

**HIGH COURT OF MADHYA PRADESH :
JABALPUR**

1	Case No.	Writ Petition No.4320/2015
2	Parties Name	T.P. Sharma Vs. State of Madhya Pradesh and others
3	Date of Judgement	06/11/2017
4	Bench Constituted on Hon'ble Justice..... and Hon'ble Justice.....	Single Bench
5	Judgement delivered by Hon'ble Justice.....	Hon'ble Ms. Justice Vandana Kasrekar
6	Whether approved for reporting	Yes
7	Name of counsels for parties	Shri K.C. Ghildiyal, learned counsel for the petitioner. Shri S.M. Lal, learned Govt. Advocate for respondents No.1 to 3. Shri Manas Verma, learned counsel for respondent No.4.
8	Law laid down	"If an employee has worked for less than 90 days in a department, whether his CR could be considered by the DPC for promotion - Held- No. "Whether the claim of the petitioner could not be ignored by taking into consideration the uncommunicated annual confidential report- Held- Yes.
9	Significant paragraph numbers	12, 13.

HIGH COURT OF MADHYA PRADESH : JABALPUR
SINGLE BENCH :JUSTICE MS.VANDANA KASREKAR

WRIT PETITION NO.4320/2015

T.P. Sharma

Vs.

State of M.P. and others

Shri K.C. Ghildiyal, learned counsel for the petitioner.
Shri S.M. Lal, learned Govt. Advocate for respondents
No.1 to 3.
Shri Manas Verma, learned counsel for respondent
No.4.

ORDER
(06/11/2017)

The petitioner has filed the present writ petition challenging the orders dated 14/05/2012 and 04/03/2014 passed by respondent No.1.

2. The petitioner was initially appointed on the post of Dy. Director, Agriculture, through M.P. Public Service Commission in March, 1987. A dispute regarding seniority between the persons directly appointed as Dy. Director and the persons promoted as Dy. Director on adhoc basis arose in the department and the dispute travelled upto the Supreme

Court. After the dispute was resolved, the seniority of the Dy. Directors showing seniority position as on 01/04/1989 was published by the department on 04/05/1990. Thereafter DPC was held on 22/01/1993 to consider the cases of the Dy. Directors for promotion to the post of Joint Directors. The review DPC was held on the basis of seniority list on 01/04/1991. The case of the petitioner was also considered in the said DPC. As per the norms of the DPC, promotions were to be made on the basis of the seniority-cum-merit criteria. Five ACRs ranging from 1986-87 to 1990-91 were taken into consideration. To become eligible for promotion, out of five ACRs under consideration, minimum three ACRs including, two ACRs for the last two years were required to have minimum good grading. In case, if the ACR for any year was with poor grading, the same was to become ineffective if there was an ACR with very good or excellent grading.

3. The case of the petitioner was considered by the DPC with the ACRs from 1986-87 to 1990-91. In the ACR for the year 1986-87, the petitioner was given 'Ka' (very good) grading. In the ACR for the year 1987-88 with 'Kha' (Good)

grading. For the year 1989-90 two ACRs were initiated on the petitioner. The first ACR was initiated for a period of six months wherein the petitioner was awarded 'Kha' (good) grading and the second ACR was initiated by the M.D., Beej Nigam for a period of 81 days as the petitioner was serving in the Beej Nigam on deputation. As this ACR was for a period of less than three months i.e. for 81 days and it should not have been initiated. It was initiated by the M.D. without submission of the self-appraisal statement by the petitioner. These ACRs were not placed before the DPC in a correct manner. The ACR with 'Kha' grading was shown as second ACR of 1989-90 and the ACR for less than three months was shown as first ACR while placing the ACRs before the DPC. In fact, the ACR for the year 1990-91 was also placed before the DPC which was an adverse ACR without any grading, this ACR was never communicated to the petitioner.

4. On the basis said ACRs, the DPC declared the petitioner unfit for promotion recording a reason that in the ACR for the year 1990-91 though there was no grading, but, the ACR was grading (Gha) (poor). The petitioner submitted that the finding of the DPC was absolutely illegal, therefore,

the petitioner submitted number of representations to the respondents to consider his case in accordance with the existing rules and instructions on the subject. However, as no action was taken in the matter, the petitioner, therefore, filed Writ Petition No.9067/2011 before this Court. The said writ petition was disposed of vide order dated 14/03/2012 with a direction to the petitioner to submit a representation before the respondents within a period of 15 days and the respondents were directed to consider the said representation within a period of 60 days. It was further directed by this Court that while deciding the representation, the respondents will look into the fact as to whether or not the adverse ACR was communicated to the petitioner and if not, what would be the effect of such non-communication on the promotion of the petitioner. In pursuance of the directions issued by this Court, the petitioner submitted a representation before respondent No.1 on 24/03/2012. The representations submitted by the petitioner were rejected by respondent No.1 vide order dated 14/05/2012. While rejecting the representations, it is stated by respondent No.1 that the ACR for the year 1989-90 for a period of 81 days could be initiated

without submitting the self-appraisal statement. Similarly, as far as ACR for 1990-91 was concerned, it is submitted that the DPC had the power to carry out its own assessment on the basis of the total text. Thus, as the said order was not in accordance with the directions issued by this Court, the petitioner again submitted another representation, but, the said representation was rejected on 04/03/2014 on the same grounds as earlier, however, it has been admitted by respondent No.1 in the order that adverse report for year 1990-91 was erroneously taken into consideration. Being aggrieved by that order, the petitioner has filed the present writ petition.

5. The respondents have filed their reply and in the reply they have taken a ground that the writ petition suffers from delay and laches. It is submitted that in the present case, DPC was held on 09/10/2006. Against the same, the petitioner filed Writ Petition No.9067/2011 which was disposed of vide order dated 14/03/2012. In compliance of the directions issued by this Court, the representation of the petitioner was considered and rejected on 14/05/2012. The petitioner did not challenge the said order and subsequently

after a period of one year, he again filed a representation claiming the same relief and the subsequent representation of the petitioner was also rejected vide order dated 14/03/2014 and after rejection of the representation, the present writ petition has been filed after a period of one year, thus, the same suffers from delay and latches. The respondents have further submitted that review DPC was held on 09/10/2006 for considering the cases of Dy. Director, Agriculture for promotion to the post of Joint Director. As per the procedure prescribed by the DPC, promotions were to be made on the basis of seniority-cum-merit criteria. Five ACRs from 1986-87 to 1990-91 were taken into consideration. To become eligible for promotion, out of five ACRs under consideration, minimum three ACRs including two CRs of last two years were required to have minimum 'Good' grading.

6. The case of the petitioner was considered by the DPC and after assessment of all the ACRs of five years, he was not found fit for promotion. The respondents have further submitted that the adverse CR of the year 1989-90 was duly communicated to the petitioner. Thus, it is incorrect submission on behalf of the petitioner that adverse CR was

not communicated and without communicating adverse CR, the same was taken into consideration by the DPC. After submitting second representation, the respondents have considered the case of the petitioner and again vide order dated 04/03/2014 rejected the representation of the petitioner on the ground that consequent upon final assessment of all the five years CRs, he was not found fit for promotion on the post of Joint Director and the CR of the year 1989-90 was duly communicated to the petitioner. The respondents have further submitted that if CR of 1990-91 and 1989-90 was ignored, then also the petitioner could not be promoted because as per final assessment of all the CRs of the preceding years, he was not found fit upto the benchmark fixed by the DPC.

7. The petitioner has filed rejoinder to the said reply and denied that the petition filed by the petitioner suffers from delay and laches. It has been submitted that the order by which the respondents have rejected of his earlier presentation was not in accordance with the directions issued by this Court, therefore, the petitioner again submitted a representation which was rejected vide order dated

04/03/2014 by speaking order and against the said order the petitioner has filed the present writ petition, therefore, the objection raised by the respondents on the ground of delay and laches is liable to be rejected. It has further been submitted in the rejoinder that the respondents have admitted that for the year 1990-91 no grading was given yet, the aforesaid CR was considered and taken as 'Gha' without any justification. The CR for the year 1989-90 was initiated in two parts. The first part which was for the major period of six months with 'Kha' grading was ignored whereas the second part i.e. for 81 days which is below the permissible period of 90 days was taken into consideration and it resulted in rejection of the petitioner for promotion. The DPC should not have considered the uncommunicated CR to the petitioner. It has further been submitted that the first part of CR for the year 1989-90 should have been considered as it was the valid ACR with 'Kha' grading. Ignoring the said ACR had seriously and adversely affected the chances of promotion of the petitioner.

8. Learned counsel for the petitioner argues that the entire action of the respondents in not considering the case of the

petitioner for promotion to the post of Joint Director is illegal and arbitrary. He submits that the DPC held on 09/10/2006 had erroneously rejected the claim of the petitioner for considering the ACRs for the year 1989-90 and 1990-91. He further submits that the ACR for the year 1990-91 was not communicated to the petitioner and the same was liable to be ignored. It has further been submitted that so far as the ACR for the year 1989-90 is concerned, two CRs were initiated on the petitioner. The first ACR was initiated for a period of six months wherein the petitioner was awarded 'Kha' grading and the second ACR was initiated by M.D., Beej Nigam for 81 days as the petitioner was serving in the Beej Nigam on deputation. He also submits that the respondents should have considered the first CR for longer period with 'Kha' grading whereas the second CR which was for a period of 81 days was impermissible under the Rules. He relied on Part-I of the General Book Circular which is published by the State Government for recording ACRs. As per sub-clause (iii) of clause-1 of the said circular, the report shall not be recorded ordinarily on an officer who has worked for less than three months in any charge during a financial year as the reporting

officer may not get sufficient opportunity to observe the work of his subordinate during such a short period. In light of the said circular, he submits that as in the present case, the petitioner was worked in the Beej Nigam only for 81 days i.e. less than 90 days, therefore, ACR for the said period should not have been considered by the DPC. He further submits that the ACR of the year 1990-91 was adverse and the same was not communicated to the petitioner. The report was also initiated after one year of the due date of limitation. Such uncommunicated adverse CR in which no grading was given should have not been taken into consideration by the DPC at all. In such circumstances, he submits that the impugned orders may be set aside and the respondents be directed to reconsider the case of the petitioner for promotion. Learned counsel for the petitioner relies upon the judgment passed by the Supreme Court in the case of **Prabhu Dayal Khandelwal Vs. Chairman, Union of India Public Service Commission and others**, reported in (2015) 14 SCC 427.

9. Heard learned counsel and perused the record.

10. From perusal of the record, it reveals that in the year 2006 the respondents have constituted DPC for promotion

from the post of Dy. Director to the post of Joint Director. The criteria for promotion fixed by the DPC was seniority-cum-merit. For consideration of the promotion, five years of ACRs are required to be considered i.e. from 1986-87 to 1990-91. As per the said criteria, the ACRs of minimum three years are required to be 'Good' or above that or 'Ordinarily' for last two years and if the ACR in any year is of 'Gha' then that will be considered to be ineffective if the candidate acquires any 'Very Good' and 'Excellent' CR in any of the year of five years. In the present case, the petitioner has given 'Ka' or 'Good' grading for the year 1986-87, 87-88 he was given 'Kha' and in the year 1988-89 with 'Ga' grading and for the year 1989-90 two CRs were initiated to the petitioner. The first CR was initiated for a period of six months wherein the petitioner was awarded 'Kha' grading and the second CR was initiated for a period of 81 days which was adverse. So far as CR for the year 1990-91 is concerned, the same were adverse and were placed before the DPC.

11. As per the petitioner, the ACR of 1990-91 which was placed before the DPC was not communicated to the

petitioner, therefore, these ACRs should not have been taken into consideration by the DPC. From perusal of the DPC record produced by the respondents, it is clear that while considering the case of the petitioner for promotion, the ACRs of the year 1986-87 to 1990-91 were taken into consideration. From perusal of the record also, it reveals that for the year 1990-91 the petitioner was given 'Gha' CR, therefore, there is also remark in the record that these ACRs were not communicated to the petitioner and on the basis of these uncommunicated CRs, the petitioner was declared unfit for promotion by the DPC, the petitioner has, therefore, approached this Court by filing W.P. No.9067/2011. The said writ petition was disposed of vide order dated 14/03/2012 with direction to the petitioner to submit a representation. In compliance of the direction issued by this Court, the petitioner has submitted a representation and that representation was rejected vide order dated 14/03/2012. The representation submitted by the petitioner was not in accordance with the directions issued by this Court. The petitioner again submitted another representation which was rejected vide order dated 04/03/2014 and thereafter the

present writ petition has been filed, therefore, the contention of learned counsel for the respondents that the writ petition suffers from delay and laches cannot be accepted. So far as consideration of the case of the petitioner by DPC is concerned, from perusal of the original record produced by the respondents, it reveals that on the basis of CRs of 1989-90 and 1990-91, the respondents have rejected the case of the petitioner for promotion.

12. So far as the CR of the year 1989-90 is concerned, the respondents have recorded CR in two parts. The first is of the period of six months in which the petitioner was graded as 'Kha' while for a period of 81 days on which he has worked on deputation. In the Beej Nigam, he was graded as 'Gha'. As per the General Book Circular issued by the State Government recording of the ACRs, sub-clause-(iii) of Rule-1 of the said circular reads as under :

“(iii) No report will be recorded ordinarily on an officer who has worked for less than three months in any charge during a financial year as the reporting officer may not get sufficient opportunity to observe

the work of his subordinate during such a short period. But in appropriate case it has also to be ensured that an officer's exceptionally good or bad work during the said short period, e.g., exemplary good work in connection with flood relief or bad work in connection with riots, etc., is not ignored. In such exceptional cases it would be the duty of the reporting officer to make a mention of such work in the Annual Confidential Reports.”

13. As per the said circular, the report will not be recorded ordinarily in case of an officer who has worked for less than three months in any charge during financial year. In the present case also as the petitioner has worked for less than 90 days in the Beej Nigam, therefore, the respondents should not have recorded his CR for this year and taking into consideration the CR of the six months i.e. of the longer period, the respondents should have graded him as 'Kha'. So far as ACR of the year 1990-91 is concerned, it is already submitted that from perusal of the original record of the DPC, it is clear that ACR of the year 1990-91 was never

communicated to the petitioner, therefore, this ACR should not have been taken into consideration while declaring the petitioner unfit for promotion. The Supreme Court in the case of **Prabhu Dayal Khandelwal (supra)** has held that the claim of the appellant could not be ignored by taking into consideration the uncommunicated annual confidential report.

14. Thus, in light of the aforesaid judgment passed by the Supreme Court, the writ petition is allowed. The impugned orders dated 14/05/2012 and 04/03/2014 passed by respondent No.1 are hereby set aside. The respondents are directed to reconsider the case of the petitioner for promotion to the post of Joint Director with effect from the date when similarly situated persons were promoted and he may be further promoted on the next higher post by constituting a review DPC. However, the petitioner would not be entitled to get the monetary benefit of the post on the principle of 'no work no pay' and if the petitioner is otherwise found fit for promotion then the respondents will re-fix his pension and grant him arrears of pension and other retiral dues. The said exercise be carried out within a period of three months. There shall be no order as to cost.

(Ms. Vandana Kasrekar)
JUDGE

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