



C.F. 100

BEFORE HON'BLE HIGH COURT OF CHHATTISGARH AT BILASPUR

Writ petition No. 1533/2001.

PETITIONER : CISF No. 7217200

ASI RAMAKSHPAL.

S/o Late Bishun Singh

aged about 48 years,

Central Industrial Security Force Unit

Bhilai Steel Plant, Bhilai,

Distt. DURG (C.G.).

VERSUS.

RESPONDENTS 1. UNION OF INDIA

Through :- Secretary

Ministry of Home Affairs,

NEW DELHI.

2. DIRECTOR GENERAL

Head Quarters

Central Industrial Security Force,

C.G.O. Complex,

Lodhi Road,

NEW DELHI - 3

3. DEPUTY INSPECTOR GENERAL

Central Industrial Security Force Unit,

Bhilai Steel Plant,

Bhilai,

Distt. DURG.

(Chhattisgarh).

P. R. No. 1654/19
Presented by Shri. V. h. Temskur
dated 2.3.8

Ram Palisarnal

contd...2

PETITION UNDER ARTICLES 226/227 OF THE CONSTITUTION
OF INDIA :



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HIGH COURT OF CHHATTISGARH : BILASPUR

SINGLE BENCH: HON'BLE SHRI MANINDRA MOHAN SHRIVASTAVA, J.

WP No.1533 of 2001

- CISF NO.7217200 ASI RAMRAKSHPAL

----- **Petitioner**

Versus

- U.O.I. & Ors.

----- **Respondents**

FOR PRONOUNCEMENT OF ORDER ON 4th OCTOBER, 2016

Sd/-
Manindra Mohan Shrivastava
Judge

4 /10/2016

HIGH COURT OF CHHATTISGARH, BILASPUR**WP No.1533 of 2001**

- CISF NO.7217200 ASI RAMRAKSHPAL

---- Petitioner

Versus

- U.O.I. & Ors.

---- Respondents

For Petitioner	:	Shri V. G. Tamaskar, Advocate
For Respondents	:	Shri NK Vyas, ASG

Hon'ble Shri Justice Manindra Mohan Shrivastava**C A V Order****Order pronounced on: 4 /10/2016**

The petitioner, a member of disciplined force i.e. Central Industrial Security Force, has filed this petition seeking declaration that he is entitled to be promoted as Assistant Sub Inspector with effect from 1991 when he became due for promotion. The petitioner has also prayed for a direction to convene the departmental promotion committee to consider his case for promotion to the next higher post of Assistant Sub Inspector from the due date by treating him as having been promoted to the post of Assistant Sub Inspector with effect from year 1991. Communications, representation/claim of the petitioner, deferring his consideration followed by rejection of his representation vide Annexure P-4 & P-6 respectively have also been assailed and prayer has been made for quashing those decisions and communications.

2. Quintessential facts relevant for decision of the controversy involved in the present case are stated infra.



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The petitioner joined services of disciplined force upon his appointment as Constable in the year 1972. He earned promotion in the year 1985. In July, 1991, he was considered for crossing efficiency bar but was not allowed on the ground that his performance does not merit crossing efficiency bar. In that particular year, the petitioner had become due for consideration of promotion to the next higher post of Assistant Sub Inspector. However, on certain allegations of misconduct, the petitioner was placed under suspension vide order dated 27-05-1992, followed by charge sheet dated 16-06-1992. The departmental enquiry eventually resulted in imposition of penalty vide order dated 09-01-1993. The penalty imposed on the petitioner was reduction of pay to the lowest stage i.e. from Rs.1150/- to Rs.975/- for a period of one year with effect from 10-01-1992 with a further stipulation that during the period of punishment, reduction will have the effect of postponing his future increment of pay.

3. Aggrieved by the order of penalty, the petitioner took recourse to the remedy of filing petition before the High Court of Calcutta. The petitioner was considered for promotion in the year 1996 but he was not found fit. However, in subsequent year i.e. in the year 1997, he was again considered and found fit and promoted as Assistant Sub Inspector vide order dated 20-10-1997 with effect from 13-11-1997. The petition preferred before the High Court of Calcutta was allowed vide order dated 07-08-1998 in the manner that paragraph 12 & 13 of the penalty order dated 09-01-1993 as also order of amendment dated 17-03-1993 were quashed and the disciplinary authority was directed to substitute those paragraphs in the light of judgment of the Court by passing a fresh order. Thus, on the issue of proportionality of the order, punishment was interfered with and authority was directed to pass fresh order on penalty, obviously required to be commensurate with the nature and gravity of misconduct. Aggrieved by that order passed by the learned Single Judge, LPA was preferred

by the employer. During the pendency of the said appeal, as no stay order was passed, the petitioner preferred a representation dated 11-12-2000 for grant of consequential benefits flowing from the order of the Court. The representation was replied vide memo dated 23-01-2001 that as the Intra Court Appeal is pending, petitioner's claim for grant of consequential benefits cannot be considered at that stage. However, after six months, a memo dated 20-07-2001 was issued stating that regarding review DPC for consideration of the case of the petitioner for promotion to the post of Assistant Sub Inspector would be considered. It is the case of the respondents, though disputed by the petitioner, that when the petitioner was asked to appear in the suitability examination, he expressed his unwillingness to participate in the process of selection. Vide letter dated 03-08-2001, the petitioner lodged his protest as to why he was being subjected to suitability test when he had already been declared fit for promotion earlier in the year 1993, leveling allegations of malice that this was only to somehow disqualify the petitioner. In any case, the petitioner did not participate in the process of selection/suitability test which eventually resulted in rejection of his representation for grant of promotion on the post of Assistant Sub Inspector from 1991 vide memo dated 15-08-2001.

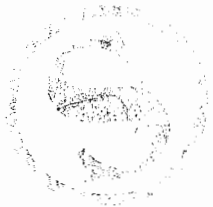
4. The rejection of his claim for promotion with effect from year 1991 is now challenged in this petition.

5. Learned counsel for petitioner contended that once the petition filed before the High Court was allowed in the year 1998, the respondents were obliged under the law to grant promotion to the petitioner since 1991. It was urged that at the time, when the petitioner had become due for promotion in the year 1991, there was neither any suspension nor any charge sheet much less any penalty imposed on the petitioner. Therefore, there was no impediment in



promotion of the petitioner. It was further argued in extenso by learned counsel for the petitioner that the petitioner has been victimized in respect of a very trivial incident, which by no stretch of imagination constituted grave misconduct in the charge sheet dated 16-06-1992, in respect of the incident which took place only in the month of May 1992, non-consideration of petitioner's case for promotion was highly unjust and arbitrary. The incident, in respect of which, charges were framed, itself happened long after the petitioner had become due for promotion in the year 1991, therefore, even if, any minor penalty came to be imposed subsequently in the year 1993 which was further reduced to minor penalty of censure after judicial intervention, non promotion to the petitioner in the year 1991 is wholly unjustified in law. Learned counsel for the petitioner further carried his submission to the extent that in order to deprive the petitioner from fruits of promotion, he was pressurized by higher officers to sign on the unwillingness certificate. According to him, this was only designed to deprive the petitioner from the benefits, therefore, he is entitled to just and fair consideration of his case. Learned counsel for the petitioner finally wound up his submission by adding that even the LPA preferred by the respondents was finally dismissed by the Division Bench of the High Court of Calcutta vide order dated 14-06-2007, by which, penalty order dated 16-06-2008 reducing the penalty to that of censure which is the lowest penalty attained finality. Therefore, the petitioner is entitled to promotion as Assistant Sub Inspector with effect from 1991 and thereafter, further consideration to the next higher post i.e. Sub Inspector from due date.

6. On the other hand, learned counsel for respondents submits that the petitioner's service record cannot be said to be unblemished in as much as Annual Confidential Report of 1987 & 1988 were found to be average and that of the year 1990 was recorded as below average. The petitioner suffered



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penalty of censure vide order dated 27-09-1989 in respect of certain misconduct and in the next year also, upon institution of enquiry for another set of misconduct, penalty of censure was again passed on 15/16-10-1990. The petitioner's service record were evaluated for the purpose of consideration of his case for crossing efficiency bar in the July, 1991 but upon over all scrutiny of service records, he was not found fit for crossing efficiency bar so as to earn next increment. Therefore, even if the case of the petitioner was not considered for promotion in the year 1991, the petitioner cannot have any legitimate grievance. It is next contended that the respondents had decided to hold suitability test to consider the petitioner's claim for promotion as Assistant Sub Inspector with effect from 1991 but the petitioner expressed his unwillingness to appear in the suitability test, therefore, the respondents rightly rejected the petitioner's claim for promotion with effect from 1991. According to learned counsel for the respondents, the effect of judicial intervention was that the petitioner would be treated as having suffered penalty of censure in the month of January, 1993 in respect of misconduct committed in the month of May 1992. The petitioner was again considered for promotion in the year 1996 but he was not found fit whereas in the next year, he was found fit and then promoted, therefore, the petitioner is not entitled to promotion from back date or for any other relief.

7. In this case, when the respondents came out with additional affidavits disclosing adverse remarks, learned counsel for the petitioner relied upon the judgment of the Supreme Court in the case of **Sukhdev Singh vs. Union of India and others, 2013 (9) SCC 566** and submitted that those adverse remarks were not communicated and unknown, therefore, the said remarks could not be considered to the prejudice of the petitioner so as to deny him promotion or crossing of efficiency bar.



8. I have given my anxious consideration to the elaborate submissions made by learned counsel for the parties and perused the records.

9. The respondents in their written as well as in their communication have come out with the case that the petitioner was though considered for crossing efficiency bar in the month of July 1991, but he was not considered fit for promotion in the year 1991. The pleadings in this regard are to the effect that he was not considered fit for promotion. In para 6.1 of the first counter affidavit, it has been stated that the case of the petitioner was not considered by the DPC in the year 1991. In additional affidavit filed in the month of May, 2016, it has been stated that the petitioner's case was considered in the DPC for crossing efficiency bar, held in the month of July, 1991 and due to poor service records, he was not found fit in the DPC for crossing of efficiency bar as reflected from memo dated 25-10-1991(Annexure R-7).

10. Therefore, on the basis of aforesaid pleadings and documents on record, it is found that as the petitioner was not found fit for crossing efficiency bar in the month of July, 1991, he was not considered fit for promotion to the next higher post of Assistant Sub Inspector. The respondents have placed on record the promotion policy dated 30-03-1989 (Annexure R-6), which admittedly was in force in the year 1991. Except this policy document, none of the parties to the petition have referred to any other statutory enactment or subsidiary statutory rules applicable prescribing eligibility criteria and parameters for consideration of cases of promotion of Head Constable to the next higher post of Assistant Sub Inspector. Therefore, this Court has to proceed to consider whether the petitioner was entitled to promotion on the basis of the aforesaid policy for promotion. The provision titled List "C" provides for promotion of Constables/Lance Naiks/Naik to the rank of Head Constables/GD. The provision

titled List "C-1"- for promotion of Head Constables (GD & Dvr) to the rank of ASI/EXe envisages the comprehensive procedure of assessment of suitability on the given minimum eligibility which provides that the selection shall be made on the basis of service records of outdoor test and interview. In clause "ee" of the aforesaid provision, it has been categorically provided that the candidate will have to secure minimum passing marks separately in the written test, outdoor test, interview and on assessment of service records with further stipulation that the aggregate marks should not be less than 56 in case of General category and not less than 50 in case of SC/ST candidates and the candidates who have secured below 56 marks for general category and 50 marks for SC/ST category, as the case may be, shall be treated as below average and termed as 'Not yet fit' for promotion.

In the promotion policy, there is nothing to show that where a candidate who has been considered and not found fit for crossing efficiency bar will not be entitled for even consideration for promotion. Even none of the parties have placed before the Court as to what was the criteria applicable in the matter of crossing efficiency bar. Obviously, the petitioner had chosen not to challenge the decision of the respondents taken in the month of July 1991 that the petitioner was not found fit to cross efficiency bar. The promotion policy of 1989 is silent on this aspect whether declaration of unfitness for crossing efficiency bar would automatically lead to non-consideration for promotion to the next higher post.

11. In the service jurisprudence, ordinarily, the level of performance required to cross efficiency bar stands on a lower pedestal than the degree of performance to earn promotion to the next higher post. Ordinarily, an employee, who could not even cross efficiency bar so as to earn next higher increment,



would normally be treated as unfit for promotion to the next higher post, because level of performance to earn promotion to next higher post, demands more meritorious records of service. The question, which arises for consideration is whether, in the absence of there being provision in the promotion policy, 1989, failure to achieve minimum level of performance to cross efficiency bar, would render an employee not even fit for consideration and subjecting him to suitability test comprising of written examination, outdoor test, appraisal of confidential report and interview.

12. On the face of promotion policy, failure to achieve minimum standards for crossing efficiency bar, in terms, has not been treated as bar to the promotion to the next higher post. It was burden on the respondents to satisfy the Court that the components of suitability test for crossing efficiency bar are one and the same as those for earning promotion so as to convince the Court that the petitioner having been considered and found unfit for crossing efficiency bar, another consideration for promotion in the same year would have been a futile exercise. The policy of promotion shows that for the purpose of promotion from the post of Head Constable to the next higher post of Assistant Sub Inspector, eligible Head Constables are required to be subjected to comprehensive suitability test under a procedure comprising written test, outdoor test, assessment of service records/ACRs appraisal and interview. If the candidate is able to secure minimum marks of 56 or 50, as the case may be, applicable for candidates of general/SC/ST category, he would be entitled for promotion to the next higher post, provided there is a vacancy for him in the order of merit. In other words, even if a candidate may have been found fit for promotion having secured 56 or 50 marks as the case may be, even though, there may not be enough vacancy available for him, because there may be candidates over and above him in order of merit having secured marks more than the candidate and



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occupy all the available vacancies.

13. The right of an employee to be considered for grant of increments, crossing of efficiency bar, promotion and disciplinary action are essentially depend upon the contract of service and applicable service rules. In public employments, particularly employment under the State service or Central Services, the terms and conditions of services are governed by the statutory rules framed either in exercise of powers under any enactment or under Article 309 of the Constitution of India. It is equally well settled that in respect of those matters where the rule is silent, it is permissible to fill in the gaps by issuance of administrative instructions which is binding not only on the employer but also the employee provided that such instruction/circulars/policies are not inconsistent with an enactment or statutory rules. Parties before this Court have brought to the notice of this Court only administrative policy of promotion contained in Circular dated 30-03-1989 (Annexure R/6) and nothing more, much less any provision contained either in any enactments/statutory rules or any other administrative instructions to deal with the question as to what will happen to the claim of an employee for consideration for promotion in that year when employee has failed to cross efficiency bar. Therefore, on the facts and documents placed before the Court, this Court has to hold that, in the absence of there being any specific bar of consideration of promotion to the next higher post, only on the ground of failure to cross efficiency bar in a given year, the employee's right to be considered for promotion to the next higher post remains intact and not taken away. In different words, even in a case, the employee has not been found fit to cross efficiency bar in a year and process is initiated for consideration of eligible employee for promotion to the next higher post, the employee will have to be subjected to suitability test notwithstanding his failure to cross efficiency bar. This is because where the terms and conditions, subject



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to which employee has to be considered for promotion have been exhaustively enumerated, unless disqualifies in express terms, it may not be implied that right to be considered for promotion to the next higher post would be lost by the reason of failure to cross efficiency bar in the past. It would essentially depend upon the applicable rules & policy. In a given case, it may be provided that failure to cross efficiency bar in a particular year, would disentitle an employee for consideration to the next higher post in that particular year. In other employment, it may not be provided so.

On facts of the present case, a perusal of the promotion policy of 1989, shows that wherever the authority intended that an employee would be treated as not found fit for promotion at the threshold, it was so provided in express terms. In the relevant provisions referred to above, there is clear stipulation that if an employee has suffered major punishment in the last five years, he will be treated as "Not yet fit" for promotion. Therefore, in case, the employee has suffered major punishment in preceding five years, therefore, his case for promotion is liable to be rejected at threshold, even for subjecting him to eligibility test. Impliedly, in all other cases including crossing of efficiency bar and consideration for promotion, the right to be subjected to suitability test would not be lost.

14. In view of above consideration, I am inclined to hold that mere failure to cross efficiency bar, in the facts and circumstances of the case, was not a bar to even consideration of promotion to the next higher post. In the present case, it is found that the petitioner started raising claim for promotion to the post of Assistant Sub Inspector communicating result of his writ petition in the matter of imposition of major penalty vide order dated 09-01-1993. Admitted facts floating on the surface of the records are that the incident, which led to suspension,

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initiation of departmental enquiry and imposition of penalty, happened in the month of May, 1992. The petitioner was suspended in the month of May 1992 and charge sheet was issued on 16-06-1992 and penalty was imposed. This was not even in existence when the petitioner had become due for promotion in the year 1991. Therefore, it logically follows that imposition of penalty in the year 1993, judicial intervention and consequent reduction of penalty of lower stage of censure would have no bearing on consideration of petitioner's case for promotion, which had become due in the year 1991. The petitioner has, however, developed his entire case that if his non-promotion in the year 1991 was based on the penalty imposed in the year 1993 and as a consequence of judicial order passed in the year 1998, he became entitled for re-consideration for promotion by review DPC as in the year 1991.

15. The stand taken by the respondents and material placed on record by the parties, shows that the petitioner was graded as Average in the ACR for the year 1987 & 1988. He suffered two minor penalties i.e. vide order dated 27-09-1989 and other vide order dated 15/16-10-1990. In both cases, penalty of censure was imposed on him. There is nothing on record that the petitioner challenged the penalty orders successfully, either in departmental appeal or in the Court of law. Moreover in the year 1991, the petitioner was graded as below Average in the ACR. Moreover, the two counter-affidavits of the respondents unmistakably show that though the petitioner was considered for crossing of efficiency bar in the year 1991 and not found fit, he was not considered for promotion to the next higher post of Assistant Sub Inspector in the year 1991.

16. It has been contended that in fact, the petitioner was found fit for promotion in the year 1993. In response to the pleadings made in the writ petition, it has been specifically denied by the respondents that any test was



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held in the year 1993 much less the petitioner found fit. The petitioner has relied upon memo dated 20-03-1993 (Annexure P-7) to say that he was considered and found fit. There is, however, no material on record to show that the petitioner was found fit in the year 1991. As a matter of fact, on the face of promotion policy of 1989, which was in force at that time also, the petitioner's case was liable to be rejected at the threshold as "Not yet fit" for promotion in the month of January 1993, as he had suffered major penalty of reduction of lower stage of pay. It continued to have its effect till the judicial pronouncement of the High Court of Calcutta vide its order dated 07-08-1998 in the writ petition of the petitioner. Precisely, for this reasons, the petitioner was not found fit in the year 1996, because the period of five years and currency of punishment was not over. The penalty order dated 09-01-1993 recorded the penalty with effect from 10-01-1992, that means, for next five years, the petitioner was not fit for consideration for promotion. In the year 1997, after completion of five years of the punishment order, the petitioner was considered for promotion to the post of Assistant Sub Inspector and promoted.

17. However, once the order of major penalty was set aside by the High Court of Calcutta vide order dated 07-08-1998 which was affirmed vide order dated 14-06-2007 passed in Intra-Court appeal by the Division Bench of that Court, the petitioner's right to be considered for promotion in the years subsequent to year 1991 got revived. The operative reason for not holding fit for promotion after passing of the penalty order dated 09-01-1993 was the provision contained in the promotion policy dated 20-03-1989(Annexure R/6) that in the event of major punishment, an employee would not be treated as fit for promotion for the next five years. It was by operation of this deleterious provision that the petitioner was not considered for promotion till expiry of period of five years from the date, penalty was to take effect. Since the period was not over, the



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petitioner was considered for promotion in the year 1997, therefore, the effect of judicial intervention would be that the petitioner's right to be considered in the years subsequent to 1991, even if he was found unfit for crossing efficiency bar in the year 1991, was continued.

18. Even though, the disclosure of service record of the petitioner for a period of five years starting from year 1991, is not at all impressive, because he could only earn Average grading in the year 1987 & 1988 followed by two penalties of censure and in the year 1990, the ACR graded below average, yet in the absence of any bar from consideration of promotion at the threshold, only by the reason of failure to cross efficiency bar, the petitioner's case was liable to be considered for promotion in the year 1991. This was because the selection is not based on seniority alone, but on more than one attributes of merit which comprised of written test, outdoor test, appraisal of ACRs, punishment and interview etc. One cannot lose sight of the possibility that other employees may have suffered grading of average, below average including minor penalty, criteria for promotion itself shows that while assessing suitability test in the light of peculiar methodology for award of marks as contained in clause "dd", minor punishment leads to reduction of three marks and not for disqualification at the threshold, as in the case of imposition of major penalty. Therefore, with all indicative aspects of the case of the petitioner, one does not know whether in competition with other employees with similar records, the petitioner would fared well to secure not only minimum eligibility marks but also to secure higher position in the order of merit so as to get promotions against available vacancies in the year 1991. It is to be noted that admittedly, the petitioner belongs to SC category, that means, in order to become eligible for promotion, he was required to secure 50% marks only.



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19. Therefore, it has to be noted that the petitioner was illegally deprived by consideration of promotion by not subjecting him to suitability test in the year 1991 only on the ground of failure to cross efficiency bar in the month of July 1991. Moreover, as result of judicial intervention, five years disqualification for consideration on account of major punishment also having been wiped off, the petitioner's right to be considered for promotion in all subsequent years also got revived after the order passed by the Court in the year 1998 crystallized, upon dismissal of Intra-Court appeal and consequent order dated 16-06-2008 reducing penalty to that of censure only.

20. However, the question which arises for consideration is whether in the present case, where the petitioner declined to be subjected to suitability test in response to memo dated 18-07-2001. In the petition, the petitioner has pleaded that he was pressurized by the higher officers to put signature on the unwillingness note. This allegation has been denied by the respondents. The petitioner's letter dated 09-08-2001 (Annexure R-1), however, gives a different picture. The text and tenor of this letter is merely in the nature of protest though coupled with the allegations that he was pressurized to sign the document. Picture which emerges from complete reading of this document, the petitioner had questioned bonafides of the respondents to subject him to suitability test on the claim that he was also found fit in the year 1993, for which, there is no material on record. What has been stated in the letter goes to show that the petitioner was not inclined to be subjected to any suitability test in the year 2001 presumably on apprehension that by this test, the respondents would somehow disqualify him so as to provide justification to deny promotion to Assistant Sub Inspector with effect from 1991. It is quite improbable that an employee, who all through was contesting the matter ever since imposition of penalty in the year 1993 before the High Court, would succumb to that kind of pressure. The date



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on which, the petitioner is alleged to have been pressurized to sign the document as is apparent from unwillingness note (Annexure R-II) is 20-07-2001 i.e. that is the date of selection. There is no material on record to show that immediately thereafter, petitioner approached or wrote to higher authorities that he was pressurized by the higher officers. For the first time, such complaint was made after about 13 days vide representation dated (Annexure P/5). The allegation, in essence, is that of coercion. In the absence of there being any clinching evidence to prove the same, in the light of the aforesaid observations, cannot be accepted and liable to be rejected. Therefore, it has to be held that on preponderance of probability that the petitioner declined to face the suitability test in response to letter dated 18-07-2001.

21. Therefore, even though, it has been held hereinabove that the petitioner was entitled to be considered for promotion by subjecting him to suitability test as on 19-01-1991 as review DPC, refusal of the petitioner to appear in the suitability test in the year 2001, disentitled him to seek any other relief from this Court. It is well settled that grant of relief under Article 226 of Constitution of India is discretionary in nature. The petitioner's conduct of declining to appear in the test in the year 2001, when he was in service, disentitled him to seek relief for consideration of his case in the review DPC as in the year 1991. Unless the petitioner is subjected to suitability test as per promotion policy, no relief can be granted to him, because promotion could be earned only by appearing in the suitability test and it does not merely depend on the appraisal of ACRs. As the petitioner has retired in the year 2014, at this stage, no direction can be issued to subject him to suitability test under the policy of promotion of 1989 and resultantly, no relief can be granted to the petitioner.

Faced with the disclosure that grading in ACRs of year 1987 & 88 and



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1990, as contained in the additional affidavit, it has been argued, without any pleadings, that those ACRs were not communicated. In the absence of any case made out on facts based on pleadings on affidavits, the issue cannot be examined one way or the other.

22. In the result, the petition is dismissed.

Sd/-
Manindra Mohan Shrivastava)
Judge