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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 30th May, 2023

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W.P.(C) 12795/2021 & CM APPL. 25964/2022

SARITA TYAGI & ANR Petitioners

Through: Mr. Anuj Aggarwal and
Ms. Shreya Kukreti, Advocates.

versus

SHAHEED RAJ PAL DAV PUBLIC SCHOOL

& ORS

..... Respondents

Through: Mr. Anurag Lakhotia and
Mr. Udit Dwivedi, Advocates for R-1 and
R-2.Mr. Yeeshu Jain, Additional Standing
Counsel with Ms. Jyoti Tyagi and
Ms. Manisha, Advocates for R-3/DoE.**CORAM:****HON'BLE MS. JUSTICE JYOTI SINGH****JUDGEMENT****JYOTI SINGH, J.**

1. This writ petition has been filed by the Petitioners seeking setting aside of the impugned seniority list of Post Graduate Teachers ('PGTs') in Shaheed Rajpal DAV Public School/Respondents No. 1 and 2 (hereinafter referred to as the 'School') with a direction to the School to re-frame a correct seniority list in conformity with the Delhi School Education Rules, 1973 (hereinafter referred to as the 'Rules, 1973'). Writ of mandamus is sought for a direction to the School to re-constitute a fresh Departmental Promotion Committee ('DPC') and consider the Petitioners for promotion to the post of Principal.



2. Factual score as averred in the writ petition is that Petitioners are permanent/confirmed employees of the School with unblemished record. Petitioner No. 1 was appointed as PGT (Chemistry) on 01.08.1991 and Petitioner No. 2 as PGT (English) on 12.07.1993. Petitioners were senior-most PGTs in the School.

3. It is averred that a seniority list of PGTs was prepared by the School for the first time in 2020 and all PGTs including the Petitioners were made to sign in a column on the seniority list during a meeting held in the School premises, in acknowledgement of their particulars. A draft or tentative list was never circulated before that date and Petitioners were shocked and surprised to note that their junior namely, Ms. Vinita Kapoor/Respondent No. 4, PGT (English) was shown senior to them. Respondent No. 4 was transferred from Kulachi Hansraj Model School to the present School on 12.07.1994 but was shown as being appointed on 10.07.1989 in order to give her seniority in the list. Since Petitioners were appointed on 01.08.1991 and 12.07.1993 respectively and Respondent No. 4 was transferred to the School on 12.07.1994, Petitioners were senior to her and the seniority position shown in the list was incorrect.

4. Petitioners were informed vide letters dated 04.08.2021 and 09.08.2021 that DPC meeting for the post of Principal was scheduled on 11.08.2021 and they were directed to report for interview at 03:30 PM in the School premises. However, when Petitioners reached the School on the date and time fixed, they were never called for an interview and only Respondent No. 4 was interviewed by the DPC. In fact, there were two other teachers namely, Mrs. Suman Goel and Mrs. Rashmi Vaidya who were also invited but were not interviewed.



Aggrieved by this, Petitioners made a representation dated 18.08.2021 to the School, pursuant to which they were called for discussions but the issue was never resolved and the representation was rejected vide impugned letter dated 28.08.2021. Petitioner No. 1 was also informed by the same letter that Respondent No. 4 had been validly and legally appointed as Principal in accordance with the established Rules and procedures.

5. Petitioners thereafter made a representation dated 31.08.2021 to Director of Education/Respondent No. 3 (hereinafter referred to as the 'DoE') requesting them to revoke/nullify the DPC proceedings but no response was received. A similar request was made on 01.09.2021 to the School but the response was in the negative. Petitioners also sought various documents including seniority list of PGTs, only to be informed that the seniority list cannot be furnished to them. A legal notice was also sent by the Petitioners but the grievances brought forth were not redressed and finally, the Petitioners approached this Court.

6. Contention of the learned counsel appearing on behalf of the Petitioners is that the impugned seniority list of PGTs is factually incorrect and legally untenable. Respondent No. 4 came to the School on transfer on 12.07.1994 whereas the Petitioners were appointed in the School prior to this date and are thus senior to her. In terms of para 10.2 of Chapter 10 titled 'Transfer and Transfer TA, DA and Joining Time' of Administrative Manual of DAV College Managing Committee, seniority of an employee cannot be carried forward to another school in case of transfer on request of the incumbent from one school to another. Clause 10.2(h) reads '*the seniority of the incumbent will NOT be carried forward*'. School runs under the aegis



of DAV College Managing Committee, which is a Society registered under the Societies Registration Act, 1860 and is bound by provisions of the Manual and could not carry forward the seniority of Respondent No. 4. A Division Bench of this Court in *Hamdard Education Society and Another v. Abdul Rehman and Another, (2014) SCC OnLine Del 3054*, has held that inter-school transfer of an employee is illegal and contrary to Rules, 1973. Furthermore, if an employee is transferred from one school to another by the Society running both the schools, then the employee loses his or her seniority and becomes junior in the transferred school. In this light, carrying forward the seniority of Respondent No. 4 and counting her past service rendered in her previous school is an unjustified action and cannot be sustained in law.

7. It was argued that no provisional or final seniority list of PGTs was circulated by the School inviting objections from the Petitioners or other employees of the School, save and except, a list in 2020 and Petitioners never had the opportunity to represent against the wrong fixation of their seniority qua Respondent No.4. Law mandates that a provisional or tentative seniority list must first be circulated giving an opportunity to those affected to file objections and only thereafter, seniority list can be finalized. In the absence of following this procedure, the School cannot rely on the impugned seniority list and treat Respondent No. 4 senior to the Petitioners.

8. It was urged that the procedure followed at the time of holding the DPC was erroneous inasmuch as five teachers were called for an interview, which is evident from the letters written to the Petitioners, however, only Respondent No. 4 was interviewed by the DPC. This



amounts to clear discrimination and favouritism and is against all cannons of fair play and justice.

9. Petitioners were always under an impression that they had a good record of service as nothing adverse was ever communicated to them, including any adverse gradings/remarks or downgrading in the ACRs for the period 2015-2016 to 2019-2020, which were in the reckoning of the DPC held on 11.08.2021. It is only in the course of hearing, when records were seen by the Court that Petitioners learnt that they had been given 'Average' gradings in some of the ACRs in the reckoning and thus being non-communicated ACRs, their consideration by the DPC was illegal and against the well settled law. It is trite that uncommunicated downgraded and/or adverse ACRs cannot be considered by a DPC and therefore, if the DPC has taken into consideration uncommunicated adverse ACRs, the DPC deserves to be quashed on this short ground. Reliance was placed on the judgments of the Supreme Court in *Sukhdev Singh v. Union of India and Others*, (2013) 9 SCC 566, *Prabhu Dayal Khandelwal v. Chairman, Union Public Service Commission And Others*, (2015) 14 SCC 427 and of this Court in *Kalpna Mehdiratta v. Air Force Bal Bharti School and Others*, 2019 SCC OnLine Del 11538 and *Poonam Sharma v. Director of Education and Others*, 2023 SCC OnLine Del 568.

10. DoE has filed an affidavit and taken a stand in favour of the Petitioners. Even during the course of arguments, learned counsel for DoE supported the Petitioners and submitted that the School is a private un-aided and recognized school and is bound to comply with provisions of Rules, 1973 and other Guidelines issued by DoE from



time to time. It is further submitted that Petitioner No. 1 had sent a representation dated 31.08.2021 to DoE raising a grievance with respect to the seniority position of Respondent No. 4 and her subsequent promotion as Principal. On an inquiry from the School, DoE was informed that no combined seniority list of various schools run by the DAV College Managing Committee has been prepared and since Respondent No. 4 was appointed prior to the Petitioners, she was placed above them in the seniority list. As to the selection of Respondent No. 4 to the post of Principal, queries were raised by DoE, however, no satisfactory response was received from the School. According to DoE's stand, on an affidavit, appointment of Respondent No. 4 on the post of Principal is unjustified.

11. Arguing on behalf of the School, learned counsel at the outset, submits that it is not open to the Petitioners to challenge the seniority list of PGTs in which Respondent No. 4 was placed senior to them since the seniority position was known to them in 2003 which is evident from the list annexed as Annexure CA-2 to the counter affidavit filed by the School. It was also stated that the seniority list was shown to the Petitioners and bears their signatures at serial Nos. 2 and 6 respectively and the signatures are in token of correctness of the seniority position in the list. Since Petitioners were aware of their seniority position vis-a-vis Respondent No. 4 way-back in 2003, as per the settled law the writ petition is barred by delay and laches and it is trite that long settled seniority cannot be unsettled. Even on merits, Petitioners cannot claim seniority over Respondent No. 4 since seniority is determined on the basis of date of joining of the employees and those who joined earlier will rank senior to those who



are appointed and join later. In the present case, Respondent No. 4 was appointed on 10.07.1989 at Kulachi Hansraj Model School and was subsequently transferred to the present School while Petitioners' initial dates of appointment are 01.08.1991 and 12.07.1993, respectively.

12. It is incorrect for the Petitioners to assert that Respondent No. 4 is junior to them. Respondent No.4 was not a fresh or new appointee in the present School and was transferred from a different school run by the Society. There is no rule or law which entails loss of seniority on transfer on administrative grounds from one school to another, save and except, when it is transfer on one's own request. Even the last Principal of the School was a transferee from Kulachi Hansraj Model School and her seniority was considered from the date of her appointment. The factum of Respondent No. 4's seniority was known to the Petitioners from 2003 which is further evidenced by the fact that she was given charge of officiating Principal on 01.05.2021, being the senior-most and at that stage, no objection was raised by the Petitioners.

13. With respect to the conduct of DPC and promotion granted to Respondent No. 4, it was submitted that the School is a private recognized un-aided school and enjoys complete freedom and autonomy to make appointments, including the appointment of a Principal of the School. While making the appointment to the post of Principal, School constituted the DPC in accordance with Rule 96(3) of Rules, 1973 pertaining to an un-aided School and considered five senior-most PGTs working in the School. Looking at overall profile of the PGTs under consideration including ACRs, service records, work



and conduct reports, integrity and vigilance certificates, DPC recommended Respondent No. 4 for promotion as she is also a recipient of Delhi State Awards to Teachers, 2013. Therefore, selection of Respondent No. 4 was on merits irrespective of seniority, the post of Principal being a selection post. Rule 96(6) of Rules, 1973 provides that Selection Committee shall regulate its own procedure and in a judicial review in a writ jurisdiction, Courts should not interfere in the discretion exercised by the DPC. In aid of this argument, reliance was placed on the judgment of the Supreme Court in *Union of India and Another v. S.K. Goel and Others, (2007) 14 SCC 641*, where the Supreme Court held that DPC enjoys full discretion to devise its own method and procedure for objective assessment of suitability and merit of the candidates.

14. Insofar as the 'Average' ACRs of the Petitioners are concerned, the argument on behalf of the School was that no ground with respect to non-communication of adverse or below benchmark grading in the ACRs is taken in the writ petition and in any case, there is no benchmark for consideration for promotion to the post of Principal. Being a private recognized un-aided school, in the normal course of working, various issues arising with respect to the performance of the teachers are regularly communicated to them from time to time so that they get the feedback and enhance their performance. Principal as well as the supervisory heads have a direct line communication with the teachers on each and every aspect including conduct, behaviour, manner of teaching, response to complaints from parents etc. and therefore, every teacher of the School knows every remark that becomes a part of the ACR annually. All remarks in the ACRs are



therefore indirectly communicated to the teachers at different times.

15. It was further submitted that the grading given by the Reviewing Officer by itself has no relevancy when the Selection Committee has seen the entire ACR and not just the 'Average' grading in some of the ACRs under consideration. The judgments relied upon by the Petitioners with respect to non-communication of ACRs in the cases of *Sukhdev Singh (supra)*, *Prabhu Dayal Khandelwal (supra)* etc. are applicable only to Government/Public servants, whether in civil, judicial or police organisation or any other service, except military service and do not apply in case of a private un-aided institution like the present School. In any event, communicating the ACRs to the teachers working in private institutions every year will create trouble between the Reviewing Officer i.e. Principal and the Reporting Officer i.e. supervisory heads, who work in the same premises with teachers and can have adverse repercussions on overall administration of the School. This will also result in a situation where reporting/reviewing authority will refrain from putting free thoughts with regard to the assessment of the teachers in the form of grading in the ACRs.

16. It was also submitted that it is not open to the Petitioners to predicate their case of non-promotion on non-communication of ACRs in the absence of pleadings and in any event, these are disputed facts which cannot be adjudicated in a writ petition. The Supreme Court in *Sadananda Halo and Others v. Momtaz Ali Sheikh and Others, (2008) 4 SCC 619*, while dealing with the recruitment process held that a roving inquiry on factual aspects is impermissible in a writ



petition and it is settled that a party cannot be permitted to argue what is not pleaded.

17. Without prejudice to the above, even otherwise in the absence of any benchmark, it cannot be urged by the Petitioners that the 'Average' ACR grading ought to have been communicated being below the benchmark. Relying on the judgment in *S.K. Goel and Others (supra)*, it was further argued by learned counsel that the Supreme Court held that where the downgrading still meets the benchmark, it cannot be contended by the employee that there was non-communication merely because DPC has assessed another candidate to be better in comparative merit. Courts can interfere in selection matters only where there is violation of Rules, 1973 or there are allegations of bias against any member of the DPC. Lastly, it was stressed that if the writ petition is allowed on the ground of non-communication of ACRs, it will create doubt on the overall workability of private un-aided schools, more so of a school of the status of DAV College Managing Committee, which runs thousands of institutions and has imparted education to more than 60 lakh students.

18. Responding to the grievance of the Petitioners that while they were asked to report for interview at the time of DPC meeting, they were not actually interviewed, it was submitted by the learned counsel for the School that the DPC had decided not to interview any candidate and to take a decision based on the records available before the Committee. Respondent No. 4 was also not interviewed and she was only called to seek her consent if she was willing to be appointed as the Principal, if selected. It was also submitted that Respondent



No. 4 has already completed her tenure as a Principal and the present petition has been rendered infructuous *albeit* she is working as a Principal on re-employment and her re-employment is not a subject matter of this writ petition.

19. I have heard the learned counsels for the parties and examined their respective contentions.

20. Insofar as the issue of seniority is concerned, the documents annexed with the counter affidavit do not reflect that any draft/tentative seniority list was formally circulated by the School inviting objections from the concerned teachers. One of the documents filed, goes back to the year 2003 and pertains to a DPC meeting where the Petitioners and Respondent No.4 were considered for promotion. Admittedly, being minutes of the DPC, this document was neither in the public domain nor communicated to the Petitioners and in any event, was not a seniority list. The second document is a list of PGTs in an order of seniority, which contains the signatures of the Petitioners and is purportedly issued in 2020 only. No material has been placed on record by the School to controvert the stand of the Petitioners that prior to the issue of this list, any draft/tentative seniority list was issued inviting objections, which is a mandate of law. School cannot take a defence that the seniority was known to the Petitioners by stating that they knew of the DPC held in 2003 or that Respondent No. 4 was officiating as Principal. Insofar as the signatures of the Petitioners on the seniority list are concerned, it is stated by them that these were in acknowledgement of their particulars and not in acceptance of the seniority position. It is trite that when law requires anything to be done in a particular manner, it can only be



done in that manner and in no other way. There is no procedure known to law by which seniority list can be finalised without circulation and inviting objections. As for the law that long settled seniority cannot be unsettled, there can be no debate on this well settled proposition. However, in the present case, seniority was never settled in so many years and the first seniority list, even according to the counter affidavit, was issued in the year 2020.

21. There is another aspect of the matter. Petitioners have contended that in terms of para 10.2 of Chapter 10 titled 'Transfer and Transfer TA, DA and Joining Time' of Administrative Manual of DAV College Managing Committee, seniority of an employee cannot be carried forward to another school in case of transfer on request of the incumbent from one school to another. Clause 10.2(h) was read which provides '*seniority of the incumbent will NOT be carried forward*'. It was also urged that the School runs under the aegis of DAV College Managing Committee, which is a Society registered under the Societies Registration Act, 1860 and is bound by provisions of the Manual and could not carry forward the seniority of Respondent No. 4. Reliance was placed on the judgment in ***Hamdard Education Society and Another (supra)***, to contend that inter-school transfer of an employee is illegal and contrary to Rules, 1973. All these facets may have had an important bearing on the seniority of the Petitioners had the list been circulated and objections invited, which was admittedly not done. The seniority may not impact the selection on merit but could possibly have effected the zone of consideration. Thus the impugned seniority list is bad in law, having been issued without



inviting objections/representations from the concerned teachers, including the Petitioners.

22. The second and the only other issue that arises in the present case, is with respect to the selection of Respondent No. 4 to the post of Principal by the DPC. Appointment to the post of Principal in recognized aided/un-aided schools is by 'selection' and is governed by Rule 96 of Rules, 1973. Before proceeding further, it would be important to refer to the Minutes of the DPC meeting, which are extracted hereunder for ready reference:-

Ref. No. :SRDAVPS/DV/2021/439

Dated : 11.08.2021

MINUTES OF THE DEPARTMENTAL PROMOTION COMMITTEE HELD ON 11th August 2021

A meeting of the Departmental Promotion Committee (DPC) for the selection of Principal at SHAHEED RAJPAL D.A.V. PUBLIC SCHOOL, DAYANAND VIHAR, DELHI-110092 under rule 96(3) of Delhi School Education Rule 1973, was held on 11th AUGUST 2021 at 4:00 pm in the school premises. The following members were present:-

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| 1. Dr. N.K.Uberoi | Chairman, LMC |
| 2. Sh. J.K.Kapur | An Educationist |
| 3. Dr. Pramod Chandra Katiyar | DDE (NE-II), an Educationist, nominated by the Directorate of Education |
| 4. Dr. Nisha Peshin | Administrator, Nominee of Management |

The following 5 senior most PGTs were categorized under the zone of consideration:

1. Mrs. Vinita Kapoor
2. Mrs. Sarita Tyagi
3. Mrs. Suman Goyal
4. Mrs. Rashmi Vaidya
5. Mrs. Jyotsna Sood

Mrs. Vinita Kapoor in presence on DPC informed that she is interested in the post of Principal.

The record was examined by the members of DPC i.e. Annual Confidential Reports, Service Records, Work and Conduct report, Integrity and Vigilance Certificates of the above mentioned five teachers. After perusal of the records, it was unanimously decided as follow:

Selected Candidate Name and Address	Serial No.	Remarks
Mrs. Vinita Kapoor M-60, Near Jagat Ram Park, Laxmi Nagar, Delhi- 110092	01	Appointed as Principal on probation w.e.f. 11.08.2021 for one year in Level 12 of 7 th CPC. Her existing basic pay is Rs. 1,02,500/-. Her salary may be fixed as per rules.

Mrs. Vinita Kapoor is the recipient of Delhi State Awards to Teachers 2013.

The minutes are subject to further approval of competent authority before issuing the promotion order. If any discrepancy is found in future at any stage the school management will be held responsible.

(Dr. Nisha Peshin)
Administrator

(Dr. Pramod Chandra Katiyar)
Educationist

(J.K. Kapur)
Educationist

(Dr. N.K. Uberoi)
Chairman, LMC

MANAGED BY - DAV COLLEGE MANAGING COMMITTEE, CHITRA GUPTA ROAD, NEW DELHI-110 055
Dayanand Vihar, Delhi-110092 / Tel - 011-41619779, 47070367, 40450501
email - davr_dv@yahoo.com | web site - www.davdayanandvihar.net

23. Minutes of the DPC reflect that five senior-most PGTs were in the zone of consideration and for the purpose of assessment of relative



merit DPC took into account five years ACRs, service records, work and conduct report, integrity and vigilance certificates of all the 05 Teachers under consideration. In the zone of consideration, Respondent No. 4 was at serial No. 1 and was recommended by the DPC and as the Minutes indicate the DPC also took note of the fact that Respondent No. 4 is a recipient of Delhi State Awards to Teachers, 2013. The recommendation by the DPC was subject to approval of the Competent Authority.

24. There cannot be any dispute that the post of Principal is a selection post and the appointment is made by selection on merit. It is equally settled that DPC enjoys full discretion to make selection and take a view on the overall assessment of the candidates and devise its own procedure for the said purpose. The autonomy, statutorily conferred on the DPC by Rule 96(6) of Rules, 1973 has to be undoubtedly respected. However, it is trite that a non-communicated ACR cannot be taken into account by the DPC to the prejudice of the concerned employee and therefore, before proceeding to the law on the subject, it would be pertinent to examine the factual score with respect to the five ACRs of the Petitioners, which were considered by the DPC.

25. The DPC record was called for and produced during the course of hearing, including the original ACR dossiers of the Petitioners and Respondent No.4. Record revealed that 5 ACRs for the period 2015-2016 to 2019-2020 were considered by the DPC. Petitioner No.1 Ms. Sarita Tyagi has two 'Good' and three 'Average' grading in the 5 ACRs, while in case of Petitioner No. 2 Ms. Jyotsna Sood, 2 ACRs are 'Average' while three are 'Good'. It is an admitted fact that none



of these ACRs were ever communicated to the Petitioners. In fact, the Petitioners were unaware of the 'Average' gradings until the records were produced by the School during the hearing. ACRs play an important role during the process of any selection, particularly for a selection post such as that of a Principal and Average gradings most certainly impact the merit of the candidate under consideration. DPC Minutes indicate that weightage was given to the ACRs for relative assessment of the 5 PGTs under consideration and this fact is reiterated in the counter affidavit filed by the School that DPC was constituted under Rule 96(6) of the Rules, 1973 and had examined records of ACRs, service reports, work and conduct report, integrity and vigilance certificates of all five senior-most teachers including Petitioners and Respondent No. 4. Relevant para of the counter affidavit is extracted hereunder for ready reference:-

“6. That the DPC had examined records of Annual Confidential Reports, Service Reports, Work and Conduct Report, integrity and vigilance certificates of all the five senior-most teachers including the petitioners and respondent no. 4 and after perusal of the records, it was unanimously decided to approve respondent no. 4 as Principal of the school. It was also considered that respondent no. 4 was recipient of Delhi State Awards to Teachers, 2013. Thus, even otherwise, without any prejudice to the seniority, it is submitted that DPC had appointed respondent no. 4 as Principal on merits.”

26. The only question that therefore begs an answer is that if ACRs were a relevant and important factor for assessment of comparative merit of the five senior-most PGTs for appointment to the post of Principal, could the DPC take into account uncommunicated ACRs with 'Average' gradings, which beyond a doubt was a downgrading from the other ACRs having an overall 'Good' grading. The law on this issue is no longer *res integra*. In *Dev Dutt v. Union of India and*



Others, (2008) 8 SCC 725, the Supreme Court held that every entry in the ACR of a public servant must be communicated to him within a reasonable time, be it poor, fair, average, good or very good, as non-communication may adversely affect the employees in two ways: (1) had the entry been communicated he would have known the assessment of his work and conduct by superiors enabling him to improve; and (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 arbitrariness violates Article 14 of the Constitution of India, as held by the Constitution Bench in ***Maneka Gandhi v. Union of India and Another, (1978) 1 SCC 248***. Relevant paras of the judgment in ***Dev Dutt (supra)*** are as follows:-

“11. Learned counsel for the respondent submitted that under Office Memorandum No. 21011/4/87 [Estt. ‘A’] issued by the Ministry of Personnel/Public Grievance and Pensions dated 10/11-9-1987, only an adverse entry is to be communicated to the employee concerned. It is well settled that no rule or government instruction can violate Article 14 or any other provision of the Constitution, as the Constitution is the highest law of the land. The aforesaid office memorandum, if it is interpreted to mean that only adverse entries are to be communicated to the employee concerned and not other entries, would in our opinion become arbitrary and hence illegal, being violative of Article 14. All similar rules/government orders/office memoranda, in respect of all services under the State, whether civil, judicial, police, or other service (except the military), will hence also be illegal and are therefore liable to be ignored.

12. It has been held in Maneka Gandhi v. Union of India [(1978) 1 SCC 248 : AIR 1978 SC 597] that arbitrariness violates Article 14 of the Constitution. In our opinion, the non-communication of an entry in the ACR of a public servant is arbitrary because it deprives the employee concerned from making a representation against it and praying for its upgradation. In our opinion, every entry in the annual confidential report of every employee under the State, whether he is in civil, judicial, police or other service (except the military) must be communicated to him, so as to enable him to make a representation against it, because non-communication deprives the employee of the opportunity of making a representation against it which may affect



his chances of being promoted (or get some other benefits). Moreover, the object of writing the confidential report and making entries in them is to give an opportunity to a public servant to improve his performance, vide *State of U.P. v. Yamuna Shanker Misra* [(1997) 4 SCC 7 : 1997 SCC (L&S) 903] . Hence such non-communication is, in our opinion, arbitrary and hence violative of Article 14 of the Constitution.

13. 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 benchmark or not. Even if there is no benchmark, 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.

14. In most services there is a gradation of entries, which is usually as follows:

- (i) Outstanding
- (ii) Very Good
- (iii) Good
- (iv) Average
- (v) Fair
- (vi) Poor

A person getting any of the entries at Items (ii) to (vi) should be communicated the entry so that he has an opportunity of making a representation praying for its upgradation, and such a representation must be decided fairly and within a reasonable period by the authority concerned.

15. If we hold that only "poor" entry is to be communicated, the consequences may be that persons getting "fair", "average", "good" or "very good" entries will not be able to represent for its upgradation, and this may subsequently adversely affect their chances of promotion (or get some other benefit).

16. In our opinion if the office memorandum dated 10/11-9-1987, is interpreted to mean that only adverse entries (i.e. "poor" entry) need to be communicated and not "fair", "average" or "good" entries, it would become arbitrary (and hence illegal) since it may adversely affect the incumbent's chances of promotion, or to get some other benefit. For example, if the benchmark is that an incumbent must have "very good" entries in the last five years, then if he has "very good" (or even "outstanding") entries for four years,



a “good” entry for only one year may yet make him ineligible for promotion. This “good” entry may be due to the personal pique of his superior, or because the superior asked him to do something wrong which the incumbent refused, or because the incumbent refused to do sycophancy of his superior, or because of caste or communal prejudice, or to for some other extraneous consideration.

17. In our opinion, every entry in the ACR 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 v. Union of India* [(1978) 1 SCC 248 : AIR 1978 SC 597] that arbitrariness violates Article 14 of the Constitution.

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

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21. Learned counsel for the respondent also relied upon the decision of this Court in *Union of India v. S.K. Goel* [(2007) 14 SCC 641 : AIR 2007 SC 1199] and on the strength of the same submitted that only an adverse entry need be communicated to the incumbent. The aforesaid decision is a two-Judge Bench decision and hence cannot prevail over the seven-Judge Constitution Bench decision of this Court in *Maneka Gandhi v. Union of India* [(1978) 1 SCC 248 : AIR 1978 SC 597] in which it has been held that arbitrariness violates Article 14 of the Constitution. Since the aforesaid decision in *Union of India v. S.K. Goel* [(2007) 14 SCC 641 : AIR 2007 SC 1199] has not considered the aforesaid Constitution Bench decision in *Maneka Gandhi* case [(1978) 1 SCC 248 : AIR 1978 SC 597], it cannot be said to have laid down the correct law. Moreover, this decision also cannot be treated as a Euclid's formula since there is no detailed discussion in it about the adverse consequences of non-communication of the entry, and the consequential denial of making a representation against it.

22. It may be mentioned that communication of entries and giving opportunity to represent against them is particularly



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

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26. *In our opinion, our natural sense of what is right and wrong tells us that it was wrong on the part of the respondent in not communicating the “good” entry to the appellant since he was thereby deprived of the right to make a representation against it, which if allowed would have entitled him to be considered for promotion to the post of Superintending Engineer. One may not have the right to promotion, but one has the right to be considered for promotion, and this right of the appellant was violated in the present case.*

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37. *We further hold that when the entry is communicated to him the public servant should have a right to make a representation against the entry to the authority concerned, and the authority concerned must decide the representation in a fair manner and within a reasonable period. We also hold that the representation must be decided by an authority higher than the one who gave the entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar to Caesar. All this would be conducive to fairness and transparency in public administration, and would result in fairness to public servants. The State must be a model employer, and must act fairly towards its employees. Only then would good governance be possible.*

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44. *We, therefore, direct that the “good” entry be communicated to the appellant within a period of two months from the date of receipt of the copy of this judgment. On being communicated, the appellant may make the representation, if he so chooses, against the said entry within two months thereafter and the said representation will be decided within two months thereafter. If his entry is upgraded the appellant shall be considered for promotion retrospectively by the Departmental Promotion Committee (DPC) within three months thereafter and if the appellant gets selected for promotion retrospectively, he should be given higher pension with arrears of pay and interest @ 8% per annum till the date of payment.”*



27. In ***Sukhdev Singh (supra)***, a three-Judge Bench of the Supreme Court affirmed the view taken in ***Dev Dutt (supra)*** and held as follows:-

“8. In our opinion, the view taken in *Dev Dutt* [*Dev Dutt v. Union of India*, (2008) 8 SCC 725 : (2008) 2 SCC (L&S) 771] 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.”

28. In ***Rukhsana Shaheen Khan v. Union of India and Others***, (2018) 18 SCC 640, the Supreme Court decided the sole issue involved in the appeal in favour of the Appellant that uncommunicated and adverse ACRs cannot be relied upon for the purpose of consideration for promotion. Earlier in ***Prabhu Dayal Khandelwal (supra)***, the Supreme Court once again re-affirmed and reiterated that uncommunicated ACRs wherein the Appellant was assessed as ‘Good’ could not be taken for consideration for promotion. In the said case, claim of the Appellant was for consideration to the post of Chief Commissioner of Income Tax and the benchmark was ‘Very Good’. Appellant raised a challenge on being declared as unfit for promotion before the Central Administrative Tribunal, Calcutta Bench on the ground that uncommunicated ACRs could not be taken into consideration to defeat his claim for promotion. A pointed



contention of the Respondent was that the three ACRs which were not communicated were 'Good' and were not required to be communicated. The Tribunal allowed the application and directed review DPC. The order was assailed by Union of India and UPSC before the High Court which set aside the order of the Tribunal. In appeal, the Supreme Court relying on the judgments in *Dev Dutt (supra)* and *Sukhdev Singh (supra)* held that the impugned order passed by the High Court deserved to be set aside inasmuch as claim of the Appellant could not be ignored by taking into consideration uncommunicated ACRs for the relevant period wherein he was assessed as 'Good'. In the absence of the 'Good' entries, the remaining entries were 'Very Good' and he would be entitled to be considered fit for promotion.

29. In *Union of India and Others v. G.R. Meghwal, 2022 SCC OnLine SC 1291*, the Supreme Court upheld the orders of the High Court and the Tribunal directing review of the DPC which had considered an ACR which had been downgraded to 'Good' for the year 2007-2008 from the earlier ACRs of the years 2005-2006 and 2006-2007 where the gradings were 'Very Good'. Relevant para is as follows:-

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



ACR for the year 2007-2008. Therefore, in the facts and circumstances of the case, no interference of this Court is called for.”

30. It would be profitable to refer to a very recent judgment of the Supreme Court on this very proposition in the case of ***R.K. Jibanlata Devi v. High Court of Manipur through its Registrar General and Others, 2023 SCC OnLine SC 178***, wherein a challenge was laid to a DPC dated 09.04.2021 denying promotion to the Petitioner to the post of Assistant Registrar in the High Court of Manipur as also a direction to hold a fresh DPC. The challenge was primarily predicated on non-communication of an ACR for the year 2016-2017 having ‘Good’ grading as also an ACR for 2019-2020 which was communicated a day before the DPC and had a ‘Good’ grading. Both these ACRs were claimed to be adverse on the ground that the gradings were downgraded from the earlier ‘Very Good’ ACRs of the Petitioner. The Supreme Court noted that ACR carried weightage of 80 marks in the scheme of selection and for the post of Assistant Registrar, ACRs of preceding four years from the date of DPC were to be taken into consideration, which included the downgraded ACRs. Relying on the aforementioned judgments of the Supreme Court in ***Rukhsana Shaheen Khan (supra)***, ***Sukhdev Singh (supra)*** and ***Dev Dutt (supra)***, the Supreme Court held as follows:-

“19. It is not in dispute and cannot be disputed that for the post of promotion to the Assistant Registrar the ACRs of preceding four years from the date of DPC were required to be taken into consideration. Therefore, in the present case the ACRs for the period between 2016-2017 to 2019-2020 were required to be taken into consideration and in fact taken into consideration. As observed hereinabove out of 100 marks ACR weightage was of 80 marks.

20. In the present case the petitioner got “Good” gradings for the year 2016-17 and received “Very Good” gradings in her ACRs for the years 2017-18 and 2018-2019. It was the specific case on



behalf of the petitioner which has not been denied that the ACRs grading of "Good" for the year 2016-17 was never communicated to the petitioner even till the DPC met. Therefore, as per the law laid down by this Court in catena of decisions more particularly, as observed and held by this Court in Rukhsana Shaheen Khan (supra); Sukhdev Singh (supra) and Dev Dutt v. Union of India, (2008) 8 SCC 725 uncommunicated adverse ACRs may be even with "Good" entry which can be said to be adverse in the context of eligibility for promotion is not to be relied upon for consideration of promotion.

21. *Therefore, uncommunicated ACR for the year 2016-17 having the grading "Good" could not have been relied upon for consideration for promotion.*

22. *Similarly so far as the ACR gradings for the year 2019-2020 is concerned, admittedly the same was communicated to the petitioner on 08.04.2021, just one day before the DPC met on 09.04.2021. The petitioner was having 15 days' time to make the representation against the ACR grading for the year 2019-2020. Before the 15 days were over, the DPC met on 09.04.2021 and considered the case of the petitioner for promotion. The submission on behalf of the High Court that the other candidates who were also communicated the ACRs for the year 2019-2020 on 08.04.2021 submitted their representations on 09.04.2021 and therefore the petitioner also could have submitted the representation on 09.04.2021 like other candidates is concerned, it is neither here nor there. The fact remains that the petitioner was having 15 days' time from 08.04.2021 to make a representation. Therefore, either the DPC could have been postponed or the ACR for the year 2019-2020 ought not to have been considered and the same ought to have been treated as uncommunicated ACR.*

23. *The sum and substance of the aforesaid discussion would be that as the ACR Grading of "Good" for the year 2016-17 was not communicated till the DPC met, the same is to be ignored and/or be not relied upon for consideration of promotion. Similarly, the grading for the year 2019-2020 also is to be excluded and/or be not relied upon for consideration for promotion as the same was communicated on 08.04.2021 and the petitioner was granted 15 days' time to make representation and before the representation could be made the DPC met on 09.04.2021 and considered the case of the petitioner for promotion.*

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26. *In view of the above and for the reasons stated above, the case of the petitioner for promotion to the post of Assistant Registrar as on 09.04.2021 is required to be considered afresh ignoring the uncommunicated ACRs for the years 2016-17 and 2019-20 and her case is required to be considered afresh taking into consideration*



the ACRs for the years 2017-18 & 2018-19 for which the petitioner was having "Very Good" gradings.

27. In view of the above and for the reasons stated above, present petition is allowed. The DPC proceedings dated 09.04.2021 denying the promotion to the petitioner for the post of Assistant Registrar are hereby quashed and set aside. The case of the petitioner for promotion to the post of Assistant Registrar as on 09.04.2021 i.e., the date on which the juniors came to be promoted is directed to be considered afresh ignoring the uncommunicated ACRs for the years 2016-17 and 2019-20 and thereafter the DPC/competent authority to take a fresh decision in accordance with law and taking into consideration the ACRs of remaining years, i.e., 2017-18 and 2018-19. Such an exercise be completed within a period of six weeks from today."

31. Therefore, a clear position of law emerges from the aforesaid judgments that uncommunicated ACRs cannot be taken into consideration by a DPC. It is significant to note that in ***Dev Dutt (supra)***, one of the major contentions of the Respondent was that it is only an adverse entry which is required to be communicated to the employee concerned. The Supreme Court negated this contention by holding that a direction to communicate only adverse entries would be arbitrary and violate Article 14 of the Constitution of India and if it was to be held that only 'Poor' entry is to be communicated, the consequence may be that persons getting 'Fair', 'Average', 'Good' or 'Very Good' will not be able to represent for upgradation and this may at some stage affect their chance of promotion. It was therefore ruled by the Supreme Court that 'every entry in the ACR' must be communicated, be it 'Poor', 'Fair', 'Average', 'Good' or 'Very Good'. Another important observation of the Supreme Court in the present context is that even if there is no benchmark, non-communication of an entry may adversely affect the employee's chance of promotion because when comparative merit is being



considered, a person having 'Good' or 'Average' or 'Fair' entry will have less chance of being selected than a person having 'Very Good' or 'Outstanding' entry.

32. In view of these observations of the Supreme Court affirmed and re-affirmed in several judgments, it is not open to the School to even contend that there is no requirement of communicating the ACRs of the teachers, on the ground that on a day-to-day interaction, almost all issues pertaining to the teachers are known to them. A somewhat strange argument was made that communicating the ACRs would create an unpleasant environment in the School between the Reporting/Reviewing Officers on one hand and the Teachers/employees on the other, leading to trouble between them, if the downgraded ACRs are made known to the teacher. This Court fails to appreciate this kind of an argument in light of the wealth of judicial precedents mandating communication of ACRs.

33. It was also sought to be urged that because the School is a private un-aided institution with autonomy to act in matters of promotion, the law on communication of ACRs is not binding on the School. The law declared by the Supreme Court is a binding dictum and there is nothing in the judgments referred to above which carves out any exception in favour of a private un-aided school and none has been shown by the counsel for the School. In fact on the contrary both sides have relied on the judgment of this Court in *Kalpana Mehdiratta (supra)*, where the Respondent was a school and one of the issues before the Court was non-communication of ACR of the Petitioner who was also seeking promotion to the post of Principal in the School. The Court held that it is trite that a non-communicated



ACR cannot be taken into account by a DPC to the prejudice of the concerned officer. This Court therefore cannot agree with the contention of the School that there is no requirement of communicating an ACR which has an 'Average' grading and/or that since there is no benchmark, any 'Average' grading ACR cannot be termed as below benchmark grading requiring communication.

34. It is true that there is no benchmark for promotion to the post of Principal, however, it is equally true and undisputed that ACRs for the last five years prior to the date of DPC were taken into account as one of the factors for comparative assessment by the DPC. ACRs have thus played a vital and important role in the relative merits of the five senior-most PGTs and it would not be wrong to conclude the ACRs were one of the crucial factors which gave an edge to Respondent No. 4 and the 'Average' ACRs of the Petitioners contributed to their non-selection. In view of the clear observation of the Supreme Court in *Dev Dutt (supra)*, that even in the absence of a benchmark for promotion, ACRs are required to be communicated; School cannot defend the non-communication of 'Average' ACRs to the Petitioners and/or their consideration by the DPC.

35. Heavy reliance was placed by the learned counsel for the School on the judgment of the Division Bench of this Court in *Ram Nath v. Union of India & Ors., 2016 SCC OnLine Del 3252* in which reliance was placed on the judgement of the Supreme Court in *S.K. Goel and Others (supra)*, and it was held that DPC is entitled to make an overall assessment of the relevant ACRs and has to be given a certain amount of play in the joints and need not be guided by the overall grading recorded in the confidential reports. It was also held



that DPC must make its own assessment on the basis of entries in the ACRs. If the DPC proceeds fairly and in a reasonable manner by applying same standards and norms to all candidates, Courts would not interfere for there is no arbitrariness. There cannot be any quarrel with the proposition that DPC has the autonomy to devise its own procedure and/or to make an overall assessment guided by the recordings in the confidential report. However, this judgment does not aid the School as the Court has not even remotely held that adverse ACRs are not to be communicated to the concerned employee. While considering the 5 PGTs for promotion, DPC no doubt enjoyed full discretion to assess their suitability and merits, however, the illegality was in considering the non-communicated 'Average' ACRs.

36. Learned counsel for the School also urged that there is no pleading in the writ petition pertaining to non-communication of ACR and thus it is not open to the Petitioners to raise this ground for their non-promotion. It is true that this ground is not pleaded in the writ petition and the reason is not far to seek. It is an admitted position that the 'Average' ACRs were never communicated to the Petitioners and they had no knowledge until the records were produced during the course of hearing. In the absence of communication, there could be no pleadings on this score. I may however pen down that after seeing the ACRs, Court had given both sides ample opportunity to address argument on this issue. Both the Counsels made oral submissions with judgments on the issue and also filed a written note of arguments with judgments appended thereto. Therefore, no objection can be raised by the School for lack of pleadings on this count.



37. It thus transpires that neither were the Petitioners afforded an opportunity to represent against any tentative seniority list nor against the adverse 'Average' ACRs despite the law being well settled on both the issues and have consequently suffered the result of losing out on promotion to the post of Principal. Therefore, following the law declared by the Supreme Court, it is imperative to direct the School to permit the Petitioners to represent against the seniority list and communicate all the five ACRs to the Petitioners which were in reckoning before the DPC.

38. Accordingly, School is directed to circulate the seniority list of PGTs and invite objections. It is left open to the Petitioners to file objections/representations after the tentative seniority list is circulated. If representations are received by the School against the draft seniority list, the same shall be considered in accordance with law and the provisions of Rules, 1973 as well as the Manual relied upon by the Petitioners, subject to its applicability. After taking a decision on the representations, a final seniority list shall be published by the School. The entire exercise shall be completed within 2 months from today.

39. School is further directed to communicate the ACRs for the period 2015-2016 to 2019-2020 to the Petitioners, within three weeks from today. It is open to the Petitioners to prefer representations against the ACRs within two weeks of receipt of the ACRs. School shall thereafter take a considered decision in accordance with law on the representations, if any and needless to state, if there is upgradation in the ACR(s) of the Petitioners, a review DPC shall be convened by the School to consider the case of the Petitioners for promotion to the post of Principal along with the other senior-most PGTs, after



finalisation of the seniority list and depending on the zone of consideration. It is made clear that Respondent No. 4 shall continue to function as Principal *albeit* on re-employment basis in the interest of the administration of the School as well as students and her continuance will be subject to the outcome of the review DPC, if any. In case any of the Petitioners is recommended by the DPC, promotion order shall follow along with all consequential benefits.

40. Writ petition is allowed and disposed of with the aforesaid directions.

41. Pending application also stands disposed of.

MAY 30, 2023/shivam

JYOTI SINGH, J

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