



2024:DHC:7089



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

% *Date of Decision: 27<sup>th</sup> August, 2024*

+ W.P.(C) 12633/2018

AJAY KUMAR SINHA .....Petitioner

Through: Mr. Anuj Aggarwal, Ms. Divya Aggarwal, Mr. Siddharth Nair and Mr. Pradeep Kumar, Advocates.

versus

INDRAPRASTHA POWER GENERATION COMPANY  
LIMITED & PRAGATI POWER CORPORATION LIMITED  
& ANR .....Respondents

Through: Mr. R.K. Vats and Ms. Kumari Alka,  
Advocates.

+ W.P.(C) 13300/2018

YAMUNA PRASAD .....Petitioner

Through: Mr. Anuj Aggarwal, Ms. Divya Aggarwal, Mr. Siddharth Nair and Mr. Pradeep Kumar, Advocates.

versus

INDRAPRASTHA POWER GENERATION COMPANY  
LIMITED & PRAGATI POWER CORPORATION LIMITED  
& ANR .....Respondents

Through: Mr. R.K. Vats and Ms. Kumari Alka,  
Advocates.

+ W.P.(C) 13261/2018

V.P. SINGH .....Petitioner

Through: Mr. Anuj Aggarwal, Ms. Divya



2024:DHC:7089



Aggarwal, Mr. Siddharth Nair and Mr. Pradeep  
Kumar, Advocates.

versus

INDRAPRASTHA POWER GENERATION COMPANY  
LIMITED & PRAGATI POWER CORPORATION LIMITED  
& ANR

.....Respondents

Through: Mr. R.K. Vats and Ms. Kumari Alka,  
Advocates.

+ W.P.(C) 13277/2018

GOPAL SINGH

.....Petitioner

Through: Mr. Anuj Aggarwal, Ms. Divya  
Aggarwal, Mr. Siddharth Nair and Mr. Pradeep  
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Through: Mr. R.K. Vats and Ms. Kumari Alka,  
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**CORAM:  
HON'BLE MS. JUSTICE JYOTI SINGH**

### **JUDGMENT**

#### **JYOTI SINGH, J. (ORAL)**

1. These writ petitions have been filed by the Petitioners under Article 226 of the Constitution of India seeking promotions from the date their immediate juniors were promoted with consequential restoration of seniority on upgradation of their respective Annual Confidential Reports ('ACRs').



As a common question of law arises in these writ petitions, they were heard together and are being decided by this common judgment.

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2. Indraprastha Power Generation Company Ltd. ('IPGCL') was incorporated on 01.07.2002 and it took over power generation activities from erstwhile DVB w.e.f. 01.07.2002 after its unbundling into six successor companies.

3. Petitioner was appointed as Assistant Manager (Technical) on 21.09.2004 by IPGCL after clearing the All-India Recruitment Examination conducted by National Thermal Power Corporation ('NTPC'). On 15.02.2012, the Board of Directors of IPGCL and Pragati Power Corporation Limited ('PPCL') in their meeting passed Resolution Nos.56.4.1 and 59.4.1 laying down the criteria for promotion to the post of Deputy Manager (Technical) from Assistant Manager (Technical), as per which Assistant Manager (Technical) completing 4/5 years of regular service was eligible for promotion to the post of Deputy Manager (Technical). In the seniority list of Assistant Manager (Technical) published by IPGCL vide Office Order dated 30.08.2012, Petitioner was placed at Serial No.63.

4. On 12.09.2012, impugned Office Order was issued by IPGCL whereby several Assistant Managers (Technical) were promoted to the post of Deputy Managers (Technical) on completion of four years of service. Petitioner had joined IPGCL on 21.09.2004 and was eligible for promotion w.e.f. 21.09.2008. However, he was promoted w.e.f. 21.09.2009, thereby leading to loss of one year in seniority and consequential benefits.



5. Aggrieved by this, Petitioner gave a representation dated 13.10.2012 to General Manager (HR), followed by a reminder dated 07.12.2012 seeking rectification of his promotion order to the extent of granting him promotion from 21.09.2008. In response to an application under the Right to Information Act, 2005 ('RTI Act'), Petitioner was informed on 14.12.2012 that his ACR for the period 21.09.2004 to 31.03.2005 was graded 'Average' and for this reason he was declared UNFIT in the initial consideration but with the addition of one more ACR, he was promoted w.e.f. 21.09.2009 for the successive year. It is averred that this ACR was never communicated to the Petitioner and ought not to have been in the reckoning for promotion by the DPC. On 17.12.2012, Petitioner represented for upgradation of his ACR. After approval from the Board of Directors, the matter pertaining to upgradation of the said ACR of the Petitioner was taken up by the Moderation Committee on 03.03.2014 and it was later learnt by the Petitioner that the ACR had been upgraded.

6. In the Provisional Combined Seniority List of Deputy Managers (Technical) circulated on 16.04.2015, juniors of the Petitioner were shown as senior to him on account of his promotion taking effect from 21.09.2009. Petitioner again represented against the loss of seniority and also sought information on his ACR as till date he had no information about the decision of the Moderation Committee.

7. By a letter dated 04.08.2015, Petitioner was informed that his final grading in the ACR for the period 21.09.2004 to 31.03.2005 had been upgraded to 'Good', but despite this the promotion was not given effect to from 21.09.2008 at par with his juniors resulting in loss of seniority and



aggrieved by this, Petitioner filed the present petition.

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8. Petitioner was appointed as Inspector (Elect.) on 06.06.1991 with erstwhile DESU and thereafter on unbundling of DVB, he was appointed with IPGCL and promoted from the post of JE to the post of Assistant Manager (Technical) on 28.07.2006. On 15.02.2012, the Board of Directors of IPGCL and PPCL in their meeting passed Resolution Nos.56.4.1 and 59.4.1 laying down the criteria for promotion to the post of Deputy Manager (Technical) from Assistant Manager (Technical), as per which Assistant Manager (Technical) completing 4/5 years of regular service was eligible for promotion to the post of Deputy Manager (Technical). In the seniority list of Assistant Manager (Technical) published by IPGCL vide Office Order dated 30.08.2012, Petitioner was placed at Serial No.77 and Rajesh Kumar, Manoj Kumar Garg, Pramanand Pradhan, etc. were shown juniors to him.

9. On 12.09.2012, impugned Office Order was issued by IPGCL whereby several Assistant Managers (Technical) were promoted to the post of Deputy Managers (Technical) on completion of four years of service. Petitioner was promoted as Assistant Manager (Technical) w.e.f. 28.07.2006 and was, therefore, eligible for promotion as Deputy Manager (Technical) w.e.f. 28.07.2010. However, he was promoted w.e.f. 28.07.2012 instead of 28.07.2010, thereby leading to loss of two years in seniority and consequential benefits.

10. Petitioner was informed on 02.05.2014 that his ACRs for the periods 2009-10 and 2010-11 were 'Average' and for this reason he was declared UNFIT in the initial consideration but with the addition of next ACR for the



period 2011-12, he was declared FIT and promoted w.e.f. 28.07.2012. It is averred that these ACRs were never communicated to the Petitioner and ought not to have been in the reckoning for promotion by the DPC. On 08.05.2014, Petitioner represented to General Manager (HR) for upgradation of his ACRs followed by reminders. In response to information sought under RTI Act, Petitioner was informed vide letter dated 28.03.2016 that his ACRs had been upgraded to 'Good'.

11. All four Petitioners herein filed writ petitions being W.P. (C) Nos.2997/2016, 4072/2016, 4649/2016 and 7270/2016, which were disposed of on 16.04.2018 recording the contentions of the respective parties with a direction to decide the representations of the Petitioners for ante-dating their promotions as per law, in light of the decision of the Division Bench of this Court in *SI/Ex. Rajeev Teotia v. Union of India & Ors., 2014 SCC OnLine Del 2360*, wherein it was held that upon review of ACRs, case of the employee has to be considered by review DPC retrospectively. In light of this decision, impugned orders were passed by IPGCL, rejecting their claims for ante-dating the promotions.

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12. Petitioner was appointed as Technical (Helper) in February, 1988 with erstwhile DESU and promoted as Operator in 1989 and thereafter on unbundling of DVB, he was appointed with IPGCL and promoted to the post of Assistant Manager (Technical) on 14.11.2003 from the post of Assistant Controller. On 15.02.2012, the Board of Directors of IPGCL and PPCL in their meeting passed Resolution Nos.56.4.1 and 59.4.1 laying down criteria for promotion to the post of Deputy Manager (Technical) from Assistant



Manager (Technical), as per which Assistant Manager (Technical) completing 4/5 years of regular service was eligible for promotion to the post of Deputy Manager (Technical). In the seniority list of Assistant Manager (Technical) published by IPGCL vide Office Order dated 30.08.2012, Petitioner was placed at Serial No.29.

13. On 12.09.2012, impugned Office Order was issued by IPGCL whereby several Assistant Managers (Technical) were promoted to the post of Deputy Managers (Technical) on completion of four years of service. Petitioner was promoted as Assistant Manager (Technical) w.e.f. 14.11.2003 and was, therefore, eligible for promotion as Deputy Manager (Technical) w.e.f. 14.11.2007. However, he was promoted w.e.f. 14.11.2008 instead of 14.11.2007, thereby leading to loss of one year in seniority and consequential benefits.

14. Petitioner represented against his delayed promotion. He was informed on 28.03.2016 that his ACR for the period 17.11.2003 to 31.03.2004, which was earlier graded as 'Average' and was the reason for his non-promotion from 14.11.2007, was upgraded to 'Good'. Pursuant to an order of this Court passed on 16.04.2018, Petitioner's representation was considered for ante-dating the promotion but was rejected by the impugned order dated 24.07.2018.

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15. Petitioner was appointed as Technical (Operator) on 14.03.1990 with erstwhile DESU and was subsequently promoted as Operator and Assistant Controller. On coming to IPGCL, Petitioner was promoted as Assistant Manager (Technical) on 18.10.2006. On 15.02.2012, the Board of Directors



of IPGCL and PPCL in their meeting passed Resolution Nos.56.4.1 and 59.4.1 laying down criteria for promotion to the post of Deputy Manager (Technical) from Assistant Manager (Technical), as per which Assistant Manager (Technical) completing 4/5 years of regular service was eligible for promotion to the post of Deputy Manager (Technical). In the seniority list of Assistant Manager (Technical) published by IPGCL vide Office Order dated 30.08.2012, Petitioner was placed at Serial No.92.

16. On 12.09.2012, impugned Office Order was issued by IPGCL whereby several Assistant Managers (Technical) were promoted to the post of Deputy Managers (Technical) on completion of four years of service. Petitioner was promoted as Assistant Manager (Technical) w.e.f. 18.10.2006 and was, therefore, eligible for promotion as Deputy Manager (Technical) w.e.f. 18.10.2010. However, he was promoted w.e.f. 18.10.2012 instead of 18.10.2010, leading to loss of two years in seniority and consequential benefits.

17. Petitioner represented against his delayed promotion. He was informed on 17.09.2013 that his ACRs for the periods 2006-07, 2007-08, 2008-09 and 2009-10, which were earlier graded as 'Average' and was the reason for his non-promotion from 18.10.2010, were upgraded to 'Good'. Pursuant to an order of this Court passed on 16.04.2018, Petitioner's representation was considered for ante-dating the promotion but was rejected by the impugned order dated 24.07.2018.

### **COMMON FACTS**

18. On 15.02.2012, the Board of Directors of IPGCL/PPCL vide Resolution Nos.56.4.1 and 59.4.1 laid down the criteria for promotion to the





post of Deputy Manager (Technical) whereby an Assistant Manager (Technical) with 4/5 years of regular service was eligible for promotion and the assessment criteria was based on weightage of marks under different Heads, as follows:-

S. No.	Subject/particulars	Maximum marks
1.	Qualification	15
2.	Experience in Grade Service	20
3.	PAR Assessment	45
	Total	80

19. On 08.08.2012, DPC was convened by IPGCL, in which 100 eligible Assistant Managers (Technical) were considered and 86 were found FIT for promotion on notional basis. 11 Assistant Managers (Technical) including the Petitioners were not able to cross the threshold of minimum 60 marks required for promotion due to less scores under the Head 'PAR Assessment' and this was on account of 'Average' gradings in some of their ACRs in the reckoning before the DPC. In the same DPC, these Officers were also considered under the extended assessment criteria for the succeeding year(s), in which ACR(s) for subsequent years were taken and they were then declared FIT and promoted from prospective dates, but lost out on seniority qua their juniors.

20. The Supreme Court pronounced the judgment in *Dev Dutt v. Union of India and Others*, (2008) 8 SCC 725, wherein it was held that non-



communication of entries in ACRs has a civil consequence as it affects the chances of promotion of an employee and therefore, not only the ACRs which are below benchmark but all entries even if 'Good' or 'Very Good' must be communicated. In implementation of the judgment, DoPT issued O.M. dated 14.05.2009 with respect to maintenance and preparations of Annual Performance Appraisal Reports ('APARs') and communication of all entries in the APARs. This DoPT O.M. was adopted by IPGCL vide Resolution dated 20.09.2013 with the approval of the Board of Directors. Pursuant thereto, Moderation Committee was constituted and acting under the mandate of Board's decision, it reviewed the ACRs of the Petitioners and upgraded them to 'Good' in August, 2015, however, their representations for consequential benefits of ante-dating the promotions and restoration of seniority were rejected on the ground that opening past cases will open a Pandora box inviting more representations from other employees and moreover, IPGCL was not bound by DoPT O.M. 14.05.2009 and shall consider the upgraded ACRs only in future DPCs.

### **COMMON CONTENTIONS ON BEHALF OF THE PETITIONERS**

21. Petitioners contend that DPC convened on 08.08.2012 initially considered 4/5 ACRs of the Petitioners which included uncommunicated ACRs with 'Average' gradings. The assessment criteria for promotion to the post of Deputy Manager (Technical) was based on weightage of marks allocated towards qualification, experience and PAR Assessment and out of a total of 80 marks, an eligible Assistant Manager (Technical) had to score minimum 60 marks to cross the threshold for promotion. 45 marks were allocated to PAR Assessment and since some of the ACRs of the Petitioners



in the reckoning had 'Average' gradings, their total marks out of 45 reduced compared to the others considered along with the Petitioners, resulting in their being declared UNFIT for the promotion. Realising that uncommunicated ACRs with 'Average' gradings ought not to have been taken into consideration by the DPC, IPGCL upgraded the 'Average' ACRs to 'Good' but did not hold a review DPC to give effect to the upgradation and as a result, Petitioners became juniors to juniors who were declared FIT in the initial consideration. IPGCL has therefore clearly erred and Petitioners deserve to be considered by review DPC with upgraded ACRs and their seniority ought to be restored.

22. Respondents were under an obligation to communicate the ACRs with 'Average' gradings knowing well that PAR Assessment had weightage of 45 marks out of total of 80 marks and the low scores towards ACRs would adversely affect the promotions of the Petitioners *albeit* the law is no longer *res integra* that not only below benchmark but all ACRs/APARs are required to be communicated and in this context, reliance is placed on the judgment of the Supreme Court in *Dev Dutt (supra)*.

23. Even after the law was declared by the Supreme Court in *Dev Dutt (supra)* and DoPT issued an O.M. on 14.05.2009 in compliance thereof, Respondents waited till 2013 to implement the directions of the Supreme Court and it was only on 20.09.2013 that the Board of Directors resolved to adopt the DoPT O.M. dated 14.05.2009 and thereafter constituted a Moderation Committee to consider the representations pertaining to ACRs including those for the period prior to 2008-09 (only of reckonable periods) and consequent thereto, upgraded the ACRs of the Petitioners but even then



failed to convene review DPCs to give effect to upgradations. Law is settled that if ACRs are upgraded, review DPCs have to be convened with consequential benefits and in this context, reliance is placed on *Prabhu Dayal Khandelwal v. Chairman, Union Public Service Commission and Others*, (2015) 14 SCC 427; *UOI v. Krishna Mohan Dixit*, 2010 SCC OnLine Del 3589; *S.D. Dobhal v. UOI & Ors.*, 2014 SCC OnLine Del 1900; and *Rajeev Teotia (supra)*. It is wrong for the Respondents to contend that DoPT O.Ms. are not binding on them and they can adopt them at their discretion. This contention was negated by this Court in the case of *Sh. Jitender Kumar v. Indraprastha Power Generation Co. Ltd. & Ors.*, 2017 SCC OnLine Del 6903.

#### **COMMON CONTENTIONS ON BEHALF OF THE RESPONDENTS**

24. It cannot be disputed that the Supreme Court has declared the law in *Dev Dutt (supra)* that all ACRs irrespective of the grading being 'Poor', 'Fair', 'Average', 'Good' or 'Very Good', must be communicated to the employee including an 'Outstanding' grading. However, DoPT O.Ms. are not automatically applicable to IPGCL and do not bind unless and until they are specifically adopted by the Board of Directors by a resolution. Hence, DoPT O.M. dated 14.05.2009, the benefit of which is sought by the Petitioners, was not automatically applicable when it was issued. The O.M. was adopted by the Board of Directors in the Resolution passed on 20.09.2013, after which Moderation Committee was constituted which considered the ACRs of the employees including the Petitioners for reckonable periods and wherever the ratings were adverse i.e. 'Average' or 'Below Average', they were upgraded. It is not open to the Petitioners to



seek a retrospective application of this resolution and/or ante-dating of their promotions. When the DPC was held on 08.08.2012, in the first consideration, Petitioners had 'Average' ACRs in their reckonable profile but there was no provision for communication of the said ACRs and/or their upgradation and thus they were rightly declared UNFIT as they failed to cross the threshold of minimum 60 marks out of a total of 80. Accepting the contention of the Petitioners would result in representations being received from hundreds of employees and open a pandora box leading to administrative chaos as well as unsettling settled seniorities. Keeping this in the backdrop, it was decided that wherever pre-2008-09 ACRs were upgraded, they would be considered only in future DPCs.

### **ANALYSIS AND FINDINGS**

25. Insofar as the law on communication of ACRs/APARs is concerned, it is no longer *res integra* that all ACRs irrespective of the gradings including those which are 'Very Good'/'Outstanding' have to be communicated and non-communication is contrary to Article 14 of the Constitution of India and opposed to principles of fairness, transparency and equal opportunity in matters of promotions. In this context, I may allude to a few passages from the landmark and celebrated judgment of the Supreme Court in *Dev Dutt (supra)* as under:-

*"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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*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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*36. 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.*

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*41. 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.*

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*43. 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 1993-1994 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.”*

**26. In *Sukhdev Singh v. Union of India and Others*, (2013) 9 SCC 566,**





the Supreme Court reiterated the principles elucidated in *Dev Dutt (supra)* and the following passages need to be highlighted:-

“6. We are in complete agreement with the view in *Dev Dutt* [*Dev Dutt v. Union of India*, (2008) 8 SCC 725 : (2008) 2 SCC (L&S) 771] particularly paras 17, 18, 22, 37 and 41 as quoted above. We approve the same.

7. A three-Judge Bench of this Court in *Abhijit Ghosh Dastidar v. Union of India* [(2009) 16 SCC 146 : (2010) 1 SCC (L&S) 959] followed *Dev Dutt* [*Dev Dutt v. Union of India*, (2008) 8 SCC 725 : (2008) 2 SCC (L&S) 771]. In para 8 of the Report this Court with reference to the case under consideration held as under: (*Abhijit Ghosh Dastidar case* [(2009) 16 SCC 146 : (2010) 1 SCC (L&S) 959], SCC p. 148)

“8. Coming to the second aspect, that though the benchmark ‘very good’ is required for being considered for promotion, admittedly the entry of ‘good’ was not communicated to the appellant. The entry of ‘good’ should have been communicated to him as he was having ‘very good’ in the previous year. In those circumstances, in our opinion, non-communication of entries in the ACR of a public servant whether he is in civil, judicial, police or any other service (other than the armed forces), it has civil consequences because it may affect his chances for promotion or getting other benefits. Hence, such non-communication would be arbitrary, and as such violative of Article 14 of the Constitution. The same view has been reiterated in the abovereferred decision (*Dev Dutt case* [*Dev Dutt v. Union of India*, (2008) 8 SCC 725 : (2008) 2 SCC (L&S) 771], SCC p. 738, para 41) relied on by the appellant. Therefore, the entries ‘good’ if at all granted to the appellant, the same should not have been taken into consideration for being considered for promotion to the higher grade. The respondent has no case that the appellant had ever been informed of the nature of the grading given to him.”

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.”*

27. A Division Bench of this Court in ***UOI & Anr. v. V.S. Arora & Ors., 2012 SCC OnLine Del 3193***, held as follows:-

*“13. Analyzing the above extracted portion from the said decision in Abhijit Ghosh Dastidar (supra), we find that the Supreme Court had affirmed the decision in Dev Dutt (supra), when it observed that - “the same view has been reiterated in the above referred decision relied upon by the appellant”. The above referred decision related to Dev Dutt (supra). The principle that was culled out by Abhijit Ghosh Dastidar (supra) from the decision in Dev Dutt (supra) was that non-communication of an ACR would be arbitrary and would be violative of Article 14 of the Constitution. The reasons for this were that the non-communication of an entry of an ACR of a public servant has civil consequences because it could affect his chances for promotion or to receive any other benefits.*

*14. However, the Supreme Court in Abhijit Ghosh Dastidar (supra) went further and observed categorically that, therefore, the entries “good”, if at all granted to the appellant, ought not to have been taken into consideration for being considered for promotion to the higher grade. What this meant was that the below benchmark ACRs, which had not been communicated to an employee, ought not to be taken into consideration for the purposes of considering the promotion of that employee to a higher grade. We must also distinguish between the stage when ACRs are written and the stage when they are considered by the DPC. What Dev Dutt (supra) and, indeed, Abhijit Ghosh Dastidar (supra) hold in unison is that the ACRs must be communicated to the concerned employee/officer soon after it is written. Because, its non-communication is contrary to the provisions of article 14 of the Constitution. But, this is at the stage when the ACRs are recorded or shortly thereafter. The objective of communicating the ACRs is two-fold. In the first place, as an element of natural justice, the officer concerned gets an opportunity of representing against the ACR before it is too late. Secondly, it also informs and warns the officer concerned that his performance is not upto the mark so that he may improve himself in the next year. However, at the stage of the DPC, the ACRs already stand crystallized and their communication then may not serve any fruitful purpose apart from informing the concerned employee/officer and, perhaps, enabling him to represent against it. But,*



*the second aspect of improvement is lost. Consequently, at the stage of the DPC meeting the practical approach would be to not consider the uncommunicated ACRs as held in *Abhijit Ghosh Dastidar (supra)*.*

15. *It is further to be noted that the directions given by the Supreme Court in the subsequent paragraphs, that is, in paragraph 5 of the said decision were in respect of the particular case before the Supreme Court and the Supreme Court had merely directed that as the appellant therein had retired from service, he would not be entitled to any pay or allowance for the period for which he had not worked in the Higher Administrative Grade. However, it had directed that his promotion would be retrospective with effect from 28.08.2000 and that should be considered for the benefit of re-fixation of his pension and retiral benefits and other benefits as per rules. We are not going by the specific directions given by the Supreme Court in the facts of that case, but by the general principles of law declared by the Supreme Court in the earlier portion of the said decision which is set out in paragraph 4 of the same. The Supreme Court did two things. First of all, it affirmed the view taken by *Dev Dutt (supra)* to the extent that noncommunication of an ACR would be arbitrary and would be violative of Article 14 of the Constitution. Secondly, it concluded that such entries, which are not communicated, should not be taken into consideration for being considered for promotion to the higher grade. Thus, while *Dev Dutt (supra)* had been affirmed by the Supreme Court in *Abhijit Ghosh Dastidar (supra)* on the first aspect, as regards what has to be done with a noncommunicated below benchmark ACR, the Supreme Court in *Abhijit Ghosh Dastidar (supra)* took the view that such an ACR ought not to be considered.”*

28. Recently, this Court in ***Manish Gupta v. UTI Infrastructure Technology and Services Limited and Another, 2022 SCC OnLine Del 2752***, following the principles laid down in the aforementioned judgments, emphasized that there was an obligation on the Respondent therein to communicate the ACRs which had impacted the overall marks awarded to the Petitioners therein as this was also a case where the promotion criteria for the post of Assistant Vice President was based on weightage of marks and out of a total of 100 marks, 40 marks were allocated towards APARs.
29. In view of the aforesaid, there is no gainsaying that Respondents ought to have communicated the ACRs of the Petitioners which had



‘Average’ gradings, before they were considered for promotions to the post of Deputy Managers (Technical) by the DPC convened on 08.08.2012. As noted above, the criteria for promotion is based on weightage of marks wherein 45 out of total 80 marks are for PAR Assessment and a minimum of 60 marks are required for promotion. It is an undisputed fact that cases of the Petitioners for promotion were considered in the DPC convened on 08.08.2012. How the ACRs with ‘Average’ gradings have impacted the numerical score under PAR Assessment and consequently the promotions of the Petitioners at par with their juniors, is demonstrable from the assessment sheet, placed on record, which is scanned and placed below, for the ease of reference:-

**Extended Assessment sheet for the post of Dy. Manager (T)**

SNO	Name of Shri	E.No.	QUALIFICATION	Dt of appointment in the present grade	PAR Assessment							Total Marks of PAR Assessment	Period of PAR's	Experience X=4/5 years	Qualification	Total	Promotion w.e.f.			
					2003-04	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10							2010-11	2011-12	
1	J.B.S HOODA	31699	DEGREE	14.11.2003	Average	Average	Good	Average	Average	Avg/Avg	Good	Good	29.25	2003-07	X	12	12	53.25	UNFIT	
					6.75	6.75	9	6.75	6.75	6.75	9	9	29.25	2004-08	X+1	14	12	55.25	UNFIT	
														29.25	2005-09	X+2	16	12	57.25	UNFIT
														29.25	2005-10	X+3	18	12	59.25	UNFIT
												31.5	2007-11	X+4	20	12	63.5	FIT 14.11.2011		
2	V.P. SINGH	30059	DEGREE	14.11.2003	Average	GOOD	GOOD	GOOD	OS				33.75	2003-07	X	12	12	57.75	UNFIT	
					6.75	9	9	9	11.25				38.25	2004-08	X+1	14	12	64.25	FIT W.E.F. 14.11.2008	
3	BHAGAT RAM	26942	DIPLOMA	15.10.2003	AVG. (SM)	NIL	GOOD	GOOD	GOOD	OS			33.75	2003-08	X	12	12	57.75	UNFIT	
					5.4	6.75	7.2	7.2	7.2	9			37.35	2004-09	X+1	14	12	63.35	FIT W.E.F. 15.10.2009	
4	R.K. VERMA	32041	DEGREE	14.11.2003	Good/Good	Good/Good	Avg (SM)/Good (7M)	Good	Good				34.875	2003-07	X	12	12	58.88	UNFIT	
					9	9	7.875	9	9			34.875	2004-08	X+1	14	12	60.88	FIT w.e.f 14.11.2008		
5	R.S. Katari	31581	Diploma	14.11.2003	Average	Average	Good	Good/Good	Good	Good			32.4	2003-08	X	12	12	56.4	UNFIT	
					5.4	5.4	7.2	7.2	7.2	7.2			34.2	2004-09	X+1	14	12	60.2	FIT w.e.f 14.11.2009	
6	HARI P. MEENA	35147	DEGREE	14.11.2003	GOOD	AVERAGE	AVERAGE	GOOD	GOOD	NIL			31.5	2003-07	X	12	12	55.5	UNFIT	
					9	6.75	6.75	9	9	7.875			31.5	2004-08	X+1	14	12	57.5	UNFIT	
													32.625	2005-09	X+2	16	12	60.63	FIT W.E.F. 14.11.09	
7	AHMED YASSER	50162	DEGREE	27.09.2004	GOOD	Average	Average	OS	OS				33.75	2004-08	X	12	12	57.75	UNFIT	
					9	6.75	6.75	11.25	11.25			36	2005-08	X+1	14	12	62	FIT W.E.F 27.09.2009		



SNO	Name of Petitioner	E.No.	QUALIFICATION	Dt of appointment in the present grade	PAR Assessment							Total Marks of PAR Assessment	Period of PAR's	Experience X=5 years	Qualification	Total	Promotion w.e.f.		
					2003-04	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10							2010-11	2011-12
8	AJAY KUMAR SINHA	50131	DEGREE	21.09.2004	AVERAGE	GOOD	GOOD	GOOD	GOOD			33.75	2004-08	X	12	12	57.75	UNFIT	
					6.75	9	9	9	9			36	2005-09	X+1	14	12	62	FIT W.E.F. 21.09.2009	
9	FAJALUR REHMAN	50152	DEGREE	23.09.2004	Average	Average	Average	Average	GOOD	Average	GOOD	27	2004-08	X	12	12	51	UNFIT	
					6.75	6.75	6.75	6.75	9	6.75	9	29.25	2005-09	X+1	14	12	55.25	UNFIT	
												29.25	2006-10	X+2	16	12	57.25	UNFIT	
10	YAMUNA PRASAD	31604	DIPLOMA	28.07.2006			NIL	GOOD	GOOD	Average	Average	OS	31.5	2006-11	X	12	12	55.5	UNFIT
							6.3	7.2	7.2	5.4	5.4	9	34.2	2007-12	X+1	14	12	62.2	FIT W.E.F. 28.07.2012
												34.2							
11	GOPAL SINGH	32140	DEGREE	18.10.2006			GOOD	Average	AVERAGE/AVERAGE	GOOD	GOOD	Average	31.5	2006-10	X	12	12	55.5	UNFIT
							9	6.75	6.75	9	9	6.75	31.5	2007-11	X+2	14	12	57.5	UNFIT
												31.5	2008-12	X+3	16	12	59.5	FIT w.e.f. 18.10.2012	

30. For a better appreciation of how the uncommunicated ACRs considered by the DPC led to the Petitioners being declared UNFIT, the following two tables have been drawn up:-

**TABLE-I (First Consideration)**

Name	PAR Assessment								Total Marks of PAR Assessment	Period of PAR's	Experience X=4/5 years	Total	Promotion
	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11					
V.P. Singh	Average	Good	Good	Good					33.75	2003-07	x	57.75	UNFIT
Ajay Kumar Sinha		Average	Good	Good	Good				33.75	2004-08	x	57.75	UNFIT
Yamuna Prasad				Nil 6.3	Good	Good	Average	Average	31.5	2006-11	x	55.5	UNFIT
Gopal Singh				Good	Average	Average/Average	Good		31.5	2006-10	x	55.5	UNFIT

**TABLE-II (Consideration for the successive year(s))**

Name	PAR Assessment									Total Marks of PAR Assessment	Period of PAR's	Experience X=4/5 years	Total	Promotion
	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12					
V.P. Singh	Average	Good	Good	Good	OS					38.25	2004-08	x+1	64.25	FIT w.e.f. 14.11.08
Ajay Kumar Sinha		Average	Good	Good	Good	Good				36	2005-09	x+1	62	FIT w.e.f. 21.09.09
Yamuna Prasad				Nil 6.3	Good	Good	Average	Average	OS	34.2	2007-12	x+1	62.2	FIT w.e.f. 28.07.12
Gopal Singh					Average	Average/Average	Good	Good		31.5	2007-11	x+2	57.5	UNFIT
					Average	Average/Average	Good	Good	Average	31.5	2008-12	x+3	59.5 (Rounded off to 60)	FIT w.e.f. 18.10.12

31. Minutes of the DPC convened on 08.08.2012 have been filed along with the petition and reflect that Petitioners were considered for promotion to the post of Deputy Manager (Technical) along with their juniors but were declared UNFIT as they were unable to score minimum 60 marks out of 80 and this was due to low scores under PAR Assessment resulting from 'Average' gradings in some of the ACRs in the reckonable profile, considered by the DPC. In the same DPC, they were considered for the successive years and with a fresh input of next ACR(s) and were declared FIT but this resulted in loss of seniority as promotions were prospective.

32. It is, therefore, palpably clear that consideration of non-communicated ACRs with 'Average' gradings by the DPC had adversely impacted the Petitioners but the second error which was committed by IPGCL was that even after upgrading the 'Average' ACRs, no review DPC was held to give effect to the upgradation. The reason why IPGCL did not convene a review DPC to give effect to the upgradation is captured in its amended counter



affidavit dated 26.07.2023 as follows and to say the least, is completely untenable in law:-

*“3. That since the OM dated 14th May, 2009 and other OMs related thereto issued by the DOPT were not automatically applicable to the employees of the respondent Companies, there was need to adopt the same and made them applicable. Accordingly, the said OMs were adopted by the Board on 20.09.2013 and were made applicable to the respondent companies w.e.f the current APAR period i.e. 2012-2013. In view thereof, the aforesaid OMs, to the extent adopted, would be applicable to and binding on the respondent companies w.e.f. the date the same were adopted and made applicable to the respondent companies and not w.e.f. the dates of the OMs.*

*4. That some of the Deputy Managers (Technical) including petitioner whose seniority was affected during promotion to the post of DM(T) due to ‘Average’ PAR ratings made representations and requested for review/upgradation of past PAR’s rating in the light of the Hon’ble Apex Court judgment in Dev Dutt Vs Union of India & Ors. decided on 12.05.2008, AIR 2008 SC 2513. In consideration of the aforesaid representations and the judgment of the Hon’ble Apex Coml in Dev Dutt case (supra) and GOI orders providing for communication of below benchmark rating. a proposal for putting in place a "Procedure for dealing with cases of deemed adverse entry in APAR’ was placed before the Board of the respondent companies (IPGCL/PPCL) in the meeting held on 20.09.2013 wherein following resolution was passed:-*

***“Resolved That the approval of the Board of Directors be and is hereby accorded to the following:-***

***i) adoption of DOPT OM No. 21011/I/2005-Estt(A)(PT-II), dated 14<sup>th</sup> May 2009 regarding maintenance & preparation of Annual Performance appraisal Reports-communication of all entries for fairness and transparency in public administration with effect from current APAR period i.e. 2012-13 (as per the proposal placed before the Board) as well as of other OMs of DOPT issued in this regard from time to time;***

***ii) constitution of a Moderation Committee consisting of all Functional Directors and Chaired by Managing Director to consider the representations pertaining to APARs of periods prior to 2008-2009(only of reckonable periods}, for review of ratings of deemed adverse nature(Average & Below Average) where the final rating has been done by Managing Director in his individual capacity or as Chairman of Moderation committee;***



iii) xxxxxx

*Copies of the extracts of the Minutes of Meeting dated 20.09.2013 of the respondent companies (IPGCL & PPCL) are annexed as **Annexure-R/1**(colly).*

5. *That, the resolution of the Board dated 20.09.2013 as aforesaid would reveal that the procedure for dealing with the cases of deemed adverse entry in AP AR was put in place, in the respondent companies in terms of the OM of DOPT dated 14th May, 2009 which was specifically adopted on 20.09.2013 and the same was made applicable to respondent companies w.e.f. current APAR period i.e. 2012-2013. The clause 2(v) of the OM dated 14th May, 2009, would further reveal that the new system of communicating the entries in the AP AR was applicable prospectively only with effect from the reporting period 2008-09 which was to be initiated after 1st April, 2009. Copy of the aforesaid OM of DOPT dated 14th May, 2009 is annexed as **Annexure-R/2**.*

6. *That the procedure for dealing with the deemed adverse entry in AP ARs as put in place by the Board vide its resolution dated 20.09.2013 would further reveal that the Moderation Committee constituted thereby was given mandate to review/up-grade the AP ARs for the 'reckonable periods' only i.e. APARs relevant for future DPCs. Therefore, in terms of the aforesaid procedure, the AP ARs rating which were already considered by the past DPCs (held prior to 20.09.2013) would not be of reckonable periods and as such the Moderation Committee had no mandate to review/up-grade the deemed adverse nature (Average & Below Average) of APARs rating, already considered by the past DPCs.*

7. *That it is further submitted, the aforesaid procedure for dealing with the deemed adverse entry in APAR as put in place by the Board vide its decision dated 20.09.2013, in respect of the review of APARs rating of reckonable periods only i.e. APARs relevant for future DPC only, is in conformity with the guidelines issued by the DOPT in this regard vide OM dated 13.04.2010. The said guideline of DOPT would be applicable to the respondent companies, however, in terms of the Board decision dated 20.09.2013 and as such its applicability to respondent companies would be w.e.f. the date of the Board resolution i.e. 20.09.2013 and not w.e.f. the date of OM i.e. 13.04.2010. In that view of the matter, the future DPC, in the context, would mean DPC to be held post 20.09.2013 i.e. decision of the Board and not post 13.04.2010 i.e. date of OM. Copy of the aforesaid OM of DOPT dated 13.04.2010 is annexed as Annexure P-24, page 169 with petition.*

8. *That in the instant case, Moderation Committee acting under the mandate of the Board decision dated 20.09.2013, reviewed the petitioner's APAR rating for the period 2004-2005 (21.09.2004-31.03.2005) and*





*upgraded the same from 'Average' to 'Good' in its meeting held in August, 2015. In the wake of the aforesaid upgradation, the petitioner represented for restoration of his seniority. The said representation was considered by the Committee of Functional Directors, in its meeting held on 17.12.2015, while finalization of the combined list of seniority for the posts of AM(T)/DM(T), Manager(T) &AM(FIN) and recommended that the benefit of the aforesaid upgradation cannot be given effect to, for the reasons as recorded in the minutes of meeting dated 17.12.2015. Copy of the Minutes of meeting dated 17.12.2015 is annexed with petition as Annexure P-18 (Pages 111-115). The aforesaid recommendation is reproduced as under:-*

***"The APARs that has been reviewed and upgraded by the Moderation Committee has already been considered in the DPC for promotion to the post of Deputy Manager(T) held in the year 2012. As such as per DOPT guidelines regarding review of APAR as well the Resolution passed by BOD of IPGCL/PPCL, the APARs of adverse ratings should be reviewed for future DPCs only (APARs of reckonable period).***

***The Committee deliberated on the different aspect of the representation as well as DOPT guidelines and found it not tenable to restore the seniority of DM(T)s whose date of promotion was extended due to adverse PAR ratings. Further the Committee felt that restoring the seniority after up-gradation of APARs which are already been considered in past DPCs will open a Pandora box of more such representations which in turn will make the situation complex for the Management.***

***Accordingly, the Committee found no merit in the representations for restoration of seniority and the changed seniority list circulated as provisional seniority list for the post of AM(T)IDM(T)."***

33. Broadly understood, the stand of IPGCL is that since the DoPT O.M. dated 14.05.2009 was adopted on 20.09.2013, the review of APARs of the Petitioners was only for the purpose of future DPCs and that restoration of seniority after upgradation of APARs for those who were already considered in past DPCs, will open a pandora box of more such representations, leading to a complex situation for the Management. This stand cannot be sustained in law for more than one reason.

34. Firstly, if after upgradation of the ACRs, review DPC is not held, the



whole purpose of upgradation is lost and Petitioners would continue to remain juniors to their erstwhile juniors. Secondly, this stand overlooks the observations of the Supreme Court in *Dev Dutt (supra)*, wherein it was directed that if the ACR was upgraded, Appellant would be considered for promotion as Superintending Engineer retrospectively. Relevant paragraph is as follows:-

*“43. 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 1993-1994 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.”*

35. The same question arose before the Division Bench of this Court in *Guriqbal Singh v. Union of India and Another, 2024 SCC OnLine Del 2353*, where pursuant to DPC held on 15.03.2010, an order was issued by the Respondents therein promoting juniors of the Petitioner to the rank of Commandant w.e.f. 01.07.2010 and he was superseded and became junior. On representation by the Petitioner, his ‘below benchmark’ ACRs for the years 2005-06 and 2007-08 were upgraded and he was considered by the DPC and promoted w.e.f. 01.06.2011. The grievance of the Petitioner was that if the adverse ACRs were communicated to him well-in time before the first DPC, he would not have suffered supersession and therefore after upgradation, review DPC should be convened to promote him to the rank of Commandant with seniority at par with his juniors i.e. w.e.f. 01.07.2010. Contention of the Respondents was that the applicable DoPT O.M. dated



13.04.2010 only provided for prospective promotion i.e. upgraded ACRs were to be considered by future DPCs only and did not apply retrospectively enabling the Respondents to hold a review DPC.

36. In paragraph 25 of the judgment, the Division Bench captured the short issue arising for consideration whether the Petitioner was entitled to promotion/seniority on the post of Commandant w.e.f. 01.07.2010 when his juniors were promoted. Referring to the DoPT O.M. dated 14.05.2009 and the judgments of the Supreme Court in *Dev Dutt (supra)* and others, the Division Bench observed and held as follows:-

*“25. Having heard the learned counsel for the parties, the short issue which arises for consideration is whether the petitioner is entitled to promotion/seniority on the post of Commandant w.e.f. July 1, 2010 when officers junior to him were granted promotion.*

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*27. There is no dispute that, on a representation made by the petitioner, the below benchmark gradings were upgraded as ‘Very Good’ and ‘Good’ respectively. In fact, his case for promotion to the post of Commandant was also considered and he was granted promotion to the post of Commandant for the vacancy year 2011-2012.*

*28. The justification given by the respondents for rejecting the request in the impugned order dated February 12, 2015, is the following:*

*“In this connection, I am directed to inform that Shri Guriqbal Singh, then 2IC (Now Comdt) was assessed as ‘Unfit’ for promotion to the rank of Comdt by the DPC held on 15.03.2010 due to his confidential record of service. Further, in accordance to DoPSsT’s OM dated 13.04.2010, below bench mark ACRs for the years 2005-2006 and 2007-2008 were communicated to the officer and subsequently upgraded for ‘Good’ to ‘Very Good’ and ‘Average’ to ‘Good’ respectively. Though, the ACRs of the officer for the years 2005-2006 and 2007-2008 were upgraded from ‘Good’ to ‘Very Good’ and ‘Average’ to ‘Good’ respectively, but his case for promotion to the rank of Commandant w.r.to DPC dated 15.03.2010 cannot be reviewed as DOP85T OM dated 13.04.2010 clearly states that it would be applicable for future DPCs only. In this connection FHQ Pers Dte (Confid Section) letter No. A-28012/14/2010/CC/Pers/BSF/5328-5627 dated 10.12.2010 refers.”*



*29. In substance, it is the case of the respondents that, in view of the OM dated April 13, 2010 of the DoP&T which states, prior to reporting period 2008-2009, only adverse remarks in the ACR had to be communicated to the concerned officer for representation but it has been decided that if an employee is to be considered for promotion in future DPCs and his ACRs prior to the period 2008-2009 which would be reckonable for assessment of his fitness in such future DPCs contain final gradings which are below benchmark for his next promotion before such ACRs are placed before the DPC, concerned employee will be given a copy of relevant ACR for his representation to be made within 15 days of such communication and to consider the representation objectively and in case of upgradation of final grading in the APAR, specific reasons be also given in the order of the competent authority.*

*30. The stand of the respondents is, since the ACRs of the petitioner were of the years 2005-2006 and 2007-2008 prior to 2008-2009 as is contemplated in the OM dated April 13, 2010, his promotion to the post of Commandant with respect to DPC dated March 15, 2010 cannot be reviewed being prior in point of time.*

*31. In the present case, the ACRs being prior to 2008-2009, i.e., of the year 2005-2006 and 2007-2008, the same being below benchmark, they were communicated to the petitioner. In fact, against that he made a representation as well. On representation, the gradings in the ACRs have been upgradaded. But in the DPC dated March 15, 2010 whereby the case of the petitioner was considered did not review the upgraded ACRs of 2005-2006 and 2007-2008 and rejected only on the ground that OM dated April 13, 2010 contemplates future DPC. In other words, the DPC in which the petitioner was not found fit was dated March 15, 2010, whereas the OM dated April 13, 2010 contemplates the DPCs held after April 13, 2010 need to consider the upgraded ACRs. This stand of the respondents is not convincing/appealing for the reason that the below benchmark ACRs were communicated to the petitioner and the same have been upgraded. Otherwise, we find no reason to communicate the below benchmark ACR's to the petitioner, if upgradation of the gradings was not to be acted upon. Having communicated the same, if they have been upgraded, then the upgraded ACRs need to be considered by convening a Review DPC, otherwise, it is anomalous despite not having below benchmark ACR, the petitioner is being denied promotion.*

*32. The plea of the respondents that only future DPC shall consider the upgraded ACRs, is unsustainable. We agree with the submission of Dr. Hooda that, in view of the judgment of the Supreme Court in the case of Dev Dutt (supra), which is of the year 2008, specifically contemplates that, if on a representation the ACRs grading are upgraded, then the case of such an employee need to be considered by review DPC, paragraph 43*



of which reads as under:

*“43. 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 1993-1994 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.”*

*33. The ratio of the judgment is squarely applicable to the case of the petitioner inasmuch as the ACRs having been upgraded, the case of the petitioner need to be considered through the review DPC for promotion from the date his immediate junior have been promoted as Commandant.*

*34. The petitioner has relied upon the case of the one Lala Krishan Kumar Lal to state that, on the upgrading the ACR, the review DPC was held for considering Lala Krishan Kumar Lal case for promotion to the next higher post, retrospectively. The justification given by the respondents is that the ACR of Lala Krishan Kumar Lal was of the year 2008-2009, whereas the ACRs of the petitioner were of the years 2005-2006 and 2007-2008 and there is no provision for communication of ACRs of the period prior to 2008-2009. But this stand of the respondents is overlooking the fact that, when the DPC was held on March 15, 2010, the judgment of Dev Dutt (Supra) was already holding the field. The respondents were required to communicate the below benchmark ACRs to the petitioner to enable him to submit a representation and if the gradings are upgraded, then to hold review DPC. So, in that sense, they cannot rely upon the OM dated April 13, 2010 to state that DPCs after April 13, 2010 would consider the below benchmark ACRs, which have been later upgraded on the representation made by a government employee. It is to state that, Lala Krishan Kumar Lal being junior to the petitioner got the benefit of the OM dated April 10, 2013 and also promoted as Commandant whereas the petitioner whose ACRs were of the year 2005-2006 and 2007-2008 and not 2008-2009, was denied the benefit though his ACRs were upgraded, which according to us is discriminatory, as such violative of Article 14 of the Constitution.*

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*37. In view of our above discussion, we are of the view that the impugned order dated February 12, 2015 is liable to be quashed. It is ordered accordingly. The case of the petitioner shall be considered for promotion to the post of Commandant w.e.f. the date his immediate junior was promoted to the post of Commandant by taking into consideration the*



*upgraded ACRs of the period 2005-2006 and 2007-2008 and other records of the petitioner in accordance with law. If the petitioner is found fit for promotion, his promotion shall relate back to the date of promotion of his immediate junior. Though the same shall be on notional basis till the date when the petitioner was actually promoted as a Commandant, however, the petitioner shall be given actual and consequential benefits. The respondent shall accordingly carry out the aforesaid exercise within a period of eight weeks from today.”*

37. It is luminously clear from the judgment of the Division Bench that the plea of the Respondents that after upgradation of the ACRs for the periods 2005-06 and 2007-08, the same could only be considered by future DPCs was negated by the Division Bench and it was held that Petitioner was entitled for a consideration by review DPC for promotion and if found fit for promotion, his promotion shall relate back to the date of promotion of his immediate junior. Case of the Petitioners herein is covered in all four corners by the judgment of the Supreme Court in *Dev Dutt (supra)* and of the Division Bench in *Guriqbal Singh (supra)* and it is not open to the Respondents to take a stand that after upgradation of the ACRs in question, they will be considered only in future DPCs.

38. The contention of the Respondents that since the DoPT O.M. dated 14.05.2009 was adopted only on 20.09.2013 and therefore review DPC cannot be held is wholly misconceived and without merit and in the teeth of the aforementioned judgments. It is an admitted position that Respondents had constituted a Moderation Committee to consider representations pertaining to APARs even prior to 2008-09 and therefore the relevance of the date from which the DoPT O.M. was adopted is lost. In any case, the law was declared by the Supreme Court in 2008 in *Dev Dutt (supra)* and a direction was issued to promote the Petitioner retrospectively therein, if after



communication of the impugned ACR for the period 1993-94, the same was upgraded. The law is no longer *res integra* that on upgradation of the ACRs, review DPC is to be held and consequential benefits are to be granted if the employee concerned is found FIT for promotion based on the upgraded ACR(s). [*Ref. Dev Dutt (supra); Prabhu Dayal Khandelwal (supra); R.K. Jibanlata Devi v. High Court of Manipur through its Registrar General and Others, 2023 SCC OnLine SC 178; S.D. Dobhal (supra); Rajeev Teotia (supra); and Guriqbal Singh (supra)*].

39. Accordingly, these writ petitions are allowed setting aside the impugned order dated 24.07.2018 whereby the representations of the Petitioners seeking consideration by review DPC, based on upgraded ACRs with consequential restoration of seniority, were rejected. It is directed that cases of the Petitioners shall be considered for promotion to the post of Deputy Manager (Technical) w.e.f. the date the immediate juniors were promoted by taking into consideration the upgraded ACRs for the relevant periods. Needless to state that if the Petitioners are found FIT for promotions, their promotions shall relate back to the dates of promotions of juniors considered in the DPC convened on 08.08.2012. If recommended for promotions in the review DPC, Petitioners will be entitled to all consequential benefits including seniority. The entire exercise shall be carried out by the Respondents within a period of three months from today.

40. Writ petitions stand disposed of in the aforesaid terms.

**JYOTI SINGH, J**

**AUGUST 27, 2024**

*B.S. Rohella/KA/shivam*