

(2013) 07 DEL CK 0243

In the Delhi High Court

Case No : Writ Petition (C) 6232 of 2011

Union of India and Others

APPELLANT

Vs

Sh. K.S. Ludu and Another

RESPONDENT

Date of Decision : 22-07-2013

Acts Referred:

Constitution of India, 1950 — Article 14, 142

Citation : (2013) 07 DEL CK 0243

Hon'ble Judges : V. Kameswar Rao, J;Pradeep Nandrajog, J

Bench : Division Bench

Advocate : R.V. Sinha and Mr. A.S. Singh, for the Appellant;

Final Decision : Allowed

Judgement

Pradeep Nandrajog, J.—The prescribed benchmark for promotion to Higher Administrative Grade (HAG) was five "Very Good" gradings in the ACRs for the preceding five years when DPC met to consider the eligible candidates. The said five years" block period was for the years 2002-03 to 2006-07. The respondent had grading "Very Good" for the year 2002-03 and 2003-04. For the year 2006-07 his grading was "Outstanding". For the year 2004-05 two ACRs were recorded for eight months and four months respectively. Respondent was graded "Very Good" and "Good" for the said two periods. For the year 2005-06 whereas the Reporting Officer graded respondent "Very Good" the Reviewing Authority downgraded the same to "Good". On account of the Reviewing Authority having retired from service, following the law statelty declared by the Supreme Court in the decision reported as Dev Dutt Vs. Union of India (UOI) and Others, the Tribunal has directed a review DPC to be convened as of September 22, 2008 i.e. the date when the DPC met and considered respondent's candidature and declared him unfit for promotion at which re-convened DPC the ACRs for the two periods in question which were below benchmark have been directed to be ignored because below benchmark ACR gradings were never conveyed to the respondent for his response.

2. To appreciate the nuances of the legal point urged by the Union of India we would have to transpose ourselves back to the year 1996, where we find ourselves in the company of the decision of the Supreme Court reported as *U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and others*, . The ratio wherein is that only such comments in the ACR record which are adverse to the appraise need to be communicated to the appraise. Meaning thereby, a below benchmark ACR grading which is "Good" need not be communicated to the appraise. This was also the ethos of the view taken by the Supreme Court the next year in the decision reported as *State of U.P. Vs. Yamuna Shanker Misra and another*, . Then came along the decision of the Supreme Court in *Dev Dutt's case (supra)*, wherein it was opined that over the decade the law has marched far ahead on the subject of reasonableness and adverse consequences of material against a person being used against him by not even communicating the same to the person concerned for his response. Opining that the effect of a below benchmark grading was prejudicial to the interest of the appraise, inasmuch as right to be promoted was adversely affected, the Supreme Court opined that keeping in view the march of times, as recorded in the history of jurisprudence, below benchmark ACR gradings, such as "Good", though by themselves would not be derogatory of the performance of the appraise, would require the same to be communicated to the appraise with an opportunity to respond and the obligation to consider the response, for the reason such ACR grading adversely affects the appraise in the onward march of the appraise in his career with the employer.

3. The learned Judges of the Supreme Court who authored the opinion in *Dev Dutt's case (supra)* also considered as to which authority should consider the representation made against a below benchmark ACR grading. In para 37 they opined as under:-

We further hold that when the entry is communicated to him the public servant should have a right to make a representation against the entry to the authority concerned, and the authority concerned must decide the representation in a fair manner and within a reasonable period. We also hold that the representation must be decided by an authority higher than the one who gave the entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar to Caesar. All this would be conducive to fairness and transparency in public administration, and would result in fairness to public servants. The State must be a model employer, and must act fairly towards its employees. Only then would good governance be possible.

4. Noting that the problematic ACR grading of Dev Dutt which was "Good" pertain to the year 1993-94 and he had since retired from service, the direction issued in paragraph 43 was as under:-

43. We are informed that the appellant has already retired from service. However, if his representation for upgradation of the "good" entry is allowed, he may benefit in his pension and get some arrears. Hence we direct that the

"good" entry of 1993-1994 be communicated to the appellant forthwith and he should be permitted to make a representation against the same praying for its upgradation. If the upgradation is allowed, the appellant should be considered forthwith for promotion as Superintending Engineer retrospectively and if he is promoted he will get the benefit of higher pension and the balance of arrears of pay along with 8% per annum interest.

5. Suffice would it be to state that the Supreme Court categorically held that the below benchmark ACR gradings have to be considered by an authority superior to the authority recording the ACR grading for otherwise there would be a likelihood that the representation would be summarily rejected since it would be an appeal from Caesar to Caesar.

6. Some confusion came into being when the Supreme Court pronounced its short opinion, in the form of an order and not a judgment, reported as Abhijit Ghosh Dastidar Vs. Union of India (UOI) and Others, . Noting that Abhijit Ghosh Dastidar was facing a problem in his promotion at the DPC held on December 15, 1999 as also on August 08, 1998 with respect to two entries in his ACR gradings, one on September 22, 1997 and the other on February 08, 1999. Said two entries resulted in Abhijit Ghosh Dastidar being graded "Good". The benchmark for promotion was "Very Good". The ACR grading "Good" were never communicated to Abhijit Ghosh Dastidar. Noting that Abhijit Ghosh Dastidar had retired, the direction issued was to promote Abhijit Ghosh Dastidar with effect from August 28, 2000 when person immediately junior to him was promoted. And we simply highlight that the Supreme Court never considered what needs to be done if in the interregnum the Reviewing or the Accepting Authority have retired. The reason why Supreme Court never considered the same is simple. Said issue was never raised.

7. Misreading the decision in Abhijit Ghosh Dastidar's case (supra) many Benches of the Central Administrative Tribunal at Delhi starting taking the view that wherever the Reviewing and/or Accepting Officers had superannuated, the ACR grading for the offending year has to be totally ignored and in its place the benchmark grading for such previous year where the appraise meets the benchmark has to be considered.

8. Now, this would be patently absurd for the reason it would mean walking backwards till you reach the year where the appraise meets the ACR grading, and if this would be so, it would be useless to convene a Departmental Promotion Committee. To appraise what! Nothing for the reason so read, only such ACR gradings would require to be placed before the DPC wherein the candidate achieves the benchmark.

9. Unfortunately, the said decisions of the Central Administrative Tribunal were upheld by various Division Benches of this Court, till when decision was pronounced on October 08, 2010 in Krishna Mohan Dixit's case (supra). The non-reasoned direction in the decision in Abhijit Ghosh Dastidar's case (supra) was

held to be in exercise of the power vested in the Supreme Court under Article 142 of the Constitution of India for the reason ignoring the offending ACR, without even a re-appraisal before the Departmental Promotion Committee, and there being nothing to suggest that previous year ACR gradings were required to be considered, the Supreme Court noted that the person junior was promoted on August 28, 2000 and thus it was directed that Abhijit Ghosh Dastidar would also be so promoted but without back wages. Highlighting para 37 of the decision in Dev Dutt's case (supra), wherein the Supreme Court categorically held that the representation against below benchmark ACR grading would have to be considered by a superior officer, the Division Bench noted that this direction issued by the Supreme Court was in conformity with an Office Memorandum No. 51/14/60-Estt. (A) dated October 31, 1961, in para 23 whereof it was instructed:-

23. To whom representation lies:-Representation against adverse remarks will lie to the authority immediately superior to the countersigning authority, if any, or to the reporting officer. If the immediate superior authority has already reviewed the confidential report in question and has also expressed his view either agreeing or disagreeing with the adverse remarks recorded and accepted by the countersigning authority, the representation should, in that event, lie to the next higher authority.

10. The Division Bench clarified the law that since neither the Initiating Officer nor the Reviewing or the Accepting Officer, if they had concurred with the grading of the Initiating Officer, were to consider the representation made against the below benchmark ACR grading and that as per the Office Memorandum aforementioned as also the law declared by the Supreme Court in Dev Dutt's case (supra) mandated that an officer superior to said two officers would consider the representation, it was irrelevant to consider the effect of the Reviewing or Accepting Officer not being available to consider the representation.

11. Our attention was drawn to an opinion dated May 31, 2012 in a batch of writ petitions, lead matter being W.P. (C) No. 5042/2002 UOI & Anr. Vs. V.S. Arora & Ors. wherein a Division Bench of this Court has opined to the contrary i.e. the view taken by a Division Bench of this Court Krishna Mohan Dixit's case.

12. The said decision by the Division Bench traces the chronology of decisions, which actually are orders, passed by various benches of the Supreme Court after the decision in Dev Dutt's case and Abhijit Ghosh Dastidar's case. With reference to the decision in Abhijit Ghosh Dastidar's case the Division Bench opined, in para 15 of its opinion as under:-

15...The Supreme Court did two things. First of all, it affirmed the view taken by Dev Dutt (supra) to the extent that non-communication of an ACR would be arbitrary and would be violative of Article 14 of the Constitution. Secondly, it concluded that such entries which are not communicated should not be taken into consideration for being considered for promotion to the next higher grade.

Thus, while Dev Dutt (supra) has been affirmed by the Supreme Court in Abhijit Ghosh Dastidar (supra) on the first aspect, as regards what has to be done with a non-communicated below benchmark ACR, the Supreme Court in Abhijit Ghosh Dastidar (supra) took the view that such an ACR ought not to be considered.

13. We note that the Division Bench which has authored the opinion in V.S. Arora's case has overlooked para 37 of the opinion of the Supreme Court in Dev Dutt's case. The Division Bench has overlooked that there is not conscious reasoning in Abhijit Ghosh Dastidar's case as to what should happen when the Reporting and the Reviewing as also the Accepting Authority have retired. In fact, the decision in Abhijit Ghosh Dastidar's case does not even record the fact that the Reporting, Reviewing or Accepting Authority had retired. Noting, in the brief order, which forms the decision in Abhijit Ghosh Dastidar's case, that as per Dev Dutt's case below benchmark ACR gradings were required to be communicated, noting further that Abhijit Ghosh Dastidar had superannuated from service, the Supreme Court directed his notional promotion from the date the person junior to him was promoted. Thus, to read into the decision of the Supreme Court in Abhijit Ghosh Dastidar's case a reasoning that if the Reviewing and/or Accepting Officers have retired, the below benchmark ACR gradings have to be ignored, would be to read something into the decision which does not exist. And said imaginary reasoning would then result in an apparent head on conflict of the law declared in para 37 of the opinion in Dev Dutt's case (supra) and the decision in Abhijit Ghosh Dastidar's case (supra).

14. We note a presumptive reasoning read by the Division Bench while reflecting upon the law declared by the Supreme Court in Abhijit Ghosh Dastidar's case and on said presumptive reasoning, read an opinion expressed contrary to the view expressed by a Division Bench in Krishna Mohan Dixit's case as to the reading of the two decisions in Dev Dutt's case (supra) and Abhijit Ghosh Dastidar's case (supra).

15. Under the circumstances we allow the writ petition and quash the direction issued by the Tribunal that review DPC be held at which the offending ACRs should be ignored. We substitute the direction. The below benchmark ACR would be conveyed to the respondent within four weeks from today granting respondent eight weeks time to file a response thereto. The Superior Authority above the Reviewing Authority shall consider the representation and pass appropriate orders and needless to state if the below benchmark ACRs gradings are enhanced to "Very Good" a review DPC be held and if respondent is found fit for promotion he would be promoted on notional basis with effect from the date he became entitled to be promoted. Back wages need not be paid but pension be re-fixed and arrears paid by determining the salary which the respondent would have received in normal course. No costs.