

(2024) 07 CAT CK 0041

Central Administrative Tribunal - Allahabad Bench, Allahabad

Case No: Original Application No. 1462 Of 2013

Devender Kumar Mehra, S/O Late
Roshan Lal Mehra

APPELLANT

Vs

Union Of India Through The
Secretary Of Defence, Department
Of Defence Production, South
Block, New Delhi 110001 & Ors.

RESPONDENT

Date of Decision: July 26, 2024

Acts Referred:

- Constitution Of India, 1950 - Article 14

Hon'ble Judges: Om Prakash VII, Member (J); Mohan Pyare, Member (A)

Bench: Division Bench

Advocate: N.P. Singh, K.K. Ojha

Final Decision: Allowed

Judgement

Om Prakash VII, Member J

1. By means of this Original Application (OA), the applicant has sought the following main relief(s):-

“(i) To issue a direction a nature of mandamus directing the respondents to consider the name of the applicant for granting financial up-gradation from JAG to SAG since the date of implementation of order dated 3.8.2012.

(ii) To issue a direction a nature of mandamus directing the respondents to produce the original copy of original ACR of the year 2007-08 and original copy of APAR for the year 2009-2010 which was considered by the Departmental Promotion Committee was not found fit to the applicant due to these ACRs.

(iii) To issue a direction a nature of mandamus directing the respondents to give all the consequential benefits to the applicant since the date of implementation of order dated 3.8.2012 .”

(iv)

(v).....”

2. In nutshell, the facts of the case are that the applicant was initially appointed as Supervisor Gr.'A' w.e.f. 10.12.1979. Thereafter, he was promoted to the post of Chargeman Gr. I w.e.f. 20.8.1986. According to the applicant, an advertisement has been issued by the Ministry of Defence, Ordnance Factory Board, Kolkata through Union Public Service Commission. The applicant, being fully eligible to be considered

for appointment on the post of Assistant Works Manager, had applied and got selected. After selection, the applicant was posted at Ordnance Equipment Factory, Haaratpur, District Firozabad on 10.7.1989. On completion of requisite period of service, the applicant was promoted to the post of Works Manager. While working at Ordnance Clothing Factory, Avadi, Chennai, the applicant was promoted to the post of Dy. General Manager w.e.f. 12.12.2001. The applicant was thereafter promoted to the post of Joint General Manager and thereafter the applicant was posted as Director w.e.f. 9.7.2007 at Regional Controllerate of Safety (RCS/NR), Kanpur. According to the O.A., a meeting of Screening Committee was held on 26.7.2012 for grant of non-functional up-gradation to the level of Joint Secretary in respect of officers of IOFS of 1989 batch wherein the name of the applicant finds place at sl. No. 16 showing unfit without giving any reasons.

2.1 It is averred in the O.A. that while conducting the DPC, the respondents have failed to communicate the adverse/average entries which has created hurdle in way of non-functional up-gradation from JAG to SAG level of the applicant. For the first time, the applicant came to know about the order dated 3.8.2012 that his name has not been included in the list of officers who have granted financial up-gradation from JAG level to SAG level. On coming to know the aforementioned facts, the applicant moved a representation to the DGOF and Chairman, Ordnance Factory Board, Kolkata through proper channel on 6.9.2012. In response to this, the applicant has received a reply dated 26.9.2012 stating therein that his name has been duly considered by the Screening Committee for non-functional up-gradation from JAG to SAG level and based on the service records of the officer, the screening committee did not recommend his name for grant of the same. On receipt of the same, the applicant immediately wrote a letter to the Secretary on 17.10.2012 followed by reminder dated 10.1.2013. asking the reasons given by the Screening Committee for elimination of his name from the said list. When the applicant did not receive the proper reply from the respondents, then he moved an application under Right to Information Act, 2005. To this, the applicant received a reply from the respondents on 14.6.2013 enclosing therewith the photocopy of ACR for the year 2007-08, which is below the bench mark. Further, the ACR for the year 2009-10 was also below the bench marks, but the same was never communicated to the applicant. It is the case of the applicant that both these ACRs were never communicated to the applicant, however, the DPC has taken the cognizance of those un-communicated ACRs and excluded the name of the applicant at the screening level, which is against the spirit of the circular dated 6.1.1994, 31.1.2010 and 10.5.2010. Hence, this O.A.

3. Per-contra, the respondents have refuted the claim of the applicant by filing a detailed Counter Affidavit stating therein that the candidature of the applicant was considered in the Screening Committee held on 26th July, 2012 alongwith other officers. Having examined the service records of the applicant, the Screening Committee found the applicant as 'Unfit' for non-functional up-gradation to SAG level. The respondents have further stated that the ACRs of the applicant for the year 2009-10 and for the period between 26.7.2007 and 31.3.2008 were communicated to the applicant against which the applicant made representation vide letters dated 16.11.2010 and 10.8.2011 respectively. The representations were duly considered by the competent authority and the same were rejected vide orders dated 22.11.2011 and 3.11.2011 respectively. The respondents have further stated that O.F. Board issued order dated 3.8.2012 for grant of non-functional up-gradation to the SAG and the same was uploaded on the same day i.e. 3.8.2012. The respondents have further averred that on receipt of representation of the applicant dated 6.9.2012, the same was promptly replied clarifying the reasons for exclusion the name of the applicant from the list of

officers granted Non-functional up-gradation to SAG level. The respondents also took the stand that the applicant has duly been communicated all the adverse entries/below bench mark entries by the Department. Further, the duly constituted Screening Committee considered the candidature of the applicant on the basis of records wherein he was found not fit for non-functional up-gradation to SAG level. Lastly, the respondents have stated that the O.A. has no merit and the same is liable to be dismissed.

4. The applicant has filed Rejoinder Affidavit to the Counter Affidavit as filed by the respondents refuting the contentions made by the respondents in their Counter Affidavit while reiterating the averments made in the O.A. In the Rejoinder Affidavit, the applicant has stated that the shortcoming should be pointed out during the currency of financial year and not after expiry of currency of financial year.

5. Learned counsel for the applicant has placed reliance upon the following decisions in support of his claim:

(i) Dev Dutt Vs. Union of India & Others decided by Hon'ble Supreme Court in Civil Appeal No. 7631 of 2002 on 12.5.2008.

(ii) Sukhdev Singh Vs. Union of India & Others decided by Hon'ble Supreme Court in Civil Appeal No. 5892 of 2006 on 23.4.2013

6. We have heard the learned counsel for the parties at length and also perused the pleadings available on record.

7. The submission of learned counsel for the applicant is that the deficiency as pointed out in the ACR for the year 2007-8 and 2009-10 was never communicated to the applicant before constitution of DPC. The DPC has taken the cognizance of those un-communicated ACRs and excluded the name of the applicant at the screening level and as such the action of the respondents are faulty one and not legally sustainable in the eyes of law. Thus, the applicant is entitled for non-functional up-gradation from JAG to SAG level from the date of implementation of the order dated 3.8.2012.

8. On the other hand, learned counsel appearing on behalf of the respondents submits that all these ACRs were communicated to the applicant and that the respondents have examined the service records of the applicant and thereafter the Screening Committee found the applicant as 'Unfit' for non-functional up-gradation to SAG level and as such he prayed that the O.A. be dismissed on this count alone.

9. In the case of Dev Dutt, the Hon'ble Supreme Court has held as under:-

"In our opinion if the Office Memorandum dated 10/11.09.1987, is interpreted to mean that only adverse entries (i.e. 'poor' entry) need to be communicated and not 'fair', 'average' or 'good' entries, it would become arbitrary (and hence illegal) since it may adversely affect the incumbent's chances of promotion, or get some other benefit.

18. For example, if the bench mark is that an incumbent must have 'very good' entries in the last five years, then if he has 'very good' (or even 'outstanding') entries for four years, a 'good' entry for only one year may yet make him ineligible for promotion. This 'good' entry may be due to the personal pique of his superior, or because the superior asked him to do something wrong which the incumbent refused, or because the incumbent refused to do sycophancy of his superior, or because of caste or communal prejudice, or for some other extraneous consideration.

19. 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 upgradation. Hence non-communication of an entry is arbitrary, and it has been held by the Constitution Bench decision of this Court in Maneka Gandhi vs. Union of India (supra) that arbitrariness violates Article 14 of the Constitution.

20. Thus it is not only when there is a bench mark but in all cases that an entry (whether it is poor, fair, average, good or very good) must be communicated to a public servant, otherwise there is violation of the principle of fairness, which is the soul of natural justice. Even an outstanding entry should be communicated since that would boost the morale of the employee and make him work harder.

21. Learned counsel for the respondent has relied on the decision of this Court in U. P. Jal Nigam vs. Prabhat Chandra Jain AIR 1996 SC 1661. We have perused the said decision, which is cryptic and does not go into details. Moreover it has not noticed the Constitution Bench decision of this Court in Maneka Gandhi vs. Union of India (supra) which has held that all State action must be non-arbitrary, otherwise Article 14 of the Constitution will be violated. In our opinion the decision in U.P. Jal Nigam (supra) cannot be said to have laid down any legal principle that entries need not be communicated. As observed in Bharat Petroleum Corporation Ltd. vs. N.R. Vairamani AIR 2004 SC 4778 (vide para 9):

"Observations of Courts are neither to be read as Euclid's Theorems nor as provisions of the statute, and that too, taken out of their context".

22. In U.P. Jal Nigam's case (supra) there is only a stray observation "if the graded entry is of going a step down, like falling from 'very good' to 'good' that may not ordinarily be an adverse entry since both are a positive grading". There is no discussion about the question whether such 'good' grading can also have serious adverse consequences as it may virtually eliminate the chances of promotion of the incumbent if there is a benchmark requiring 'very good' entry. And even when there is no benchmark, such downgrading can have serious adverse effect on an incumbent's chances of promotion where comparative merit of several candidates is considered."

10. Hon'ble Supreme Court in the case of Sukhdev Singh (supra) has held as under:-

"Subsequent to the above two decisions, in the case of Dev Dutt vs. Union of India and others³ , this Court had an occasion to consider the question about the communication of the entry in the ACR of a public servant (other than military service). A two Judge Bench on elaborate and detailed consideration of the matter and also after taking into consideration the decision of this Court in U.P. Jal Nigam¹ and principles of natural justice expounded by this Court from time to time particularly in A.K. Praipak vs. Union of India⁴; Maneka Gandhi vs. Union of India⁵; Union of India vs. Tulsi Ram Patel⁶;

Canara Bank vs. V.K. Awasthy⁷ and State of Maharashtra vs. Public Concern for Governance Trust⁸ concluded that every entry in the ACR of a public service must be communicated to him within a reasonable period whether it is poor, fair, average, good or very good entry. This is what this Court in paragraphs 17 & 18 of

the report in Dev Dutt³ at page 733:

“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 upgradation. Hence non-communication of an entry is arbitrary, and it has been held by the Constitution Bench decision of this Court in Maneka Gandhi vs. Union of India (supra) that arbitrariness violates Article 14 of the Constitution.

Thus, it is not only when there is a benchmark but in all cases that an entry (whether it is poor, fair, average, good or very good) must be communicated to a public servant, otherwise there is violation of the principle of fairness, which is the soul of natural justice. Even an outstanding entry should be communicated since that would boost the morale of the employee and make him work harder.”

4. Then in paragraph 22 at page 734 of the report, this Court made the following weighty observations:

“It may be mentioned that communication of entries and giving opportunity to represent against them is particularly important on higher posts which are in a pyramidal structure where often the principle of elimination is followed in selection for promotion, and even a single entry can destroy the career of an officer which has otherwise been outstanding throughout. This often results in grave injustice and heart-burning, and may shatter the morale of many good officers who are superseded due to this arbitrariness, while officers of inferior merit may be promoted.”

5. In paragraphs 37 & 41 of the report, this Court then observed as follows:-

“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 concerned authority, and the concerned authority 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.

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 military), certainly has civil consequences because it may affect his chances for promotion or get other benefits (as already discussed above). Hence, such non-communication would be arbitrary, and as such violative of Article 14 of the Constitution.”

6. We are in complete agreement with the view in Dev Dutt³ particularly paragraphs 17, 18, 22, 37 & 41 as quoted above. We approve the same.

7. A three Judge Bench of this Court in Abhijit Ghosh Dastidar vs. Union of India and others⁹ followed Dev Dutt³. In paragraph 8 of the Report, this Court with reference to the case under consideration held as under:

“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 ACR 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 for promotion or get 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 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.”

11. From the close scrutiny of the case, in hand, it would reveal that the law laid down in the aforementioned cases is squarely applicable in the instant case as well. It is settled law that the every entry must be communicated to the employee concerned within a reasonable period, otherwise it would be violation of principles of natural justice and also against the verdict of Hon'ble Supreme Court, in the referred cases. Although in the Counter Affidavit, it was mentioned that the relevant entries were communicated to the applicant, but no evidence in support of the said pleading has been adduced. It is also clear from the record that the applicant was declined for granting NFG on the basis of non-speaking order. In the facts and circumstances of the case and on the basis of pleadings of the parties, it shall be presumed that the relevant entries were not communicated to the applicant. If the entry below the bench mark was not communicated to the applicant within the reasonable period of time and that entries have been taken into cognizance by the DPC in its meeting held for grant of NFG from JAG level to SAG level and as such the action of the respondents is against the settled proposition of law on the subject, hence the same is not legally sustainable in the eyes of law. Thus, the said entries, which were not communicated to the applicant within the reasonable period of time, could not have been taken into consideration by the DPC while assessing the eligibility of the applicant from JAG level to SAG level. In view of the above, the action of the respondents cannot be said to be legal one.

12. In view of the above discussions and keeping in mind the ratio laid down by the Hon'ble Supreme Court in the cases, referred to above, O.A. succeeds and is allowed accordingly. Respondents are directed to consider the claim of the applicant for grant of Non-functional selection grade from JAG level to SAG level without taking into consideration the un-communicated entries, which are below the bench mark, from the due date i.e. 3.8.2012 if he is not otherwise unfit. Respondents are further directed to accord all consequential benefits consequent upon grant of financial up-gradation from JAG level to SAG level. The aforesaid exercise shall be completed within a period of three months from the date of receipt of certified copy of this order. No costs.

13. All the associated MAs stand disposed of.