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

+ **W.P.(C) 6604/2017**

VIDULA

..... Petitioner

Through Mr. Anil Singhal, Advocate

versus

GOVT OF NCT OF DELHI AND ORS

..... Respondents

Through Ms. Jyoti Taneja, Advocate for R-1 to  
R-3

**CORAM:**

**HON'BLE MR. JUSTICE VIPIN SANGHI**

**HON'BLE MS. JUSTICE REKHA PALLI**

**ORDER**

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**02.08.2017**

**C.M. APPL. 27369/2017 (Exemption)**

1. Exemption allowed, subject to all just exceptions.

Application stands disposed of.

**W.P.(C) 6604/2017**

2. The petitioner has preferred the present petition to assail the order dated 24.11.2014 and 07.09.2016 passed in O.A. No. 3219 of 2012 and RA No.18 of 2016 in O.A. No. 3219 of 2012. The Tribunal has dismissed the original application by the first order and the review application preferred by the petitioner by the second order.

3. The late husband of the petitioner had joined the Directorate of Education, Government of NCT of Delhi, as a Trained Graduate Teacher ('TGT') (Sanskrit) w.e.f. 05.11.1980; he superannuated on 01.01.2010. It is

claimed that during the service he was never communicated any adverse ACR. He was not granted any promotion or ACP/MACP benefit during the term of his employment. On 16.07.2011, he was communicated two average ACRs for the years 2006-07 and 2007-08. He represented against the same on 29.07.2011. These representations were rejected on 28.05.2012. Consequently, the late husband of the petitioner preferred the aforesaid original application to seek quashing of the two adverse ACRs and for consideration of his case for grant of MACP. The Tribunal while dismissing the original application directed that this case may be considered in terms of MACP Scheme for grant of third financial upgradation upon his completion of 30 years of service on the basis of the record available, if not already considered. The petitioner then preferred the Review Application to seek a clarification that the direction be treated as the one directing reconsideration of the claim of her husband for second upgradation under the MACP Scheme upon completion of 20 years of service, since late husband of the petitioner superannuated prior to completion of 30 years of his service. Clarification was granted by the Tribunal.

4. So far as the rejection of the original application qua the challenge to the two adverse ACRs is concerned, the submission of Mr. Anil Singhal, learned counsel for the petitioner is that the adverse remarks in the ACRs were not communicated to the late husband of the petitioner within the time stipulated as per the Government of India, Department of Personnel and Training Office Memorandum dated 23.07.2009 which required that the adverse ACRs be communicated by 15<sup>th</sup> September of the following financial year. Thus, the adverse ACR for 2006-07 should have been communicated by 15<sup>th</sup> September, 2007 and similarly the adverse remarks

for the year 2007-08 should have been communicated by 15<sup>th</sup> September, 2008. However, the same were communicated only after the retirement of late husband of the petitioner, on 16.07.2011. According to the petitioner, on account of said delay the said adverse reports/remarks should have been ignored while considering the case of the late husband of the petitioner for grant of MACP Scheme benefits. The Tribunal had rejected this submission of the petitioner, and recorded it rightly so.

5. The aforesaid Office Memorandum, no doubt, fixes the time schedule for communication of the adverse remarks in the ACRs, however, the same does not provide for any consequence upon the time schedule not being followed. It cannot, therefore, be canvassed that the delay in communicating the ACRs or non-adherence to the schedule prescribed in the OM would render the ACR as non est.

6. In the present case, the aforesaid adverse ACRs were communicated to the husband of the petitioner on 16.07.2011. Pertinently, he had superannuated on 01.01.2010. Even, according to the petitioner, the case of the husband of the petitioner could not have been considered for benefits under the MACP Scheme prior to 2008. There was no other adverse consequence which flowed on account of non-communication of the adverse remarks in two ACRs. When the case of the husband of the petitioner was taken up for consideration for grant of MACP benefits, the respondent realised that there were two adverse ACRs. Before taking a decision on the grant of MACP Scheme benefits to the husband of the petitioner, the said adverse ACRs were communicated to him and his representation invited. After consideration of the representation, the same has been rejected. This being the position, no prejudice has been caused to the late husband of the

petitioner due to late communication of the ACRs and in view thereof, the said adverse ACRs could not have been possibly be ignored by the respondent.

7. Even otherwise, it is well settled that if the adverse ACRs are not communicated punctually but with some delay, the same cannot be ignored on that basis itself. It may be apt to refer to a Judgment of the Division Bench of this court in the case of ***S.D. Dobhal v Union of India & Ors.***, in W.P. (C) No. 452/2009 wherein this court, after considering various judgments of the Apex Court regarding the issue, had held that merely because adverse ACRs were not communicated to the employee or were communicated belatedly, they cannot be treated as non est. The remedy available to an employee in such cases would be an opportunity to file a representation against his adverse ACRs which should be decided expeditiously by the Competent Authority after which the case would be considered afresh for promotion. The relevant paragraphs of this judgment are reproduced hereunder:

“35. It would be seen that in Sukhdev Singh case, the Supreme Court did not direct retrospective promotion of the appellant therein and unlike the view as taken in ***Abhijit Dastidar*** case by the Supreme Court it was held that it would be open to the appellant to make a representation to the authorities concerned for his retrospective promotion in view of the legal position stated. Nowhere has the Supreme Court held that non communicated adverse ACR could be treated as *non est*. Indeed, in ***Sukhdev Singh case*** (supra) the Supreme Court fully adopted and endorsed the reasoning and legal principles enunciated in ***Dev Dutt*** case (supra) and even while granting the final relief the Court preferred to observe the right of the public servant to make a representation against his adverse entry to the concerned authority and his right to a decision on such a representation.

36. In ***Dev Dutt*** case (supra) as well, the emphasis of the Supreme Court was on the communication of an ACR, irrespective of whether the entry was 'good', 'average' or 'fair', it was to observe the right to the public servant to make representation against an adverse entry to the concerned authority, and that the decision of the competent authority on such representation of the employee ought to be in a fair manner and within reasonable period.

37. We may also point out here that in ***Dev Dutt*** case, the grievance raised by the employee was that he was not communicated about the 'good' entry of 1983-1984, which was '*below benchmark grade*' of 'very good' and the DPC in its meeting held on 16<sup>th</sup> December 1984 denied him the promotion because of the said non communication of the below benchmark grading. After discussing the legal position, the Court directed the respondents to communicate the 'good' entry to the appellant within a period of two months and accorded the appellant an opportunity to represent against the said entry. If he so choose, within a period of two months; the competent authority was to take a decision on such representation within a period of two months.

38. ***Dev Dutt (supra)*** further laid down that the representation made by the employee against an adverse entry in his ACR must be decided by an authority, higher than the one who gave the entry, otherwise in all likelihood the representation would be summarily rejected. Relevant para of ***Dev Dutt (supra)*** is extracted as under:-

*"5. We further hold that when the entry is communicated to him the public servant should have a right to make a representation against the entry to the concerned authority, and the concerned authority must decide the representation in a fair manner and within a reasonable period. We also hold that the representation must be decided by an authority higher than the one who gave the entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar to Caesar. All this would be conducive to fairness and transparency in public administration, and would result in fairness to public servants. The State must be a model employer, and must act fairly towards its employees. Only then would good governance be possible. In our opinion, non-communication of entries in the Annual Confidential Report of a public servant, whether he is in civil, judicial, police or any*

*other service (other than the military), certainly has civil consequences because it may affect his chances for promotion or get other benefits (as already discussed above). Hence, such non-communication would be arbitrary, and as such violative of Article 14 of the Constitution.”*

39. As can be seen from the foregoing paras, the entire emphasis in the above judgments was first to inform the employee with regard to his grading, which is *below benchmark* and could come in the way of his promotion. Indeed, the Court went to the extent of conveying all sorts of gradings so that an employee can be made aware of his merits/demerits during the course of a particular year. Secondly, emphasis was to accord the right to an employee to file a representation and for such representation to be decided by an officer superior in rank to the officer who has assessed him in the appraisal report, so that his adverse ACR is not summarily rejected by the assessing officer.

40. In the present case, the petitioner was promoted as Senior Commandant in the DPC held against the vacancy for the year 2011-2012. As per the case of the petitioner, he deserved this promotion to the post of Senior Commandant against the vacancy for the year 2004-2005 as in the DPC held in the month of April, 2005, his juniors were promoted to the said rank but he was denied promotion due to the said non-communication of “*below benchmark*” grading for the years 1998-1999 and 2002-2003. The other grievance of the petitioner is that his representation dated 10.05.2010 was not decided by the competent authority, superior to the rank of the accepting officer, therefore, his two subsequent *below benchmark* grading ACRs for the period between 01.04.2003 to 31.03.2004 and from 01.04.2004 to 02.07.2004 be also considered as *non est* while considering his case for promotion by the Review DPC.

41. We note that the Supreme Court has neither taken the view nor implied that non-communicated ACR of an employee could be ignored, as if the same was never written or was non-est. Neither do we find this analogy in any of the DoPT Guidelines nor in the judgments of the Supreme Court. If the non-est argument is accepted, it would defeat the very rationale of the aforesaid judgments of the Supreme Court, which recognises the right of a government employee to be communicated an adverse ACR i.e. a

rating lesser than the highest, so that if aggrieved, he could file a representation before the competent authority, and in case there is an erroneous decision at the end of the officer entrusted to appraise his report, the same can be rectified by the officer superior in rank to the accepting officer and thereafter, his case for promotion could be placed before the Review DPC. However, if we accept the reasoning as suggested by the counsel for the Petitioner, then an officer against whom there may be serious charge/complaint with regard to his performance, conduct, behaviour, efficiency and potential etc., he would be promoted simply because his adverse ACR was not communicated to him/her or was not decided by the competent authority or for some other similar reason. In our considered view, such a situation will have deleterious effect on the entire scheme of service promotions because in such cases, an officer may be rewarded with promotion despite the fact that he is not upto the requisite mark, on the parameters of his performance, conduct, behaviour, efficiency and potential, etc. In such like cases of non-communication of *below benchmark* grading in the ACR or where the representation is not decided by the officer superior to the rank of Accepting Officer, there would be postponement in the decision of Departmental Promotion Committee as ultimately if the representation is decided in favour of such an employee then he will get the promotion retrospectively with all other consequential benefits. For the aforesaid reasons, we are not persuaded by the contention of the learned counsel for the petitioner to let the case of the petitioner be placed before the Review DPC, by treating the said adverse ACRs for the years 1998-1999 and 2002-2003 as if they were never written, because of their non-communication to the petitioner.”

8. In the meantime, the respondent has rejected the claim of the late husband of the petitioner for grant of second MACP benefit on 16.05.2017. This order has not been assailed by the petitioner before the Tribunal and we are not concerned with the same. It is left to the petitioner to take appropriate steps in relation to this order independently. In view of the above position, we do not find any infirmity in the impugned order. The

present petition is accordingly dismissed while reserving the right of the petitioner to independently seek remedy in respect of the order dated 16.05.2017 whereby the claim in respect of grant of second MACP Scheme benefit qua the petitioner's husband has been rejected.

**VIPIN SANGHI, J**

**REKHA PALLI, J**

**AUGUST 02, 2017**

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