

Tribunal Application
Present:
The Hon'ble Justice Pratap Kumar Ray.
And
The Hon'ble Justice Mrinal Kanti Sinha.
Judgment On : 30.04.2010
W. P. C.T No.140 of 2009
Union of India & Ors.
Versus
Girish Kumar
With
W.P.C.T No.328 of 2008
Girish Kumar
Versus
Union of India & Ors.

Points

Promotion: Non communicated annual confidential report- Departmental promotion committee whether can consider the report- Indian Railway Establishment Code, 1971

Facts:

These two writ applications W.P.C.T No.140 of 2009 and W.P.C.T No.328 of 2008 arose out of challenge of the self-same order dated 28th November, 2008 passed by the learned Central Administrative Tribunal, Kolkata Bench, in original application No.803 of 2003 filed by one Sri Girish Kumar assailing the decision of Departmental Promotion Committee rejecting his candidature for the promotional post of Higher Administrative Grade, hereinafter referred to as HAG for brevity, by relying upon down-graded and non-communicated annual confidential reports for brevity referred to as ACR, of the years 2002-2003 to 2005-06 along with other factors due to lack of qualifying bench mark. Learned Tribunal below allowed the said original application by the order dated 28th November, 2008 directing the respondents to consider the candidature of applicant afresh for selection and recommendation to the promotional post of Higher Administrative Grade by ignoring the non-communicated and downgrade ACRs as mentioned in the said order within 4 months from the date of communication of the order.

Held

Though the Departmental Promotion Committee sat to consider the issue in May, 2007, but it did not consider the outstanding remarks of the said year and the previous year thereof but considering the non-communicated remarks “good” for the appraisal period 1st April, 2003 to 30th June, 2003 and for the period 2004 to 2005 did not recommend appointment of Sri Girish Kumar in the post of Higher Administrative Grade. The learned Tribunal below took an exception of the issue by applying the test of fairness and reasonableness doctrine regarding communication of the remark irrespective of the fact whether it is “good”, “very good” or outstanding, by holding, inter alia, that when an officers’ performance was recorded in the previous years as “outstanding”, or “very good” but subsequently in subsequent year when a noting was made in confidential report as “good” or “average” as the case may be, the concern reportee was entitled to have communication of the same so that he could file a representation seeking, inter alia, the relief as to why the grading should not be “outstanding” elevating it from the grading “very good” and/or it should not be “very good” on elevating it from the remarks “good”. Para-43

Every management must provide realistic opportunity for promising employee to move upward and an opportunity should be given for advancement which is essential requirement for progress of any organisation and incentive for personal development. In that angle, the said finding has an impact to deal with the present case wherein to fulfil the realistic opportunities for promising employees to move upwards and for advancement in the service career, the communication of ACR as are being considered to reach the bench mark by the departmental promotional committee will satisfy the said requirement of management rule as discussed in the said judgement. Para-46

In view of the principle of natural justice so far as communication of all entries of annual confidential reports should be given a retrospective effect considering the objective purpose of reporting the performance appraisal and its basic philosophy and approach as has been dealt with in the brochure. Hence, departmental promotion committee when sat in the year 2007, they should not have considered the non-communicated annual confidential report to assess merit of a candidate and thereby to finalise the bench mark for promotional berth of Girish Kumar, to refuse recommendation. Sri Girish Kumar, has suffered a civil consequence without having any opportunity to represent against the assessment appraisal of “good”, “very good” in

comparison to his earlier appraisal report of “outstanding”. The point No.(ii) & (iii) are answered accordingly. Para-75

Learned Tribunal below was justified to pass the appropriate order directing the respondents therein to consider the promotional issue of the applicant Girish Kumar afresh for selection and employment for promotion to the Higher Administrative Grade by excluding the non-communicated down-graded ACRs as mentioned therein from their decision making zone, within the time frame of 4 months from the communication of the order. Para-76

By the interim order leave granted for appointment of the recommended candidates in H.A.G subject to the result of the writ applications and the candidates who have already been appointed in terms of interim order of the Court should be considered as ad-hoc appointee till the finality of decision so far as consideration of the candidature of Sri Girish Kumar in terms of judgement delivered by this Court and the order of the learned Tribunal below. In the event the departmental promotion committee consider Sri Girish Kumar a suitable candidate for promotional berth to the Higher Administrative Grade, Sri Girish Kumar be appointed with retrospective effect from the date when a junior candidate from lower feeder post was appointed and thereby all appointees who were appointed during pendency of matter would be relieved from their legal status of ad-hoc appointment. So far as further promotional benefit from Higher Administrative Grade to other grade, considering retrospective effect of promotion above the juniors as to be made in favour of Sri Girish Kumar, his case also could be considered and if he is eligible and suitable for Higher Grade and Higher Promotional birth from Higher Administrative Grade, it to be done on considering his case along with other candidates identically placed and situated. All these directions to be followed strictly within the time frame namely within four months from this date by this process namely first consideration of promotional berth to Higher Administrative Grade and thereafter in the event Sri Girish Kumar is recommended for appointment, his appointment with retrospective effect to be made within two weeks therefrom above the juniors who have already appointed as per recommendation earlier and thereafter within further one month period consideration of his promotional berth to Higher Grade along with others to be considered and all interim order earlier passed will stand vacated after due consideration of the aforesaid direction in letter and spirit of the judgement as delivered and after filing of a compliance report to that effect to the High Court Registry after five months from this date, by the Railway

Authority. Interim order dated 10th March, 2010 will continue till filing of compliance report as directed. Para-77

Cases Cited :

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S. L. Kappor v. Jagmohan and & Ors.
reported in AIR 1981 SC 136 a judgement of three Judges Bench and in the case
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1978 SC 851, a judgement of Constitution Bench.
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SCC 635
State of U.P. Vs. Yamuna Shanker Misra & Anr. reported in (1997) 4 SCC 7
K. L. Mishra(supra) reliance made upon Satyanarayan (supra) reported in (2006) 9 SCC 69
State of Punjab Vs. Baldev Singh, a judgement of constitutional bench, reported in (1999) 6 SCC 172
Regional Manager vs. Pawan Kumar Dubey reported in AIR
1976 SC 1766
Ambika Quarry Works Vs. State of Gujarat reported in (1987) 1
SCC 213
Bharat Petroleum Corporation Limited Vs. N. R. Vairamani
reported in (2004) 8 SCC 579
London Graving Dock Co. Ltd. v. Horton (AC at p.761) Lord Mac Dermott observed: (All ER p. 14 C-D)
Home Office v. Dorset Yatch Co. (All ER p. 297 g-h)
Herrington v. British Railways Board Lord (All ER p. 761c)

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Atma Ram Vs. State of Punjab reported in AIR 1959 SC 519 at page 527
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Pramathanath vs. Chief Justice reported in AIR1961 Calcutta 545,
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U.P State Road Transport Corporation Vs. State Transport Tribunal reported in AIR 1977 Allahabad 1.
Gobind Nayek Vs. West Patton Press Company reported in AIR 1980 Karnataka 92
R. Rama Subbarayalu vs. Rengammal reported in AIR 1962 Madras 450.
D. D. Belimorea Vs. Central Bank of India reported in AIR 1943 Nagpur 340
Union of India v. K. S. Subramaaniam AIR 1976 SC 2433 at p. 2437,
Javed Ahmed v. State of Maharashtra, AIR 1985 SC 231 at p. 236
Pramatha Nath v. Chief Justice, AIR 1961 Cal 545 at p. 551,
Sovachand Mulchand v. Collector, Central Excise, AIR 1968 Cal 174 at p. 186
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Vasant v. Dikkaya, AIR 1980 Bom 341 at p. 345.
U. P. State Road Transport Corpn. v. Trade Transport Tribunal, AIR 1977 All 1 at p. 5
Indo- Swiss Time Ltd. V. Umarao, AIR 1981 Punj & Har 213 at p. 219-220
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R. Rama Subbarayalu V. Rengmmal, AIR 1962 Mad 450
D. D. Bilimoria v. Central Bank of India, AIR 1943 Nag 340 at p. 343
Atma Ram V. State of Punjab, AIR 1959 SC 519

Bagala Sundari v. Prosanna Nath, 21 Cal WN 375 at p. 377: (AIR 1917 Cal 668 at p. 669)

Arnit Das vs. State of Bihar reported in (2000) 5 SCC 488

U.P vs. Syndicate & Chemical reported in (1991) 4 SCC 139

Canara Bank Vs. V. K. Awasthy reported in (2005) 6 SCC 321

State of Maharashtra Vs. Public Concern for Government Trust reported in (2007) 3 SCC 587.

For the petitioners in : Mr. R. N. Das

W.P.C.T No.140 of 2009 Mr. U. K. Mazumder

and for the respondents Mr. Uday Sankar Bhattacharya

in W.P.C.T 328 of 2008 Mr. Prasenjit Saha

For the respondent : Mr. Sunrit Deb

W.P.C.T No.140 of 2009 Mr. Iswar Chandra Sharma

and for the petitioner Mr. Girish Kumar-in-person

in W.P.C.T 328 of 2008

The Court:

These two writ applications W.P.C.T No.140 of 2009 and W.P.C.T No.328 of

2008 arose out of challenge of the self-same order dated 28th November, 2008

passed by the learned Central Administrative Tribunal, Kolkata Bench, in original application No.803 of 2003 filed by one Sri Girish Kumar assailing the

decision of Departmental Promotion Committee rejecting his candidature for the

promotional post of Higher Administrative Grade, hereinafter referred to as HAG

for brevity, by relying upon down-graded and non-communicated annual confidential reports for brevity referred to as ACR, of the years 2002-2003 to

2005-06 along with other factors due to lack of qualifying bench mark.

Learned

Tribunal below allowed the said original application by the order dated 28th November, 2008 directing the respondents to consider the candidature of

applicant afresh for selection and recommendation to the promotional post of

Higher Administrative Grade by ignoring the non-communicated and downgraded

ACRs as mentioned in the said order within 4 months from the date of communication of the order.

2. Asailing said order, W.P.C.T No.140 of 2009, a writ application, was filed by the Union of India represented by Secretary, Ministry of Railway, Railway

Board, Rail Bhawan, Raisina Road, New Delhi as writ petitioner, praying following reliefs which read such:

i) A writ of and/or in the nature of Mandamus be issued declaring that the impugned judgement and order dated 28th November, 2008 passed by the learned Central Administrative Tribunal, Calcutta Bench in O.A. No.803 of 2007 (Girish Kumar Vs. Union of India & Ors.) is contrary to the law and the same should not be given effect to ;

ii) A writ of and/or in the nature of certiorari be issued directing the respondent to produce all relevant papers relating to this case before this Hon'ble Court so that conscionable justice may be administered by quashing the impugned judgement and order dated 28th November, 2008 passed by the learned Central Administrative Tribunal, Calcutta Bench in O.A. No.803 of 2007 (Girish Kumar Vs. Union of India & Ors.)

iii) A writ of and/or in the nature of Prohibition be issued prohibiting the respondent from taking any steps in terms of the said impugned order dated 28th November, 2008 passed by the learned Central Administrative Tribunal, Calcutta Bench in O.A. No.803 of 2007 (Girish Kumar Vs. Union of India & Ors.) ;

iv) Rule NISI in terms of prayers (a), (b) and (c) above and to make the Rule absolute, if no cause is shown and/or insufficient cause has been shown;

v) Stay of operation of the order dated 28th November, 2008 passed by the ld. Central Administrative Tribunal in O.A. No.803 of 2007 (Girish Kumar Vs. Union of India & Ors.) till the disposal of the writ petition and to allow the petitioners to implement the said panel already prepared;

vi) Ad-interim order in terms of prayer (e) above;

vii) Any other or further order/orders be passed as this Hon'ble Court

may deem fit and proper.

Assailing said order of Tribunal, another writ application W.P.C.T No.328 of

2008 was filed by the applicant of original application Sri Girish Kumar praying

the following reliefs:

a) Dispensing with compliance of the Writ Rules of this Hon'ble Court in so far as service of notice is concerned;

b) Issue of a Writ of Mandamus and/or writ in the nature thereof commanding the respondent authorities not to give any effect or further effect to the panel prepared by the Departmental Promotion Committee till the case of the writ petitioner is considered afresh for Higher Administrative Grade against the vacancies 2007-2008 and the periods subsequent thereto;

c) Issue of a writ of mandamus and/or writs in the nature thereof commanding the respondents not to take any action in respect of the Panel prepared by the Departmental Promotion Committee excluding the nature of the petitioner with regard to Higher Administrative Grade against the vacancies of 2007-2008 and the periods subsequent thereto;

d) Issue a writ in the nature of Certiorari calling upon the Registrar, Central Administrative Tribunal, Calcutta Bench, to transmit and produce the records of the O. A. No.803 of 2007 as also the respondent authorities to produce before Your Lordships all the relevant records relating to selection made to Senior Administrative Grades (SAG) for promotion to Higher Administrative Grade (HAG) against the vacancies of 2007-08 so that upon perusing the same conscionable justice may be done by and between the parties;

e) Issue of a writ of and/or in the nature of Prohibition prohibiting the respondents in any manner whatsoever from taking any step in respect of the panel prepared by the Departmental Promotion Committee for the Higher Administrative Grade against vacancies of 2007-08 and the periods subsequent thereto;

f) Issue of any other appropriate writ and/or order of direction under Article 226 (1) of the Constitution of India;

g) Issue Rule NISI in terms of prayers (b) (c) (d) (e) and (f) above;

h) Stay of the operation of the action taken by the respondents in furtherance to the panel prepared by the departmental promotion committee with regard to Higher Administrative Grade against the vacancies of 2007-08 and the periods subsequent thereof;

- i) Injunction restraining the respondents and each one of them and their servants and agents from taking any steps in further to the any panel prepared by the departmental promotion committee for vacancies of 2007-2008 and subsequent thereof with regard to Higher Administrative Grade, till the case of the petitioner is considered afresh;
- j) Interim order in terms of prayers (h) and (I) above;
- k) To make the Rule absolute;
- l) Costs.

3) Initially said writ applications were heard at the motion stage by different Division Bench of Calcutta High Court resulting conflicting interim orders. To

resolve the conflict appropriate order dated 27th August, 2009 was passed by us

which read such:

“ Re: CAN 5098 of 2009

Heard the learned Advocates appearing for the parties.

4) The issue involved herein as to whether non-communicated down graded ACR could be considered by the Departmental Promotional Committee while considering the promotional issue to the Higher Administrative Grade for which the respondent's case was considered. Learned Tribunal answered the point in favour of the respondent by the impugned order, challenging which this writ application has been filed. The respondent also has filed another writ application being W.P.C.T 328 of 2008 assailing the said order of the learned Tribunal below on the grievance that learned Tribunal below ought to have passed an order restraining promotion of other candidates without considering the respondent's candidature first in terms of the order of the Tribunal. In the said writ application already there is an order restraining the respondent from providing any promotion in the language “no step for appointment to the promotion post to be given”. In this writ application an interim order was passed in terms of prayer (e) on 20th May, 2009 by the Division Bench (coram: Amit Talukdar & Tapas Kumar Giri, JJ). This application has been filed seeking modification of that order. The order passed in this writ application was with a rider “in the meantime”. Learned advocate Mr. Basu submits that, it clearly reflects the fact that the interim order was for the limited period for two weeks after summer vacation in terms of the said order and accordingly it has already been expired. Since there is another

order passed by another Division Bench (coram Kalyan Jyoti Sengupta & Prasenjit Mandal, JJ) on 24th December, 2008, which subsequently was extended by Bench (coram: Amit Talukdar & Tapas Kumar Giri, JJ) in the writ application filed by the respondent as already quoted and as the said writ application has been directed to be heard along with this writ application by the order dated 20th May, 2009, we are modifying the interim order in terms of the order passed by the earlier Division Bench (coram Kalyan Jyoti Sengupta & Prasenjit Mandal, JJ) for a limited period of three weeks from this date. Application C.A.N 5098 is allowed to that extent.

Let this matter along with W.P.C.T. 328 of 2008 be posted for hearing on 2nd September, 2009 as "Fixed Item".

5) This order is passed to avoid any conflict in between the order dated 20th May, 2009 passed in this writ application earlier and the order passed in the writ application W.P.C.T. 328 of 2008. The effect of the order as passed today, is prospective.

Let xerox plain copy of this order duly countersigned by the Assistant Registrar (Court) be given to the learned advocates appearing for the parties on usual undertakings."

6) Said order was passed in connection with application for vacating interim order being CAN 5098 of 2009 filed by the Union of India praying for vacating the interim order dated 20th May, 2009 passed in WPCT No.148 of 2009. Subsequently on 16th September, 2009, the interim order dated 27th August, 2009 was modified by a reasoned decision allowing the Railway administration to act in terms of recommendation of the selection committee for appointment of the incumbents concerned selected in Higher Administrative Grade with a rider that those appointments would abide by result of both writ applications. The order dated 16th September, 2009 reads such:

]7) " Heard the learned Advocates appearing for the parties. Assailing the refusal to recommend the promotion of one Girish Kumar in the rank of higher administrative grade on elevation from the feeder rank of senior administrative grade by a high level administrative

committee, an application was moved before the learned Tribunal in O.A. No. 803 of 2007 on the ground that the down graded entries of Annual Confidential Report which were non-communicated, were considered by the high level committee which caused prejudice to the applicant and consideration of such non-communicated entries of Annual Confidential Report particularly the down graded entries were nothing but an arbitrary action.

8) On perusal of the records, learned Tribunal below found that there was, in fact, down gradation of grading in Annual Confidential Reports and those were not communicated.

9) Having regard to such, original application was allowed directing the high level selection committee to consider the candidature of the applicant afresh without taking note of non-communicated down graded grading.

10) Assailing the said order of the learned Tribunal dated 28th November, 2008, two writ applications have been filed, one by Union of India and Railway Administration jointly being W.P.C.T. No. 140 of 2009 and another by the said applicant, Girish Kumar being W.P.C.T. No. 328 of 2008.

11) In the writ application of Railway Administration the main point of challenge is that the learned Tribunal should not have directed fresh consideration of candidature of the applicant on the reasoning that there was no liability of the Railway Administration to communicate all entries of the Annual Confidential Report save and except the adverse entries. As in the instant case, there was no adverse entry against the applicant but there is a down gradation of grading, there was no question of communication of the same. The said Girish Kumar in the writ application has assailed the order for further relief about protection of his promotional interest by restraining any appointment in the higher administrative grade of any incumbent without considering his candidature till disposal of his matter in terms of the order of the learned Tribunal.

12) From the submission of the Railway Administration it appears that the higher administrative grade is a rank in Railway service wherein different incumbents are placed with higher responsibilities and in the event the interim order as passed on 27th August, 2009 is allowed to continue further whereby the Court directed not to give any appointment to

anybody in the meantime, the administration will suffer. The Railway Administration has prayed for modification of the said order orally and not to extend the order dated 27th August, 2009 further.

13) On 27th August, 2009 we passed the order as there was a conflict of different orders by different Benches who heard the matter earlier and to resolve it for a limited period an workable interim order was passed with the idea to dispose of the matter finally. Since due to Ensuing Puja Vacation the matter could not be disposed of early due to prayer to adjourn the matter, as allowed, we intend to post the matter for final disposal after Puja Vacation as a fixed item.

14) Having regard to such contingency of the issue and considering the fact that the learned Tribunal below did not pass any order restraining the consideration of promotion of other incumbents in the high administrative grade, for effective functioning of the Railway Administration, the order dated 27th August, 2009 should not be extended further, but a modified order should be passed to this effect.

15) The Railway Administration is at liberty to act in terms of the recommendation of the selection committee so far as appointment of incumbents in high administrative grade, but those appointments will abide by the result of both writ applications considering respective grievances, finally, on final adjudication of the matter.

16) Mr. Basu, Learned Senior Advocate further on behalf of said Girish Kumar, the petitioner in one matter, submits that an interim order protecting the interest of the said writ petitioner may be passed in the nature that in the event the petitioner succeeds in his writ application and Railway fails in their writ application, the seniority of the petitioner in the event of recommendation by the high level selection committee for his placement in high administrative grade, to be protected. This prayer is a very early prayer for our decision. It requires an adjudication, at the time of final hearing in accordance with law.

All affidavits are now ready.

Let this matter be posted on 10th November, 2009 as a fixed item at 10-30 A.M. as a part-heard matter.

Let xerox plain copy of this order duly countersigned by the Assistant Registrar (Court) be given to the learned Advocates appearing for the

parties on usual undertakings.”

17) By the order dated 29th January, 2010 for effective adjudication of nucleus of lis, namely, whether all entries in the confidential reports ought to have been communicated to the employee concerned seeking his objection, if any, irrespective of the fact whether such confidential reports were not “adverse” in the angle of general meaning of the word ‘adverse’, Court directed Union of India to file a supplementary affidavit disclosing their mechanism and procedural steps as followed relating to consideration of the candidature of a candidate for the post of Higher Administrative Grade and rules/procedures for communication of A.C.R.

18) In pursuance thereof, an affidavit was filed annexing “brochure on confidential reports” and the circulars on procedures for consideration of candidature of a candidate for the said promotional post by the departmental promotion committee. Said supplementary affidavit was affirmed by one Sri Sibdan Singh on behalf of the writ petitioner Union of India who is working as Joint Secretary (GAZ) in the Ministry of Railways, Rail Board, New Delhi on 23rd February, 2010. As many junior candidates were given promotion during pendency of the writ applications which however was made to be controlled and contoured by the result of writ applications, but ultimately as it was noticed that several persons were given appointment by subsequent DPC by selecting the candidates who are junior to the respondent Sri Girish Kumar, an order was passed on 10th March, 2010 restraining the respondent from giving any promotion to any junior candidates in the Higher Administrative Grade as well as any promotion to the higher grade/higher post above the Higher Administrative Grade till the judgement was delivered by the Court. Order dated 10th March,

2010 reads such:

“ Written notes of argument on behalf of the respondent filed in Court today be kept on record.

Hearing is concluded and the matter is made CAV.

19) This writ application has been heard analogously with the writ application, being W.P.C.T 328 of 2008, filed by girish Kumar. Having regard to the fact disclosed in the said writ application wherefrom it appears that many juniors have been promoted in the meantime; however that is subject to the result of the said writ application. But it is the apprehension as expressed by the respondent-in-person of this writ application that juniors who were already promoted in the post of Higher Administrative Grade, may be promoted further. Appropriate direction prayed for till the matter is finally decided by this Court.

20) Having regard to such, the respondents are restrained from giving any promotion to any junior candidate in the Higher Administrative Grade as well as any promotion to the Higher Grade/Higher post from Higher Administrative Grade, till the judgement is delivered by this Court.

21) Since it is an analogous matter, judgement to be delivered analogously with the said writ application.

The said writ application, being W.P.C.T 328 of 2008 also stands as CAV.

Xerox plain copy of this order, duly countersigned by the Assistant Registrar (Court) be given to the learned Advocates appearing for the parties, on the usual undertaking.”

22) In the respective writ applications the parties concerned filed their respective oppositions and replies including supplementary affidavits, its rejoinders etc. time to time as per direction of the Court. Before discussing the

rival contentions of the parties as raised, the impugned order is set out for effective adjudication. The impugned order dated 28th November, 2008 reads

such:

“ O R D E R

Dr. D. K. Sahu, J. M.

The applicant borne in Senior Administrative Grade (SAG) of the Indian Railway Services, Mechanical Engineering cadre, having been aggrieved for

his non-empanelment for promotion in the cadre of Higher Administrative Grade (HAG) now seeks redress for issuance of a direction to the respondent authorities to consider his case afresh for selection and empanelment to HAG grade ignoring the down graded annual confidential reports (ACRs) during the year 2002-2003 to 2005-2006.

2. The applicant submits that he was appointed in the aforesaid cadre in March, 1975 and since then rendering a meritorious service. His ACRs prior to 2002-2003 was outstanding, as such, he was promoted to the rank of Senior Administrative Grade. He was previously departmentally proceeded against on a plea of laxity in performance of duties, but was exonerated of that allegation/charge. In May, 2007 the respondents convened a Departmental Promotion Committee for selection and promotion to HAG wherein his case was considered. It is learnt by him that though he was found suitable for promotion he could not meet the benchmark "very good +". For some years between 2002-2003 to 2005-2006 he was rated as "very good" and outstanding, but in between that period there was down gradation of ACR which have not been communicated to him. The applicant submits that the respondent authorities should have not acted while making selection for promotion on the basis of these noncommunicated down graded ACRs. He accordingly submits that such nonempanelment of him is an arbitrary and malafide action of the authority.

He made a representation on 13.06.07 (Annexure A-2) submitting his grievances for non-empanelment, but having not got any relief, he has come to the Tribunal for the aforesaid relief.

3. The respondents submit that the applicant having preferred a representation before the authority, should have not rushed to the Tribunal pending disposal of the same. It is submitted that the selection/promotion to Higher Administrative Grade is done in accordance with recommendation of a high level Selection Committee (DPC) consisting of Chairman, Railway Board, Secretary, Department of Personnel and Training and a Member of Railway Board. The principal and procedure for appointing to that grade has been notified by the Ministry of Railways/Railway Board on 29th March, 2000 vide notification at Annexure R-1 wherein it is stated that the officer considered for empanelment should have worked in Senior Administrative Grade for a minimum period of 5 years. ACRs are the basic inputs for assessment of merit of the incumbents so also his service record is considered to assess the suitability of the incumbents. Case of the applicant was considered, but he was not found suitable for empanelment. So, his case was not recommended. The

respondents further submit that the Tribunal should not interfere with such decision of the DPC.

4. As regards the submission of the respondents that the applicant having made a representation should have not filed an application before this Tribunal pending disposal of the same, it be stated that the applicant has filed this application on 18.09.2007 i.e. about three months after submission of representation. The respondent authorities having not passed any order on the representation, as it was urgent for being not empanelled for promotion, though his juniors were so empanelled, the applicant has filed this application without waiting for final decision of the competent authority. Section 20 of the Administrative Tribunals Act enumerates that the Tribunal shall not entertain an application if the applicant has not exhausted other available remedies, but this is not applicable in this case because the applicant has made representation and as such exhausted the domestic remedies available to him. But that having not been disposed of within 3 months, he has filed this application. Accordingly the above contention of the respondents is not sustainable.

5. The pleadings of the parties and documents annexed thereto establish that the applicant was found eligible for consideration for promotion to the cadre of SAG. He was so considered but has not been empanelled. The respondents take a plea that he was not found suitable. During the course of hearing, learned counsel for the respondents submitted that the applicant did not have the bench mark for promotion i.e. "Very Good +". On the contrary learned counsel for the applicant submits that the applicant was an outstanding and very good officer. He was so rated but anything below that any time is a down gradation of the ACR adversely affecting his career and that having not been communicated to him and he having not been given a chance to represent against the same, the respondents should not have taken into consideration of those ACRs at the time of consideration for promotion.

6. We are not to sit in judgement over the selection made by the DPC unless the selection is assailed as being vitiated by malafides or on the ground of it being arbitrary. The applicant pleads that the action of the DPC is arbitrary and unreasonable. Submissions and counter submissions of both sides persuaded us to obtain the concerned DPC proceedings so also the ACRs of the applicant in order to find if the action of DPC was arbitrary and/or unreasonable. We have carefully perused the same. The minutes of the relevant proceeding have been gone through. They have considered the case of 24 incumbents for 14 vacancies. The guidelines issued by the Government/Railway Board under Annexure R-1 & R-2 were

the guiding factors. The proceeding does not reveal if the 14 posts feel vacant in the year 2006 or 2007 for which the meeting was held on 17.5.07. Clause (IV) of the resolution (Annexure R-1) relating to periodicity of the meeting of the Selection committee and the panel year enumerates that the selection committee shall normally meet once in a year and it may meet at intervals of less than a year if circumstances so require. The panel should be made to fill up the vacancies anticipated from 1st July of the year to 30th June of next year. To reiterate, the DPC meeting does not state about the year when vacancies arose. The minutes of the proceeding, para 2 reveals that upto 30.6.2006 there were 14 vacancies. Apparently, all the 14 vacancies did not arise in one year. Evidently the panel was not prepared for the anticipated vacancies from 1st July 2007 to 30th June, 2008.

7. Para 10 and 11 of the Government/Railway Board's instruction contained in the letter dated 03.06.08 (Annexure R-2) reads: -

“10. The grading in the ACR represent the assessment of the superior officers during a particular year's performance in general. The overall grading to be assigned by the DPC shall encompass several year's performance and not merely relate with the entries/assessment recorded in the ACRs. It shall be borne in mind that the grading by DPC and in the ACR represent assessment of the officer by two distinct authorities for two different purposes.

11. DPC shall, considering the various factors, assign an overall grading for each of the officer. The grading shall be one among, 'Outstanding', 'Very Good +', 'Very Good', 'Good' and 'Unit'.

12. The benchmark for promotion to various grades shall be as under:-
17

a) From Senior Scale to JAG/SG : Good

b) SAG : Very Good

c) HAG : Very Good +

stringent criteria of selection shall apply for promotion to HAG.”

8. The proceeding manifests that it had considered CCR of 5 years next before 31.3.06. As regards non-empanelment of the applicant it is stated in para 10 thereof:-

“10. Having regard to the provisions and after careful scrutiny of the records, the Committee found S/Shri Balram Majhi, SC Sood, Vishwa Bandhu and Girish Kumar, 1, 4, 5 and 14 respectively of S. No.9 not suitable for empanelment to grade 22400-24500/-.”

9. We have gone through the relevant grading of the ACRs of the

applicant at Srl. No.14 of the list enclosed obviously in accordance with seniority. It is found that he was rated as "Good". In the year 1997-98, he was graded as outstanding. From 01.04.1998 to 21.01.1999 he was graded as outstanding. Thereafter also he was graded as outstanding. In the year 1999-2000 he was graded as "Very Good". In 2000-2001 he was graded as 'outstanding'. In 2002-2003 he was graded as "very good". From 01.04.2003 to 30.06.2003 the reporting officer has graded him as 'Good', but the reviewing or accepting officer has not made any remark and those columns have fallen vacant. Likewise from 02.07.03 to 21.10.03 he was rated as 'Very Good' whereas in the year 2004-2005 he was graded as 'Good'. In 2005-2006 he has been graded as "Average" by the reporting officer whereas reviewing officer has graded him as "Very Good". In 2006-2007 he has been reported as "outstanding" and from 01.04.2007 to 22.07.2007 he has been reported as "outstanding". The ACR entries of three months of the period 2003-2004 (supra), having not been considered by the reviewing or accepting authority, that should not be taken into consideration. In 2004-2005 the applicant was rated as "Good" by the reporting officer P. K. Gupta, CME/MER. But the same reporting officer for the period from 01.04.05 to 09.01.06 rated him as "Average". The General Manager i.e. the reviewing authority did not agree with that remark and made a commendable entry and rated him as "Very Good". We find that the self-appraisal report submitted by the applicant and entries by the authorities in those two years are almost the same. Still the self-same reporting officer rated him from "Good" to "Average" which has not been accepted by the reviewing authority. In the subsequent two years he has been rated as "Very Good" and "Outstanding". The entries made by Sri P. C. Gupta was thus vacillating and arbitrary, so, entries made by Sri P. C. Gupta should have not been considered by the DPC.

10. To reiterate, in para 10 of Railway Board's instruction contained in their letter dated 03.06.02, the performance of several years needs to be considered by the DPC. We find from the enclosures of the DPC proceeding that performance of preceding 5 years from March, 2006 has been considered. In para 4 of the resolution dated 29.3.2000 (Annexure R-1) instruction has been issued that the DPC should be held usually after 1st April of the year ending March of that year as confidential reports ending by March could be available. It is manifest therefrom that the ACRs upto March of the year meeting should be taken into consideration. In the instant case, the meeting was held in May, 2007 but ACRs upto March, 2006 have been considered and no reason has been assigned for the same. At the stake of repetition, the vacancies did not arise in the year 2005-

2006. Obviously those arose long before. So, there was no reason to ignore the CCR of 2006-2007 of the applicant and others.

11. Para 10 of the minutes of the proceeding of DPC has been extracted above. It does not reveal the reason for which the 4 persons especially the applicant has been excluded. It does not reveal as to what records they have verified. The resolution at Annexure R-I and R-II manifests that for empanelment of Higher Administrative Grade officers various factors of several years should be taken into consideration. The documents annexed with the minutes of the proceeding shows that only ACRs have been considered. It does not reveal that any other performance report has been perused.

12. For non-recording of reasons the Apex Court in the case of State of Punjab –Vs- Bhag Singh have held as under: [AIR 2004 SC 1203]
“ Even in respect of administrative order Lord Denning M. R in Breen V. Amalgamated Engineering Union [1971 (1) All ER 1148] observed : The giving of reasons is one of the fundamentals of good administration. In Alexander Machinery [Dudley] Ltd. v. Crabtree, [1974 LCR 120], it was observed : Failure to give reasons amounts to denial of justice. Reasons are live links between the mind of the decision taker to the controversy in question and the decision or conclusion arrived at. Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the ‘inscrutable face of the sphinx’, it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking out. The ‘inscrutable face of a sphinx’ is ordinarily incongruous with a judicial or quasi-judicial performance.”

The applicant had continuous ‘outstanding’ and ‘very good’ entries for various years which have been reflected above except for one or two years in which he was rated as “Good”. We have stated as to why those entries should have not taken into consideration. True it is, a grading as “Good” may not be an adverse remark, but obviously it is down grading when compared to preceding entry of ‘Very Good’ or ‘outstanding’. In the instant case, the applicant has “outstanding” and “Very Good” entries through out inclusive of such “outstanding” entries in the year 2006-2007 and 2007-2008. For such stray entries which should have not been

considered, the applicant met a civil consequence that is, he was debarred from being empanelled for promotion.

13. In the case of U. P. Jain & Ors. v. Pravat Chandra Jain & Ors., the Apex Court has held as follows:-

“ we need to explain these observations of the High Court. The Nigam has rules, whereunder an adverse entry is required to be communicated to the employee concerned, but not downgrading of an entry. It has been urged on behalf of the Nigam that when the nature of the entry does not reflect any adverseness that is not required to be communicated. As we view it the extreme illustration given by the High Court may reflect an adverse element compulsorily communicable, but if the graded entry is of going a step down, like falling from ‘very good’ to ‘good’ that may not ordinarily be an adverse entry since both are a positive grading. All that is required by the authority recording confidential in the situation is to record reasons for such downgrading on the personal file of the officer concerned, and inform him of the change in the form of an advice.”

14. Having relied on the aforesaid decision, Bombay High Court in the case of Dr. Binoy Gupta v. Union of India & Ors. reported in 2002(3) Administrative Total Judgments, Page-7 held as follows:-

“ In the light of the decision of the Supreme Court we find that non selection of the petition for promotion to the post of Chief Commissioner on the basis of the Acr where communication of down grading has not been made vitiate the proceedings. Therefore, we direct the respondents to convene a review DPC and reconsider the case of the petitioner ignoring the ACRs of the Reviewing Officer for 1995-1996 and also ACRs of 1996-1997 and 1998-99 and if he is found suitable, give him promotion from the date from which other officers who were promoted on the recommendations of the DPC.”

15. The Apex Court in the case of Deb Dutt V. Union of India & Ors. (Civil Appeal No.7631 of 2002) held that non-communication of such entries in the circumstances mentioned above, is an arbitrary action of the authority and violative of Art. 14 of the Constitution.

16. Coming to the instant case, we find that the down grading in the facts and circumstances is an arbitrary action of the authority which is apparent from the fact that the applicant was graded as “Very Good” and “Outstanding” in the previous and subsequent years. Though he met the consequence for such down gradation, that has not been communicated to him. Accordingly this was an arbitrary act of the authority. The arbitrariness of the authority is corroborated from the fact that they have not considered the ACRs for 2006-07

(upto March 2007) though the DPC meeting was held in May, 2007. Further, the periodicity prescribed has not been adhered to.

17. As discussed above instructions of Board/government contained in AnnexureR-1 and R-2 have not been adhered to. In the absence of a statutory rule, administrative instruction can fill up the gap.

[Referred the decision of Apex Court in the case of M. Srinibas Prasad & Ors. vs. Controller of Audit {2008 (1) AISLJ 229 SC}]. Non adherence to the instruction amounts to unreasonable and arbitrary action of the authorities. A remark has been made in the annexed documents of DPC proceeding against the applicant, which was placed before the committee for their consideration, that he was imposed with a minor penalty, but was exonerated of the charges by the higher authority. When he was exonerated of the charges, this entry/remark was not necessary and uncalled for. On the other hand, there is reason to hold that such a remark has been made, and placed before the DPC only to prejudice the minds of the members of the DPC. The down grading rating for the reasons discussed above, should have not been considered. On the other hand, his previous performance should have been taken into consideration as overall performance. These facts reveal that the exclusion of the applicant of being empanelled for promotion to Sr. Administrative Grade is an arbitrary and unreasonable act of the authority, violative of Art. 14 and as such is not sustainable.

18. The Apex Court in the case of Coal India Ltd. & Ors. vs. Saroj Kr. Misra [2008 (1) AISLJ 100] held that State action must satisfy the test of reasonableness and fairness. After careful consideration and for reasons discussed above, we hold exclusion of the applicant from the impugned panel is not sustainable. The respondents are directed to consider the claim of the applicant afresh for selection and empanelment for promotion to the Higher Administrative Grade by ignoring the non-communicated down graded ACRs mentioned above. This exercise be completed within 4 months from communication of this order. No order as to cost.

MEMBER (A) MEMBER (J)”

23) The factual foundation of the original application filed by Sri Girish Kumar before the learned Tribunal below was to this effect. That downgraded rating in

annual confidential reports as were not communicated to him, were considered by the Departmental Promotion Committee while considering his case for promotion in the cadre of Higher Administrative Grade of the Railways. It was contended that he meritoriously served the railway since March, 1975 in the Indian Railway Mechanical Cadre and in the Senior Administrative Grade which is referred to as SAG since January, 1995 and while he was working in the feeder post of Senior Administrative Grade, his name was within the zone of consideration of the Departmental Promotion Committee for promotion in the cadre of Higher Administrative Grade, a promotional post, from the said post of Senior Administrative Grade of Railways and the Departmental Promotion Committee despite the fact that he was continuously awarded 'outstanding' and 'very good' rating in respective annual confidential reports of the respective years upto 2001-02, considered the down-graded non-communicated annual confidential reports for the period 1st April, 2003 to 30th June, 2003 which was assessed as 'Good' by the reporting officer without any remarks by reviewing and accepting officer and the report of the year 2004-2005 having remark as 'good' as well as the remark of the year 2005-06 as 'average' assessed by the same reporting officer and thereby did not recommend his case for appointment when it sat in May, 2007 though the names of many junior candidates were recommended for appointment.

24) The annual confidential reports of different years were noticed by the learned Tribunal below while passing the impugned order and it was asserted also by Sri Girish Kumar in his written notes of argument and in his writ application. The particulars of such reports during working period in the cadre of Senior Administrative Grade are to this effect :

- i) For the year 1997-98 remarks 'outstanding'
- ii) For the period 1st October, 1998 to 21st January, 1999 remarks 'outstanding'
- iii) For the period 1999-2000 remarks 'very good'
- iv) For the period 2000-2001 remarks 'outstanding'
- v) For the period 2001-2002 remarks 'outstanding'
- vi) For the period 2002-2003 remarks 'very good'
- vii) For the period 1st April, 2003 to 30th June, 2003 remarks made by reporting (good) but no remark by reviewing and accepting officer and this remarks was not communicated to Grish Kumar.
- viii) Non-communicative remarks for 2nd July, 2003 to 21st October, 2003 remarks 'very good'
- ix) Non-communicative remarks for 2004-05 remarks 'good'
- x) Non-communicative remarks for the period 2005-06 'average' by the same reporting officer but Girish Kumar was graded as very good for the same year by the Reviewing and Accepting Officer. The remarks of good, average were not communicated to Girish Kumar.
- xi) For the period 2006-07 remarks 'outstanding'.
- xii) For the period 1st April, 2007 to 22nd July, 2007 'outstanding'.

25)_ Departmental Promotion Committee did not consider the remarks of the year 2006-07 and for the period 1st April, 2007 to May, 2007 though they sat in a meeting in May, 2007.

26)Relying upon the principle of law as decided namely that all Annual Confidential Reports should be communicated to the employee concerned seeking objection, if any, irrespective of the fact whether it is good, outstanding or adverse as propounded on considering applicability of principle of natural justice following the case of Maneka Gandhi vs. Union of India reported in (1978) 1 SCC 248, in the case of Deb Dutt vs. Union of India & Ors. reported in (2008) 8 SCC 725 and instruction of the Railway Board/ Central Government annexed as Annexure R-1 and R-2 in the original application, learned Tribunal below answered the issue in favour of Sri Girish Kumar.

27) It is the case of the Union of India or more precisely the Railway authority in the writ application assailing the order of the learned Tribunal below as follows

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1) That down-gradation of report of Annual Confidential Reports should be identified on basis of performance appraisal of interim period of the concerned year of assessment, but not on basis of assessment of different years. Hence, there is no scope as per rule to communicate any remark of a year by comparative analysis of report of previous year, terming it “adverse”. So, duty of communication of the ACR provided in the circular letters of the Railway Board, was not breached as only the “adverse remark” is required to be communicated.

2) That Deb Dutt (supra) on the reflection of subsequent judgement passed in

the case K. L. Mishra vs. Central Bank of India reported in (2008) 9 SCC 120 where earlier judgement of Satyanarayan Sukla vs. Union of India reported in (2006) 9 SCC 69 was relied upon, could not be said as a precedent to give effect of the views expressed therein namely that all reports should be communicated irrespective of the fact that it was not termed as “adverse” as per common meaning. That even if by subsequent instruction of the railway board, ratio of Deb Dutt case (supra) has been accepted and direction made for communication of all entries of the confidential reports, but the said circular since was issued on 14th May, 2009, with specific stipulation of prospective effect, it could not be given retrospective effect to grant appropriate relief to Sri Girish Kumar.

3) Lastly, it has been argued that word ‘adverse’ always means something below “good” or “average” as such considering the dictionary meaning of the word adverse, there was no liability upon the railway authority to communicate the remarks “good”, or “average” as were noted in the respective annual confidential reports for the period 1st April, 2003 to 30th June, 2003, for the period 2004-2005 and for the period 2005-06 which were considered by the Departmental Promotion Committee to refuse recommendation in favour of Sri Girish Kumar for his promotional berth to the post of higher administrative grade.

28) Countering the arguments advanced by the Railway authority the learned Advocate for Sri Girish Kumar has contended before us as follows:-

i) That as the ACR of last 5 years are required to be considered by the

Departmental Promotion Committee while considering the candidature of a candidate for promotional post of Higher Administrative Grade, any entry of such 5 years irrespective of noting good or average, was required to be communicated inasmuch as when Sri Girish Kumar was awarded remarks for his performance of work since the year 1997-98 to 2002-2003 as outstanding, very good etc. at different years which naturally would be considered as a tool to identify ACR of subsequent years irrespective of remarks “good” or “average” as the case may be, as “adverse” and as such the Departmental Promotion Committee was wrong to conclude their decision relying upon non-communicated down graded remarks, namely the remarks of the respective years “good”, “average” etc. as the case may be.

ii) That the word adverse is required to be considered not as per meaning of dictionary, but in the angle of the promotional rules of the organization as well as taking note of the settled judgement of the Apex Court Deb Dutt(supra) whereby and whereunder it is propounded that any remarks as would affect adversely while considering the promotion issue for higher post, would be considered as “adverse” and as such there was necessity of communication of the same.

iii) Lastly, it has been argued that the order passed by the learned Tribunal cannot be considered under the scanner of judicial review under Article 226 of the Constitution of India as arbitrary, illegal or on breach of any legal principle of law to face the wrath of the writ Court and more emphasis has been made to the circular letter dated 14th May, 2009 issued by the Railway authority accepting the principle laid down in the case of Deb Dutt(supra), a judgement delivered relying upon the Larger Bench views identifying the principle of natural justice qua the arbitrary action as propounded in the case Maneka Gandhi (supra).

29) Having regard to the rival contention of the parties the points emerge for our adjudication are as follows:-

i) Having regard to the Promotion Rule of Railway authority for the post of Higher Administrative Grade from the lower feeder post of Senior Administrative Grade and the object and purpose of communication of the annual confidential reports on the basis of circulars as contained in brochure, published by the Railway authority annexed in the supplementary affidavit by the Union of India, whether respective ACR having remarks as ‘good’ or ‘average’ as were considered by the departmental promotion committee while considering promotional scope of Sri Girish Kumar, would be considered as “adverse” in comparison to

earlier ACR and thereby non-communication of such remarks seeking objection, if any, before relying upon such reports whether has vitiated the recommendation- process of the Departmental Promotion Committee to hold that its conclusion thereof was arbitrary and illegal?

ii) The effect of the subsequent circular letter dated 14th May, 2009 issued by

Railway Board accepting applicability of the principles laid down in Deb Dutt (supra) on promotional rules and the procedural circulars contained in brochure for recording the confidential reports, whether could be considered, to test the decision of the learned Tribunal and Departmental Promotional Committee under anvil of Article 14 of the Constitution of India?

iii) Whether the views expressed in Deb Dutt(supra) could be read as a binding

precedent to apply its “ratio decidendi” on taking note of ratio decidendi of the earlier judgement of Larger Bench of the Apex Court passed in Maneka Gandhi (supra) and the circular of Railway Board as contained in ‘Brochure’ as referred to above?

iv) What relief could be available to the respective writ petitioners with reference to their respective writ applications?

30) Point No.1 is taken up for consideration. Xerox copy of the brochure on confidential reports containing different circular letters/memo published by the

Government of India, Ministry of Railway and Railway Board for its official use

with preface and notes thereof, a xerox blank ACR form in respect of officers in

Senior Administrative Grade and the list of officers of IRSE service who were

promoted to Higher Administrative Grade during pendency of the writ applications and their seniority position vis a vis of Sri Girish Kumar, have been

annexed in a supplementary affidavit filed by the Union of India, the writ petitioner, affirming the same through one Sri Shibdan Singh, Joint Secretary

(GAZ), Ministry of Railway, Railway Board, New Delhi on 23rd February, 2010.

The purpose and conceptual idea of writing a confidential report and its

communication thereof including the philosophy and procedure of writing the same was already included in Indian Railway Establishment Code, 1971 edition (hereinafter referred to as 'IREC' for brevity) but due to some changes and modifications thereof, by issuing the said "brochure of confidential reports", the existing chapter of confidential reports in the said IRSE Vol.1 1971 edition so far as provisions incorporated in brochure was declared as deleted with a saving clause by keeping other provisions in tact. The relevant portions from said brochure read such:

"NOTES

1. With the issue of this Brochure, the existing chapter on confidential report in IREC Vol. 1 1971 edition, in regard to the provisions thereof incorporated herein, may be treated as deleted.
2. Other instructions issued for writing of CRs on gazetted Railway servants which are not contradictory to the provisions of this Brochure will remain in force.
3. In case of any doubt in regard to interpretation of the provisions of the Brochure or its applicability, the matter may be referred to Railway Board whose decision would be final.
4. Instructions contained in this Brochure are in the nature of administrative guidelines for the guidance of Railway officers for writing of ACRs of Gazetted Railway servants. Nothing contained herein should be construed and quoted for furtherance of any illegitimate claim or untenable demand/request not otherwise due or admissible, for modification, revision or alteration of any ACR written and finalised and not proved to the mala fide.

31) Preface of the brochure reads such:

" Confidential Reports are important documents. These are necessary input for taking decisions in the matter of promotion, placement, training, premature retirement etc. Confidential Reports are supposed to serve the interest of both organisation as well as its members; organisation gets feedback about the performance of individual members through these documents so that it may utilise their capabilities and potential in best possible manner to achieve its goals. For individuals, system of CRs act as a catalyst for their professional development as it enables them to improve their performance. A system of Confidential Reports has a very important

bearing on the efficiency of the public service and motivation of its members.”

Chapter-I of the brochure deals with performance appraisal –philosophy and approach. The said chapter 1 reads such:

“ CHAPTER – I

PERFORMANCE APPRAISAL – PHILOSOPHY AND APPROACH

1.1 The performance of an organisation is ultimately the sum total of the performance of the individuals through which it functions. Performance appraisal is an essential tool of management to know how the individual functions. It helps in achieving the objectives of the organisation through the critical assessment of the capabilities and potential of its employees, and their usefulness for the organisation. A formal appraisal in the Government sector is known as Annual Confidential Report written at the end of calendar or financial year.

1.2 The system of Confidential Reports on the performance of Government servants is a means to an end and not an end in itself. The ultimate goal is to optimize the achievement of organisation’s objectives and programs. This is possible only if the Confidential Reports lead to the optimization of the performance of the concerned Reportee officer. The main focus of the Reporting system should, therefore, be developmental rather than judgmental. A Confidential Report should be a true indicator of the achievement of the Reportee officer; and should not be merely to control or discipline him.

1.3 The main purpose of a reporting system is to serve the interest of organisation by ensuring that the Administration knows the officers and makes optimum use of their capabilities. This implies that the officers showing promise are spotted and assigned higher responsibilities. Postings are done in a manner that the organisation gets the best from its members. It gives them job satisfaction and the officers are appraised of weakness for further professional development. Hence, the reporting system has an important bearing on the efficiency of the individual and the organisation as a whole.

1.4 Performance appraisal should be continuous and participative process, based on two-way dialogue between the supervisor and the supervised throughout the year culminating into a formal Annual Performance Review (APR). Managers should as part of their daily responsibility have open and informal discussions with subordinates throughout the year. This should happen as a matter of course and has no rigid form or timing. However, the need to plan for the future demands the formal requirement to record and annual and more detailed review. Informal

including verbal conversations, memos, notes, directions should constitute a natural progression to the Annual Review.

1.5 The system of Confidential Reports has two principal objectives and the Reporting officer should have a very clear perspective of these objectives.

These objectives are :-

(a) To assess truly the performance of the sub-ordinate in his present job and by providing guidance and counseling to him to improve his performance ; and

(b) To assess his potential and to prepare him through appropriate feedback and guidance for higher responsibilities.

1.6 Success of the Reporting system depends on the following principles :-

(i) Absolute objectivity of the assessor (s).

(ii) Two- way communication between the reportee and reporting officer.

(iii) A true and objective assessment of job-related performance and fitness to shoulder higher responsibilities.

(iv) Should be aimed at improving the performance of employees.

(v) Subsequent follow-up action.

1.7 It is in the interest of every Gazetted Railway servant that he should know whether he is performing his job well or otherwise. In fact, he should be more interested in knowing his defects. He should always endeavor to know and to find out his defects in his interaction with his superiors, colleagues and public/persons with whom he deals. His defects would affect his career advancements in the long run, unless he comes to know of them in time and overcomes them by making special efforts. Any system to be successful should also provide this feedback to him.

1.8 It is the duty of the superior officer to give the subordinate a clear understanding of the tasks to be performed and the subordinate is required to contribute to the best of his capacity to the qualitative and quantitative achievement of the given tasks making optimum use of the resources available. Also, both the superior and his subordinate have to be aware of the ultimate goal of their organisation, which can be achieved only through joint efforts of both of them.”

Chapter-II of the said brochure deals with in general the mode of writing of confidential report on appraisal of performance of the officer concerned as well as

scrutiny by the reporting authority including reviewing authority and communication of the reports to the reportee. The relevant portion under column

2.10, 2.11 reads such:

“2.10 ACR should be initiated by the Reporting officer immediately after the reporting period – annual or part, is over. It is the responsibility of the Reporting officer that no delay in writing of ACRs occurs. The Reporting authority has also the responsibility regarding making a mention in the report about warning, admonishment, displeasure, reprimand etc., administered to a Railway servant for inefficient working during the reporting period. In case the officer has shown improvement after warning etc., otherwise may decide not to make a reference in the ACR to the warning etc., otherwise he may make an appropriate mention in the relevant columns. In that case adverse remarks thus entered should be conveyed to Railway servant concerned and his representation disposed off as per procedure.

2.11 After the report is written by Reporting officer, it would be reviewed by Reviewing authority i.e. authority superior to Reporting authority or such other authority as maybe prescribed in this regard. The Reviewing authority should exercise a positive and independent judgement on the remarks given by the Reporting authority in the ACR and record his/her agreement or disagreement with the remarks/assessment of the Reporting authority, particularly if they are adverse.”

Chapter-III of the said brochure which is compilation of different circular letters from IRSC deal with “contents and objective assessment- its procedural

steps”. The relevant portions being clauses 3.9, 3.10, 3.11, 3.17, 3.28, 3.30 read

such :

“3.9. Confidential reports on gazetted railway servants must contain a full and frank appraisal of his work during the year, the traits of character, whether pleasant or unpleasant, aptitude, personality and bearing, which contribute to quality of his work as a gazetted railway servant and his fitness for shouldering higher/particular responsibilities. The reports must not be confined merely to general remarks and off hand impressions so brief and casual as to convey little or no real meaning and the assessment must be based on failure or excellence in the work entrusted to the gazetted railway servant.

3.10. ACR contains a column regarding general assessment of the Government servant and grading of his work. The Government servant to be reported upon should be graded according to his performance. A Government servant should not be graded ‘outstanding’ unless exceptional qualities and performance have been noticed in him. Reasons for giving

such a grading should be clearly brought out. Where performance of an officer is graded 'Average', it should be supported by reasons bringing out his deficiencies in the body of the report which should be communicated to the concerned officer for improvement of his performance.

3.11. ACR format also contains columns regarding fitness for promotion to next higher grade/posting in the cadre, and against specific posts. Where the performance of the officer is graded as per the bench mark for the next grade in the cadre but he is considered 'Not Fit' for promotion, the grounds therefor should be clearly brought out and communicated to the officer reported upon.

3.17. To minimise operation of subjective human element and of conscious or unconscious bias, writing of ACRs at more than one level has been desired. While it might be difficult for an higher officer to have a detailed knowledge of the qualities of a gazetted railway servant two level below him, is overall assessment of the character, performance and ability of the gazetted railway servant reported upon is vitally necessary as a built-in corrective. The judgement of the immediate superior can sometimes be too narrow and subjective to do justice to the gazetted railway servant reported upon. The Reviewing Officer should, therefore, consider it his duty to personally know from his judgement of the work and conduct of the gazetted railway servant reported upon. He should exercise positive and independent judgement on the remarks of the Reporting Officer under the various detailed headings in the form of Report as well as on the general assessment and express clearly his agreement or disagreement with these remarks. This is particularly necessary in regard to adverse remarks (if any), where the opinion of the higher officer shall be construed as the correct assessment. The Reviewing Officer is also free to make his own remarks on points not mentioned by the Reporting Officer.

3.28. Performance appraisal through Confidential Reports should be used as a tool for human resource development. Reporting Authorities should realise that the objective is to develop an officer so that he/she realises his/her true potential. It is not meant to be a fault-finding process but a developmental one. The Reporting Authority and the Reviewing Authority should not shy away from reporting shortcomings in performance, attitudes or overall personality of the officer reported upon.

3.30. The commentary in the Confidential Report and the views/recommendation given by the General Manager or Reviewing/Accepting authority, sometimes do not tally and it becomes difficult to find out true assessment of the performance of the officer reported upon. This may be due to a hesitation on the part of Reporting

officers to say much against an individual officer. The Report writing officers must express their honest opinion about the performance and potential of the Reportee officer and need not worry as to how the officer reported upon is going to react, if the Report has been recorded objectively and in a fair manner. ”

Chapter-IV deals with “adverse remarks and representations thereagainst”. The relevant portion 4.1, 4.2, 4.7.4 reads such :

“4.1. A gazetted railway servant shall not ordinarily be given an unfavourable confidential report before an opportunity has been taken, by means of a personal interview and/or, by means of a personal letter/memo pointing out to him the direction in which his work has been unsatisfactory or the faults of character or temperament, which are required to be Remedied. The manner and method of conveying to the gazetted railway servant that his work needs improvement in certain directions must be such that the advice given and the warning or censure administered, whether orally or in writing, shall, having regard to the temperament of the gazetted railway servant, be most beneficial to him. If, in spite of this, there is no appreciable improvement and an adverse confidential report has to be made, the facts on which the remarks are based should be clearly brought out in the confidential report itself.

4.2. As a general rule, in no circumstances, should a gazetted railway servant be kept in ignorance for any length of time that his superiors, after sufficient experience of his work, are dissatisfied with him; where a warning might eradicate a particular fault, the advantages of prompt communication are obvious. On the other hand, the communication of any adverse remarks after a long time and removed from their context is likely to give a misleading impression to the gazetted railway servant concerned.

4.7.3. In some cases, officers are declared ‘not fit’ for promotion to the next grade in the cadre without any supporting entries to this effect in the report. Occasionally, the reviewing authorities also declares an officer unfit without mentioning the reason thereof. To do justice to the reportee officers, considered ‘NOT FIT’ in ACR, it is necessary that the reasons should be adduced in the relevant columns of the report form and the shortcomings, if any, are brought to the notice of the officer or appropriate counseling is done so that the officer is able to improve upon his performance.

4.7.4. The grading of ‘Average’ should be supported by remarks in the body of the report pointing out the specific deficiencies and the same should be communicated to the concerned officer to enable him to improve

his performance.

Annexure-I of the brochure speaks about various time schedule for finalisation and submission of ACR. The time schedule to complete the portion of

confidential report and submission of ACRs under Clause-I, II reads such:
“TIME SCHEDULE FOR REPORT WRITING OFFICERS TO COMPLETE THEIR PORTION OF CR.

Post Date by which to be finalised and submitted\

(i) SAG & above officers with 25 years or more Group ‘A’ 15th April

(ii) SAG officers with less than 25 years Group ‘A’ service 30th April

(iii) SG/JA Grade officers with 13 years and above Group ‘A’ service 15th May

(iv) Other officers. 31st May

II. TIME SCHEDULE FOR FINALISATION AND SUBMISSION OF ACRs

Nature of Action Date by which to be completed

1. Submission of report by reporting authority to Reviewing authority

7th April

10th April

20th April

30th April

15th May

In case of As level and above where self-appraisal is not prescribed.

In case of SAG and above officers with +25 years Group ‘A’ service, where self-appraisal is prescribed.

In case of SAG and above officers with less than 25 years Group ‘A’ service.

In case of SG/JAG officers with 13 years service.

In all other cases.

2. Report to be completed by Reviewing officer

15th April

In case of AS level and Sag and above officers with +25 years

service.

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25th April

10th May

25th May

In case of SAG officers with less than 25 years Group 'A' service

In SG/JAG with +13 years of service

In all other cases.

3. Report to be completed by Accepting authority and sent to Administration

15th April

30th April

15th May

30th May

In case of AS level, SAG and above officers with +2 years Group 'A' service

In case of SAG officers with less than 25 years service.

In SG/JAG with +13 years of service

service

In all other cases

Note : ACR forms should be distributed to all Reportee officers by 25th of March who

should submit the self-appraisal latest by 7th April.”

Grading and fitness column as annexed in the brochure under Annexure clause 5 reads such:

“ Designation/Railway _____

5. Grading and Fitness

(Outstanding/Very Good/Good/Average/Below Average)

(An officer should not be graded outstanding unless exceptional qualities and performance have been noted; grounds for giving such a grading should be clearly brought out.)

Fitness for promotion

GM & Equivalent

Auth

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Gradi

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Suita

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as

DRM

Gr.

Rs.22,400-

24,500/-

Addl.

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Note: i) No officer can give fitness for posts higher than his own.

ii) Fitness for grade Rs.22,400-24,500/- and GM & equivalent will not

given unless the reportee officer has completed 20 and 25 years of service respectively in Group 'A'. The fitness for AGM/GM(OL) shall be given in respect of those officers who have worked/are working as DRMs (Please see column 7 (b) of part-I).

i

ii) Give reasons for difference of opinion. Otherwise grading of reviewing/accepting authority shall not be accepted.

iv) Write 'Yes' and 'No' in each box of fitness. (☐) Mark should not be made.

Place: _____ Reporting Signature _____

Date : _____ Authority Name _____

Designation _____ ”

Under Chapter-V remarks of reviewing authority and the remarks of accepting authority, in the format are required to be noted which provides a scope of scrutiny.

The instruction column of the said brochure having relevancy to adjudicate this. The relevant instruction thereof under clause 1, 2, 6, 8 which reads such :

“1. The Confidential Report is an important document. It provides the basic and vital inputs for assessing the performance of an officer and for his/her further advancement in his/her career. The Officer reported upon, Reporting, Reviewing and Accepting Authority, should, therefore, undertake the duty of filing out the form with & high sense of responsibility.

2. Performance appraisal through Confidential Reports should be used as a tool for human resource development. Reporting Authority should realise that the objective is to develop an officer so that he/she true potential. It is not meant to be a fault finding process performance, attitudes or overall personality of the officer reported upon.

6. The Reporting Officer shall, in the beginning of the year, set quantitative/physical/financial targets in consultation with each of the officers with respect to whom he is required to report upon. Performance appraisal should be a joint exercise between the officer reported upon and the Reporting Authority. The targets/goals shall be set at the commencement of the reporting year, i.e. April. In case an officer takes up a new assignment in the course of the reporting year, such targets/goals shall be set at the time of assumption of the new assignment.

8. Although performance appraisal is a year-end exercise, in order that it

may be a tool for human resource development, the Reporting Authority and the officer reported upon should meet during the course of the year at regular intervals to review the performance and to take necessary corrective steps. Review should confirm understanding of goals and targets.4.”

32) Having regard to the aforesaid contents as set out above from the brochure, the conceptual philosophy of preparing a confidential report will give proper answer to the issue raised as to whether all entry/remark of the confidential report should be communicated by identifying it as “adverse” remark in the angle of the philosophical context of writing the confidential report as per Indian Railway Establishment Code, 1971 edition read with brochure aforesaid and promotional procedure and rule for considering merits of candidates for the post of HAG.

33) From the preface as quoted above it appears that confidential reports are necessary input for taking decision in the matter of promotion as well as other aspects and it serves the interest of both the organisation as well as its employee; organisation gets feed back about the performance of individual employee through those documents so that it may utilise his capabilities and potentiality in best possible manner to achieve its goal. For individual employee also it acts as a feed back for his professional development as it enable him to cure defects or short coming to improve performance. The system of writing confidential report accordingly in the preface of said brochure has been commented as very important bearing on the efficient public service and motivation of its members. This preface was written by Sri D. P. Tripathi, Secretary, Railway Board.

34) Performance appraisal, its philosophy and approach as quoted above in Chapter-I, clause 1.2, provides main focus of reporting system which is

developmental rather than judgemental. From clause 1.3 it appears that the performance of reporting system gives the reportee a job satisfaction and they are apprised of weakness which helps them to acquire professional development by curing defects, if any, as such the reporting system has an important bearing on the efficiency of individual and the organisation as a whole. (underline is of mine)

35) Under clause 1.7 as quoted above- it speaks that authority should inform whether employee is performing his job well or otherwise. In fact he should be more interested in knowing his defects- as his defects would affect his career advancement in the long run. So unless he comes to know of them in time he fails to make special efforts to improve his performance and any system to be successful should also provide this feed back. (underline is of mine)

36) Clause 2.10 speaks about performance reporting and communication of the “adverse” remarks. Clause 3.9 as quoted speaks that report should not be confined to merely its general remarks which does not convey real meaning and the assessment must be based on failure or excellence in the work entrusted to the Gazetted Railway servant. (underline is of mine)

37) Clause 3.10 speaks about that only on exceptional qualities and performance, grading of outstanding should be noted and grading of average should be supported by reasons bringing out the deficiency in the body of the report which require to be communicated to the concerned officer for improvement of his performance. (Underline is of mine).

38) Clause 3.28 speaks that performance appraisal should be used as a tool for human resource development and its objective is to develop an officer to realise his/her true potential and does not mean to be a error finding process but a developmental one. As such the reporting officer and the reviewing authority

should not shy away from reporting shortcomings in performance attitude or overall personality assessment of the officer, reported upon. (underline is of mine)

39) Clause 4.74 categorically specifies that grading of average should be supported by remarks and to be communicated to improve his performance.

Time

schedule and the procedural steps for recording the reports by reporting officer,

reviewing authority and the accepting authority as an indicative of utilisation of

potentiality of the officer for the service of the organisation. (underline is of mine)

40) Having regard to those conceptual idea of making the confidential reports

on performance judgement and philosophy of such, it is abundantly clear that a

confidential report should be utilised for the purpose of assessing potentiality of

the officer and when the potentiality of the officer for the organisation is the sole

criterion to be judged and considered for better utilisation of his service, it is axiomatic that it requires to be communicated.

41) From the application filed before the learned Tribunal below and the writ

application as filed before us by Sri Girish Kumar as well as relevant documents

and papers as have been produced by the writ petitioner Union of India in its writ

application, it appears that for consideration of the candidature for promotion in

the Higher Administrative Grade, Departmental Promotion Committee sat in May,

2007 and in view of the remarks “good” for the period April, 2003 to 30th June,

2003; remark “very good” for the periods 2nd July, 2003 to 21st October, 2003;

“good” for the appraisal period of 2004-05 and the remark “very good” for

appraisal period of 2005-06, they did not consider to recommend Sri Girish Kumar for appointment to the post of Higher Administrative Grade on the ground

of non-suitability by considering ACR of 5 years next before 31st March, 2006.

From the records it appears that performance of Sri Girish Kumar since the year

1997 upto the year January, 1999 was “outstanding”, thereafter for the year 1999-2000 “very good” and again for the years 2000-02, for two consecutive years remark was “outstanding” and thereafter for the year 2002-03 it was “very

good”, for the period 2nd July, 2003 to 21st October, 2003 it was “very good” for

the year 2005-06 it was also “very good” as per remarks of the reviewing and

accepting authority and thereafter for the period 2006 to July, 2007 it was again

“outstanding” by two consecutive reports. The departmental promotion committee did not recommend his case as he could not achieve bench mark for

promotion which was specified as “very good +”.

42) The Learned Tribunal below quoted Annexure R-2 of the original application, a circular letter/instruction of the Railway Board dated 3rd June, 2008, stipulating the procedural steps for consideration by the departmental promotion committee to grade the candidate aspiring for the promotional post in

the rank of Higher Administrative Grade. The relevant portion of those, reads

such:

“Para 10 and 11 of the Government/Railway Board’s instruction contained in the letter dated 03.06.08 (Annexure R-2) reads: -

“10. The grading in the ACR represent the assessment of the superior officers during a particular year’s performance in general. The overall grading to be assigned by the DPC shall encompass several year’ performance and not merely relate with the entries/assessment recorded in the ACRs. It shall be borne in mind that the grading by DPC and in the Acr represent assessment of the officer by two distinct authorities for two different purposes.

11. DPC shall, considering the various factors, assign an overall

grading for each of the officer. The grading shall be one among, 'Outstanding', 'Very Good +', 'Very Good', 'Good' and 'Unit'.

12. The benchmark for promotion to various grades shall be as under:-

a) From Senior Scale to JAG/SG : Good

b) SAG : Very Good

c) HAG : Very Good +

stringent criteria of selection shall apply for promotion to HAG.”

43) Though the Departmental Promotion Committee sat to consider the issue in May, 2007, but it did not consider the outstanding remarks of the said year

and the previous year thereof but considering the non-communicated remarks

“good” for the appraisal period 1st April, 2003 to 30th June, 2003 and for the

period 2004 to 2005 did not recommend appointment of Sri Girish Kumar in the

post of Higher Administrative Grade. The learned Tribunal below took an exception of the issue by applying the test of fairness and reasonableness doctrine regarding communication of the remark irrespective of the fact whether

it is “good”, “very good” or outstanding, by holding, inter alia, that when an officers' performance was recorded in the previous years as “outstanding”, or

“very good” but subsequently in subsequent year when a noting was made in confidential report as “good” or “average” as the case may be, the concern reportee was entitled to have communication of the same so that he could file a

representation seeking, inter alia, the relief as to why the grading should not be

“outstanding” elevating it from the grading “very good” and/or it should not be

“very good” on elevating it from the remarks “good”.

44) From the promotion Rule as has been placed before us, it appears that the

gradation is done by the Departmental Promotion Committee on considering different factors including consideration of confidential reports of last 5 years. As

confidential reports are taken into account to fix 'Bench Mark', communication of those 5 years confidential reports, even if any report is "good" for some period, was required to be done prior to consideration of the same by the Departmental Promotion Committee, so that officer concerned may file a representation seeking upgradation of such remark to "very good/outstanding" from "good" as has been reported against. Since promotion of a candidate is based upon identification of Bench mark "very good +" considering the confidential reports, as a major factor, in terms of promotion rule prescribing consideration of performance records written in confidential reports of last 5 years, an officer who was graded in the previous year as outstanding/very good if was graded "good" in subsequent year, naturally he accrues a right for fair consideration of his promotional birth to make an objection to the recording 'good', so that appropriate decision could be taken by considering his representation either for upgradation of such confidential report "very good" or "outstanding" or to reject it. By this process fairness and reasonableness principle, a facet of Article 14 of the Constitution of India could be satisfied. This area of filing representation is within the domain of natural justice principle as the report "good" though may not be considered as "adverse" in terms of general meaning, but the remark "good" in comparison to the earlier assessment as "outstanding/very good" surely could be considered as "adverse" due to the special fact that this remark 'good' may result his ouster to achieve the bench mark 'very good +', when his case would be considered for

promotional birth to higher post. Though promotion is not matter of right, but fair and reasonable consideration of a candidate's past performance to consider his candidature for such promotional birth, comes within the domain of his right under Article 14 of the Constitution of India read with Article 21 of the Constitution of India. It also results an effect alike "civil consequence" as per settled legal position analysed in the case S. L. Kappor v. Jagmohan and & Ors. reported in AIR 1981 SC 136 a judgement of three Judges Bench and in the case Mohinder Singh Gill v. Chief Election Commissioner, New Delhi, reported in AIR 1978 SC 851, a judgement of Constitution Bench.

45) There is no doubt on settled legal proposition that promotion is not a matter of right. But consideration of candidature fairly and properly however, is within the domain of constitutional right under Article 14 and 21 of the Constitution of India. The promotion in a service results vital effect and impact in the service career of the employee. The Apex Court considered the basic philosophy of promotional birth and its avenue in the case Council of Scientific and Industrial Research and Anr. Vs. K. G. S. Bhatt & Anr. reported in (1989) 4 SCC 635 while dealing with the issue about opening of promotional birth. Philosophical context of "promotion avenue" as discussed in the said report will throw some light to identify the issue clearly. In para 9 of the said report, the Court held to this effect, which is quoted hereinbelow. "It is often said and indeed, adroitly, an organisation public or private does not 'hire a hand' but engages or employs a whole man. The person is recruited by an organisation not just for a job, but for a whole career. One must, therefore, be given an opportunity to advance. This is the oldest and most important feature of the free enterprise system. The opportunity for advancement is a requirement for progress of any organisation. It is an incentive for personnel development as well (See:

Principles of Personnel Management by Flipo Edwin B. 4th Ed. p.246). Every management must provide realistic opportunities for promising employees to move upward. "The organisation that fails to develop a satisfactory procedure for promotion is bound to pay a severe penalty in terms of administrative costs, misallocation of personnel, low morale, and ineffectual performance, among both non-managerial employees and their supervisors." (See: Personnel Management by Dr. Udai Pareek p.277). There cannot be any modern management much less any career planning man-power development, management development etc. which is not related to a system of promotions. (See: Management of Personnel in Indian enterprises by Prof. N. N. Chatterjee, Chap. 12, p. 128)."

46) From the above quote it appears that every management must provide realistic opportunity for promising employee to move upward and an opportunity should be given for advancement which is essential requirement for progress of any organisation and incentive for personal development. In that angle, the said finding has an impact to deal with the present case wherein to fulfil the realistic opportunities for promising employees to move upwards and for advancement in the service career, the communication of ACR as are being considered to reach the bench mark by the departmental promotional committee will satisfy the said requirement of management rule as discussed in the said judgement.

47) Opportunity to a public servant to improve excellence satisfying the constitutional provision of Article 51A(j) which enjoins upon every citizen the primary duty to constantly endeavour to prove excellence, was considered in the case State of U.P. Vs. Yamuna Shanker Misra & Anr. reported in (1997) 4 SCC 7 as referred to in the said Dev Dutt (supra). The relevant para 7 is profitable for our discussion in this judgement is quoted hereinbelow:-
" It would, thus, be clear that the object of writing the confidential

reports and making entries in the character rolls is to give an opportunity to a public servant to improve excellence. Article 51-A(j) enjoins upon every citizen the primary duty to constantly endeavour to prove excellence, individually and collectively, as a member of the group. Given an opportunity, the individual employee strives to improve excellence and thereby efficiency of administration would be augmented.”

48) Since in the promotion rule it is provided that last 5 years confidential report to be considered, naturally any remark made therein becomes an ingredient/a factor of scrutiny before the departmental promotion committee for its decision to allot bench mark. Any non-communicated remarks as is considered, to that extent, surely hit by the constitutional provision of Article 14 of the Constitution of India, as non-communicated remark even if “good”, is being considered by the departmental promotion committee as not a satisfactory grade for the purpose of their grading “very good plus” while considering the candidature of a candidate for the post of higher administrative grade. The incumbent in that angle surely is suffering a civil consequence due to lack of opportunity of filing any objection against assessment of performance made, in a non-communicated ACR, irrespective of the fact that it is marked as “good”.

49) In *Deb Dutt*(supra) the Apex Court considered this issue applying ratio of *Maneka Gandhi* (supra) to identify the applicability of the facet which is outcome of principle of natural justice, its effect, contour and purpose thereof, with reference to each and every governmental action and/or inaction and/or of any authority under Article 12 of the Constitution of India. The view expressed in *Deb Dutt*(supra) in that angle is profitable to decide this case. Relevant portion of which read such:
“9. In the present case the benchmark (i.e. the essential requirement) laid down by the authorities for promotion to the post of Superintending Engineer was that the candidate should have “very good” entry for the last five years. Thus in this situation the “good” entry in fact is an adverse entry

because it eliminates the candidate from being considered for promotion. Thus, nomenclature is not relevant, it is the effect which the entry is having which determines whether it is an adverse entry or not. It is thus the rigours of the entry which is important, not the phraseology. The grant of a "good" entry is of no satisfaction to the incumbent if it in fact makes him ineligible for promotion or has an adverse effect on his chances.

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

12. It has been held in *Maneka Gandhi v. Union of India* 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 Shankar Misra*. 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.

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 vs. Union of India* 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.”

50) Considering the brochure, a compilation of circulars on ACR as discussed above, this Court is of the view that consideration of non-communicated remarks of ACR, even if it is ‘good’ by the departmental promotion committee caused serious prejudice to the right of Sri Girish Kumar in the angle of fair consideration of his candidature on merit by the departmental Promotion Committee due to the breach of principle of natural justice to communicate the remark “good” “very good” as the case may be, more particularly for the reasons that the said officer earlier was awarded “outstanding” on performance appraisal by the competent authority. Once an officer is awarded a remark “outstanding” which under the brochure requires strict scrutiny of his performance in work field on identification of performance as of exceptional qualities in terms of clause 3.10 as quoted above, naturally, if in subsequent years any grading is made as “good” or “very good” in comparison to earlier remark of “outstanding” as was awarded due to exceptional performance of the work judged as of exceptional qualities, naturally said officer concerned, by applying the principle of natural justice under Article 14 of the Constitution of India was entitled to represent seeking upgradation of remarks from “good” “very good” to “outstanding” by detailing his performance profile so that the reviewing authority and subsequently the accepting authority could have considered it in open mind either to upgrade his performance record or to reject it. In that angle the word

“adverse” always should be read and construed when the performance records of different years are considered to recommend a candidate for promotional post. Hence, all assessment/performance appraisal record irrespective of recording either “outstanding”, “average” or below, are required to be communicated to the employee, so that he may get a chance to represent against any remark for which he is aggrieved and it will thus satisfy the philosophical basis of ‘promotional avenue’, in any organisation which is authority under Article 12 of the Constitution of India.

51) It appears further that after the Deb Dutt (supra), the Railway Board introduced the ratio decidendi of that case in the “procedure of communication of annual performance appraisal reports” by office memo dated 14th May, 2009

which reads such :

“ No.21011/1/2005-Estt (A) (Pt.-II).

Government of India

Ministry of Personnel, Public Grievances and Pensions

(Department of Personnel and Training)

North Block, New Delhi, 14th May, 2009

OFFICE MEMORANDUM

Subject: Maintenance and preparation of Annual Performance Appraisal Reports-communication of all entries for fairness and transparency in public administration.

The undersigned is directed to invite the attention of the Ministries/Departments to the existing provisions in regard to preparation and maintenance of Annual Confidential Reports which inter-alia provide that only adverse remarks should be communicated to the officer reported upon for representation, if any. The Supreme Court has held in their judgement dated 12.5.2008 in the case of Dev Dutt Vs. Union of India (Civil Appeal No.7631 of 2002) that the object of writing the confidential report and making entries is to give an opportunity to the public servant to improve the performance. The 2nd Administrative Reforms Commission in their 10th Report has also recommended that the performance appraisal system for all services be made more consultative and transparent on the

lines of the PAR of the All India Services.

2. Keeping in view the above position, the matter regarding communication of entries in the ACRs in the case of civil services under the Government of India has been further reviewed and the undersigned is directed to convey the following decisions of the Government-

(i) The existing nomenclature of the Annual Confidential Report will be modified as Annual Performance Assessment Report (APAR).

(ii) The full APAR including the overall grade and assessment of integrity shall be communicated to the concerned officer after the report is complete with the remarks of the reviewing officer and the accepting authority wherever such system is in vogue. Where government servant has only one supervisory level above him as in the case of personal staff attached to officers, such communication shall be made after the reporting officer has completed the performance assessment.

(iii) The section entrusted with the maintenance of APARs after its receipt shall disclose the same to the officer reported upon.

(iv) The concerned officer shall be given the opportunity to make any representation against the entries and the final grading given in the Report within a period of fifteen days from the date of receipt of the entries in the APAR. The representation shall be restricted to the specific factual observations contained in the report leading to assessment of the officer in terms of attributes, work output etc.

While communicating the entries, it shall be made clear that in case no representation is received within the fifteen days, it shall be deemed that he/she has no representation to make. If the concerned APAR Section does not receive any information from the concerned officer on or before fifteen days from the date of disclosure, the APAR will be treated as final

(v) The new system of communicating the entries in the APAR shall be made applicable prospectively only with effect from the reporting period 2008-09 which is to be initiated after 1st April, 2009.'

(vi) The competent authority for considering adverse remarks under the existing instructions may consider the representation, if necessary, 59

in consultation with the reporting and/or reviewing officer and shall decide the matter objectively based on the material placed before him within a period of thirty days from the date of receipt of the representation.

(vii) The competent authority after due consideration may reject the

representation or may accept and modify the APAR accordingly. The decision of the competent authority and the final grading shall be communicated to the officer reported upon within fifteen days of receipt of the decision of the competent authority by the concerned APAR section.

3. All Ministries/Departments are requested to bring to the notice of all the officers under them for strict implementation of the above instructions.

(C. A. Subramanian)

Director”

52) Though the said memo speaks about prospective effect, but effect could be

extended retrospectively relying upon the Maneka Gandhi(supra), which mandates to follow principle of fairness and transparency in public administration. The subsequent judgement of K. L. Mishra(supra) did not take

notice of Deb Dutt(supra) as well as Maneka Gandhi (supra). Besides such, in the

case K. L. Mishra(supra) reliance made upon Satyanarayan (supra) reported in

(2006) 9 SCC 69, where factual matrix was different. In S. N. Sukla the issue

involved therein was completely different as would appear from the report of S. N.

Sukla (supra) which reads such:

“The appellant also argued that the remarks made in the ACR were not communicated to him. It was also urged by the appellant that this Court should direct the authorities to streamline the whole procedure so that even remarks like “good” or “very good” made in ACRs should be made compulsorily communicable to the officers concerned so that an officer may not lose his chance of empanelment at a subsequent point of his service. In our view, it is not our function to issue such directions. It is for the Government to consider how to streamline the procedure for selection. We can only examine if the procedure for selection as adopted by the Government is unconstitutional or otherwise illegal or vitiated by arbitrariness and malafide.”

53) On bare reading of said paragraph 29, it appears that the Apex Court was invited in the said case to direct the authority for streamlining the procedures for

communication of all reports of ACR which the Apex Court declined by holding that it was the function of executive body to streamline its procedure. Hence, it does not mean as per my reading that the Apex Court in that case negated applicability of fairness and reasonableness doctrine in public administration vis a vis the effect of civil consequence as could be suffered by the candidate aspiring for promotion which is based on assessment of merit on reflection of annual confidential reports. The opinion in said paragraph, may be, by looking the issue in the angle of working field of judiciary qua executive, though not explicit. But that issue directly was the issue decided in the Deb Dutt(supra) analyzing the pros and cons with molecular precision and scanning.

54) Even if it is assumed that there is a conflict of views in between Deb Dutt(supra) and K. L. Mishra (supra), the Court has to consider the applicability of the judgement as will fit on the basis of factual matrix of this case by dealing with ratio decidendi of those cases.

55) Ratio decidendi of a judgement is identified on analysis of factual matrix as dealt with and the question of law involved and duly addressed. The ratio decidendi of a case accordingly is dependent upon the factors namely the facts as dealt with and the question of law applied therein. The test of ratio decidendi of a judgement has been discussed by the English Court and the Apex Court in different judgements which reads such :

57) In the case State of Punjab Vs. Baldev Singh, a judgement of constitutional bench, reported in (1999) 6 SCC 172, in paragraph 43 the Court held “a decision is an authority for what it decides and not that everything said therein constitute

a precedent. The Courts are obliged to imply an intelligent technique in the use of precedent bearing in mind that ‘a decision of the Court takes its colour from the question involved in the case in which it was rendered’.” In the case *Regional Manager vs. Pawan Kumar Dubey* reported in AIR 1976 SC 1766, a judgement of three Judges Bench, in para 7, the Apex Court held “it is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between a conclusion in two cases, even when the same principles are applied in each case to similar facts.”

58) In the case *Ambika Quarry Works Vs. State of Gujarat* reported in (1987) 1 SCC 213, in paragraph 18, the Apex Court held “the ratio of any decision must be understood in the background of the facts of the case. It had been said long time ago that a case is only an authority for what it actually decides and not what logically follows from it.”

59) In the case *Bharat Petroleum Corporation Limited Vs. N. R. Vairamani* reported in (2004) 8 SCC 579 the Apex Court considered the true meaning of the binding precedent as well as identification of ratio decidendi of a case relying upon the English decisions as well as the decision passed by the Apex Court. The paragraphs 9, 10, 11 and 12 of the said report reads such: “9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are neither to be read as Euclid’s theorems nor as provisions of a statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgements of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may

become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgements. They interpret words of statutes; their words are not to be interpreted as statutes. In *London Graving Dock Co. Ltd. v. Horton* (AC at p.761) Lord Mac Dermott observed: (All ER p. 14 C-D)

“The matter cannot, of course, be settled merely by treating the *ipsissima verba* of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge,”

10. In *Home Office v. Dorset Yatch Co.* (All ER p. 297 g-h) Lord Reid said, “Lord Atkin’s speech ... is not to be treated as if it were a statutory definition. It will require qualification in new circumstances.” Megarry, J. in *Shepherd Homes Ltd. v. Sandham (No.2)* observed: “One must not, of course, construe even a reserved judgement of Russell, J. L as if it were an Act of Parliament.” And, in *Herrington v. British Railways Board* Lord Morris said: (All ER p. 761c)

“ There is always peril in treating the words of a speech or a judgement as though they were words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case.”

11. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

12. The following words of Lord Denning in the matter of applying precedents have become *locus classicus*:

“Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.

* * *

Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it.””

60) In the case *Sarva Sramik Sangathana (K.V) Vs. State of Maharashtra & Others* reported in (2008) 1 SCC 494, the Apex Court considered the earlier views as referred to English case *Quinn Vs. Leathem* reported in (1901) AC 495, *Ambika Quarry Works (supra)*, *Bhavnagar University Vs. Palitala Sugar Mills (Pvt.) Ltd.* reported in (2003) 2 SCC 111 and *Bharat Petroleum Corporation Limited (supra)* and reechoed the same principle.

61) In the case *Rajbir Singh Dalal (Dr.) Vs. Chowdhury Devidulal University, Sirsa & Anr.* reported in (2008) 9 SCC 284, the Apex Court on considering the cases *Baldev Singh (supra)*, *Quinn Vs. Leathem (Supra)*, *Ambika Quarry Works (supra)*, *Palitalya Sugar Mills (supra)*, *Bharat Petroleum Corporation Limited (supra)* and other judgements as referred to therein held about precedential status in the language “some principle of law supported by reason. Mere observation without laying down any principle of law and without giving reasons does not amount to a precedent.”

62) Applying tests of ratio decidendi as discussed above, it appears before this Court that principle decided in *Deb Dutt(supra)* is squarely fitting with the factual matrix of the present one wherein an officer’s performance graded “outstanding” in previous year or “very good” as the case may be was graded “good” in subsequent year, but such performance record was not communicated to him seeking his objection. In *Deb Dutt(supra)* said factual matrix was considered very minutely and dealt with in molecular precision relying upon the larger bench judgement of the Apex Court passed in *Maneka Gandhi (supra)* and applying the principle of fairness and reasonableness doctrine in the field of public administration as well as transparency theory applicable in public action.

63) Having regard to the judgement passed in S. N. Sukla (supra) which was relied in K. N. Mishra(supra) and the judgement Dev Dutt(supra) it appears that the said judgements were delivered by the respective Division Bench of Apex Court comprising of two Hon'ble Judges. Apparent conflict even if any, though we have discussed that there is no conflict in between the views expressed in S. N. Sukla qua Dev Dutt (supra) on the reasoning that in S. N Sukla (supra) the point about communicability of all ACRs and justifiability of such communication in the angle of fairness and reasonableness doctrine and on the reflection of civil consequence principle was not urged, but the learned Advocate therein simply invited the Apex Court for a direction to streamline the procedure so that all ACR should be made compulsorily communicable. In answer to that, in S. N. Sukla(supra) the Court held “in our view, it is not our function to issue such direction. It is for the government to consider how to streamline the procedure for selection.” Having regard to that finding which is the only finding made in S. N. Sukla (supra), it is prima facie my view that the Apex Court did not address the issue as answered expressly in Dev Dutt (supra) about justifiability of communication of all ACRs under the anvil of Article 14 of the Constitution of India. In S. N. Sukla(supra), the Apex Court simply held that it was not the function of the judiciary to issue such direction but the issue required consideration by the executive government. Hence, it appears that in S. N. Sukla(supra) the Court kept the point open for consideration by executive government for their decision on the reasoning that judiciary should not streamline the procedural issue. That answer was of different angle and domain based on principle of exercising jurisdiction of judiciary on a particular issue but

that does not mean as per my reading with due respect to the views expressed by the Apex Court, that justifiability of communication of all ACR applying the principle of fairness and reasonableness doctrine, a facet of principle of natural justice and a derived principle from Article 14 of the Constitution of India, was answered negatively by holding inter alia, that there was no justifiability of such communication and it was not communicable. In subsequent judgement of Dev Dutt(supra), namely K. N. Mishra(supra), the Apex Court simply relied S. N. Sukla (supra) without any further finding or observation and without taking note of findings and observation as discussed in detail relying upon the principle of law enunciated, explained and propounded in Maneka Gandhi(supra), in the case Dev Dutt(supra).

64) Even if it is assumed that there is an apparent conflict on the issue as we are deciding in this case about justifiability of communication of ACR applying the test under Article 14 of the Constitution of India, as discussed, it is the duty before this Court though the duty is an embarrassing and uncomfortable duty to apply ratio of one of the cases apparently conflicting each other, to resolve the problem as cropped up herein. I repeat that it would be highly embarrassing situation for the High Court to declare, one out of two or more decision of the Supreme Court, to be more reasonable implying thereby that the other or others is or are not reasonable. But such task when falls upon the High Court because of the situation, however, uncomfortable or embarrassing, so far as its degree and amplitude, it requires to be performed by the High Court. A Constitution Bench

of Apex Court answered the point in the case so far as the task as to be performed by the Court when there would be apparent conflicting views expressed in one or other judgement of Apex Court, in the case Atma Ram Vs.

State of Punjab reported in AIR 1959 SC 519 at page 527 which reads such: “When a Full Bench of three Judges was inclined to take a view contrary to another of equal strength, perhaps the better course should have been to constitute a larger Bench, otherwise the subordinate Court are placed under the impression of preferring one view to another, both equally binding to them.”

65) On a reading of the Atma Ram(supra) it appears that the Apex Court long back appreciated the point and left the choice open to the Court while deciding a case wherein there is reference of apparent conflicting views expressed by different bench of Supreme Court constituted with identical number of Judges, to prefer one.

66) In the case Indo-swiss Time Limited Vs. Uma Rao reported in AIR 1989 Punjab & Haryana 213, a full bench decision, Sandhawalia, CJ with the concurrence of other two learned Judges observed “judgement of the Supreme Court which cannot stand together, present a serious problem to the High Court and Subordinate Courts and in such circumstances the correct thing is to follow that judgement which appears to the Court to state the law accurately or more accurately within the conflicting judgements”. It is true that there is still a conflict about adjudicatory tools by different High Courts relating to applicability of conflicting judgements of Apex Court. Three propositions evolved namely (I) High Court has no option in the matter but to follow the later one vide the views expressed in the case Pramathanath vs. Chief Justice reported in AIR 1961 Calcutta 545, Sovachand Mulchand Vs. Collector, Central Excise reported

in AIR 1968 Calcutta 174, New Krishna Bhawan vs. Commercial Tax Officer reported in AIR 1961 Mysore 3, a judgement of Division Bench of Mysore High Court and the decision of Division Bench of Bombay High Court in Vasant Vs. Dikkaya reported in AIR 1980 Bombay 341, full bench judgement of Allahabad High Court in U.P State Road Transport Corporation Vs. State Transport Tribunal reported in AIR 1977 Allahabad 1.

II) Other view that High Court may follow the one which in its view is better in point of law vide the views expressed in Full Bench decision of Punjab & Harayana High Court in Indo-swiss Time Limited(supra), decision of Karnataka High Court in Gobind Nayek Vs. West Patton Press Company reported in AIR 1980 Karnataka 92, though a minority view, the full bench decision of Madras High Court in R. Rama Subbarayalu vs. Rengammal reported in AIR 1962 Madras 450.

III) The third proposition cropped up as per view expressed in the case in a full bench decision of Nagpur High Court in D. D. Belimorea Vs. Central Bank of India reported in AIR 1943 Nagpur 340 that it is open to the High Court to consider/prefer any one of them.

67) The Special Bench of Calcutta High Court constituted three Judges, in Bholanath Karmakar & Ors. Vs. Madanmohan Karmakar & Ors. reported in AIR 1988 Calcutta 1 discussed all the aforesaid cases minutely by taking note of recommendation of ancient jurists. The relevant portion of the said reports read such:

“10. When faced with contrary decisions of the Supreme Court, the first course to be adopted by the High Court is to ascertain which one of them is decided by a larger Bench and to govern itself by such larger Bench decision, if any. This has been laid down by the Supreme Court itself in a series of decisions and must be taken to be settled law and reference may

be made, among others, to the decision of the Supreme Court in *Union of India v. K. S. Subramaniam* AIR 1976 SC 2433 at p. 2437, even though it may be noted, a two-Judge Bench of the Supreme Court in *Javed Ahmed v. State of Maharashtra*, AIR 1985 SC 231 at p. 236 has thought that “it may be inappropriate for a Division Bench of three Judges to purport to overrule the decision of a Division Bench of two Judges.” But when such contrary decisions of the Supreme Court emanate from Benches of equal strength, the course to be adopted by the High Court is, firstly, to try to reconcile and to explain those contrary decisions by assuming as far as possible, that they applied to different sets of circumstances. This in fact is a course which was recommended by our ancient jurists- “*Srutirdwaidhe Smritirdwaidhe Sthalaveda Prakalpate*”- in case there be two contrary precepts of the *Sruties* or the *Smritis*, different cases are to be assumed for their application. As Jurist Jaimini said, contradictions or inconsistencies are not to be readily assumed as they very often be not real but only apparent resulting from the application of the very same principle to different sets of facts- “*Prayoge Hi Virodha Syat*”. But when such contrary decisions of co-ordinate Benches cannot be reconciled or explained in the manner as aforesaid, the question would arise as to which one the High Court is obliged to follow.

11. One view is that in such a case the High Court has no option in the matter and it is not for the High Court to decide which one it would follow but it must follow the later one. According to this view, as in the case of two contrary orders issued by the same authority, the later would supersede the former and would bind the subordinate and as in the case of two contrary legislation by the same legislature, the later would be governing one, so also in the case of two contrary decisions of the Supreme Court rendered by Benches of equal strength the later would rule and shall be deemed to have overruled the former. P. B. Mukherji, J (as His Lordship then was) in his separate, though concurring, judgement in the Special Bench decision of this Court in *Pramatha Nath v. Chief Justice*, AIR 1961 Cal 545 at p. 551, para 26 took a similar view. S. P. Mitra, J (as his Lordship then was) also took such a view in the Division Bench decision of this Court in *Sovachand Mulchand v. Collector, Central Excise*, AIR 1968 Cal 174 at p. 186, para 56. To the same effect is the decision of a Division Bench of the Mysore High Court in *New Krishna Bhawan v. Commercial tax Officer* AIR 1961 Mys 3 at p. 7 and the decision of the Division Bench of the Bombay High Court in *Vasant v. Dikkaya*, AIR 1980 Bom 341 at p. 345. A Full Bench of the Allahabad High Court in *U. P. State Road*

Transport Corpn. v. Trade Transport Tribunal, AIR 1977 All 1 at p. 5 has also ruled to that effect. The view appears to be that in case of conflicting decisions by Benches of matching authority, the law is the latest pronouncement made by the latest Bench and the old law shall change yielding place to new.

12. The other view is that in such a case the High Court is not necessarily bound to follow the one which is later in point of time, but may follow the one which, in its view, is better in point of law. Sandhawalia, C. J, in the Full Bench decision of the Punjab & Haryana High Court in Indo-Swiss Time Ltd. V. Umarao, AIR 1981 Punj & Har 213 at p. 219-220 took this view with the concurrence of the other two learned Judges, though as to the actual decision, the other learned Judges differed from the learned Chief Justice. In the Karnataka Full Bench decision in Govinda Naik v. West Patent Press Co. AIR 1980 Kant 91, the minority consisting of two of the learned Judges speaking through Jagannatha Shetty, J., also took the same view (supra, at p.95) and in fact the same has been referred to with approval by Sandhawalia, C.J, in the Full Bench decision in Indo-Swiss Time (supra).

13. This later view appears to us to be in perfect consonance with what our ancient Jurist Narada declared-Dharmashastra Virodhe To Yuktikyukta Vidhe Smrita- that is, when the Dharmashastras or Law Codes of equal authority conflict with one another, the one appearing to be reasonable, or more reasonable is to be preferred and followed. A modern Jurist, Seervai, has also advocated a similar view in his Constitutional Law of India which has also been quoted with approval by Sandhawalia, C.J in Indo-Swiss Time (supra, at p.220) and the learned Jurist has observed that judgements of the Supreme Court, which cannot stand together, present a serious problem to the High Courts and Subordinate Courts” and that “in such circumstances the correct thing is to follow that judgement which appears to the Court to state the law accurately or more accurately than the other conflict judgement.

14. I had also occasion to consider this question in Gopal Chandra Kalay v. State, 1981 Lab IC 422 at pp.423, 425 (Sikkim) and the Union of India v. Ashok, AIR 1983 Sikkim 19 at pp. 23, 25, 26 where, for the reasons stated therein, I accepted this view and agreed respectfully with the views of Sandhawalia, C.J in the Punjab Full Bench decision in Indo-Swiss Time, (AIR 1981 Punj & Har 213) (supra) and the minority view of Jagannatha Shetty, J, in the Karnataka Full Bench decision in Govinda Naik, (AIR 1980 Kant 91) (supra). I held that where there are contrary decisions of the Supreme Court rendered by Benches of equal strength, the High Court, in

theory, being bound by each one, is, in effect, bound by none and is not necessarily obliged to follow the later in point of time, but many follow the one which, according to it, is better in point of law.

15. It appears that the Full Bench decision of the Madras High Court in *R. Rama Subbarayalu V. Rengmmal*, AIR 1962 Mad 450, would also support this later view where it has been observed (at p. 452) that “where the conflict is between two decisions pronounced by a Bench consisting of the same number of Judges, and the subordinate Court after a careful examination of the decisions came to the conclusion that both of them directly apply to the case before it, it will then be at liberty to follow that decision which seems to it more correct, whether such decision be the later or the earlier one”. According to the Nagpur High Court also, as would appear from its full bench decision in *D. D. Bilimoria v. Central Bank of India*, AIR 1943 Nag 340 at p. 343 in such case of conflicting authorities, “the result is not that the later authority is substituted for the earlier, but that the two stand side by side conflicting with each other”, thereby indicating that the subordinate Courts would have to prefer one to the other and, therefore, would be at liberty to follow the one or the other.

16. Needless to say that it would be highly embarrassing for the High Court to declare one out of two or more decisions of the Supreme Court to be more reasonable implying thereby that the other or others is or are less reasonable. But if such a task falls upon the High Court because of irreconcilable contrary decisions of the Supreme Court emanating from Benches of co-ordinate jurisdiction, the task, however, uncomfortable, has got to be performed.

17. We are inclined to think that a five Judge Bench of the Supreme Court in *Atma Ram V. State of Punjab*, AIR 1959 SC 519 has also indicated (at p. 527) that such a task may fall on and may have to be performed by the High Court. After pointing out that “when a Full Bench of three Judges was inclined to take a view contrary to another Full Bench of equal strength”, “perhaps the better course would have been to constitute a larger Bench”, it has been observed that for “otherwise the subordinate Courts are placed under the embarrassment of preferring one view to another, both equally binding on them”. According to the Supreme Court, therefore, when confronted with two contrary decisions of equal authority, the subordinate Court is not necessarily obliged to follow the later, but would have to perform the embarrassing task, “of preferring one view to another.”

18. It is true that if there are two contrary legislations enacted by the same Legislature, the later would impliedly repeal the earlier and would be

binding law. But we do not think that this legislative analogy would at all be apposite and can help us in solving the question before us because the very same legislature can always repeal or alter its own law, even impliedly, while overruling being an act of superior jurisdiction, one Bench cannot overrule, expressly or by implication, a decision of a co-equal Bench. It is also true that the view that when there are conflicting decisions rendered by co-ordinate authorities, the later decision would govern us, would be conducive to certainty in the field of law. But the same certainty would also be achieved if it is also ruled that the later Bench being not competent to overrule the earlier decision of a co-ordinate Bench, the earlier decision would still continue to be the good law. A similar view in favour of the earlier decision was in fact taken by a Division Bench of this Court in *Bagala Sundari v. Prosanna Nath*, 21 Cal WN 375 at p. 377: (AIR 1917 Cal 668 at p. 669) where it was held that even though there might be later decisions not easy to reconcile, since the earlier one was not or could not be overruled, it would be binding “that being a decision of this Court and the earliest on the point.” We are, however, inclined to think that no blanket proposition can be laid down either in favour of the earlier or the later decision and as indicated hereinbefore and as has also been indicated by the Supreme Court in *Atma Ram* (supra) the subordinate Court would have to prefer one to the other and not necessarily obliged, as a matter of course, to follow either the former or the later in point of time, but must follow that one, which according to it, is better in point of law. As old may not always be the gold, the new is also not necessarily golden and ringing out the old and bringing in the new cannot always be an invariable straightjacket formula in determining the binding nature of precedents of coordinate jurisdiction. ”

68) Having regard to those legal proposition about embarrassing choice of the High Court to prefer any one of the judgement which are apparently conflicting each other, I am of the view being armed with judgements of *Atma Ram*(supra) of Apex Court, *Bholanath* (supra) Special Bench judgement of Calcutta High Court, Full Bench judgement *Indo-Swiss Time Ltd.*(supra) of Punjab & Haryana High Court, Full Bench Judgement of Madras High Court in *R. Rama Subbarayalu* (supra) and the Full Bench decision of Nagpur High Court, *D. D.*

Belimorea(supra) that the judgement passed in Dev Dutt (supra) holding justification of communicability of all ACRs which to be considered at the time of deciding the bench mark by the departmental promotion committee as my preferable choice for its applicability in the instant case on the reasoning that in the Dev Dutt(supra) it was the direct issue addressed and answered by the Apex Court dealing with every pros and cons by relying the larger Bench views of 7 Judges Maneka Gandhi(supra). Relying upon the test as propounded by the Apex Court so far as binding effect of a judgment under Article 141, passed in the case Arnit Das vs. State of Bihar reported in (2000) 5 SCC 488 wherein the Court held that a decision not expressed and accompanied by reasons and not proceeded on clear consideration of issue, could not be deemed to be a law declared to have a binding effect as contemplated under Article 141, my preferential embarrassing choice not to apply S. N. Sukla (supra) and K. N. Mishra (supra) could be answered.

69) In the case state of U.P vs. Syndicate & Chemical reported in (1991) 4 SCC 139, the Hon'ble Justice Sahay in concurring judgement held that a decision which is not expressed and is not founded on reasons on consideration of issue, cannot be deemed to be, a law declared to have binding effect as is contemplated by Article 141. It is further held therein that any declaration or conclusion arrived at without application of mind or proceeded without any reason, cannot be deemed to be declaration of law or authority of a general nature binding as a precedent.

70) In the case Arnit Das(supra) the Court further held when a particular point of law is not consciously determined by the Court that does not form part of ratio decidendi and is not binding.

71) Having regard to those legal proposition, in my view as in S. N. Sukla (supra) the Apex Court declined to exercise the jurisdiction to test the justifiability of communication of all ACRs on the reasoning that it was not Court's function but function of executive government, it cannot be considered as contra ratio decidendi of the proposition laid in Dev Dutt (supra). In S. N. Sukla as already observed there was no detail argument advanced about applicability of reasonableness and fairness doctrine to test the communicability of all ACRs and justification thereof in the angle to avoid civil consequences principle, hence I hold that Dev Dutt(supra) has full applicability to decide this case irrespective of the apparent conflict with S. N. Sukla (supra), K. N. Mishra (supra) as submitted by the learned Advocate appearing for the Union of India.

72) Having regard to the aforesaid findings and observation I am of the view that the consideration of non-communicated remarks of confidential reports, even if remark is "good" or "very good", on the reflection of earlier remarks as "outstanding", is an arbitrary action which hit fairness and reasonableness doctrine and subsequent gradation "good" or "very good" is nothing but a downgradation from the remark earlier made "outstanding". The non-communication of report caused a prejudice in proper and fair consideration of merit of Sri Girish Kumar and decision of the Departmental Promotion Committee accordingly was vitiated due to refusal to recommend his name for promotional post of Higher

Administrative Grade on considering such non-communicated remarks which

inflicted a civil consequence so far as fair consideration of candidature for promotional post under the anvil of fair and reasonable doctrine, a species of Article 14 of the Constitution of India. There is a clear constitutional breach thereof. Accordingly, we hold that the decision of the Departmental Promotion

Committee was vitiated due to such arbitrary action. Point No. (I) is answered accordingly.

Point nos.(ii) & (iii) are now answered as follows:-

73) Office memo dated 14th May, 2009 was issued by the Director, Government of India, Ministry of Personnel, Public Grievance & Pension (Departmental of Personnel & Training) which speaks about the acceptance of recommendation of second administrative reforms commission as submitted in their 10th report by the Government of India as well as of giving effect of Supreme Court Judgement, passed in *Deb Dutt (supra)*. It was stipulated therein that all grade and assessment of an employee including full annual performance assessment report, should be communicated to him for the purpose of giving an opportunity to the public servant to improve his performance and for giving an opportunity of representing against the entries and final grading of the report, but effect of such was made from the reporting period of 2008-2009 as to be initiated after 1st April, 2009.

74) *Deb Dutt (supra)* was decided on 12th May, 2008 applying the doctrine of fairness and reasonableness in public administration, which is heart and soul of

principle of natural justice, relying upon Maneka Gandhi (supra), Canara Bank Vs. V. K. Awasthy reported in (2005) 6 SCC 321 and State of Maharashtra Vs. Public Concern for Government Trust reported in (2007) 3 SCC 587. In the case Public Concern for Governance Trust (supra) in para 39 it is held that any decision as would invite a civil consequence and affects the right of a person, principle of natural justice should be followed. Besides the aforesaid cases, in Deb Dutt (supra), the principle of natural justice as evolved and its conceptual idea was discussed by discussing the English cases way back of the year 1943. It reechoed basic principle so far as its applicability with reference to communication of all confidential reports to avoid the effect of civil consequences due to non-communication. Hence, the principle of law as discussed therein and the ratio decidendi was a long and old principle of natural justice, wherein its facet “fairness and reasonableness doctrine” in government action, has been dealt with. As such, in the judgement of Deb Dutt (supra), no new principle evolved but the old principle of natural justice was explained for its applicability so far communication of annual confidential reports. Having regard to the tenure of the judgment passed in Deb Dutt (supra) by considering the principle of natural justice, surely the effect of such principle cannot be confined and controlled from 1st April, 2009 as contained in the office memo dated 14th May, 2009 issued by the Director aforesaid and the principle of natural justice relating to communication of all Annual Confidential reports to avoid injury due to civil consequence is based on a proper foundation of fairness and reasonableness doctrine in government administration. In the brochure issued by the Railway Board being a complied copy of circular letters applicable in the field, it is

stipulated that communication of annual confidential report work out in a developmental field which helps the organisation as well as employee concern.

The philosophy and approach of Chapter-I contained in said brochure dealt with that issue which speaks that communication of the report will render job satisfaction and also it will aware the officer concerned about his weakness for further professional development. The different clauses of said principle has already been discussed in details in earlier findings. It is held that reporting of all reports in effect help the organisation as well as employee concern to cater and empower properly the man power which is main theme of human resource concept. Hence, it is not a new thing that all reports should be communicated irrespective of its marking adverse or non-adverse having regard to the circulars contained in brochure as already discussed. So the effect as limited by the office memo dated 14th May, 2009 could not be an embargo to deal with the case of Sri Girish Kumar when his promotional aspect was dealt with by the departmental promotion committee long back in May, 2007.

75) Even if we assume that by circular letter the effect of judgement Deb Dutt (supra) and its principle therein namely the natural justice principle was given effect to from April, 2009 by modification of earlier system of communication of the appraisal report, still then, applying the principle of mischief Rule which is popularly known as Hyden's rules, its effect could be applied to deal with old cases. As the amendment is a beneficial provision for the employee concern, such beneficial provision could be given a retrospective effect irrespective of the fact

that the effect has been made otherwise from April, 2009 by the said office memo dated 14th May, 2009. Further more, Deb Dutt (supra) did not discuss any new principle of law but applied the old principle already existing namely the natural justice principle wherein fairness and reasonableness doctrine is species thereof, being a derived concept from Article 14 of the Constitution of India as held in earlier case namely Awasthy (supra), Maneka Gandhi (supra). we are of the view that the principle of natural justice so far as communication of all entries of annual confidential reports should be given a retrospective effect considering the objective purpose of reporting the performance appraisal and its basic philosophy and approach as has been dealt with in the brochure. Hence, we conclude that departmental promotion committee when sat in the year 2007, they should not have considered the non-communicated annual confidential report to assess merit of a candidate and thereby to finalise the bench mark for promotional berth of Girish Kumar, to refuse recommendation. Sri Girish Kumar, has suffered a civil consequence without having any opportunity to represent against the assessment appraisal of “good”, “very good” in comparison to his earlier appraisal report of “outstanding”. The point No.(ii) & (iii) are answered accordingly. So far as relief is concerned now to be considered.

76) Having regard to the findings and observation above, I am of the view that the learned Tribunal below was justified to pass the appropriate order directing the respondents therein to consider the promotional issue of the applicant Girish Kumar afresh for selection and employment for promotion to the Higher

Administrative Grade by excluding the non-communicated down-graded ACRs as mentioned therein from their decision making zone, within the time frame of 4 months from the communication of the order. I am not finding any illegality in the impugned order passed by the learned Tribunal below impugned in the writ application filed by the Union of India being WPCT 140 of 2009 to face the wrath of writ Court. The learned Tribunal below discussed the principle of natural justice in details relying upon views expressed by the Apex Court and the English Courts as well. I am in full agreement with the said findings. Hence, I am not interfering with the impugned order in the writ application filed by the Union of India seeking quashing of the said order. Hence, writ application W.P.C.T No.140 of 2009 stand dismissed. Since, four months time have already expired during pendency of this case, another two months time is extended with effect from this date of judgement to implement the order of Tribunal and this Court. Writ petitioner Union of India/Railway Board will communicate their decision to Sri Girish Kumar within three weeks from the date of decision by Departmental Promotion Committee.

77) By the interim order we granted leave for appointment of the recommended candidates in H.A.G subject to the result of the writ applications and the candidates who have already been appointed in terms of interim order of the Court should be considered as ad-hoc appointee till the finality of decision so far as consideration of the candidature of Sri Girish Kumar in terms of judgement delivered by this Court and the order of the learned Tribunal below. In

the event the departmental promotion committee consider Sri Girish Kumar a suitable candidate for promotional berth to the Higher Administrative Grade, Sri Girish Kumar be appointed with retrospective effect from the date when a junior candidate from lower feeder post was appointed and thereby all appointees who were appointed during pendency of matter would be relieved from their legal status of ad-hoc appointment. So far as further promotional benefit from Higher Administrative Grade to other grade, considering retrospective effect of promotion above the juniors as to be made in favour of Sri Girish Kumar, his case also could be considered and if he is eligible and suitable for Higher Grade and Higher Promotional berth from Higher Administrative Grade, it to be done on considering his case along with other candidates identically placed and situated. All these directions to be followed strictly within the time frame namely within four months from this date by this process namely first consideration of promotional berth to Higher Administrative Grade and thereafter in the event Sri Girish Kumar is recommended for appointment, his appointment with retrospective effect to be made within two weeks therefrom above the juniors who have already appointed as per recommendation earlier and thereafter within further one month period consideration of his promotional berth to Higher Grade along with others to be considered and all interim order earlier passed will stand vacated after due consideration of the aforesaid direction in letter and spirit of the judgement as delivered and after filing of a compliance report to that effect to the High Court Registry after five months from this date, by the Railway Authority. Interim order

dated 10th March, 2010 will continue till filing of compliance report as directed.

So far as writ application as filed by Sri Girish Kumar being WPCT No.328 of 2008, it is also disposed of with the aforesaid findings and observation by allowing it.

(Pratap Kumar Ray,J.)

I agree,

(Mrinal Kanti Sinha, J.)

LATER:

After the judgement is delivered, learned Senior Advocate Mr. Das appearing for the writ petitioner/Union of India represented by the Railway Board in W.P.C.T No.140 of 2009 relying upon the order dated 29th March, 2010 passed in S. L. P (Civil) No.15770 of 2009 by the Apex Court has prayed for stay of the operation of the judgement as delivered to day.

The order of the Supreme Court reads such:-

“Leave granted.

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In view of the apparent conflict between the decisions of this Court in Dev Dutt vs. Union of India & Ors. 2008 (8) SCC 725 on the one hand and Satya Narain Shukla Vs. Union of India 2006 (9) SCC 69 and K. M. Mishra vs.

Central

Bank of India & Ors. 2008 (9) SCC 120, these appeals are referred to a larger

Bench. Let the matter be placed before the Hon'ble the Chief Justice of India for

this purpose.”

Let the xerox copy of the order as produced by Mr. Das in Court today be kept with the record.

On a bare reading of the order aforesaid it appears that the subsequent Division Bench of Apex Court has referred the matter to a Larger Bench to resolve the apparent conflict in between Dev Dutt (supra) and K. M. Mishra(supra) as well as Satya Narain Shukla (supra).

Having regard to the tenor of the said order, we are not finding any merit to stay our judgement herein.

Prayer of stay, as made, accordingly stands refused.

Mr. Das, learned Senior Advocate, further prays for issuance of certificate for appeal under Article 134A of the Constitution of India on the ground of

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conflicting judgements of the Apex Court and reference of the matter to the larger

Bench to resolve conflict.

Article 134A requires fulfilment of material ingredients on substantial question of interpretation of the Constitution in terms of the Article 132 (1) of the

Constitution of India or fulfilment of ingredients in terms of Article 133(1) of the

Constitution of India involving the substantial question of law by general importance. We have held today in the judgement that conflict, if any, in between the Dev Dutt(supra) and K. M. Mishra (supra), could be resolved relying

upon the Constitution Bench Judgement of the Apex Court holding, inter alia,

that earlier judgements of larger coram should be the binding precedent and as

in our judgement we have discussed in details to this effect that Dev Dutt (supra)

did not pronounce any new principle of law, but simply applied the old principle

of natural justice by analyzing in details the applicability of reasonableness and

fairness doctrine in the public administration as well as transparency in the public action, a settled proposition, there is no point made out for grant of any

certificate as sought for. Beside such, present case has been answered relying

upon the factual matrix that Railway Board by publishing brochure has already

accepted its stand to communicate all confidential reports. Our judgement delivered on taking note of circulars in the filed, a factual identification, so, it

does not cover/fulfil the ingredients of Article 132 (1) & 133(1) of the Constitution

of India, to grant any certificate as sought for.

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Accordingly, prayer made stands rejected.

Let urgent xerox certified copy of this order, if applied for, be given to the learned Advocates appearing for the parties.

(Pratap Kumar Ray,J.)
(Mrinal Kanti Sinha, J.)