

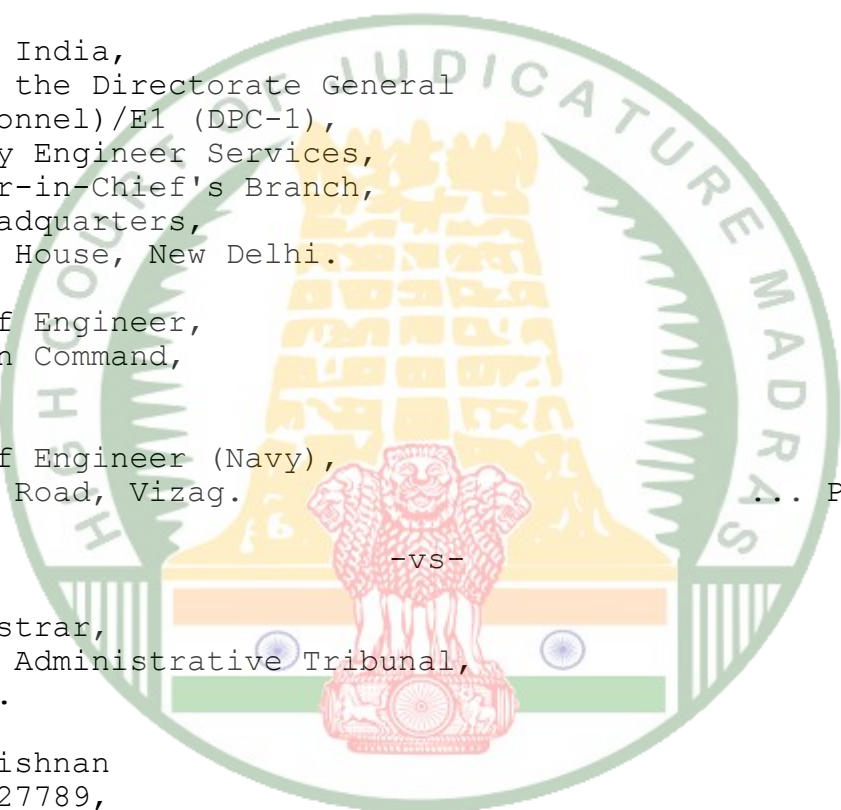
IN THE HIGH COURT OF JUDICATURE OF MADRAS

DATED: 16.11.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE N.AUTHINATHAN

W.P.No.29824 of 2016 &
W.M.P.No.25827 of 2016

- 
- 1.Union of India,
Rep. by the Directorate General
(Personnel)/E1 (DPC-1),
Military Engineer Services,
Engineer-in-Chief's Branch,
Army Headquarters,
Kashmir House, New Delhi.
- 2.The Chief Engineer,
Southern Command,
Pune.
- 3.The Chief Engineer (Navy),
Station Road, Vizag. ... Petitioners
- vs-
- 1.The Registrar,
Central Administrative Tribunal,
Chennai.
- 2.R.Balakrishnan
MES No.27789,
Assistant Engineer E/M (Retd),
B-4, Vimal Emerald Flats,
No.105, Rajagopalan Street,
Valasaravakkam, Chennai. ... Respondents

Prayer: Writ petition has been filed under Article 226 of the Constitution of India, praying for a Writ of Certiorari, calling for the records from the file of the first respondent made in O.A.No.82 of 2012 dated 26.02.2015 and quash the same.

For Petitioners : Mr.Su.Srinivasan
Asst. Solicitor General of India

For Respondent No.2: Mr.R.Balakrishnan
(Party-in-Person)

O R D E R

[Order of the Court was made by N.AUTHINATHAN, J.]

The petitioners have come up with the present writ petition for a Writ of Certiorari, to call for the records of the order dated 26.02.2015 passed by the Central Administrative Tribunal / first respondent herein, in O.A.No.82 of 2012 and to quash the same.

2.The second respondent (MES 27789) joined Military Engineer Service as Superintendent E/M Grade-II on 16.08.1965. He was promoted to Superintendent E/M Grade-I on 12.04.1985. Subsequently, Superintendent Grade-I and Superintendent Grade-II posts were merged and redesignated as Junior Engineer E/M with effect from 09.07.1999.

3.As per the Assured Career Progression (ACP) Scheme for Diploma Holders in MES vide Ministry of Defence Letter No.85610/ACP/47/Supdts/CSCC/715/07(D-works) dated 22.03.2007, the second respondent was granted second financial up-gradation with effect from 09.08.2002. It was approved by the Departmental Screening Committee.

4.The second respondent made representation claiming that there was disparity in granting second financial up-gradation under ACP Scheme. He was informed by the Department that the second financial up-gradation for him with effect from 09.08.2002 has been approved by the Departmental Screening Committee, based on the assessment made by the Departmental Promotional Committee (DPC). He has again made a representation for granting financial up-gradation (ACP) with effect from 09.08.1999. A reply dated 30.11.2011 has been sent by the Department. They reiterated that the second financial up-gradation under Assured Career Progression Scheme in respect of the second respondent herein has been approved with effect from 09.08.2002 based on the assessment by the Departmental Promotion Committee. He was further asked to submit an undertaking to the effect that he has no objection for review of panel for promotion from E/M to AE E/M for the vacancy year 2001-02.

5.Aggrieved by the order dated 30.11.2011, denying second financial up-gradation under Assured Career Progression Scheme with effect from 09.08.1999, the second respondent approached Central Administrative Tribunal seeking the following relief: "to call for the proceedings of the first respondent B/41028/ACP/AEs/JEs/E1(DPC-1)(ii) dated 30.11.2011 and quash the same and direct the respondents to grant the benefits of 2nd ACP to the applicant in Rs.10,000-15,200/- scale with effect from 09.08.1999 with all consequential and attendant benefits and

consequently revise his pension and all other terminal benefits and pay the arrears."

6.The Central Administrative Tribunal allowed the Original Application and directed the Writ Petitioners to grant the second financial up-gradation to the second respondent as per his entitlement in accordance with law.

7.The case of the second respondent is that he did not get promotion within 24 years of service and therefore, he is entitled to the benefits of second financial up-gradation with effect from 09.08.1999.

8.The Writ Petitioners contested the Original Application by filing reply statement. Their case is that the second financial up-gradation under Assured Career Progression Scheme with effect from 09.08.1999 has not been granted to the second respondent on the basis of the assessment made by the Superior Officers as recorded in the Annual Confidential Report (ACR). According to them, the following entries and final grading are found in the Annual Confidential Report of the second respondent:

"(a) 1994-95	-	Average
(b) 1995-96	-	Average
(c) 1996-97	-	Average
(d) 1997-98	-	Good
(e) 1998-99	-	Average
(f) 1999-2000	-	Very Good"

9.According to the Writ Petitioners, the bench mark prescribed for promotion is 'very good'. The Departmental Promotion Committee assessed his performance and found him not eligible for promotion. Consequently, he was given benefits of the second financial up-gradation with effect from 09.08.1999.

10.The second financial up-gradation was effective from 09.08.1999. The up-gradation is granted in lieu of promotion and for all practical purposes the up-gradation is treated on par with promotion. The petitioners have admitted that the second respondent completed 24 years of service. It is also not in dispute that on completion of 24 years of service, JEs will be granted second financial up-gradation under ACP Scheme with effect from 09.08.1999. In the instant case, what ought to have been granted to the second respondent with effect from 09.08.1999 in the ordinary course, has been granted with effect from 09.08.2002. But for the aforementioned grading of the performance of the second respondent has recorded in his Annual Confidential Report, there would not have been denial of the second financial up-gradation.

11.The contention of the second respondent is that the benefits cannot be denied on the basis of the aforesaid uncommunicated adverse remarks recorded in his Annual Confidential Report. The learned Asst. Solicitor General of India appearing for the petitioners would submit that the above mentioned remarks (average, good) are not adverse remarks and as per the Official Memorandum dated 14.05.2009 only adverse remarks should be communicated.

12.In Dev Dutt v. Union of India [(2008) 8 SCC 725], the Supreme Court has explained the meaning of adverse remarks. It has been held thus: "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 1993-1994 should be upgraded from "good" to "very good". Of course, after considering such a representation it was open to the authority concerned to reject the representation and confirm the "good" entry (though of course in a fair manner), but at least an opportunity of making such a representation should have been given to the appellant, and that would only have been possible had the appellant been communicated the "good" entry, which was not done in this case. Hence, we are of the opinion that the non-communication of the "good" entry was arbitrary and hence illegal, and the decisions relied upon by the learned counsel for the respondent are distinguishable."

13.Grading of performance of an employee is intended to provide an opportunity to improve upon his past performance. If the case of the second respondent is considered in the backdrop of the test formulated by the Supreme Court, it would be clear that the remarks made in the Annual Confidential Report of the second respondent would be adverse in nature and the failure to communicate the same would be prejudicial to the second respondent. Uncommunicated adverse remarks cannot be relied on for any purpose to the prejudice of the second respondent. If so, the grading of the performance of the second respondent ought to have been communicated to him at the appropriate time. That having been not done, the grading of the performance should not be the basis for denial of the second financial up-

gradation. By not communicating the same, the petitioners deprived the second respondent of an opportunity to improve or dispute the correctness of the adverse remarks. "Denial of appropriate pay scales on the basis of uncommunicated adverse remarks has been held to be arbitrary." vide Vijay Kumar v. State of Maharashtra [AIR 1988 SC 2060]. In the light of the dictum laid down by the Supreme Court, we hold that the petitioners ought not to have denied the benefits on the basis of the uncommunicated adverse entries.

14. For the reasons stated above, the conclusion reached by the Central Administrative Tribunal deserves to be upheld and is accordingly upheld. The Writ Petition is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

sri

To

1. The Registrar,
Central Administrative Tribunal,
Chennai.

2. The Directorate General
(Personnel)/E1 (DPC-1)
Union of India,
Military Engineer Services,
Engineer-in-Chief's Branch,
Army Headquarters,
Kashmir House, New Delhi.

3. The Chief Engineer,
Southern Command, Pune.

4. The Chief Engineer (Navy),
Station Road, Vizag.

+1cc to M/s. Su. Srinivasan, Advocate, S.R.No.66761

MV(CO)
EU(/07/2016)

W.P.No.29824 of 2016