

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI**

ORIGINAL APPLICATION NO.486 OF 2017

DISTRICT : SOLAPUR

Smt. Aparna Sudhakar Gitay.)
Age : 35 Yrs, Working as Deputy Commissioner)
of Police, Solapur City, R/o. Avishkar Bungalow,)
R.D.C. Corner, Gandhi Nagar, Opp. Life Line)
Hospital, Vikas Nagar, Solapur.)...**Applicant**

Versus

1. The Director General & Inspector)
General of Police, M.S, Mumbai having)
Office at Old Council Hall, Shahid)
Bhagatsingh Marg, Mumbai – 400 039.)
2. The State of Maharashtra.)
Through Additional Chief Secretary,)
Home Department, Mantralaya,)
Mumbai - 400 032.)...**Respondents**

Mr. A.V. Bandiwadekar, Advocate for Applicant.

Mr. A.J. Chougule, Presenting Officer for Respondents.

CORAM : A.P. KURHEKAR, MEMBER-J

DATE : 27.02.2019

JUDGMENT

1. This is the second round of litigation challenging the impugned orders dated 03.01.2017 as well as 10.03.2017 thereby again rejecting the claim of the

Applicant for deemed date of promotion despite the order passed by this Tribunal in first round of litigation i.e. O.A.No.193/2015 decided on 29.09.2016.

2. Shortly stated facts giving rise to this application are as under :

The Applicant joined as direct recruit on the post of Deputy Superintendent of Police / Assistant Commissioner of Police in November, 2007. She was eligible to be considered for promotion to the post of Deputy Commissioner of Police after seven years in the post of Assistant Commissioner of Police. In the year 2013-14, the Respondents prepared select list to consider 89 eligible Officers for promotion. As per prescribed norms, the eligibility criteria for promotion is average grading of 'B+', in preceding 5 years ACRs. However, only 22 Officers were found completed 7 years of service. Therefore, the Respondents decided to consider the Officers who have not completed 7 years' service for promotion. The Respondents prepared list of 37 eligible Officers for promotion but the name of Applicant was not included. The Respondents by order dated 09.01.2015 promoted 14 Officers on regular promotion and 28 Officers were promoted as on ad-hoc basis, as they have not completed 7 years of service ignoring the claim and entitlement of the Applicant. Therefore, she made representations dated 12.01.2015, 21.01.2015 and 02.02.2015. However, by order dated 28.01.2015, her claim was rejected informing her that she is unfit for promotion.

3. The Applicant has, therefore, challenged the order dated 28.01.2015 in O.A.193/2015 which was allowed by the Tribunal on 28.09.2016.

4. In O.A.193/2015, the Respondents resisted the claim of the Applicant contending that the average gradation of ACR of the Applicant was not 'B', and therefore, she was not reaching eligibility criteria. As per Respondents'

contention, the following was the gradation of the ACRs for the period from 2008-2009 to 2013-2014.

“1)	2008-09	-	B+	
2)	2009-10	-	B	[It was communicated on 25.4.2013]
3)	2010-11	-	C	[Representation against adverse remarks dated 30.9.20211 is still pending.]
4)	2011-12	-	B+	
5)	2012-13	-	B+	
6)	2013-14	-	B+”	

5. On consideration of the matter on merit, the Tribunal has set aside the impugned order dated 28.01.2015 and directed Respondent No.1 to convene meeting of Departmental Promotion Committee to consider the case of the Applicant in the light of findings and observations made in the Judgment.

6. At this juncture, it would be apposite and useful to reproduce the relevant Paragraph from the Judgment of O.A.193/2015 for better appreciation and to decide this subsequent O.A.

“It is stated that ACR of 2012-13 was not available when the Applicant’s case for promotion was considered by D.P.C in its meeting held on 2 3.5.2014. Definitely, it was not the fault of the Applicant. The Applicant has placed on record copy of her ACR for the year 2012-13 (1.4.2012 to 31.3.2013) on pages 54-55 of the Paper Book. Reporting Officer has given her A-very good grading. It was downgraded by the Reviewing Officer to ‘B+’, without giving any reasons. For the years 2008-09 to 2011-12, the following gradings were given:-

2008-09	-	‘B+’
2009-10	-	B
2010-11	-	B-
2011-12	-	B+

The adverse remarks in the ACR of 2010-11 were communicated to the Applicant on 24.8.2011 (Exhibit ‘C’ on page 38 of the Paper Book). In para 6.17 of the Original Application, the Applicant has stated that she made a representation on 31.10.2011 against the adverse remarks, and no decision has yet been taken by

the Respondents on that representation. In the affidavit in reply of the Respondent no. 1 dated 15.9.2015, in para 20, it is stated that records of the Home Department were destroyed in fire. The contention of the Applicant that her representation dated 31.10.2011 has not been decided by the Respondents has not been denied by the Respondents. The Respondents have also not denied the claim of the Applicant that such ACRs are required to be ignored by D.P.C. If ACR of 2010-11 is ignored and ACR of 2007-08 for the part, it was available, is considered, the Applicant appears to reach the bench mark of 'B+', in the light of special sympathy in terms of G.R dated 7.1.1961 as the Applicant belongs to O.B.C category and all ACRs except for the year 2009-10 has grading of 'B+'. 2010-11 is ignored and ACR for 2009-10 will be read as 'B+' as per G.R dated 7.1.1961. ACR of 2012-13 is 'B+'. The Applicant's claim that the Respondents have not acted as per extant instructions appears to be correct.

Impugned order dated 28.1.2015 issued by the Respondent no. 2 is quashed and set aside. The Respondent no. 1 is directed to convene a Review D.P.C to consider the case of the Applicant on the basis of select list of 2013-14 in the light of observation in the preceding paragraph. This should be done within a period of 3 months from the date of this order. This Original Application is allowed accordingly with no order as to costs."

7. In the above background, the DPC decided the issue, but again rejected the claim of the Applicant by impugned orders dated 03.01.2017 and 10.03.2017. Now, these impugned orders are subject matter of this second round of litigation in present O.A.No.486/2017.

8. Now, Applicant contends that the decision taken by DPC again rejecting her claim is unsustainable in law and facts as well as contrary to the directions issued by the Tribunal in O.A.193/2015. The Applicant contends that the Tribunal has given specific directions as how to consider the ACRs of the Applicant and how she is reaching gradation 'B+' in all the relevant ACRs. She contends that though the ACR of 2009-2010 was 'B', it was to be upgraded in terms of G.R. dated 07.01.1961, as she belongs to Backward category and was eligible for special sympathy in terms of the said G.R. Secondly, though the ACR of 2010-2011 was graded as 'B' at the relevant time, her representation dated 30.09.2011 against the gradation of 'B' was pending and not decided by the concerned authority. However, the Respondents subsequently by letter dated 16.03.2016

rejected her representation confirming her gradation as 'B'. Whereas as per direction of the Tribunal in O.A.193/2015, the ACR of 2010-2011 was to be ignored in view of pendency of representation on crucial date of meeting i.e. 23.05.2014 wherein the select list was prepared. She had also filed O.A.213/2017 challenging the rejection of her representation by order dated 16.03.2016 pertaining to ACR of 2010-2011. The O.A.213/2017 is subjudice.

9. In the above pleadings, the Applicant contends that the decision taken by the Respondents rejecting her claim for deemed date of seniority is not in consonance and directions issued by the Tribunal while deciding O.A.193/2015. She, therefore, prayed to set aside the order dated 03.01.2017 as well as 10.03.2017 and to grant her deemed date of promotion in the cadre of Superintendent of Police / Deputy Commissioner of Police.

10. The Respondent No.2 filed Affidavit-in-reply at Page Nos.48 to 63 of Paper Book whereas Respondent No.1 has filed separate Affidavit-in-reply at Page Nos.66 to 76 of the P.B. Then again, Respondent No.2 has filed Affidavit-in-sur-rejoinder at page Nos.72 to 82. Then again, Respondent No.2 has filed Additional Affidavit-in-reply at Page Nos.86 to 89 of the P.B. In all these Affidavit-in-reply, the Respondents have reiterated the pleadings raised in earlier O.A.No.193/2015 and repeated the same contentions again and again. In so far as the compliance of direction issued by Tribunal in O.A.193/2015 by Judgment dated 28.09.2016 and justification for the refusal of the claim of the Applicant twice is concerned, the pleadings is far from satisfaction. There is no such specific pleading to justify the decision taken by DPC which was held after the decision of O.A.193/2015. Earlier even the minutes of DPC made was not placed on record. It was placed on record lastly on 11.01.2019 along with the Affidavit of Mr. K.A. Gaikwad, Deputy Secretary, Home Department, Mantralaya, Mumbai. In fact, what is attached are the charts showing the gradation of ACRs which are at Page Nos.91 to 96 of the P.B. Page No.97 of the P.B. is collective Chart whereby each member of the

Committee has given individual grading as 'B'. Whereas, Page Nos.98 to 101 of the P.B. is the copy of note submitted by Home Department to Law & Judiciary Department for their opinion, wherein their seems to be reference of the decision of DPC. Lastly, Page Nos.102 to 106 is the opinion of Law & Judiciary Department dated 03.05.2017. Here, it would be apposite to reproduce opinion given by Law & Judiciary, which is as follows :

“11. Thus, the Hon'ble MAT has made the observation that the ACR of 2010-11 is to be ignored and came to the conclusion that considering the ACR of 2007-08 which reach the bench mark of 'B+' in the light of special sympathy in Government Resolution dated 07.01.1962 and all ACRs except for the year 2009-10 as grading of 'B+' will reach the bench mark as prescribed by the department and the Hon'ble MAT quashed and set aside the order dated 28th May, 2015 and directed to convene a Review D.P.C. to consider the case of the Applicant on the basis of select list of 2013-14.

12. On perusal of the note of Home Department, Poll 1A, at page no.23/NS and the opinion of Shri Bhalerao, Deputy Secretary, (Legal), it appears that now it is the contention of the department that the Government has taken the decision on the representation made by Smt. Gitay on 31.10.2011 in respect of ACRs 2010-2011 and denied the upgradation of ACR. Even after showing special sympathy in terms of Government Resolution dated 07.01.1961 she cannot reach the bench mark of 'B+' and thus not entitled for promotion.

13. Whether there is a contempt of Hon'ble Tribunal's direction or not can only be decided by the Hon'ble Tribunal. Neither this department nor any other department can decide that.

However, what is to be seen is, whether the concerned department took steps as per direction given in the said Original Application or not. The directions are very clear and therefore, if the said judgment and order passed in the O.A. is not challenged, the concerned department has to follow the directions. Whether the consideration of applicant's case/claim for promotion is according to the directions of Hon'ble Tribunal or not is a factual aspect, on which no opinion can be given by this department.

It is seen that the department has rejected the claim of applicant for promotion. Now it is for the concerned department to show the Hon'ble Tribunal that their action was as per direction.

Principal Secretary and R.L.A. (Shri Jamadar) has seen the papers and approved the above view.”

11. At the very outset, I must point out that there is no compliance of the direction given by this Tribunal in O.A.193/2015. The DPC apparently travelled beyond specific direction given by the Tribunal and the decision taken by the DPC is in total contravention and disobedience of the order passed by this Tribunal.

12. While deciding O.A.193/2015, the Tribunal has specifically held that the ACR of 2009-2010 will be read as 'B+' in terms of G.R. dated 07.01.1961 and ACR of 2010-2011 was to be ignored since the representation made by the Applicant was not decided by the Department. That time, the representation was allegedly destroyed in fire. This Tribunal, therefore, specifically held that the ACRs of 2010-2011 are to be ignored and remaining ACRs of subsequent three years i.e. 2011-2012, 2012-2013 and 2013-2014 being admittedly 'B+' and gradation of ACR of 2008-2009 was also admittedly 'B+', the Applicant would be entitled to promotion. As ACR of 2010-2011 was to be ignored, the Committee was to consider ACR of earlier period of 2007-2008 which was also admittedly 'B+'. Thus, in terms of directions given by the Tribunal, following would have been the position.

"2007-2008	'B+'	
2008-2009	'B+'	
2009-2010	'B'	[To be graded as 'B' in terms of G.R. dated 07.01.1961]
2010-2011	'B'	[was to be ignored since representation was not decided]
2011-2012	'B+'	
2012-2013	'B+'	
2013-2014	'B+'	

13. However, the Committee did not consider the ACR of 2007-2008, which was admittedly 'B+'. Furthermore, the Committee graded ACR of 2010-2011 as 'B' contrary to the directions of the Tribunal. True, her representation in respect of ACR of 2010-2011 was rejected subsequently on 16.03.2016 against which the Applicant has already filed separate O.A.No.213/2017 which is subjudice. What is material to note that the crucial period is of 2013-2014 and the date of meeting

i.e. 23.05.2014. Therefore, the subsequent rejection of order dated 16.03.2016 has no effect which is in fact under challenge in separate O.A. and Committee ought to have considered the situation as on date of meeting i.e. 23.05.2014. It is more so in view of specific directions given by the Tribunal. However, the Committee apparently erred in grading the Applicant as 'B' which ought to have been ignored in view of specific order of the Tribunal.

14. Amazingly, the DPC member individually graded the Applicant as 'B' (as seen from Page No.97 of the P.B.). It is incomprehensible and un-understandable as to how and on what basis, the members of the Committee have given such gradation 'B' to the Applicant when the gradation in the ACR of the years 2007-2008, 2008-2009, 2011-2012, 2012-2013 and 2013-2014 were 'B+'. There is absolutely no justification whatsoever for giving gradation 'B' by the members of the Committee.

15. Shri Bandiwadekar, learned Advocate for the Applicant rightly referred to the Judgment of Hon'ble Supreme Court in ***Sukhdev Singh Vs. Union of India, decided on 23.04.2013 in Civil Appeal No.5892/2006*** wherein after taking review of various earlier Judgments, the Hon'ble Supreme Court reiterated that un-communicated decision cannot be considered to deny promotion or other service benefits. In the present case, the ACR of 2009-2010 which was of grading 'B' was communicated to the Applicant on 25.04.2013 which was to be upgraded as 'B+' in view of G.R. dated 07.01.1961 as specifically held by this Tribunal. Para No.8 of the Judgment of ***Sukhdev Singh's*** case is important, which is as follows:

"8. In our opinion, the view taken in Dev Dutt that every entry in ACR of a public servant must be communicated to him/her within a reasonable period is legally sound and helps in achieving threefold objectives. First, the communication of every entry in the ACR to a public servant helps him in improving his work and give better results. Second and equally important, on being made aware of the entry in the ACR, the public servant may feel dissatisfied with the same. Communication of the entry enables him/her to

make representation for upgradation of the remarks entered in the ACR. Third, communication of every entry in the ACR brings transparency in recording the remarks relating to a public servant and the system becomes more conforming to the principles of natural justice. We, accordingly, hold that every entry in ACR – poor, fair, average, good or very good – must be communicated to him/her within a reasonable period.”

16. In respect of implementation and importance of G.R. dated 07.01.1961, a reference of Hon'ble High Court in ***Writ Petition No.2154/1999 (State of Maharashtra Vs. Gopal A. Nagargoje), decided on 29th April, 2005*** is necessary.

Para No.7 of the Judgment is important, which is as follows :

“7. The only question is whether on the facts on record otherwise the order need to be interfered with. We have the Government Resolution dated 7th January, 1961 whereby the Government of Maharashtra by its resolution granted concession to members of the backward class in the matter of promotion. The resolution noted that government servants belonging to backward classes should be judged with special sympathy and promotion should not be denied to such government servants unless they are considered definitely unfit for promotion or unless promotion is ordered by competent authority to be withheld as a measure of punishment. Further the Resolution notes that the special sympathy be shown in case of Government Servants belonging to backward class with regard to standards of efficiency. In respect of character and integrity the criteria of fitness should be applied with equal strictness to all Government servants, irrespective of whether or not the Government servant belongs to a backward class. It is not the case of the petitioner that the respondent was unfit on the ground of character and integrity. The Tribunal on the contrary has recorded a finding of fact in favour of the respondent. If the G.R. of 7th January, 1961 is considered what that will mean is that if in the order of seniority there is a backward class candidate he ordinarily ought not to be by-passed with regard to the standards of efficiency unless he was unfit. The standard of efficiency normally will be the confidential report. In the instant case the petitioner was marked as B+. B+ will be a high grading and definitely not a grading of a person who is unfit. In these circumstances the resolution of 7th January, 1961 could not be by-passed. No other resolution to the contrary has been pointed out. We are, therefore, of the considered opinion that in the ultimate analysis the impugned order of M.A.t. need not be interfered with.”

17. As such, what emerges from the ACRs of the Applicant pertaining to 2007-2008 to 2013-2014 in view of aforesaid discussion, the gradation of the Applicant comes to 'B+'. Except ACR of 2010-2011, which was to be ignored for want of

decision on the representation on the crucial date of meeting i.e. 23.05.2014. This would have been ultimate outcome of DPC, had they implemented the order passed by this Tribunal in letter and spirit. However, the DPC travelled beyond the specific direction given by the Tribunal and landed in material illegally, which now needs to be rectified by passing specific order for grant of deemed date of promotion. During the pendency of earlier O.A. itself, the Applicant was promoted to the post of DCP in November, 2015. However, the question of deemed date of promotion still survives and needs to be adjudicated. It would not be out of place to mention here that the ACR of the Applicant for the year 2012-2013 was graded 'A' Very Good by the Reporting Officer. However, it was downgraded to 'B+' by Reviewing Officer without assigning any reasons for the same, which was required to be given for modifying grading given by the Reporting Officer. It is well settled that the ACR which was not been communicated to the employee cannot be considered to deny the benefit of promotion and Department has to consider only the communicated ACRs. In view of Judgment of Hon'ble Supreme Court in **(2015) 14 SCC 427 (Prabhu Dayal Khandelwal Vs. Chairman, UPSC and Ors.)**. As such, the Applicant was entitled to the promotion in the select list of 2013-2014 and ought to have placed in the seniority list at 25-A w.e.f.09.01.2015 that is the date on which, the juniors to the Applicants were promoted.

18. In view of above discussion, irresistible conclusion is that the impugned communications and orders rejecting the claim of Applicant for deemed date of promotion in the select list of 2013-2014 is not at all sustainable in law and facts. The decision is not only contrary to the factual and legal aspects, but also in contravention of specific direction given by this Tribunal in O.A.193/2015. The Applicant was subjected to injustice twice, and therefore, it needs to be rectified by passing specific order of deemed date of promotion having found entitled to the same.

19. The necessary corollary of the aforesaid discussion leads me to sum-up that the Applicant is entitled to deemed date of promotion to the post of DCP and her name be included in seniority list of 2014 w.e.f.09.01.2015 at Serial No.25-A of the order. As the Applicant has been promoted to the post of D.C.P. in November, 2015, now she will be entitled to deemed date of promotion without monetary benefits of the said period. The O.A, therefore, deserves to be allowed. Hence, the following order.

ORDER

- (A) The Original Application is allowed.
- (B) The impugned order dated 03.01.2017 and communication dated 06.04.2017 are hereby quashed and set aside.
- (C) The Applicant is entitled to deemed date of promotion on the post of DCP and her name be included in the seniority list dated 09.01.2015 at Serial No.25-A, so that her seniority is maintained. However, she will not be entitled to monetary benefits in view of Rule 32 of M.C.S. (General Conditions of Services) Rules, 1982.
- (D) The aforesaid exercise be completed within two months from today.
- (E) No order as to costs.

Sd/-
(A.P. KURHEKAR)
Member-J

Mumbai
Date : 27.02.2019
Dictation taken by :
S.K. Wamanse.