



2023-DHC-6969-DB



IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: September 25, 2023

+ W.P.(C) 6885/2021

NIRMAL KUMAR CHAUDHARY

..... Petitioner

Through: Mr. M.K. Bhardwaj and
Mr. Maria Mugesh Kannan.
H, Advs.

versus

UNION OF INDIA

..... Respondent

Through: Mr. Rakesh Kumar CGSC with
Mr. Sunil, Adv. for UOI

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

HON'BLE MR. JUSTICE ANOOP KUMAR MENDIRATTA

J U D G M E N T

V. KAMESWAR RAO, J

1. The challenge in this petition is to the order dated December 03, 2020 passed by the Central Administrative Tribunal, Principal Bench, New Delhi ('Tribunal', for short) in the Original Application being O.A. No.4437 of 2017, filed by the petitioner whereby, the Tribunal has dismissed the OA.

2. The claim of the petitioner in the O.A. was primarily for his promotion to the post of Grade IV in Pay Band 4- ₹37400-67000 with Grade Pay Rs.8700/-.

3. Suffice to state, the Departmental Promotion Committee ('DPC', for short) had recommended the names of 39 officers for



promotion, whereas three officers who were found 'Unfit' were not given promotion.

4. It is the case of the respondent that, with regard to 11 officers including the petitioner, it deferred consideration on account of below benchmark of Annual Performance Appraisal Reports (APARs) for the preceding 5 years.

5. The case of the petitioner was that, he made several representations but when no specific response was received, he filed the O.A. with a prayer for quashing and setting aside the communication dated November 24, 2017, through which his promotion was deferred. He sought consequential prayer against the respondent to reconsider his case for promotion to Grade IV of IFS w.e.f. January 01, 2016.

6. The case of the respondent was primarily that, as the APARs for the preceding five years were below the benchmark, he was not recommended for promotion. In this respect, the respondent has primarily relied upon the APAR of the second half of 2013-14 i.e., between the period October 17, 2013 to March 31, 2014 which was rated as 'Good'. The benchmark which is adopted for promotion is 'Very Good' or above, for five years.

7. In substance, their case was, it is only the officers, whose APARs are 'Very Good' or above, for the preceding 5 years, shall be treated as fit for promotion. In the case of the petitioner the APARs for the period 2009-10, 2010-11, 2011-12, 2012-13 and first half of 2013-14, were 'outstanding' but in the second half of the reporting period of 2013-14, the performance was marked as 'Good' in the APAR,



therefore, he was not found fit for promotion.

8. The Tribunal dismissed the O.A. as being without merit.

9. The submission of Mr. M.K. Bhardwaj is primarily that the Tribunal has erred without advertng to the main issue raised in the O.A., inasmuch as, the petitioner was not informed with respect to any adverse grading in the APAR, therefore, he could not have been declared 'Unfit' by the DPC by relying upon un-communicated APAR as the same is not permissible in view of the law laid down by the Supreme Court in *Abhijeet Ghosh Dastidhar v. Union of India & Ors., (2009) 16 SCC 146*.

10. He stated that the DPC for promotion was held on February 10, 2016 and APAR for the period October 17, 2013 to March 31, 2014 was communicated to the petitioner only on December 06, 2017, i.e., after a delay of 21 months and 24 days.

11. It is also his submission that, as per the DoP&T instructions contained in O.M. dated October 06, 2012, both the CRs written for the year 2013-14 were required to be treated as one. Thereby, the marks awarded in both the CRs were required to be added to evaluate the fitness of petitioner. Once both the CRs of 2013-14 are treated as one, the petitioner's grading for the same year will become 'Very Good' and in that eventuality he would be 'Fit' for promotion.

12. He stated, the petitioner had earned "Outstanding" grading throughout his career and was downgraded from "Outstanding" to "Good" for a short period of six months and again awarded "Outstanding" for the subsequent years, therefore, the sudden fall in grading was required to be treated as nullity in the eyes of law, in view



of judgments of the Supreme Court in the case of *J.R. Jain v. UOI 1973 (2) SLR 309* and *S.T. Ramesh v. State of Karnataka (AIR) 2007 SC 1262*.

13. He stated that the very purpose of writing APARs is to ensure that the concerned officers' performance remain upto the mark and in case the officer is found lacking, the same is duly communicated to the officer for improvement. He stated that, in the case of petitioner, the APAR has been used as a weapon to deny him promotion and the same is evident from the fact that the below benchmark of 'Good' grading was communicated after delay of 21 months, 24 days from the date of DPC and after 4 years from the date of writing of APAR. He contended that, in view of aforesaid delay, the said APAR was required to be declared as invalid. He has relied upon the DoP&T instructions contained in OM dated May 14, 2009, that below benchmark grading is required to be communicated within 15 days of recording of the same.

14. He stated that the Tribunal overlooked the law laid down by this Court and the Supreme Court, which resulted in prejudice caused to the petitioner, as he has been denied promotion despite having an outstanding record. In support of his submission, he has relied upon the judgments in the cases of *Union of India & Anr. v. V. S. Arora & Ors., W.P.(C) 5042/2002*, *Amarjeet Singh Raina v. Union of India & Ors., OA No.61/418/2017*; *Abhijit Ghosh Dastidar v. Union of India & Ors., (2009) 16 SCC 146* and *Union of India and Ors. v. G.R. Meghwal, Civil Appeal No. 2021 of 2022*.

15. On the other hand, Mr. Rakesh Kumar, learned counsel for the



respondent would submit that the impugned action of the respondent cannot be contested. He justified the order of the Tribunal and stated that, when the grading in the APAR of the second half of 2013-14 is 'Good' as against the requirement of 'Very Good', the petitioner cannot be declared 'Fit' for promotion. He also stated that the plea of Mr. Bhardwaj that, if the below benchmark grading of APARs has not been communicated to the employee, the same shall be treated as invalid is a misconceived argument. According to him, in the eventuality, the ACR is below benchmark, the only requirement in law as per the judgment of the Supreme Court in *Dev Dutt v. Union of India & Ors.*, (2008) 8 SCC 725, is that the ACR below benchmark has to be communicated to the officer for the Officer to make representation, and if it is found that the grading is not upgraded, then the conclusion of the DPC is treated to be valid. If it is otherwise then a review DPC need to be convened for consideration of the case of the officer afresh based on the upgraded ACR.

16. He stated that, it is not such a case here, as the APAR was communicated to the petitioner in the year 2017, as his grading required for promotion is below benchmark. He stated that the petitioner approached the competent authority by a representation. The same was considered and was decided that the grading need not be interfered with. He also stated that the requirement of law having been complied with, the rejection of the representation shall not have any impact on the DPC, which had already found the petitioner unfit.

17. In support of his submissions, he has relied upon the judgments in the case of *Union of India & Ors. v. K. S. Ludu & Ors.*,



W.P.(C) 6232/2011, S. D. Dobhal v. Union of India, W.P.(C) 452/2009 and Saroj Kumar v. Union of India & Ors., Civil Appeal No.6081/2015, to contend that the petitioner is not entitled to any relief in the present petition.

18. Having considered the submissions made by the counsel for the parties, the only issue which arises for consideration is, whether the Tribunal is justified in dismissing the O.A.

19. This Court is of the view that the decision of the Tribunal rejecting the O.A. filed by the petitioner challenging his non-promotion to Grade IV of the IFS on the ground of below benchmark APARs for the preceding five years is not justified.

20. It is a conceded case of the parties that, the preceding five years APARs, which were considered by the DPC held on February 10, 2016, the APARs of 2009-2010, 2010-2011, 2011-2012, 2012-2013 and 2013-2014 (April 1, 2013 to July 2, 2013) are rated as '*Outstanding*' except the second half of 2013-2014 (October 17, 2013 to March 31, 2014) which is rated as '*Good*'. The benchmark adopted for promotion was '*Very good*'. In other words, only the Officers whose APARs are assessed as '*Very good*' or above for the preceding 5 years were considered as fit for promotion.

21. The case of the respondent is that, DPC has not found the petitioner 'fit' as he did not meet the benchmark for promotion. It is also their case as contended by Mr. Kumar that, unless grading is upgraded, he cannot be found fit to be promoted.

22. It is also a conceded case that, before the DPC held its proceedings, the below benchmark grading in APAR of second half of



2013-2014, was not communicated to the petitioner. It was communicated only on November 24, 2017. We find that the Tribunal has not considered the effect of non-communication of the below benchmark grading of APAR of the second half of 2013-2014. The Tribunal dismissed the OA by stating in paragraph 5 as under:

“5. The applicant filed copies of APARs of 2009-10, 2010-11, 2011-12, 2012-13 and 2013-14, which are relevant for the said promotion. While the APARs for the years 2009-10, 2010-11, 2011-12, 2012-13 and half of 2013-14 (01.04.2013 to 02.07.2013) are rated as 'Outstanding', the one of second half of 2013-14 (17.10.2013 to 31.03.2014) is rated as 'Good'. The benchmark, which is adopted for promotion, is 'Very Good'. In other words, it is only the officers, who got their APARs assessed as 'Very Good' or above for 5 years, that are treated as fit for promotion. The applicant, no doubt, was assessed 'Outstanding' in 2009-10, 2010-11, 2011-12, 2012-13 and half of 2013-14, as against the requirement of 'Very Good'. But in respect of the half of year 2013-14, he was assessed as 'Good'. Unless this grading is upgraded, his case cannot be considered. As the things stand now we do not find any illegality in the impugned order.”

23. The petitioner has made a representation against the APAR of the second half of 2013-2014, which was rejected by the Ministry of External Affairs vide order dated February 04, 2021, with the following observations:-

“The representation of Shri N. K. Chawdhary, former First Secretary, EoI, Helsinki was received vide letter dated 04.01.2021 requesting the upgradation of APAR for the period 17.10.2013 to 31.03.2014.

2. Sh. N. K. Chawdhary has fully exercised all his rights to upgrade his APAR. There is no further merit in appeal, it has been decided to retain the overall grading of 'Good' recorded in the APAR.”



24. It must be stated here that the rejection of the representation on February 4, 2021, was after the dismissal of the OA by the Tribunal. In that sense, the rejection was not before the Tribunal.

25. The question would be, whether the rejection of the representation against the grading of the second half of the year 2013-2014, shall mean that, this petition need to be dismissed as it shall be an impediment for the petitioner to get promotion to the post of Grade IV of the IFS. The answer to the same has to be “No”. It is because, Mr. Bhardwaj has relied upon the judgment of the Supreme Court in the case of *G.R. Meghwal (supra)* to contend that, if the representation of the petitioner has been rejected with a non-speaking order, the same needs to be treated as invalid and should not be considered for assessing the petitioner for promotion. On similar proposition, he has relied upon the judgment of this Court in the case of *V.S. Arora & Ors. (supra)*.

26. Whereas, Mr. Kumar would submit that non-communication of the below benchmark grading or for that matter rejection of the representation against below benchmark grading of APAR would not make the APAR invalid, rather the officers non-promotion is liable to be upheld. In support of his submission, he has relied upon the judgment in the case of *Saroj Kumar (supra)*.

27. Before we consider the judgments referred to by the counsels, it must be stated that the initial judgment on the issue of below benchmark grading in ACR / APAR, as was answered / decided by the Supreme Court in the case of *Dev Dutt (supra)*. In *Dev Dutt (supra)*, the Supreme Court has held, the non-communication of below



benchmark grading in ACR is arbitrary and is violative of Article 14 of the Constitution of India. It was also held that, such entries which are not communicated should not be taken into consideration for the purpose of promotion to the higher grade. The judgment of *Dev Dutt (supra)* has been reiterated and followed by the Supreme Court in *Abhijit Ghosh Dastidar (supra)*.

28. Having said that, insofar as the judgment in *Saroj Kumar (supra)* on which reliance has been placed by Mr. Kumar is concerned, the Supreme Court was concerned with an issue wherein the appellant Saroj Kumar's ACR was downgraded without giving him an opportunity. It was later communicated. The representation made by him was also considered and rejected. The Central Administrative Tribunal had directed that the appellant's claim for promotion be considered ignoring the un-communicated entries in the ACR by constituting a review DPC. The High Court has allowed the petition filed by the respondents. The Supreme Court was of the view that the High Court has rightly held that the Tribunal has erred directing the authorities to consider the case of the appellant for promotion ignoring the remarks which had been communicated after first round of litigation and the representations submitted by the appellant was considered by the higher authority, namely two different Secretaries and speaking orders were issued. The Supreme Court was of the view that, since there was no upgradation of below benchmark grading, there is no necessity for holding review DPC and as such dismissed the appeal.

29. Insofar as the reliance placed by Mr. Bhardwaj on the



judgment in the case of **G.R. Meghwal** (*supra*) is concerned, the appeal filed by the Union of India was dismissed by the Supreme Court by stating in paragraph 10 as under:

“10. Therefore, in view of the above and in the facts and circumstances of the case and considering the fact that though the respondent was graded as “Very Good” in the ACRs for the years 2005-2006 and 2006- 2007 and was graded only “Good” in the ACR for the year 2007-2008 by the very same reporting and reviewing officer, despite the fact that specifically the respondent was given the opportunity against the ACR for the year 2007-2008. However, no valid reasons are given for rejecting the representation, we are of the opinion that in view of the aforesaid facts and circumstances, the learned Tribunal and the High Court have not committed any error in directing the Department to call for a review meeting of the Screening Committee to re-assess the suitability of the respondent for the purpose of grant of SAG and while doing so to exclude the ACR for the year 2007-2008. Therefore, in the facts and circumstances of the case, no interference of this Court is called for.”

(emphasis supplied)

30. From the above, it is noted that, as against grading of two years ACR as ‘very good’, the grading of one year was ‘good’ and no valid reasons have been given while rejecting the representation against below benchmark grading of ‘Good’. The Supreme Court was of the view that the Tribunal and the High Court were right in directing the department to call for a review meeting of the Screening Committee to re-assess the suitability of respondent for grant of SAG.

31. The judgments relied upon by Mr. Kumar and Mr. Bhardwaj are on the issue of validity of grading in the APAR when the



representation thereof has been rejected, i.e., whether the APAR need to be treated as invalid / valid.

32. We are of the view that the issue needs to be looked into in the manner in which the representation has been rejected. In *Saroj Kumar (supra)*, the Supreme Court upon conclusion has held that the representation was rejected by a speaking order, hence no re-assessment is called for, whereas in *G.R. Meghwal (supra)*, the Supreme Court held that the representation was rejected without giving valid reasons and upheld the order of the Tribunal and High Court directing to the department to call for a review meeting of the Screening Committee to re-assess the respondent's grading by excluding the non-communicated ACR of the year 2007-2008.

33. Though, there is no challenge to the rejection of the representation by the petitioner, as the same was communicated only on February 4, 2021 during the pendency of this petition, but as the rejection has been placed before us, and the fact that the petitioner had approached the Tribunal in the year 2017 and seven years have gone by, this Court instead of remanding the matter back to the Tribunal, shall decide the petition by also considering the rejection letter dated February 4, 2021. We have already reproduced the contents of the rejection letter in paragraph 23 above. The same is devoid of any reasoning. Absence of reasoning does not justify the grading in the APAR of 2013-14 (second half). In other words, it cannot be said to be valid. So, it follows, the same cannot be taken into consideration for the purpose of assessment.

34. Having said that, the question that would arise is, what is the



way forward. The way forward necessarily has to be in view of the judgment of this Court in the case of *V.S. Arora (supra)*, wherein, this Court had made a reference to guidelines in Chapter 54 of the Manual on Establishment and Administration for Central Government Offices which have been issued by Government of India on April 10, 1989 as amended on March 27, 1997, and also amended on October 06, 2000. The relevant part of the guidelines read as under:-

"6.2.1. Confidential Rolls are the basic inputs on the basis of which assessment is to be made by each DPC. The evaluation of CRs should be fair, just and non-discriminatory. Hence –

(a) The DPC should consider CRs for equal number of years in respect of all officers considered for promotion subject to (c) below.

*(b) The DPC should assess the suitability of the employees for promotion on the basis of their Service Records and with particular reference to the CRs for **five preceding years** irrespective of the qualifying service prescribed in the Service/ Recruitment Rules. The 'preceding five years' for the aforesaid purpose shall be decided as per the guidelines contained in the DoP&T, OM No. 2201119/98-Estt. (D), dated 8-9-1998, which prescribe the Model Calendar for DPC read with OM of even number, dated 16-6-2000. (If more than one CR have been written for a particular year, all the CRs for the relevant years shall be considered together as the CR for one year.)*

xxx

xxx

xxx

(c) Where one or more CRs have not been written for any reason during the relevant period, the DPC should consider the CRs of the years preceding the period in question and if in any case even these are not available, the DPC should take the CRs of the lower grade into account to complete the number of



CRs required to be considered as per (b) above. If this is also not possible, all the available CRs should be taken into account.

xxx

xxx

xxx”

(emphasis supplied)

35. We also reproduce paragraph 25 of the judgment of this Court in the case of **V.S. Arora (supra)**, as under:

“25. From the above, it is clear that the DPC should consider the confidential reports for equal number of years in respect of all the employees considered for promotion subject to © mentioned above. The latter sub-paragraph © makes it clear that when one or more confidential reports have not been written for any reason during the relevant period, the DPC should consider the CRs of the years preceding the period in question and if, in any case, even these are not available, the DPC should take the CRs of the lower grade into account to complete the number of CRs required to be considered as per sub-paragraph (b) above. If this is also not possible, all the available CRs should be taken into account. We are of the view that the same would apply in the case of non-communicated below benchmark ACRs. Such ACRs would be in the same position as those CRs which have not been written or which are not available for any reason.”

(emphasis supplied)

36. In view of the above, we are of the view that the order of the Tribunal needs to be set aside with a direction that the respondents shall re-consider the case of the petitioner by following the mandate of 6.2.1 as reproduced above and consider the case of the petitioner for promotion to the post of Grade-IV of IFS w.e.f. the date when his case was considered in the DPC, i.e., in the year 2016 and if found fit, grant



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the same to him on notional basis and then accordingly recalculate the retiral benefits and grant the arrears thereof to the petitioner. The arrears shall not entail any interest. The above direction shall be complied with within three months from today.

37. The petition stands disposed of.

V. KAMESWAR RAO, J.

ANOOP KUMAR MENDIRATTA, J.

SEPTEMBER 25, 2023/ds/jg