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

+ **Date of Decision: December 04, 2018**

% **W.P.(C) 185/2018**

MRS. SUNITA MEHRA Petitioner
Through Mr. Satish Kumar, Adv.

versus

SECRETARY OF EDUCATION AND ORS. Respondents
Through Ms. Ruchira Gupta, Adv.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE A.K.CHAWLA

VIPIN SANGHI, J. (ORAL)

1. The petitioner has preferred the present writ petition to assail the order dated 08.12.2016 passed by the Central Administrative Tribunal (CAT) in OA no. 4248/2011.
2. The Tribunal had dismissed the said OA preferred by the petitioner, wherein, she had raised her grievance with regard to her not being granted benefits of Modified Assured Career Progression Scheme (MACPS) on the premise that her ACRs for the years 2008-09 and 2009-2010 were "Average" i.e. below the benchmark. The petitioner also sought direction for setting aside the said ACR entries and to declare that she had "Very Good" grading in the said years on the basis of entries contained in the ACR

form. The petitioner also assails the order dated 10.02.2017 passed in RA no. 42/2017 preferred by the petitioner since the said RA was dismissed by the Tribunal.

3. The petitioner joined Govt. of NCT of Delhi as TGT (Home Science) on 21.04.1993. She was promoted as PGT (Home Science) on 05.08.2000. She worked at Sarvodaya Kanya Vidyalaya (SKV), Raj Nagar-II, Delhi for a certain length of time. Thereafter, she was transferred to Sarvodaya Kanya Vidyalaya, Deoli on 16.09.2010. She was further transferred to SKV, Samalka on 24.06.2011. She was due for financial upgradation under MACP in the year 2010-2011. However, she was not considered due to her below benchmark ACR grading. The respondent issued the impugned office memorandum dated 12.07.2011, wherein, the petitioner was informed that her case for grant of MACP had been received back with the observation of District Screening Committee (DSC) of MACP (District Level) that ACRs for the period 2008-09 and 2009-2010 were found "Average".

4. The grievance raised by the petitioner before the Tribunal was that said two ACRs were adverse to her career progression since the benchmark for further promotion was "Good" and she was graded "Average", even though she had been graded as "Very Good" in the ACRs for the previous years. The said "Average" ACRs of the two years were never communicated to her and she learnt about the same for the first time, when office memorandum dated 12.07.2011 was issued communicating the reasons for denial of MACP to her. On this short ground, the petitioner prayed that office memorandum dated 12.07.2011 be quashed and her cause be considered by the DSC by ignoring said two ACRs grading and by

considering the grading of the previous years. The petitioner also raised grievance that her ACR grading for the said two years were wrongly assessed as “Average” on account of manipulation and there was no justification to grade her as “Average” in the light of the attributes and achievements recorded in the ACR forms for the said two years.

5. The stand taken by the respondent before the Tribunal, which is also the stand taken before us, was that the petitioner had been graded as “Average” in the two years in question on account of her behaviour and conduct during the relevant period. She had been issued show cause notices to which she sent a reply. These show cause notices and warning letters reflect her indiscipline and behaviour and it is on that account that she was given “Average” grading in the said two years.

6. As noticed above, there are two facets of the case. The first is short and simple and is squarely covered by the decision of this court in *Union of India vs. V.S. Arora*, 2012 SCC Online Del. 3193 decided by the Division Bench of this court. The Division Bench of this Court considered the judgments of the Supreme Court in *Dev Dutt vs. Union of India* 2008 (8) SCC 725 and *Abhijit Ghose Dastidar vs. Union of India & Ors.* 2009 (16) SCC 146. The Division Bench held that the non-communication of ACRs, which are adverse to the interest of the employee, is, firstly, violative of Article 14 of the Constitution of India since it is in breach of principle of natural justice inasmuch as the concerned officer is denied the opportunity of representing against the same and, secondly, the non-communication of the ACR denies the opportunity to the government official to improve upon his/her performance. The Division Bench also considered as to what course

of action should be adopted by the DPC when it is confronted with a situation where some of the relevant ACRs, though adverse, have not been communicated to the Govt. servant. Whether, in such a situation, an opportunity should be granted to the concerned Govt. servant by communicating ACR at this stage and asking him/her to make a representation and to decide the same and thereafter hold a review DPC or whether the DPC should ignore such ACRs and look at ACRs of previous years? The Division Bench held that the first course of action would not be correct to adopt and that the DPC should consider the ACRs of the previous years so as to look at the requisite number of ACRs to decide on the issue of promotion of the Govt. servant. The relevant observations made by the Division Bench of this Court in *V.S. Arora* (supra) read as follows :

“13. Analyzing the above extracted portion from the said decision in Abhijit Ghosh Dastidar (supra), we find that the Supreme Court had affirmed the decision in Dev Dutt(supra), when it observed that - “the same view has been reiterated in the above referred decision relied upon by the appellant”. The above referred decision related to Dev Dutt(supra). The principle that was culled out by Abhijit Ghosh Dastidar (supra) from the decision in Dev Dutt (supra) was that non-communication of an ACR would be arbitrary and would be violative of Article 14 of the Constitution. The reasons for this were that the non-communication of an entry of an ACR of a public servant has civil consequences because it could affect his chances for promotion or to receive any other benefits.

14. However, the Supreme Court in Abhijit Ghosh Dastidar (supra) went further and observed categorically that, therefore, the entries “good”, if at all granted to the appellant, ought not to have been taken into consideration for being considered for promotion to the higher grade. What this meant

was that the below benchmark ACRs, which had not been communicated to an employee, ought not to be taken into consideration for the purposes of considering the promotion of that employee to a higher grade. We must also distinguish between the stage when ACRs are written and the stage when they are considered by the DPC. What Dev Dutt (*supra*) and, indeed, Abhijit Ghosh Dastidar (*supra*) hold in unison is that the ACRs must be communicated to the concerned employee/officer soon after it is written. Beucase, its non-communication is contrary to the provisions of article 14 of the Constitution. But, this is at the stage when the ACRs are recorded or shortly thereafter. The objective of communicating the ACRs is two-fold. In the first place, as an element of natural justice, the officer concerned gets an opportunity of representing against the ACR before it is too late. Secondly, it also informs and warns the officer concerned that his performance is not upto the mark so that he may improve himself in the next year. However, at the stage of the DPC, the ACRs already stand crystallized and their communication then may not serve any fruitful purpose apart from informing the concerned employee/officer and, perhaps, enabling him to represent against it. But, the second aspect of improvement is lost. Consequently, at the stage of the DPC meeting the practical approach would be to not consider the uncommunicated ACRs as held in Abhijit Ghosh Dastidar (*supra*).

15. It is further to be noted that the directions given by the Supreme Court in the subsequent paragraphs, that is, in paragraph 5 of the said decision were in respect of the particular case before the Supreme Court and the Supreme Court had merely directed that as the appellant therein had retired from service, he would not be entitled to any pay or allowance for the period for which he had not worked in the Higher Administrative Grade. However, it had directed that his promotion would be retrospective with effect from 28.08.2000 and that should be considered for the benefit of re-fixation of his pension and retiral benefits and other benefits as per rules.

We are not going by the specific directions given by the Supreme Court in the facts of that case, but by the general principles of law declared by the Supreme Court in the earlier portion of the said decision which is set out in paragraph 4 of the same. The Supreme Court did two things. First of all, it affirmed the view taken by Dev Dutt (supra) to the extent that noncommunication of an ACR would be arbitrary and would be violative of Article 14 of the Constitution. Secondly, it concluded that such entries, which are not communicated, should not be taken into consideration for being considered for promotion to the higher grade. Thus, while Dev Dutt (supra) had been affirmed by the Supreme Court in Abhijit Ghosh Dastidar(supra) on the first aspect, as regards what has to be done with a noncommunicated below benchmark ACR, the Supreme Court in Abhijit Ghosh Dastidar (supra) took the view that such an ACR ought not to be considered.

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24. Therefore, the position that emerges is that the decision in Abhijit Ghosh Dastidar (supra) holds the field. Now, what is it that Abhijit Ghosh Dastidar (supra) decides? It has, in the first instance, while affirming Dev Dutt (supra), concluded that non-communication of an ACR is violative of the constitutional rights of a government servant/employee. In the second instance, it has stated that such below benchmark ACRs ought not to be taken into consideration while the question of promotion of a particular government servant is in contemplation. Now, that leaves us with the further question as to what is to be done after we ignore/do not consider the below benchmark ACRs. In this regard, we have clear guidelines contained in Chapter 54 of the Manual on Establishment and Administration for Central Government Offices, which have been issued by the Government of India for DPCs (G.I., Dept. of Per. & Trg., O.M. No. 22011/5/86-Estt.(d), dated the 10th April, 1989 as amended by O.M. No. 22011/5/91-Estt.(d), dated the 27th March, 1997 as amended/substituted vide Dept.

of Per. & Trg., O.M. No. 22011/5/98-Estt.(d), dated the 6th October, 2000). The relevant portion of the guidelines reads as under:-

“6.2.1. Confidential Rolls are the basic inputs on the basis of which assessment is to be made by each DPC. The evaluation of CRs should be fair, just and non-discriminatory. Hence -

(a) The DPC should consider CRs for equal number of years in respect of all officers considered for promotion subject to (c) below.

*(b) The DPC should assess the suitability of the employees for promotion on the basis of their Service Records and with particular reference to the CRs for **five preceding years** irrespective of the qualifying service prescribed in the Service/Recruitment Rules. The ‘preceding five years’ for the aforesaid purpose shall be decided as per the guidelines contained in the DoP&T, O M. No. 22011/9/98-Estt. (D), dated 8-9-1998, which prescribe the Model Calendar for DPC read with OM of even number, dated 16-6-2000. (If more than one CR have been written for a particular year, all the CRs for the relevant years shall be considered together as the CR for one year.)*

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(c) Where one or more CRs have not been written for any reason during the relevant period, the DPC should consider the CRs of the years preceding the period in question and if in any case even these are not available, the DPC should take the CRs of the lower grade into account to complete the number of CRs required to be considered as per (b) above. If this is also not possible, all the available CRs should be taken into account.

xxxx xxxx xxxx xxxx”

7. In the light of the aforesaid decision, the matter could be disposed of with direction to the respondents to place the case of the petitioner before the DSC for consideration afresh for grant of MACP by ignoring the ACRs for the years 2008-09, 2009-10. We would however, like to notice the other aspects raised by the petitioner namely, the manner in which the ACRs grading for the said years have been recorded as “Average”. Our attention has been drawn to the ACRs for the said years. The ACR format is in four parts. Parts A and B are filled by the officer under assessment and contains the relevant information with regard to the performance of the Govt. servant. The ACR format for the two years in question shows that the petitioner had very good results and a high percentage of distinction in the subject taught by her. Pertinently, for the year 2009-10 i.e. for the period from 01.04.2009 to 31.3.2010, there are two assessments recorded in respect of the petitioner. In the first assessment, in para C- which is filled by the head of school, the assessment recorded as follows :

“PART –C

(Assessment by the Head of the School)

Period of supervision is less than 3 months? No.

1. Please comment on Part B as filled in by the official and specifically state whether you agree with the answer or not, if not, give reasons thereof. Yes.
2. Punctuality (in attending the school as well as class periods). Punctual

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|-----|--|----------------------------|-------------------------|
| 3. | Honesty and integrity. | Honest | |
| 4. | Promptitude/Initiative. | She does her work | |
| 5. | Whether private tuitions taken during the year. | No | |
| 6. | Whether responsible for any outstanding work during the year. | Home Science Lab Incharge. | |
| 7. | Whether reprimanded verbally/in written for indifferent work or other cause during the year, give details. | No | |
| 8. | Observation of the Head of the school regarding the teacher. | She is a good teacher | |
| 9. | Grading : Outstanding/Very Good/Good/Average/Poor (in case of outstanding/poor give full justification). | Average | |
| 10. | Diary No. | 252 | Diary 31/05/2010 Date. |
| 11. | Dispatch No. | 1421 | Diary 11/06/2010 Date.” |

8. Curiously, without any notice or intimation to the petitioner, the same was changed by Head of the School so as to read as follows :

“PART –C

(Assessment by the Head of the School)

Period of supervision is less than 3 months? No.

- | | |
|---|---|
| 1. Please comment on Part B as filled in by the official and specifically state whether you agree with the answer or not, if not, give reasons thereof. | Relationship with HOS |
| 2. Punctuality (in attending the school as well as class periods). | Punctual |
| 3. Honesty and integrity. | Honest |
| 4. Promptitude/Initiative. | She does not performed her duties properly. |
| 5. Whether private tuitions taken during the year. | No. |
| 6. Whether responsible for any outstanding work during the year. | Home Science Lab Incharge. |
| 7. Whether reprimanded verbally/in written for indifferent work or other cause during the year, give details. | Yes she speaks loudly in aggressive manner and disobedient. |
| 8. Observation of the Head of the school regarding the teacher. | She is uncooperative and uses unparliamentary language. |
| 9. Grading : Outstanding/Very Good/Good/Average/Poor (in case of outstanding/poor give full justification). | Average |
| 10. Diary No. | 252 Diary 31/05/2010
Date. |
| 11. Dispatch No. | 1421 Diary 11/06/2010
Date.” |

9. ACR grading on both occasions, no doubt, was “Average” but what is the relevant is that the remarks given by the Head of School were changed in a material way. In the first assessment, the Head of School agreed with the self assessment in Part B by the petitioner, whereas, in the subsequent form, the Head of School raised the issue that the relationship with the Head of School (HOS) was not very good. Also, in the first form, the Head of School recorded that the petitioner “Does her work”, in the second form, it was recorded that “she does not perform duties properly”. In the second form, there was another aspect noted namely, that she speaks loudly in aggressive manner, she is disobedient and unco-operative and uses unparliamentary language. These adverse remarks were not to be found in the first assessment. It is also pertinent to note that diary number, date and dispatch number in both the forms is the same. The petitioner has pointed out, and, rightly so, that if the subsequent assessment for the year 2009-10 was re-filled by the Head of School, after obtaining permission from the Directorate of Education, the diary number, dispatch number and dispatch date could not be the same. There is no satisfactory explanation in this regard. The respondents have sought to place reliance on the show cause notice issued on account of misbehaviour of the petitioner. Pertinently, they were responded to by the petitioner and the matter stood closed on each occasion. The respondents did not choose to initiate any action against the petitioner for the misbehaviour during the relevant period, though, it is informed that after 31.03.2010, some action had been initiated against her. Even, if, any action was initiated, it would not have any bearing so far as the

consideration for grant of MACP is concerned on the basis of her ACRs upto 31.03.2010.

10. In the light of the aforesaid, we set aside the impugned order and direct that the case of the petitioner be placed before DSC of MACP (District Level) for consideration of the petitioner's case for grant of MACP. While doing so, the grades assigned to the petitioner for the years 2008-2009 and 2009-2010 shall be ignored and DSC shall look at the ACRs of the petitioner for the preceding five years. The said exercise should be completed within the next two months and the petitioner should be communicated the decision thereon.

11. The petition stands disposed of.

VIPIN SANGHI, J

A. K. CHAWLA, J

DECEMBER 04, 2018

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