Submission of the learned counsel for the petitioners is that the Tribunal in giving the final direction to accept the claim of the applicant for his promotion ignoring the uncommunicated entry in the light of the decision given by the Principal Bench in the case of H. S. Acharya has committed an error. Submission is that earlier on two occasions the Tribunal directed the competent authority to consider the merits in the representation in respect to the offending entries as they were not communicated which clearly means that in the event they are upgraded the applicant may lay his claim for promotion from the date his junior were promoted but in the event he is not able to make out a case on the merits then he may not be entitled to get relief.

It is then argued that the Tribunal has not found fault on the merits in the order rejecting the representation and in a casual manner certain observation in this regard has been made and thereafter by referring to the decision given by the Apex Court in the case of Dev Dutt (Supra) and in the case of H. S. Acharya

(Supra) final direction has been given which in fact is without taking note of the other decisions of the Apex Court which will be noticed shortly in the subsequent paragraphs.

Argument is that on these facts petitioners are entitled to get stay to the order of the Tribunal and get a decision on the merits after exchange of the pleadings on merits.

Sri Sharma, learned Sr. Advocate appearing for the respondent no. 1 submits that the Tribunal while giving direction to accept the claim of the applicant has not committed any error for the simple reason that the direction is based on the decision given by the Apex Court in the case of Dev Dutt (Supra) and H. S. Acharya (Supra) which is of the Principal Bench of the Tribunal. Decision given by the Apex Court in the case of Abhijit Ghosh Dastidar Vs. Union of India and others reported in 2009 (17) SCC 146 was also referred in support of the submission.

Argument is that for all practical purposes as the reporting and reviewing officer both stood retired the entry given by the accepting authority is to be ignored and the entries of the previous year has to be taken into account straightaway without any consideration on merits on the representation filed by the applicant.

In the light of the aforesaid submission we are to form a prima facie opinion about the order passed by the Tribunal.

Facts are not in much dispute.

Respondent no. 1 was not having the bench mark entries for the purpose of his promotion. There is no challenge to the bench mark "Very Good". The entry "Good" is said to be uncommunicated entry. Reporting officer and the reviewing officer are said to have retired.

The issue is that the entry "Good" is to be ignored for the purpose and by taking the previous entry straightaway the promotion is to be given.

Submission is based in the light of the judgment given by the Apex Court in the case of Dev Dutt (Supra). Observation as made in the operative portion of the in the case of Dev Dutt (Supra) is hereby quoted :

"We, therefore, direct that the "good" entry be communicated to the appellant within a period of two months from the date of receipt of the copy of this judgment. On being communicated, the appellant may make the representation, if he so chooses, against the said entry within two months thereafter and the said representation will be decided within two months thereafter. If his entry is upgraded the appellant shall be considered for promotion retrospectively by the Departmental Promotion Committee (DPC) within three months thereafter and if the appellant gets selected for promotion retrospectively, he should be given higher pension with arrears of pay and interest @ 8% per annum till the date of payment. With these observations this appeal is allowed. No costs"

(Emphasis supplied by us)

The other case on which reliance has been placed is the case of Abhijit Ghosh Dastidar (Supra). Observation as made in the aforesaid decision for our purposes is quoted :

"The same view has been reiterated in the above referred decision 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."

Following the decision given by the Apex Court given by the Apex Court in the case of Dev Dutt (Supra) there is a decision in the case of H. S. Acharya vs. Union of India and others by the Principal Bench of the Central Administrative Tribunal in which it was observed that "we would have directed the respondents to communicate the applicant his report for the year 200405, enabling him to make a representation against the same. However, we find that both the reporting and reviewing officers who initiated and finalized the report of the applicant pertaining to year 200405, have since retired.", the applicant is entitled for the relief.

At this stage we may refer to certain decisions given by the Apex Court on which reliance has been placed from the petitioners side.

In the decision given by the Apex Court in the case of Satya Narain Shukla Vs. Union of India reported in (2006) 9 SCC 69 issue about remarks like "good" or "very good" made in the ACRs to be made compulsorily communicable to the officers has been considered. It has been said that it is a matter of consideration of the government to streamline the procedure for selection. The observation in this respect as made in the aforesaid judgment is hereby quoted :

"The appellant also argued that the remarks made in the ACR were not communicated to him. It was also urged by the appellant that this Court should direct the authorities to streamline the whole procedure so that even remarks like `good" or `very good" made in ACRs should be made compulsorily communicable to the officers concerned so that an officer may not lose his chance of empanellment at a subsequent point of his service. In our view, it is not our function to issue such directions. It is for the Government to consider how to streamline the procedure for selection. We can only examine if the procedure for selection as adopted by the Government is unconstitutional or otherwise illegal or vitiated by arbitrariness and mala fides."

In another judgment given by the Apex Court in the case of K.M. Mishra Vs. Central Bank of India reported in 2008 (9) SCC 120 by referring the decision given in the case of Satya Narain Shukla the same view was taken. The observation as made in the case of K. M. Mishra (supra) is quoted here :

"14. Mr. Srivastava then submitted that in the preceding years the appellant had

`Excellent" ratings and in the year 1995 he had `Very Good". The rating `Good" for the year 1996/97 was thus a climb down and it was incumbent upon the authorities to intimate the appellant about his ratings for the two years in question. Since no intimation was given to the appellant the ratings for those two years should not have been taken into account and instead the ratings for the earlier years should have been considered for the purpose of promotion.

15. We are unable to accept the submission. In *Satya Narain Shukla vs. Union of India & Ors.*, 2006 (9) SCC 69 (81) it was held and observed as follows :

The appellant also argued that the remarks made in the ACR were not communicated to him. It was also urged by the appellant that this Court should direct the authorities to streamline the whole procedure so that even remarks like "good" or "very good" made in ACRs should be made compulsorily communicable to the officers concerned so that an officer may not lose his chance of empanelment at a subsequent point of his service. In our view, it is not our function to issue such directions. It is for the Government to consider how to streamline the procedure for selection. We can only examine if the procedure for selection as adopted by the Government is unconstitutional or otherwise illegal or vitiated by arbitrariness and mala fides."

After the aforesaid judgments, one way or the other, as noticed above, a reference by the Apex Court to the Larger Bench came to be given in the case of *Union of India Vs. Uttam Chand Nahta and others*.

In the reference order the decision given by the Apex Court in the case of *Dev Dutt, S. N. Shukla, K. M. Mishra* and also *Abhijit Ghosh Dastidar* were taken into account.

Order passed by the Apex Court in the *Petition For Special Leave to Appeal (Civil) No. 29515 of 2010* is hereby quoted :

"After taking us through the order of the Tribunal and the impugned order of the High Court, learned Solicitor General appearing for the Union of India has brought to our notice that in similar circumstances this Court has referred the similar issue to a Larger Bench and relied on the reference order of Two Judges Bench dated 29th March, 2010 ;

"In view of the apparent conflict between the decisions of this Court in *Dev Dutt Vs. Union of India and others* 2008 (8) SCC 725 on the one hand and *Satya Narain Shukla Vs. Union of India*, 2006 (9) SCC 69 and *K. M. Mishra Vs. Central Bank of India and others* 2008 (9) SCC 120, these appeals are referred to a Larger Bench. Let the matter be placed before the Hon'ble the Chief Justice of India for this purpose"

It is also brought to our notice the decision of three Judges Bench reported in 2009 (16) SCC 146.

In view of the fact that the similar issue/matter has been referred to Larger

Bench, we feel that this issue is also be considered by the Larger Bench. Accordingly, we order notice and post the matter along with Civil Appeal.....of 2010 SLP (C) No. 15770 of 2009 etc.

Both the parties are directed to maintain status quo prevailing as on date until further orders.

Counsel of both the parties are permitted to raise all the points before the Larger Bench."

The court has not been informed by either of the sides that after reference by the Apex Court, as noted above, any final decision has been given.

From the aforesaid quotations of the Apex Court, it is clear that in the case of Dev Dutt (Supra) the only observation and direction is that the entry has to be communicated to the appellant so that he may make a representation, if he so chooses and if the entries are upgraded he is to be considered for promotion retrospectively by the Departmental Promotion Committee so as to get the benefits accordingly.

The question of communication of the kind of entry and its upgradation and then its consequence is certainly one aspect but the question that for all purpose it is to be ignored so as to extend the benefit immediately is another question.

So far the aforesaid issue is concerned, we have noticed, a reference by the Apex Court to the Larger Bench, specially to the case of Dev Dutt (Supra), Satya Narain Shukla (Supra) and to the case of K. M. Misra (Supra), it may not be proper for this Court to consider and express any opinion and that too at this stage.

Apart from the aforesaid, we are just to take notice of another relevant aspect.

If the respondent no.1 was so sure about his contention to ignore the entry "Good" for the purpose of acceptance of his claim for promotion then there was no occasion for him to accept the order of Tribunal twice for consideration of his representation against the offending entry. Consideration of the representation has a result, either way i.e. acceptance or its rejection. It cannot be claimed as a matter of course that although his view point is to be considered but that has to be accepted. The consideration on the representation can lead to up gradation of the entry or not. Consideration of the representation against the action cannot be accepted to be just formal as that has a meaning and purpose. If claim of the applicant is not accepted then certainly that may be tested by the higher forum or by the competent court and thus there will be an adjudication by the next forum/court/authority.

Here is a case where, on a writ petition filed by the petitioner against the order of remand by the Tribunal dated 27.4.2010, this Court while dismissing the writ petition made it clear that the competent authority has not properly considered the merits in the representation and sound reasons has not been given. This

Court found the case of non application of mind and non recording of the proper reasons. It clearly means that this Court also directed for meaningful consideration of the representation on the merits. The observation as made by this Court while dismissing the writ petition can be quoted here :

"We do not find that the competent authority had considered the respondent's representation at all. He has given no reason to meet the points taken in the representation. The order of the competent authority is mere reiteration of the downgrading of all the three entries and the manner they were reiterated. The observation that reviewing officer has downgraded the entry consciously based on work parameters alone and since there are reasonable arguments for downgrading, there does not seem to be any reason to change the grading, is a mechanical reiteration without any application of mind and recording of reasons. Where the reviewing authority downgrades the entries on the basis of some complaints, it is necessary to mention some details of such complaints. Mere mention of complaints is not sufficient to downgrade the entry by reviewing officer. There should have been some material on record or its reference with some details to indicate that the reviewing officer, and the competent authority deciding the representation had reasons to believe, the allegations in such complaints."

Sri Sharma referred to Rule 3 from a digest to argue about the powers of the authority other than reporting officer and the review officer. The provisions referred by Sri Sharma itself clearly states that "there is no provision for any authority other than the reporting officer and the review officer for recording his remarks/comments of the work and conduct of an officer, in his confidential records."

Aforesaid makes it clear that it is in relation to recording of the remarks. The remarks are to be recorded certainly on a personal watch and work and conduct of the employee by an authority who has an opportunity to personally watch it and is to be approved by the next higher authority but so far the accepting authority is concerned it is the consideration of material whichever is available on record.

If it is not accepted as such, then take a case that it is managed to keep all the things in abeyance for sometime, permit an officer to retire and then get it communicated and take its full advantage irrespective of the nature of the entry. Award of the entry and its acceptance/approval by a higher authority may or may not be by the person available at that time but this can be said to be a core issue to be decided.

The question of upgradation of the entry in the light of the representation has some purpose. The question is that it is to be done by whom and in what manner. The case in hand is where the authority has rejected the representation of the petitioner and has written a lot and gone very deep to the record to mention each and every aspect about exercise by the reporting officer by the

reviewing officer. The charge of bias by the employee has been dealt and cogent reason after application of mind has been given. That may be correct, may not be correct but that has to be certainly examined in that very manner.

On a perusal of the judgment of the Tribunal and as argued by Sri Sharma also the consideration part to the order of the competent authority while rejecting the representation appears to be only, in para 3 of the order of the Tribunal.

Observation as made in para 3 of the judgment of the Tribunal has been carefully read.

The petitioner no. 1 has passed a lengthy order on merits while rejecting the representation. Each and every point in a lengthy order has been discussed. We are not supposed to go into merits in the order rejecting representation which was impugned before the Tribunal as that can be the first concern and satisfaction of the Tribunal. As on date on a perusal of the judgment of the Tribunal we are not prima facie satisfied that the decision of the competent authority dated 23.3.2011 has been addressed by Tribunal on merits. In fact the Tribunal by giving reference to the decision of the Apex Court in the case of Dev Dutt (Supra) and H. S. Acharya passed by the Principal Bench of the Tribunal, allowed the Original Application.

In view of decisions of the Apex Court as referred in preceding paragraphs and the reference by the Apex Court to the Larger Bench to the issue, we are satisfied that it is a case where against the order of the Tribunal we can grant stay subject to the completion of the pleadings and then an order on the merits.

Accordingly this Court directs that till the next date of listing operation of the order passed by the Tribunal allowing the Original Application (O.A. No. 658 of 2011) shall remain stayed.

Respondent no. 1 is already represented by Sri Sharma and Sri Srivastava, learned Advocate.

Counter affidavit may be filed on or by the next date fixed.

Let the matter be listed in the week commencing 10.12.2012.