

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

SWP No. 2135/2009
IA No. 2834/2009

Reserved on : 13.04.2023
Pronounced on: 26 .5.2023

Ashok Kumar Sharma

.....Appellant(s)/Petitioner(s)

Through: Mr. Ajay Sharma, Advocate with
Mr. Atul Verma, Advocate

Vs

Union of India and others

..... Respondent(s)

Through: Mr. L. K. Moza, CGSC
None for private respondents

Coram: HON'BLE MR. JUSTICE WASIM SADIQ NARGAL, JUDGE

JUDGMENT

1. The petitioner through the medium of the instant petition seeks quashment of order dated 08.4.2002 and 21.04.2003, whereby respondents 4 to 15 have been promoted to the post of Additional DIG with reference to the DPC held on 10.01.2002 and 27.03.2003, respectively with a further direction seeking writ of mandamus to promote the petitioner to the post of Additional DIG w.e.f. 08.04.2022 from the date his juniors have been promoted with further direction of seniority and consequential benefits besides seeking quashment of adverse entry of the year 1998-1999.

FACTS:-

2. The petitioner after undergoing the selection process and on the basis of his merit in the selection process was appointed as Assistant Commandant on 01.09.1973. The respondents on the basis of his seniority and eligibility promoted the petitioner to the post of Deputy Commandant and 2nd in Command in 1991 and 1990 respectively. Pursuant thereto, the petitioner came to be promoted as Commandant on 19.12.1994. The petitioner had an excellent and unblemished record and, accordingly, was selected and deputed in SPG (Special Protection Group) for Prime Minister's Security in the year 1991 and joined the same in February, 1992. As per the stand of the petitioner he was posted in the Security of Late Sh. P. V. Narsinha Rao, the then Prime Minister and latter with Smt. Sonia Gandhi. The petitioner has earned 04 DG BSF Commendation in addition to number of IG's Commendation Certificates and resultantly the petitioner has got DG's Commendation Certificate in the year 2006, which was given to the petitioner for his "*unblemished meritorious service*", which is based on the past performance of many years. Further, the petitioner was awarded with Police Medal for meritorious service in the year 2008, which was granted after consistent, outstanding / very good record work shown by him during the past ten years. It is worthwhile to mention that while serving in SPG (Prime Minister Security) from the year 1992-1998, the petitioner earned 14 Commendation Certificates-Commendation Rolls, of which 10 Commendation Certificates were given by Director SPG and 04 by Secretary Security. The last Commendation Role was given to the petitioner by Secretary Security in the year 1998 for "*outstanding operational work for providing security to Prime Minister,*

Ex-Prime Ministers during general elections" in February 1998. The details thereof are as under:-

BSF :-

Inspector General's CC - 1981, 2001 and 2003
DG's CR - 1985, 2004, 2005 & 2006
Police Medal for Meritorious Service - 2008

SPG Secretary Security's CR – 1993, 1994, 1995 & 1998
Director SPG's CC 1993 - 04 Nos.
 1994 - 03 Nos.
 1995 - 01 Nos.
 1996 - 02 Nos.

3. In June 1998, the petitioner was repatriated from the SPG to BSF and was posted to 95 Battalion BSF in Baramulla, Kashmir Valley in counter insurgency role, where the petitioner again had a tough assignment, wherein the petitioner exhibited excellent track record. Keeping in view the excellent merit and performance, the petitioner came to be promoted as Additional DIG w.e.f. 29.06.2004, vide order dated 05.07.2004 passed by respondent No. 3. The petitioner further earned next promotion to the post of Deputy Inspector General in BSF vide order dated 29.09.2008 passed by respondent No.3.

4. The petitioner's case was that the post of Additional DIG was upgraded to the post of DIG by the respondents w.e.f. 01.01.2006 in conformity to the Government of India, Ministry of Home Affairs Memorandum No. II 27012/14/2008-PF-I dated 16.10.2008 following the recommendations of the Sixth Pay Commission. The case which has been set up by the petitioner is that respondent Nos. 4 to 15 were junior to the petitioner in the rank of Commandant. However, respondent Nos. 4 to 7 came to be promoted as Commandant on 19.12.1994 and while respondent Nos. 8 and 9 were promoted as Commandant on 27.03.1995 and respondent Nos.10 to 15 were promoted as Commandant on 04.11.1995.

The seniority position of the petitioner vis-a-vis private respondent Nos. 4 to 15 is evident from the seniority list/ gradation list of Group "A" (GD) Officers as it existed on 02.09.2002.

5. Further case of petitioner is that the Departmental Promotion Committee was held on 10.01.2002 for the year 2002-2003 for promotion to the rank of Additional DIG. In the said meeting of DPC, the case of the petitioner

along with others were considered for promotion to the post of Additional DIG in which the ACRs of the petitioner along with other officers for the year 1996-1997, 1997-1998, 1998-1999, 1999-2000 and 2000-2001 were considered. The name of the petitioner was not included in the select panel for promotion from Commandant to Additional DIG on the premise that Departmental Promotion Committee did not recommend his name for empanelment, as he could not meet requisite bench mark, which ultimately resulted in supersession of the petitioner. In the aforesaid DPC the cases of the respondent Nos. 4 to 15 along with petitioner were considered and respondents 4 to 7 were empanelled for their promotion to the rank of Additional DIG during the vacancy year 2002-2003, leaving out the petitioner.

6. Further case of the petitioner is that the next DPC was convened on 27.3.2003 during the vacancy year 2003-2004 and in the said DPC the claim of the petitioner was again ignored and respondents 5, 6, 8 to 15 were promoted to the post of Additional DIG vide order dated 21.04.2003 and the petitioner was again superseded in the aforesaid DPC. The ACRs of the petitioner along with other officers, for the year 1997-1998, 1998-1999, 1999-2000, 2000-2001 and 2001-2002, were considered.

The petitioner has reasons to believe that the ACR for the year 1998-1999 which has been downgraded from "Very Good" to "Good" had come in the way of the petitioner for seeking promotion to the post of Additional DIG. Since the petitioner was superseded by his juniors, feeling aggrieved of the same he filed various representations from time to time to the various DG's BSF and finally he submitted a representation to Home Secretary and then to the Hon'ble Minister, Government of India, which were duly replied by the respondents. The petitioner claims that his name was figuring senior in the up-gradation list, yet respondents 4 to 15 who were admittedly junior to him in the rank of Commandant became senior to the petitioner. Feeling aggrieved of the same, the petitioner has filed the instant petition *inter alia* challenging the action of the respondents and has sought the following reliefs:-

“Petition under Article 226 of the Constitution of India read with Section 103 of Jammu and Kashmir Constitution for issuance of Writ, order or direction in the nature of Writ of Certiorari seeking quashment of order dated 8.4.2002 and 21.4.2003, whereby respondents 4 to 15 have been promoted to the post of Additional DIG with reference to the DPC held on 10.01.2002 and 27.03.2003, respectively.

WITH

Further writ of mandamus commanding the respondents to promote the petitioner to the post of Additional DIG with effect from 08.04.2002, i.e. from the date his juniors have been promoted with the further direction to the respondents 1 to 3 to re-fix the seniority of the petitioner at a proper place over and above respondents No.4 to 15 with all consequential benefits WITH Further writ of

Certiorari seeking quashment of adverse entry of the year 1998-1999, whereby the entry has been downgraded from Very Good to Good and any other entry of the relevant year.”

7. The petitioner apprehends that he was superseded for promotion on the ground that one of the ACR written in the intervening period from 1996 to 2001 has been downgraded, which adversely effected his promotion. As a matter of fact, the ACRs are initiated by the Initiating Officer and the same are reviewed by the Reviewing Officer then these are finally sent to the Director General BSF, who is the final accepting officer in case of Commandants.

8. The case set up by the petitioner is that the respondent No. 2 may have changed the ACR of the petitioner from "Very Good" to "Good" without any justifiable cause/reason. The petitioner further has a reasons to believe that the then Director General changed the grading from "Very Good" to "Good", which ultimately led the ouster of the petitioner from being promoted to the post of Additional DIG. The then Additional DIG had no reason or material to change the ACR of the petitioner from "Very Good" to "Good" nor there was any occasion for doing the same and the petitioner has strong apprehension that it was done with the malafide intention to oust the petitioner for being promoted to the post of Additional DIG. It is stated that if the entry was changed from "Very Good" to "Good", then a duty was cast upon the respondents to communicate the same to the petitioner, as the same falls within the realm of downgrading.

9. The petitioner has placed reliance on the Office Memorandum dated 10.3.1989, in which it has been stipulated that in respect of the posts which are in the level of Rs.3700 - 5000 and above, the bench mark grade should be “*very good*” and the officers should be graded as outstanding would rank enblock senior to those who are graded as very good and placed in the select panel, accordingly, up to the number of vacancies, officers with same grading maintaining their inter-se seniority in the feeder post. The petitioner has placed reliance on para 2.2.1 of the memorandum which specifically provides that the DPC assess the suitability of the officers for promotion on the basis of their service record with particular reference to the Confidential Reports for five preceding years. Thus, it is clear that five ACRs for the preceding years were required to be considered by the DPC.

ARGUMENT ON BEHALF OF THE PETITIONER:

10. Mr. Ajay Sharma, learned counsel appearing for the petitioner has vehemently argued that the petitioner was never communicated the “Good” entry for the year 1998-1999 and therefore, the petitioner had reasons to believe that the same was done to oust him from being promoted to the post of Additional DIG. Had the said entry been communicated, petitioner would have an opportunity to make a representation for upgrading the entry from “Good to Very Good”. According to the learned counsel for the petitioner the nomenclature of the entry is not relevant, it is the effect which determines whether it is an adverse entry or not. Thus, *as per the petitioner, the rigours of the entry is important not the phraseology.* It is stated that the grant of the Good entry is of no satisfaction to the petitioner, if the same makes him ineligible for

promotion or has an adverse effect on his chances for being promoted. By not communicating the adverse entry to the petitioner, the very object of writing the confidential report and making entries stands forfeited, because the object of the writing of the confidential report and making entries is to give an opportunity to a public servant to improve his performance.

11. The learned counsel for the petitioner has further argued that the benchmark of promotion to the post of Additional DIG was at least three "Very Good" or two "Good" entries. The petitioner although was having outstanding entry for the year 1996-1997 when he was in SPG and earned "Very Good" for the year 2000-2001, but he was downgraded for 1998-1999 and the said downgrading of the entry was never communicated to the petitioner which is against the law and thus, the action of the respondents, according to the petitioner cannot sustain the test of law and liable to be quashed.

12. The petitioner with a view to justify his argument has referred to factual background that while the petitioner was in SPG in the year 1996-97 and earlier the petitioner earned "Outstanding" ACRs while serving in the security of late Sh. P. V. Narasimha Rao and Mrs. Sonia Gandhi. However, during 1997-98, which was incidentally the last year of SPG, surprisingly the petitioner was graded as "Good" despite the fact that the petitioner earned Commendation from Secretary Security for "Outstanding" performance in 1998. The petitioner in the instant petition has levelled allegations and personal vendetta against Sh. M. R. Reddy, the then Director SPG who had joined SPG during the year 1997 after Sh. Shayamal Dutta. The action of the aforesaid Director has been contrary to what has been the track record of the petitioner for the last 5/6 years, when

on the other hand, Shri Shayamal Dutta, has given "Outstanding" ACRs to the petitioner. The petitioner was pioneer to introduce novel welfare practices in SPG and pioneered the SPG Welfare Fund Rules, which were never formulated. During a short stint, the petitioner was particularly chosen by Shri Shayamal Dutta, Director SPG and the petitioner accordingly, was given the security of Prime Minister, late. P. V. Narsasimha Rao. From the record the petitioner has tried to establish that it is clear cut case of personal vendetta against the petitioner whose performance from "Outstanding" in the previous years was brought to "Good" in the last year of his repatriation.

13. The petitioner has also filed rejoinder affidavit in opposition to the counter filed by the respondents.

14. The learned counsel appearing on behalf of the petitioner has referred to the Border Security Force (General Duty Officers) Recruitment Rules 2001, which govern the service conditions of the petitioner. In terms of the aforesaid Rule, the method for promotion to the post of Additional DIG is provided in the Schedule, wherein Commandant BSF with 2 years regular service in the grade with total 18 years Group-A service and having 2 years' command as Commandant in a Duty Battalion and had undergone Higher Command Course, besides Medical Category SHAPE-I, is eligible for promotion to the post of Additional DIG. As per the above said Rules (Supra) the mode of selection for promotion to the post of Additional DIG is selection- cum-merit.

15. The learned counsel for the petitioner has also referred to the *Guidelines on Departmental Promotion Committee issued by the Government of India, Ministry of Home Affairs*, which provides that five

years preceding year's Confidential Rolls are required to be taken into consideration. For facility of reference Clause 6.2.1 is reproduced as under-

“Clause 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 considered CRs for equal number of year s in respect of all officers considered for promotion subject to (c) below .

(b) The DPC should assess the suitability of the officers for promotion on the basis of their service record and with particular reference to the CRs for 5 preceding years. However, in cases where the required qualifying service is more than 5 years, the DPC should see the record with particular reference to the CRs for the years equal to the required qualifying service . (If more than one CR has been written for a particular year, all the CRs for the relevant year shall be considered together as the CR for one year).

(c) Where one or more CRs have not been written for any reason during the re 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.

(d) Where an officer is officiating in the next higher grade and has earned CRs in that grade,

his CRs in that grade may be considered by the DPC in order to assess his work, conduct and performance, but no extra weightage may be given merely on the ground that he has been officiating in the higher grade.

(e) The DPC should not be guided merely by the overall grading, if any, that may be recorded in the CRs but should make its own assessment on the basis of the entries in the CRs, because it has been noticed that sometimes the overall grading in a CR may be inconsistent with the grading under various parameters or attributes.

(f) If the Reviewing authority or the Accepting authority as the case may be has over-ruled the Reporting Officer or the Reviewing authority as the case may be, the remarks of the latter authority should be taken as the final remarks for the purposes of relevant entries that the higher authority has come to a different assessment consciously after due application of mind. If the remarks of the Reporting Officer, Reviewing authority and Accepting authority are complementary to each other and one does not have the effect of overruling the other, then the remarks should be read together and the final assessment made by the DPC.”

16. The learned counsel for the petitioner submits that as per the guidelines if an officer earns three “Very Good” entries out of five and if other two are “Good”, in that eventuality, an officer meets the benchmark and gets promotion to the post of Additional DIG. The said guidelines were invoked since the year 1998 and an Office Memorandum came to be issued on 8th February, 2002 by the concerned Ministry.

17. Learned counsel for the petitioner further submits that the ACRs for the year 1998-99, in BSF the petitioner was graded as 'Very Good' by the Initiating Officer and also by the Reviewing Officer, but the Accepting Authority, i.e., Director General, BSF downgraded the same to "Good" without disclosing any reasons. It is further stated that the then DG, BSF could not have assessed the past performance of the petitioner for the year 1998-99, as the petitioner after repatriation had joined BSF in September 1998.

18. The break-up of the five preceding years ACRs is given as under:-

I.O	Deptt.	Period	IO Grading (DIG)	RO's Grading IG's	AO's Grading DG's	Duties
Sh. V.N.Rai, Sh IPS Narsinha	SPG	1996-97	Outstanding	Outstanding	Outstanding	with late P.V. Rao. As
Sh.Sanjeev Dalal, AIG(Welfare)		1997-98	Good	Good	Good	As
Sh.A.K.Vaishnav, 95 Bn. BSF, DIG		1998-99	Very Good	Very Good	Good	As Comdt.
Sh.A.K.Vaishnav, 95 Bn BSF, DIG		1999-2K	Good	Good	Good	As Comdt.
Sh.M.L.Verma, 95 Bn BSF DIG		2000-01	Very Good	Very Good	Very Good	As Comdt.
Downgraded by E. N. Ram Mohan, DG BSF"						

19. As per the aforesaid break-up, till the year 2008 the benchmark of 'Very Good 'was prescribed for promotion of officers of Dy. Secretary and above, as three 'Very Good" ACRs. Since the post of Addl.

DIG is above the level of Dy. Secretary post, the petitioner could not be promoted as Addl. DIG for the vacancy year 2002-03 as the ACRs for the year 1997-98 and 1998-99 were downgraded from "Outstanding" to "Very Good" and "Very Good" to "Good". The last Commendation Roll was given to the petitioner in 1998 for his "Outstanding operational work" for providing security to Prime Minister, Ex. Prime Minister during the General Elections in February 1998.

20. Further case of the petitioner is that subsequent DPC for promotion to the post of Addl. DIG which was held on 20th February, 2003, the claim of the petitioner was again ignored and the private respondents who were junior to the petitioner were promoted. The said DPC considered five preceding years' ACRs of the petitioner along with other officers and the petitioner could not make the grade, because of downgrading of ACRs for the year 1997-98 and 1998-1999. It was only when the petitioner for the year 2002-2003 earned two "Good" and three "Very Good" ACRs, he was promoted to the post of Addl. DIG in the year 2004. The case which has been setup by the petitioner is that the entry of "Good" for the year 1997-98 after "Outstanding" grading for the previous year and 1998-1999 which have been downgraded falls within the ambit of "*adverse entry*" though, has a positive grading, but the same was never communicated to the petitioner, inasmuch as, no reason for the change has been mentioned for such downgrading on the personal file of the petitioner, which ultimately has infringed the right of the petitioner for seeking promotion to the post in question.

21. Learned counsel for the petitioner further submits that since petitioner has already retired from service and, accordingly, he confines his

relief to the grant of retrospective promotion from the date the benefit has been given to his junior by directing the respondents to hold review Departmental Promotional Committee by expunging the adverse remarks and, accordingly, fixing his pension by giving him the arrears from the date same were due and denied by the respondents.

ARGUMENTS ON BEHALF OF RESPONDENTS:-

22. *Per contra*, counter has been filed by the respondents in which specific stand has been taken that due to non-attaining of the prescribed benchmark, the petitioner was not recommended by the DPC for empanelment and eventual promotion. The respondents consequently deny that there was any malafide on their part for not considering the promotion of the petitioner during the year 2002-2003 and 2003-2004, the officers junior have been promoted because they attained the prescribed benchmark and were empanelled for promotion to the rank of Addl. DIG by the DPC during the vacancy year 2002-2003 and 2003-2004 by being assessed 'Fit'. Thus, the supersession was in view of the service record of the petitioner. The respondents with a view to fortify their claim have placed reliance on the office memorandum dated 14.02.1998.

23. The specific stand taken by the respondents in the counter affidavit is that the DIG found the performance of the petitioner as "average" and graded the petitioner as "Good" and there is no such provision that the remarks graded as "Good" shall fall within the ambit of adverse remarks and were required to be communicated to the petitioner. The respondents have taken a specific stand that there is no such rule or provision which casts an obligation upon the respondents to communicate

ACRs being “Good” to the petitioner. The further stand of the respondents is that the DPC has followed the policy and the procedure while making promotion and since the petitioner could not meet the benchmark and rightly was not promoted and thus, there is no illegality or irregularity on the part of the respondents.

24. Heard learned counsel for the parties at length and perused the original record provided to this Court by the respondents in the aforesaid case.

LEGAL ANALYSIS

25. The system of Confidential Reports has two principle objectives and the Reporting Officer should have a very clear perception of these objectives. The first and foremost is to improve the performance of the subordinate in his present job. The second objective is to assess the potentialities of the subordinate and prepare through appropriate feedback and guidance for future possible opportunities in service. To a great extent, the second objective is dependent on the achievement of the first.

26. It is the duty of the superior officer to give the subordinate a clear understanding of the tasks to be performed and to provide requisite resources for his performance. The subordinate is required to contribute to the best of his capacity to the qualitative and quantitative achievement of the given tasks making optimum use of the resources provided. Also, both the superior and his subordinate have to be necessarily aware of the ultimate goal of their organization, which can be achieved only through the joint efforts of both of them. This is the basic philosophy underlying any system of Confidential Report.

27. The performance of every Government servant is assessed annually through his Confidential Report, which is an important document providing the basic and vital inputs for assessing the performance of the Government servant and for assessing his suitability for his further advancement in his career on occasions like confirmation, promotion, crossing of efficiency bar, selection for deputation and selection for foreign assignment etc.

28. The issue which arises for consideration before this Court is *“whether downgrading of Annual Confidential Reports for the year 1997-1998 and 1998-1999 from “Outstanding” to “Good” and “Very Good” to “Good” falls within the ambit of adverse remarks and whether under law the respondents were required to communicate the said remarks to the petitioner?*

29. With a view to answer the aforesaid question, it would be apt to refer to guidelines of Departmental Promotional Committee issued by the Government of India, Ministry of Home Affairs dated 07.07.2017.

30. According to Para 6.2.1(b) of the aforesaid guidelines, the DPC is required to assess the suitability of the Officers for promotion on the basis of their service record and with particular reference to the Confidential Rolls for 05 preceding years. Para 6.2.1(f) of the aforesaid guidelines contemplates that if the *Reviewing Authority or the Accepting Authority*, as the case may be, has over-ruled the *Reporting Officer or Reviewing Authority*, the remarks of the latter authority should be taken as the final remarks for the purposes of assessment, provided it is apparent from the relevant entries that the higher authority has come to a different assessment consciously after due application of mind.

31. The case which has been set-up for the petitioner that the confidential rolls are the basic inputs on the basis of which assessment has to be made by each DPC. The five preceding years ACR are required to be considered for promotion to the next higher post as contemplated in the Guidelines on DPC. The ACRs of the petitioner for the year 1996-97, 1997-98, 1998-99, 1999-2000 and 2000-2002 were considered by the DPC held on 10.01.2002 and 27.03.2002 to the post of Additional DIG for vacancy year 2002-2003. The respondent Nos. 4 and 7 who were junior to the petitioner were empanelled for their promotion to the rank of Additional DIG for the vacancy year 2002-2003 vide order dated 08.04.2002, which is impugned in the instant petition, but the petitioner was superseded and not recommended for promotion in lieu of the fact that he was downgraded for the year 1997-98 from "Outstanding" to "Good" i.e. two steps below.

32. From the perusal of the original record which has been supplied to this Court reveals that downgraded ACR was never communicated to the petitioner nor there is any specific stand taken by the respondents in the counter affidavit that the said ACR was ever communicated to the petitioner. On the other hand, the respondents have taken a specific stand that ACR which has been downgraded to "Good" does not fall within the ambit of adverse remarks and thus, there was no requirement under law to communicate the same to the petitioner.

33. I do not agree with the stand taken by the respondents in the counter affidavit that downgrading of the ACR from "Outstanding" to "Good" fall outside the purview of adverse remarks, rather, a duty was cast upon the respondents to have communicated the said downgraded ACR to

the petitioner which in a way has denied the promotion to the petitioner and was a decisive factor from ousting the petitioner of being promoted. The further case of the petitioner is that for the subsequent vacancy year 2003-2004 for promotion to the post of Additional DIG, five preceding years ACRs of the petitioner for the year 1997-98, 1998-99, 1999-2000 and 2000-2002 were considered by the D.P.C held on 20.02.2003, as per the aforesaid guidelines/policy. In the aforesaid meeting, the respondent Nos. 5, 6, 8 to 14 being junior to the petitioner were empanelled for their eventual promotion to the rank of Additional DIG for the vacancy year 2003-2004 vide order dated 21.04.2003 and the petitioner was again superseded and eventually not recommended for promotion owing to the downgrading of the ACRs for the year 1998-1999 from "Very Good" reported by the "*Initiating Authority*" and "*Reviewing Authority*" to "Good" by the Accepting authority without recording any reason for such downgrading which according to the petitioner is in utter violation of Para 7 and Para 10 of the policy dated 26.02.2003 issued by the Government of India, Ministry of Home Affairs. For facility of reference, paras 7 and 10 of the aforesaid policy (supra) are reproduced hereunder:-

"7. While examining the confidential record of officer during Departmental Promotion Committee, examining cases of representations regarding supersession and in the context of Writ-petitions filed in Courts of law it has come to the notice of competent authority that at times Reviewing officers at various levels indulge in down grading of the grading awarded by the Initiating and or the Reviewing officer without endorsing specific reasons for such different assessment."

10. The foregoing does not mean that senior officers even upto the rank of DG are not conversant with the

performance of the officer. Even the DG in some cases in certain contends have the opportunity to observe and assess the work and conduct of the officer. As such don grading by SRO or the Accepting authority is not per-se bad. What is required is that they should endorse specific reason for disagreeing with the grading awarded by the I.O or R.O. This especially is important in case of down grading. A specific mention of this has also been made in the ACR forms.”

34. The downgraded ACR from “Very Good” to “Good” was never communicated to the petitioner which is evident from the bare perusal of the record produced by the official respondents.

35. The grievance of the petitioner that the downgrading of the ACR for the year 1997-98 from “Very Good” to “Good” and the entry of the ACR for the year 1998-1999 downgrading from “Very Good” to “Good” were never communicated to the petitioner is found to be true and cannot sustain the test of law for the reason that no reasons for the change have been mentioned in the record for such downgrading in the personal file of the petitioner.

36. The second limb of argument which has been advanced by learned counsel for the petitioner that had he not been communicated those entries, is found to be true after examining the original record and thereby, the petitioner has been denied an opportunity of making a representation for upgrading that entry. Had the petitioner given an opportunity to file the said representation, then perhaps the petitioner would have become eligible for promotion to the post of Additional DIG in reference to the DPC held on 10.01.2002, 27.03.2002 and 20.02.2003. Thus, action of the respondents in not giving an opportunity of being heard to the petitioner to represent

has violated the right of being considered for promotion to the post of Additional DIG along with other eligible officers.

37. The issue of non-communication of the downgraded entry from “Very Good” to “Good” to the petitioner is arbitrary and violative of the principles of natural justice. The entry of “Good” operates as an adverse entry, has been subject matter of debate in several cases before the Apex Court and the various High Courts of the Country, and the issue is no more res integra.

38. Reliance is placed on the decision of Supreme Court rendered in *U.P. Jai Nigam vs. Prabhat Chandra Jain*, reported in AIR 1996 (SC) 1661, wherein in para 3 following has been laid down:-

“3. We need to explain these observations of the High Court. The Nigam has rules, whereunder an adverse entry is required to be communicated to the employee concerned, but not down grading of an entry. It has been urged on behalf of the Nigam that when the nature of the entry does not reflect any adverseness that is not required to be communicated. As we view it the extreme illustration given by the High Court may reflect an adverse element compulsorily communicable, but 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. All what is required by the Authority recording confidentials in the situation is to record reasons for such down grading on the personal file of the officer concerned, and inform him of the change in the form of an advice. If the variation warranted be not permissible, then the very purpose of writing annual confidential reports would be frustrated. Having achieved an optimum level the employee on his part may slacken in his work, relaxing secure by his one time achievement. This would be an undesirable situation. All the same the sting of adverseness must, in all events, be not reflected in such variations, as otherwise they shall be communicated as such. It may be emphasized that even a positive confidential entry in a given case can previously be adverse and to say that an adverse entry should always be qualitatively damaging may not be true. In the instant case we have seen the service record of the first respondent. No reason for the change is mentioned. The

down grading is reflected by comparison. This cannot sustain. Having explained in this manner the case of the first respondent and the system that should prevail in the Jal Nigam, we do not find any difficulty in accepting the ultimate result arrived at by the High Court.

The Special Leave Petition is therefore, dismissed.”

39. Reliance is also placed on the judgment passed by the Apex Court in *Dev Dutt vs. Union of India and others*, reported in AIR 2008 (SC) 2513.

40. The question fell for consideration of the Supreme Court in the context of facts that Dev Dutt had joined Border Roads Engineering Service and as per rules he was eligible to be considered for promotion to the post of Superintending Engineer. In the D.P.C held on 16.12.1994, he was not held to be eligible for promotion, but his juniors were selected and promoted to the rank of Superintending Engineer. He did not have “Very Good” entry but only “Good” entry for the year 1993-94, as such, was not considered for promotion to the post of Superintending Engineer. The Apex Court held that every entry must be communicated to the employees concerned so that he may have an opportunity of making a representation against it, if he is aggrieved. In Paras 10,11,14,19, 20, 25, 36, 39, 45 to 47 following has been laid down:-

“10. In the present case the bench mark (i.e. the essential requirement) laid down by the authorities for promotion to the post of Superintending Engineer was that the candidate should have 'very good' entry for the last five years. Thus in this situation the 'good' entry in fact is an adverse entry because it eliminates the candidate from being considered for promotion. Thus, nomenclature is not relevant, it is the effect which the entry is having which determines whether it is an adverse entry or not. It is thus the rigours of the entry which is important, not the phraseology. The grant of a 'good' entry is of no satisfaction to the incumbent if it in fact makes him ineligible for promotion or has an adverse effect on his chances.

11. Hence, in our opinion, the 'good' entry should have been communicated to the appellant so as to enable him to make a representation praying that the said entry for the year 1993-94 should be upgraded from 'good' to 'very good'. Of course, after considering such a representation it was open to the authority concerned to reject the representation and confirm the 'good' entry (though of course in a fair manner), but at least an opportunity of making such a representation should have been given to the appellant, and that would only have been possible had the appellant been communicated the 'good' entry, which was not done in this case. Hence, we are of the opinion that the non-communication of the 'good' entry was arbitrary and hence illegal, and the decisions relied upon by the learned counsel for the respondent are distinguishable.

14. In our opinion, every entry (and not merely a poor or adverse entry) relating to an employee under the State or an instrumentality of the State, whether in civil, judicial, police or other service (except the military) must be communicated to him, within a reasonable period, and it makes no difference whether there is a bench mark or not. Even if there is no bench mark, non-communication of an entry may adversely affect the employee's chances of promotion (or getting some other benefit), because when comparative merit is being considered for promotion (or some other benefit) a person having a 'good' or 'average' or 'fair' entry certainly has less chances of being selected than a person having a 'very good' or 'outstanding' entry.

*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.

25. In the present case, the action of the respondents in not communicating the 'good' entry for the year 1993-94 to the appellant is in our opinion arbitrary and violative of natural justice, because in substance the 'good' entry operates as an adverse entry (for the reason given above).

36. In our opinion, fair play required that the respondent should have communicated the 'good' entry of 1993-94 to the appellant so that he could have an opportunity of making a representation praying for upgrading the same so that he could be eligible for promotion. Non-communication of the said entry, in our opinion, was hence unfair on the part of the respondent and hence violative of natural justice.

39. In the present case, we are developing the principles of natural justice by holding that fairness and transparency in public administration requires that all entries (whether poor, fair, average, good or very good) in the Annual Confidential Report of a public servant, whether in civil, judicial, police or any other State service (except the military), must be communicated to him within a reasonable period so that he can make a representation for its upgradation. This in our opinion is the correct legal position even though there may be no Rule/G.O. requiring communication of the entry, or even if there is a Rule/G.O. prohibiting it, because the principle of non-arbitrariness in State action as envisaged by Article 14 of the Constitution in our opinion requires such communication. Article 14 will override all rules or government orders.

45. 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.

46. In view of the above, we are of the opinion that both the learned Single Judge as well as the learned Division Bench erred in law. Hence, we set aside the judgment of the Learned Single Judge as well as the impugned judgment of the learned Division Bench.

47. 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 1993-94 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."

41. I am also supported by the law laid down by the Division Bench of the Delhi High Court on the issue in question in case *titled Commandant V. S. Shekhawat vs. Union of India and others*, decided on 03.09.2019, wherein in paras 17, 19, 22 and 26 following has been observed:-

"17. It must be noted that the judgment of the Supreme Court in UP Jal Nigam v. Prabhat Chandra Jain (1996) 2 SCC 363 referred to in the above OM was distinguished by the Supreme Court in Dev Dutt v. Union of India (2008) 8 SCC 725. There, the Supreme Court made it explicit that "every entry must be communicated to the employee concerned, so that he may have an opportunity of making a representation against it if he is aggrieved". The Supreme Court rejected the contention of the Respondent Union of India that only an adverse entry needs to be communicated to an employee. The Supreme Court emphasized that it was not the nomenclature that was relevant, but the "effect which the entry is having which determines whether it is an adverse entry or not". In particular, it was pointed out that "the grant of „good“ entry is of no satisfaction to the incumbent if it in fact make it ineligible for promotion or has an adverse effect on his chances".

19. Subsequently, a three judge bench of the Supreme Court in Sukhdev Singh v. Union of India AIR 2013 SC 2741 considered the issue and in para 8 held as under:

"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/her to work harder and achieve more that 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."

22. In the present case, admittedly the Petitioner was given only a copy of the adverse remarks and not the ACR containing the below benchmark grading at the relevant time. This deprived the Petitioner of an opportunity to seek an upgradation of his ACR, as he was not made aware of that fact. He could not have anticipated that such grading would affect his future promotion.

26. A direction is now issued to the Respondents to hold a review DPC to consider the Petitioner's prayer of upgradation of his ACR/APAR of 2002- 03 consequent upon the expunction of the adverse remarks therein. This exercise be completed within a period of six weeks from today. Within a further period of four weeks thereafter, orders will be issued granting the notional seniority with reference to the promotion to the Petitioner to the ranks of 2IC and Commandant and this should be communicated to the Petitioner not later than two weeks thereafter. All consequential benefits will ensure to the Petitioner. The petition is allowed with the above directions"

42. Thus, in the light of the settled legal position coupled with the record and facts of the present case, *I hold that the downgrading of the ACR from "Outstanding" to "Very Good" and "Very Good" to "Good"* falls within the ambit of adverse remarks in the present case and the adverse remarks were required to be communicated to the petitioner so that he would have got an opportunity to make a representation against such adverse remarks. Having failed to do so, action of the responders' is not justified and cannot sustain the test of law and is liable to be set aside.

43. Thus, the above question is answered in favour of the petitioner.

44. The next question which arises for consideration in the present case is that *whether non-communication of the entry below the benchmark recorded in the ACRs is violative of Articles 14 and 16 of the Constitution of India and also principles of natural justice.*

45. With a view to answer the aforesaid question, it would be apt to refer to the stand taken by the petitioner in the rejoinder in paras 13 and 14 of the rejoinder, wherein, in the similar facts and circumstances of the case, one officer was given “Very Good” grade by the Initiating Officer, but the Reviewing Officer recorded some adverse remarks and also downgraded the grading to “Good” without any supporting reasoning and consequently, Ministry of Home Affairs vide order dated 16.11.2005 ordered that the said adverse remarks to be expunged. The petitioner has also pleaded that in case of Commandant Bharti Prasad Shah, wherein Initiating Officer downgraded the said officer from “Very Good” to “Average” and the senior reviewing officer upgraded the grading of the officer from “Average” to “Good”. Feeling aggrieved of the aforesaid, the said officer submitted a representation with regard to the benchmark grading and finally in the aforesaid case, the then Director General BSF upgraded the final grading of the said officer vide order dated 2 February, 2011 on the ground that the assessment from “Very Good” to “Average” and then “Good” did not appear justifiable in the absence of adequate reasoning to support the downgrading of the ACR, whereas in the similar fact and circumstances of the case, the respondents have not upgraded the grading from “Good” to “Very Good” reported by Initiating Officer and

Reviewing Officer for the year 1998-1999. Thus, the respondents cannot adopt different yardsticks insofar as the case of the petitioner is concerned, vis-a-vis similar situated officer and by doing so, the petitioner has been meted with hostile discrimination. The respondents by no stretch of imagination can treat equals as unequals under law by adopting two different yardsticks to the similarly situated officers. Thus, the action of the respondents in adopting two yardsticks is per-se arbitrary and in violation of Article 14 and 16 of the Constitution of India.

46. With a view to substantiate the claim of the petitioner, reliance is placed on communication dated 16.11.2005 issued by the Ministry of Home Affairs regarding recording of adverse remarks in ACRs and downgrading of the grading by reviewing officer/accepting authority. In the aforesaid communication, a direction has been issued by the Home Secretary that the assessment by the concerned Reviewing/Accepting Authorities should be impartial and objective in case such authorities decide to down/upgrade the grading given by the Reporting Officer, sufficient reasoning must be duly given/recorded.

47. Thus, the action of the respondents in the present case was bereft of any reasoning and the same was in violation of their own policy framed regarding the recording of the adverse remarks. Viewed from any angle, the action of the respondents cannot be sustained and is, accordingly, set aside.

48. The Division Bench of Delhi High Court in case titled *Union of India and others vs. V. S. Arora and others*, decided on 31.05.2012, after placing reliance on the decisions of the Apex Court in Paras 24 and 25 has held as under:-

“24. Therefore, the position that emerges is that the decision in Abhijit Ghosh Dastidar (supra) holds the field. Now, what is it that Abhijit Ghosh Dastidar (supra) decides? It has, in the first instance, while affirming Dev Dutt (supra), concluded that non-communication of an ACR is violative of the constitutional rights of a government servant/employee. In the second instance, it has stated that such below benchmark ACRs ought not to be taken into consideration while the question of promotion of a particular government servant is in contemplation. Now, that leaves us with the further question as to what is to be done after we ignore/do not consider the below benchmark ACRs. In this regard, we have clear guidelines contained in Chapter 54 of the Manual on Establishment and Administration for Central Government Offices, which have been issued by the Government of India for DPCs (G.I., Dept. of Per. & Trg., O.M. No. 22011/5/86-Estt.(d), dated the 10th April, 1989 as amended by O.M. No. 22011/5/91-Estt.(d), dated the 27th March, 1997 as amended / substituted vide Dept. of Per. & Trg., O.M. No. 22011/5/98-Estt.(d), dated the 6th October, 2000). The relevant portion of the guidelines reads 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, O M. No. 22011/9/98-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.)

(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.

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 (c) mentioned above. The latter sub-paragraph (c) 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.

Thus, it is clear that below benchmark ACRs, which have not been communicated, cannot be considered by the DPC and the DPC is then to follow the same procedure as prescribed in paragraph 6.2.1 (c), as indicated above.”

49. It will be advantageous and appropriate herein to refer to a judgment of *Gauhati High Court titled Donatus Engzanang Vs. State of Mirzoram* reported in 2000 LIC 664, wherein it was averred in para 13 that the petitioner was given the grade “Outstanding” in the year 1995-1996 and the very next year 1996-1997, it was downgraded two steps from “Outstanding” to “Good” and that such downgrading was adverse to the petitioner and should have been communicated to him, and in the absence of such communication such downgrading could not have been acted upon. The Court considered the stand of the petitioner and placing reliance on *U.P.Jai Nigam Vs. Prabhat Chandra Jain*, AIR 1996 (SC) 1661 at Para 14 held as under:-

“14. There is nothing before me to show that the concerned authority recorded reasons for downgrading in respect of the petitioner in his personal file, and admittedly, it was not communicated to the petitioner.

Learned Govt. Advocate, appearing for the State respondents, however, submits that in that case downgrading was from “Outstanding” to “Satisfactory” and in the instant case downgrading was from “Outstanding” to “Good”, and hence no communication to the petitioner was necessary. Having given my anxious consideration to such submission, I am not inclined to accept the same. In the instant case, the graded entry had gone two steps down falling from “Outstanding” to “Good”, and I feel that the authority should have recorded reasons for such downgrading in the personal file of the petitioner and should have informed him about the change in the form of an advice. In view of what has been stated above, the ACR of the petitioner for the year 1996-97 could not have been acted upon. While making its own assessment, the MPSC took into consideration the ACR of the petitioner for the year 1996-1997 also along with other ACR’s for the year 92-93, 93-94, 94-95, and 95-96, and hence such assessment must be said to have been vitiated. Hence the MPSC’s recommendation to promote the respondent No. 9 to the post of Vice Principal based on such assessment cannot be allowed to stand and also the order dated 5.11.97 passed by the State Govt. promoting the respondent No. 9 to the post of vice Principal on the basis of such recommendation cannot be allowed to stand.”

50. *Thus, I hold that the non-communication of the entry “below” the Benchmark recorded in the ACRs is violative of Article 14 of the Constitution of India and also violates of the fundamental principles of natural justice and the Policy framed by the respondents, which cannot sustain the test of law and liable to be set aside.*

The question 2nd is answered accordingly.

51. The law relating to recording of Annual Confidential Reports (ACRs) has now been crystallized by a series of decisions of the Apex Court. The decision in *Dev Dutt Vs. Union of India*, (2008) 8 SCC 72 can be said to be a significant milestone in the development of this particular branch of service jurisprudence. The Legal issue involved in *Dev Dutt (supra)* was whether the “Good” entry in the ACR, which adversely

affected the petitioner's promotion, ought to have been communicated to him so as to afford him opportunity of making representation against it. In this context, one Office Memorandum dated 10/11.09.1987 of the Govt. of India was noticed which provided for communication of adverse entries only and not "Good" entry in the aforesaid case. ***The Supreme Court held that "Good" entry is in fact an adverse entry as it forecloses the chance of a candidate from being considered for promotion.*** It was further held that the "Good" entry adversely affecting chances of promotion should have been communicated within a reasonable period. The Apex Court has held that every entry, irrespective of whether it is poor, average, good, very good or outstanding, should be communicated to the concerned Government servant within a reasonable period. Explaining the rationale behind such a proposition, the Apex Court held that non-communication of such an entry may adversely affect the employee in two ways:-

(1) if the entry is 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 can pray for its upgradation.

52. Thus, non-communication of an entry in ACR is arbitrary and therefore, violative of Article 14 of the Constitution. The Apex Court further held that when the entry is communicated to the Government servant he should have the right to make a representation against such entry. Such representation should be decided by an authority higher than

the one who made the entry. The representation must be decided in a fair manner and within a reasonable period. In the context of promotion, it was observed by the Apex Court in case mentioned (supra) that non-communication of entries in Annual Confidential Reports has civil consequences and may affect the chances of a Government servant for promotion or for availing other benefits. The Hon'ble Supreme Court observed that communication of entries in the ACRs and giving opportunity to represent against them is particularly important in higher posts which are in pyramidal structure where often the principle of elimination is followed in selection promotion.

CONCLUSION

53. Thus, in the light of the aforesaid settled legal position of law and the facts and circumstances of the case, ***I hold that non-communication of the impugned ACR for the year 1997-1998 and 1998-1999 to the petitioner by the respondents is arbitrary, whimsical and in violation of the Policy framed by the respondents, besides being violative of Article 14 and 16 of the Constitution.***

54. Since the petitioner has already retired from service and the private respondents have been promoted way back in 2002-2003 respectively, it would not be appropriate at this stage to upset/quash their promotion.

55. In the peculiar facts and circumstances of the case, if the representation of the petitioner for upgrading of the "Good" entry is allowed, it may benefit in his pension and get some arrears.

56. If the upgradation is allowed, the petitioner be considered forthwith for promotion as Additional DIG retrospectively from the date,

the benefit has been given to his juniors i.e. 08.04.2002 and if he is promoted he will get the benefit of higher pension and the balance of arrears of pay.

57. I, therefore, direct the respondents that the “Good” entry be communicated to the petitioner within a period of one month from the date of receipt of the copy of this judgment. On being communicated the entry, the petitioner may make a representation, if he so chooses, against the said entry within one month and the said representation will be decided within one month thereafter.

58. If the entry of the petitioner is upgraded, the petitioner shall be considered for promotion retrospectively by the DPC (Departmental Promotion Committee) within two months thereafter and if the petitioner gets selected for promotion retrospectively, he should be given higher pension with arrears of pay.

59. With these observations, the writ petition of the petitioner is **allowed**.

60. Registry is directed to handover the record to the learned counsel appearing on behalf of the respondents.

(Wasim Sadiq Nargal)
Judge

Jammu:
26.05.2023
Bir

Whether order is speaking? Yes
Whether order is reportable? Yes

