

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

Date of decision: 05.05.2017

CWP No.20275 of 2016

Gulshan Kumar Sharma

...Petitioner

Vs.

Union of India & others

...Respondents

CWP No.20322 of 2016

Chaman Rana

...Petitioner

Vs.

Union of India & others

...Respondents

CORAM: HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. Rajeev Anand, Advocate, for the petitioner.

Mr. Vivek Singla & Mr. Udit Garg, Advocate,
for the respondents in CWP No.20275 of 2016.

Mr. Anil Chawla, Advocate,
for the respondents in CWP No.20322 of 2016.

RAJIV NARAIN RAINA, J. (ORAL)

This order will dispose of CWP No.20275 of 2016 and CWP No.20322 of 2016 brought by Gulshan Kumar Sharma and Chaman Rana respectively, as a common issue is involved in both the cases, which can conveniently be decided by a consolidated order.

Annual Confidential Reports (ACRs) adverse to the service career of the petitioners were not conveyed when their cases for promotion [Gulshan Kumar Sharma from the post of 'Second-in-Command' to 'Commandant' and Chaman Rana from 'Deputy Commandant' to 'Second-

in-Command'] were considered in the Border Security Force. Both the promotional posts were selection posts where junior could supersede senior on merit and bench mark assessment.

The effect of non-communication of adverse ACRs in selection posts has been evolved by the Supreme Court in Dev Dutt Vs. Union of India & others, (2008) 8 SCC 725, a judgment which seeks to bring about transparency in the matter of recording of ACRs, communicating them in time and giving opportunity to the employee to meet his shortcomings, if any, during the year under review or to encourage him to reach greater heights and overcome deficiencies pointed out by the reporting officer. In Para.22, their Lordships of the Supreme Court observed as under:

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 This often results in grave injustice and heart-burning, and may shatter the morale of many good officers who are superseded due to this arbitrariness, while officers of inferior merit may be promoted.”

The judgment is a command on the managers of promotions and Assessing Officers, who report and review work through the medium of recording ACRs to follow the rules and guidelines, strictly prescribed for this important work on which careers depend. When the Supreme Court declares a law it is as it always stood and has retrospective application on all actions taken even before the judgment was pronounced on 12.05.2008 in the face of litigation. These obligations have not been discharged in these cases by the authorities in the BSF. The adverse ACRs which do not touch

upon the integrity and honesty of the officer(s) when not conveyed cannot be used to deny promotion.

The ruling in *Dev Dutt's* case was referred to the Larger Bench in Union of India Vs. A.K.Goel & others, Civil Appeal No.2872/2010. However, before the Larger Bench was seized of the matter, another judgment of three Judge Bench came to be delivered, that is, in Sukhdev Singh Vs. Union of India & others, (2013) 9 SCC 566 as against *Dev Dutt's* case, which was a ruling of two Judge strength.

In *Sukhdev Singh*, the Supreme Court approved the decision in *Dev Dutt's* case and declared that the decisions of the Supreme Court in Satya Narain Shukla Vs. Union of India, (2006) 9 SCC 69 and K.M.Mishra Vs. Central Bank of India, (2008) 9 SCC 120 do not lay down good law. In Para.8 in *Sukhdev Singh's* case, their Lordships observed as follows:

“8. In our opinion, the view taken in *Dev Dutt* that every entry in ACR of a public servant must be communicated to him/her within a reasonable period is legally sound and helps in achieving threefold objectives. First, the communication of every entry in the ACR to a public servant helps him/her to work harder and achieve more that helps him in improving his work and give better results. Second and equally important, on being made aware of the entry in the ACR, the public servant may feel dissatisfied with the same. Communication of the entry enables him/her to make representation for upgradation of the remarks entered in the ACR. Third, communication of every entry in the ACR brings transparency in recording the remarks relating to a public servant and the system becomes more conforming to the principles of natural justice. We, accordingly, hold that every entry in ACR – poor, fair, average, good or very good – must be communicated to him/her within a reasonable period.”

When *A.K.Goel's* case came up for hearing on 27.11.2014, the following order was passed:

“Heard learned counsel for the parties.

Delay condoned.

In view of the order passed by a three Judge Bench in *Sukhdev Singh Vs. Union of India & others*, (2013) 9 SCC 566, nothing further survives in the instant appeal/petitions and the same are accordingly dismissed.

As a sequel to dismissal of the appeal/petitions, the application for impleadment and the application for substitution are also dismissed.”

In this manner, a system has been evolved conforming to the principles of natural justice. These are constitutional obligations in the administrator of justice in offices of the Government.

However, Mr. Singla argues that when the consideration took place, these judgments were not available. That may be right, but looking on hind sight the action may not be flawed, but the law is the law, which has to be followed and this Court has to obey the binding decisions of the Supreme Court. Moreover, the principle in *Dev Dutt* as to compulsory communication of ACRs was new, but the principle that un-communicated ACRs could not be used to deny promotion was an old principle and part of service jurisprudence since yester years evolved by Courts. The contention is, thus, rejected. The law applied in the year when the petitioners were passed over.

His further argument is that the cases of the Supreme Court relied upon by Mr. Anand are cases specific and each case has to be viewed on its own facts. As a statement of law, Mr. Singla is not incorrect, but the

question is whether there is merit in bringing about uniformity in the law and this Court has to act in aid of the Supreme Court.

As a result of above discussion, both the petitions are allowed. The cases of the petitioners will be considered retrospectively from the due date by excluding consideration of adverse/below benchmark ACRs. For this purpose, the respondents may adopt a method of looking to past and subsequent ACRs and drawing an average of them and then see if the petitioners make the bench mark on the due date of consideration when DPC was convened and cases of promotion considered by BSF. In a similar situation in a case where record of ACRs was missing drawing a blank for some of the years, I resorted to the principle of averaging past and future ACRs, I had observed in Gopal Dass Science Master & others Vs. State of Punjab & others, 2016 (1) SCT 17: 2016 (2) SLR 592 as follows:

“In view of this factual position and the fact that the record is not available regarding the adverse ACRs of the three petitioners, then the only way to redress the grievance would be not leave the ACR year blank but to direct the State to make an average of the ACRs for the 4 years out of the 5 years required and accordingly average out the grading for the disputed year by the average of ACRs before and after the disputed year and to work out the bench mark by moderation on an average. In this case despite average ACRs, the petitioners still make the bench mark and that is another reason which persuades this Court to follow the course adopted since the petitioners in some of the years have received outstanding or very good grading and remarks. This is the only reasonable way out of the predicament, the mess created by the State by not keeping its house in order.”

If that be the position, then a direction is issued to the respondents, that the cases of retrospective promotions of the petitioners

shall be considered from the date juniors were promoted to the higher posts and when granted in the light of this order, and on the principle in *Gopal Dass* case (supra), the same will be with all consequential benefits as naturally follow.

Let the consideration take place within three months from the date of receipt of a certified copy of this order, either from the Court or from the petitioners, whichever is earlier. In the event of anti-dated promotions, the actual monetary benefits determined by way of arrears of difference of pay etc accruing shall be given to the petitioners in the next six months.

In the special facts of these cases, no interest is awarded since the issue had to be debated on retrospectivity of judgments. To this, Mr. Rajeev Anand for the petitioners immediately counters that want of retrospectivity was one of the issues raised by the Union of India in its SLP in *A.K.Goel's* case and a copy of which he has brought to Court and, therefore, it is deemed to have been rejected by the Supreme Court in view of the nature of the order passed. I agree.

Accordingly, both the petitions are allowed. All adverse orders and noting portions leading to them on BSF record are hereby quashed.

05.05.2017
Vimal

[RAJIV NARAIN RAINA]
JUDGE

<i>Whether speaking/reasoned:</i>	<i>Yes</i>
<i>Whether Reportable:</i>	<i>Yes</i>