

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

Reserved on: 27th November, 2019
Pronounced on: 21st December, 2019

W.P.(C) 1302/2013 and CM APPL. 10213/2019 (direction)

D. C. MISHRA

..... Petitioner

Through: Petitioner in person.

versus

UNION OF INDIA AND ANR.

..... Respondents

Through: Mr. S. S. Lingwal, Advocate.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE TALWANT SINGH

J U D G M E N T

Dr. S. Muralidhar, J.:

1. The Petitioner, who was appointed as a Senior Technical Assistant Tissue Culture on 23rd March, 1994, in the National Bureau of Plant Genetic Resources ('NBPGR'), Indian Council of Agricultural Research ('ICAR') has filed the present petition challenging the order dated 9th January, 2012 of the Central Administrative Tribunal, Principal Bench, New Delhi ('CAT'), dismissing the Petitioner's OA No.2493/2011. The Petitioner has also challenged an order dated 5th October, 2012 of the CAT, dismissing his Review Application, being RA No.61/2012, which he had filed against the dismissal of the above OA.

2. The Petitioner has impleaded the Union of India through the Secretary, Department of Agricultural Research and Education ('DoARE'), ICAR, Ministry of Agriculture ('MoA') as Respondent No. 1. Respondent No. 2 herein is the Director, NBPGR, Pusa Campus, New Delhi.

3. The background facts are that the Petitioner, who received his Masters of Science in Agriculture, was on 23rd March, 1994 appointed in the NBPGR as a Senior Technical Assistant Tissue Culture. The said post was a Grade 4 post in the Technical Service Cadre ('T-4').

4. The Career Advancement Scheme ('CAS') contained in the Handbook of the Technical Service Rules ('TSRs') of the ICAR, stipulated criteria for the time-bound promotion of technical personnel. Rule 6.3 of the said TSRs, in particular, provided for "assessment promotions" from T-4 to T-5 to be "regulated at five years interval".

5. According to the Petitioner, as per the aforesaid Rule 6.3, he became due for promotion to the T-5 grade with effect from 23rd March, 1999 i.e. the date of his having completed 5 years of service as a T-4 officer. On 25th July, 2002, an Assessment Committee ('AC')/Departmental Promotion Committee ('DPC') considered the candidature of the Petitioner and rejected the same. Subsequently, a DPC that was convened on 23rd March, 2005 again rejected his candidature.

6. Aggrieved by the aforesaid rejections, the Petitioner filed OA No.1254/2006 in the CAT, seeking a direction to the effect that he be granted promotions that were due to him in accordance with the CAS. The case of the Petitioner in the said OA was that the actions of the Respondent, in

promoting his juniors to the said posts before him and withholding his promotions were in violation of the CAS, and therefore, unsustainable in law. The said OA was dismissed *ex parte* by an order dated 19th July, 2007, with the CAT observing that the Petitioner could not be granted promotion because he had “failed to achieve the requisite grade on the basis of assessment made by the Selection Committee”.

7. According to the Petitioner, it was only upon a perusal of the counter affidavit filed by the Respondent on 10th November, 2006 in the above OA that he became aware that he had been graded ‘Average’ in some of his Annual Confidential Reports (‘ACRs’) for the period between 1994 and 2004.

8. Against the CAT’s dismissal of the above OA, the Petitioner filed a Review Application being RA No.164/2007 in which he sought to make the case that the CAT in its order dated 19th July, 2007 had failed to take notice of the fact that he had not been communicated his ACRs for the period under consideration. The CAT dismissed the said RA No.164/2007 on the ground that it could not under its review jurisdiction permit the Petitioner to re-argue his case on merits. Accordingly, the CAT dismissed the said RA on 14th September, 2007 “in circulation”.

9. On 5th/6th August, 2008, the Petitioner wrote a letter to the Senior Administrative Office (‘Sr.A.O.’) of the NBPGR requesting that adverse entries in his ACRs be communicated to him. The Petitioner received a reply dated 10th/12th September, 2008 wherein it was stated that the ‘Average’ grading for the years 1996-97 and 2006-07 had been communicated to him by a memo dated 29th December, 2007.

10. On 20th August, 2008, the Petitioner filed an application under the Right to Information Act, 2005 ('RTI Act') for communication of adverse entries in his ACRs since 1996-97. By a letter dated 19th/20th September, 2008, the Petitioner's RTI application dated 20th August, 2008 came to be rejected on the ground that the assessment reports by superior officers constituted "confidential information" and were, therefore, "exempted under Section 8 (1)(j) of the RTI Act".

11. The DPC that was convened on 6th May, 2009 again considered the Petitioner for promotion to the T-5 grade. By an Office Order dated 22nd June, 2009 the Petitioner was informed that the DPC of 6th May, 2009 had considered his case for promotion and it was found that he was not suitable. On 4th January, 2010, the Petitioner submitted an appeal against the aforesaid Office Order pursuant to Rule 24 of the CCS (CCA) Rules, 1965, in which he pointed out *inter alia* that the "non-selection method" of assessment set out in the Office Memorandum ('OM') of the Department of Personnel & Training ('DoPT') was applicable to the Petitioner and that since he had only an 'Average' and no adverse entries, he was entitled to be promoted. It is unclear whether a decision on the said appeal was taken.

12. It is stated that on 30th August, 2010, the Petitioner inspected his Assessment Proforma and noticed a "gross procedural mistake" inasmuch as the facilitator of the DPC was the 'AAO' when it should have been either the 'AO' or 'SAO'. He further contended that as per the TSRs and the DoPT Rules his "grade was considerable" for promotion.

13. On 17th August, 2010 the Petitioner filed an RTI Application

requesting for his 'below benchmark' ACRs. In response to the said Application, on 13th September, 2010, the Petitioner was supplied a copy of his ACRs for the periods of 1997-1998, 1st April, 1998 to 31st December, 1998, 1st January, 1999 to 31st March, 1999, 1999-2000 and 1st April, 2000 to 10th September, 2000. Enclosed with the said ACRs was a letter of the Assistant Administrative Officer, indicating that the ACRs for the aforesaid period "were not communicated" and that if the Petitioner was aggrieved by his gradings, he could submit a representation within 15 days of receiving his ACRs.

14. On 17th September, 2010, the Petitioner submitted a representation for upgradation of his ACR for the aforesaid periods from 'Average' to 'Good'. In the instance of the each of the said periods, the Petitioner attempted to make out the case that there was a mismatch between the overall grading awarded to him and the comments of the Reporting and Reviewing Officers. Additionally, the Petitioner pointed out that some of the ACRs had been prepared by the Director, when the appropriate authority should have been the Head of the Department ('HoD') who was aware of his work during the relevant periods.

15. The rejection of above representation was communicated to the Petitioner by a memorandum of the Assistant Administrative Officer, NBPGR dated 8th November, 2010. The Petitioner's representation was rejected in the following terms:

"As per instructions of DOPT O. M. No. 21011/1/2010-Estt.(A) (Pt.II) dated 13.04.10, the representation dated 17.09.10 of Sh. D. C. Mishra, T-4, Evaluation Division was submitted to the Competent Authority (as most of the Reviewing Officers have now been retired). After

examination of the case, it is observed by the Competent Authority that the ACRs gradings of Sh. D. C. Mishra since 1994-95 were placed before the assessment committee and the promotion was not done as he did not possess good performance for the said assessment period and also placed before Hon'ble, CAT during the court case and the case was rejected. Hence Competent Authority has decided to adhere to the gradings given to Sh. D. C. Mishra and this will be treated as final."

16. On 28th January, 2011 in a DPC that was convened, the Petitioner was considered for promotion to T-5 grade with effect from 1st January, 2006. The period for which ACRs were considered was the period between 29th March, 1994 and 31st December, 2005.

17. The Petitioner wrote a letter dated 4th February, 2011 asking to be provided the proceedings of the DPC and be afforded an opportunity to put forth his case for upgradation of the gradings in the ACRs before the DPC. He addressed a similar letter on 14th/16th March, 2011 requesting to know whether the DPC had considered upgrading the Petitioner's ACR gradings and decided on recommending him for promotion.

18. On 8th March, 2011, the Petitioner filed an RTI Application to receive copies of all his ACRs as well as to enquire whether there had been an upgradation in his ACR gradings from 'Average' to 'Good'. Enclosed with the letter dated 4th April, 2011, were the Petitioner's ACRs for the period between 1994 and 2007. In the said letter, it was reiterated that the decision of the Competent Authority to maintain status quo in relation to his ACR gradings had already been communicated to the Petitioner on 8th November, 2010.

19. The Petitioner submitted a consolidated representation by a letter dated 23rd April, 2011 for upgradation of his 'Average' grading to 'Good' in the ACRs for the periods that he had been awarded the former grade. His case in the said representation was that his overall grading was not in consonance with the comments in individual columns of the ACRs. He also contended that vague remarks had been made in some of his ACRs and that comments in a report like the ACR needed to refer to specific instances. In the said representation addressed to the Director, NBPGR, the Petitioner also requested that Dr. S.S. Rana and Ex-Director review his case for upgradation. By a letter dated 9th/11th May, 2011, this request was, however declined.

20. On 12th/13th May, 2011, the Petitioner filed an RTI Application seeking the following information:

- (i) Communication of the decision of the DPC held on 28th January, 2011 and whether such recommendation was approved by the Competent Authority.
- (ii) Communication of the decision on his representation dated 23rd April, 2011.

21. The Petitioner also filed an RTI Application on 23rd May/24th, 2011 wherein he sought a clarification on the applicability of the ICAR letter dated 26th December, 2005, which supplemented the DoPT circular dated 2nd May, 1989 and the ICAR Handbook of TSRs. The letter *inter alia* laid down a modified procedure for evaluation of ACRs by stipulating marks corresponding to gradings of 'Very Good', 'Good', 'Average', etc. The marks for all relevant ACRs was to be added up and divided up by the

number of assessment years to arrive at a weightage on a scale of 80. The Petitioner sought information on whether the said procedure was to be used to assess his case for promotion, given that he was due for promotion earlier than the date on which the procedure in the letter was stated to be applicable.

22. In the aforesaid RTI Application the Petitioner also reiterated his request to be informed of the decision of the DPC in relation to his promotion.

23. By a letter dated 7th June, 2011 the Petitioner received a response to the above RTI Application dated 23rd May/24th May, 2011. It was clarified therein as under:

“With reference to your application dated 23rd May, 2011 under the RTI Act, the information details as under:

A) i) The rule which was prevailing before Dec. 31st, 2005 will be applicable.

ii) The DOPT instruction were followed while making an assessment who were considered eligible between 2000-2005.

B) Your case was placed before Assessment Committee for reviewing on 28/01/2011. The Committee did not recommend your case for assessment.

24. By another letter dated 10th June, 2011, the Petitioner received a response to his RTI Application dated 12th/13th May, 2011. It was stated in response to his query about the decision of the DPC convened on 28th January, 2011 that the said DPC had not recommended his case for promotion. It was further clarified that DPC's recommendations were accepted by the Competent Authority. Finally, enclosed with the said letter

was another letter from the Assistant Director General (Seed) communicating the rejection of his representation dated 23rd April, 2011 against the 'Average' gradings, in the following terms:

“Your representation has been examined by the competent authority and decided to maintain status quo for final grading of ACRs. This is for your kind information.”

25. Aggrieved by the decision of the DPC convened on 28th January, 2011 to not recommend him for promotion, as also the decision of the Respondents to main status quo as regards his 'Average' gradings, the Petitioner filed OA No. 2493/2011 on 7th July, 2011.

26. The CAT dismissed the said OA by an order dated 9th January, 2012 on the grounds of limitation and *res judicata*. According to the CAT, the Petitioner's claim for setting aside the order of the DPC convened on 28th January, 2011 was barred by *res judicata* for the following reasons:

“Cause of action to application for questioning the grading in his ACRs, if any had arisen between 29.03.1994 to 31.12.2005. We further note that DPC which assessed the case of applicant for promotion to T-5/T-6 was in fact a review DPC which considered the case of application for promotion w.e.f. 1.1.2006. Thus, the applicant is incorrect in submitting that in the present OA his grievance is against his non promotion to T-6 Scientist from 2011. Substantially, the relief claimed by applicant in present OA is for his promotion to T-5/T-6 w.e.f. 1.1.2006 which was also his claim in OA 1254/2006.”

27. As far as the ground of limitation was concerned, the CAT placed extensive reliance on paras 12 to 14 of the judgment of the Supreme Court in *Union of India v. A. Durairaj (2011) 1 SCALE 494* to conclude that “in

order to reckon the period of limitation, delay and laches should be considered with reference to the original cause of action.”

28. The Petitioner filed a Review Application being RA No. 61/2012 against the order of the CAT dated 9th January, 2012 dismissing his OA No.2493/ 2011. The said RA came to be dismissed on 5th October, 2012. As mentioned hereinabove, the Petitioner has also impugned the above order dismissing his RA.

29. Notice was issued in the present petition by an order dated 6th May, 2013. While counsel for the Respondent No. 1 accepted notice on the same date, service on the Respondent No. 2 could only be completed after 24th May, 2013.

30. The Petitioner has made elaborate submissions in the petition. The Petitioner’s case is that out of his 12 ACR grades for the period between 1994 and 2004, as many as 8 of them ought to be “processed” to ‘Good’ on account of the several legal infirmities from which they suffer. These include, *inter alia*, his grades not being given by the appropriate authorities; his grades not being communicated to him; his representations against his grades not being duly considered; and his grades not being in consonance with the over-all remarks in ACRs. In all such instances, he avers that the applicable DoPT letter dated 21st January, 1983 necessitated that the grades be ignored, and the grades from previous years be granted to the Petitioner. In this manner, the Petitioner submits, all his ACR grades shall amount to ‘good’, making him eligible for promotion to T-5 and T-6 Grade.

31. It is also the Petitioner's case that for the year 1999-2000, whilst he was allegedly on leave, he ought not to have been awarded a grade. Instead, the preceding year's grade should have been granted to him, by virtue of the DoPT letter dated 21st January, 1983. A similar approach should have been taken with respect to the ACRs for the years 1996-1997 and 2002-2003, which had been allegedly erroneously left blank. He also claims that some of his ACRs have been forged.

32. The Petitioner further submits that the Respondents have misapplied the TSRs, as modified by the letter dated 26th December, 2005 of the ICAR. In view of the fact that the modification only applied prospectively, the Petitioner claims the DPC dated 28th January, 2011 was in error in applying the said modified rule in its proceedings.

33. The Petitioner also claims that he was due for "non-functional promotion to non-selection grade". He contends that 'Average' did not constitute an 'adverse remark', and that he could be promoted even with such grade on account of a DoPT OM dated 27th March, 1997. In this regard, the Petitioner has also placed reliance on an order of the CAT, Madras Bench in O.A. Nos. 950/2006 and 976/2006 (*M. Varadarajan v. Union of India*).

34. Significantly, the Petitioner challenges the Respondent's decision to keep his 'Average' grading in some of the ACRs intact on the basis that in a few instances the remarks in the ACR columns were vague in that they did not make reference to particular incidents. It is also his case that the 'Average' grading for some years did not correspond with the remarks in the columns of the ACRs. Finally, the Petitioner also claims that the

Reviewing Authority in some of the ACRs should have been the HoD, but was instead the Director of NGPGR, who was not apprised of the Petitioner's work.

35. Finally, the Petitioner has vehemently argued that the CAT's dismissal of O.A. No. 2493/2011 and R.A. No. 61/2012 as being barred by laches and the principle of *res judicata* is erroneous. In this regard, the Petitioner has sought to place reliance on the judgments in ***G. N. Nayak v. Goa University (2002) 2 SCC 712*** and ***Rehana Parveen v. Naimuddin AIR 2000 MP 1***.

36. In the counter-affidavit of the Respondents, it is first submitted that the impugned orders of the CAT dated 19th July, 2007 in O.A. No.1254/2006, 6th September, 2007 in R.A. No.164/2007, 9th January, 2012 in O.A. No.2493/2011, and 5th October, 2012 in R.A. No.61/2012 have been decided on merits. It is further submitted that the Petitioner's case for promotion has been considered in accordance with the relevant TSRs. The assessments conducted in 2002 and 2005 followed due procedure as prescribed by the relevant rules, based on the ACR grades received by the Petitioner. It is similarly averred that the representations of the Petitioner as regards upgradation were considered by the CA and declined in accordance with the prescribed rules. The Respondents claim that upgradation is based upon the discretion of the CA and not as a matter of right. The Respondents also stated that the DPC proceedings are confidential and not subject to disclosure. The Respondents also suggest that the CAS does not apply to the Petitioner's case.

37. At the outset, the Court is not in agreement with the grounds on which

the CAT dismissed OA No.2493/2011. As noted hereinabove, the Petitioner managed to access some of his ACRs on 13th September, 2010 and the rest on 4th April, 2011. His representations against the 'Average' grading followed within a short span of time, on 17th September, 2010 and 23rd April, 2011, respectively. It was when the Petitioner was informed by letters dated 7th and 10th June, 2011 that the last of these representations had been rejected and the DPC of 28th January, 2011 had decided against promoting him, that the Petitioner was afforded an opportunity to challenge the said decisions.

38. In fact, OA No.2493/2011 came to be filed merely a month thereafter on 7th July, 2011. At no point of time could the Petitioner's OA therefore be said to be suffering from delay and laches. In this regard, the reliance by the CAT on *Union of India v. A. Durairaj (supra)* is misplaced. In the said judgment, the Supreme Court held as under:

"12. Section 21 of the Administrative Tribunals Act, 1985 prescribes the limitation for approaching the Tribunal. In this case the medical examination of the respondent and the non-promotion as ad hoc ASTE were in the year 1976. The respondent accepted the diagnosis that he was colour blind and did not make any grievance in regard to his non-promotion. On the other hand, he attempted to get treatment or correction contact lenses from USA (to aid the colour blind to distinguish colours correctly). On account of the non-challenge, the issue relating to his non-selection in 1976 attained finality and the same issue could not have been reopened in the year 1999-2000, on the ground that medical tests conducted in 1998 and 2000 showed him to be not colour blind.

13. It is well settled that anyone who feels aggrieved by non-promotion or non-selection should approach the Court/Tribunal as early as possible. If a person having a

justifiable grievance allows the matter to become stale and approaches the Court/Tribunal belatedly, grant of any relief on the basis of such belated application would lead to serious administrative complications to the employer and difficulties to the other employees as it will upset the settled position regarding seniority and promotions which has been granted to others over the years. Further, where a claim is raised beyond a decade or two from the date of cause of action, the employer will be at a great disadvantage to effectively contest or counter the claim, as the officers who dealt with the matter and/or the relevant records relating to the matter may no longer be available. Therefore, even if no period of limitation is prescribed, any belated challenge would be liable to be dismissed on the ground of delay and laches.

14. This is a typical case where an employee gives a representation in a matter which is stale and old, after two decades and gets a direction of the Tribunal to consider and dispose of the same; and thereafter again approaches the Tribunal alleging that there is delay in disposal of the representation (or if there is an order rejecting the representation, then file an application to challenge the rejection, treating the date of rejection of the representation as the date of cause of action). This Court had occasion to examine such situations in *Union of India v. M.K. Sarkar* [2010 (2) SCC 58] and held as follows:

"The order of the Tribunal allowing the first application of respondent without examining the merits, and directing appellants to consider his representation has given rise to unnecessary litigation and avoidable complications.

X X X X X

When a belated representation in regard to a 'stale' or 'dead' issue/dispute is considered and decided, in compliance with a direction by the Court/Tribunal to do so, the date of such decision can not be considered as furnishing a fresh cause

of action for reviving the 'dead' issue or time-barred dispute. The issue of limitation or delay and laches should be considered with reference to the original cause of action and not with reference to the date on which an order is passed in compliance with a court's direction. Neither a court's direction to consider a representation issued without examining the merits, nor a decision given in compliance with such direction, will extend the limitation, or erase the delay and laches.

A Court or Tribunal, before directing 'consideration' of a claim or representation should examine whether the claim or representation is with reference to a 'live' issue or whether it is with reference to a 'dead' or 'stale' issue. If it is with reference to a 'dead' or 'stale' issue or dispute, the Court/Tribunal should put an end to the matter and should not direct consideration or reconsideration. If the court or Tribunal deciding to direct 'consideration' without itself examining of the merits, it should make it clear that such consideration will be without prejudice to any contention relating to limitation or delay and laches. Even if the Court does not expressly say so, that would be the legal position and effect."

We are therefore of the view that the High Court ought to have affirmed the order of the Tribunal dismissing the application of the respondent for retrospective promotion from 1976, on the ground of delay and laches."

39. The Petitioner's case evidently lies on a different footing. On the specific issue of representations too, as noted hereinabove, the Petitioner has made them within the stipulated period of 15 days. The judgment in ***Union of India v. A. Durairaj*** (*supra*) cannot therefore come to the aid of the Respondents.

40. The Court also holds that the Petitioner's claim is also not barred by *res judicata*. The communication of the Petitioner's ACRs to him for the first time on 13th September, 2010 and 4th April, 2011, his representations against the 'Average' gradings subsequent thereto, and the Respondent's rejection of his representation, gave the Petitioner a fresh cause of action, which was not available to the Petitioner to agitate at the time of filing OA No.1254/2006. The fact that the DPC convened on 28th January, 2011, which decided not to recommend the Petitioner for promotion was a Review DPC that had to take into account the Petitioner's work during the same period that the DPCs of 2002 and 2005 did, cannot on its own operate as *res judicata*. The point remains that the Petitioner had challenged the decision of the Review DPC on bases entirely different from those forming the substance of his challenge in OA No.1254/2006. Significantly, these grounds became available to him only after his ACRs were communicated to him and the representations against the 'Average' gradings therein were rejected.

41. For the aforesaid reasons, the Court is of the opinion that the CAT has erred in rejecting the Petitioner's OA No. 2493/2011 on the grounds that it has.

42. The Court now proceeds to examine the contentions of the Petitioner as regards legality of the decision of the DPC convened on 28th January, 2011 to not promote him.

43. At the outset, it requires to be noticed that by the Respondent's own admission, the ICAR letter dated 2nd December 2005, does not apply to the

Petitioner's case, which has been confirmed by the letter dated 7th/10th June, 2011 in reply to his specific query on the subject under RTI. Yet, it appears from a perusal of the impugned DPC proceedings dated 28th January, 2011 that the TSRs were erroneously applied to the Petitioner's case.

44. Likewise, the ACR for the year 1997-98 had been kept 'under observation' until 17th August, 2008, when the Petitioner wrote a letter for the "replacement of old ACR with new appropriate ACR for the period 1997-98". Pursuant thereto, the ACR grade for the aforesaid period was changed to 'Very Good'. However, the DPC that met on 28th January, 2011 has clearly fallen into error by nonetheless treating the ACR grade for the period as being 'under observation'.

45. A related contention of the Petitioner is that as per the extant rules, including the TSRs, the grading of 'Average' was neither adverse nor 'below the benchmark' and that accordingly, it could not have acted as a bar to his promotion. It is clear from a bare reading of the TSRs and the DoPT OM dated 19th March, 1989, that although the grading of 'Average' is not to be considered as 'adverse', such grading may still bear relevance in the matter of promotions. The portion of the above DoPT OM dated 19th March, 1989 in this regard reads as under:

"2.1.4. Government also desires to clear the misconception about "Average" performance. While "Average" may not be taken as an adverse remark in respect of an officer, at the same time, it cannot be regarded as complimentary to the officer, as "Average" performance should be regarded as routine and undistinguished. It is only performance that is above average and performance that is really noteworthy which should entitle an officer to recognition and suitable

rewards in the matter of promotion”

46. It is clear from the above extract of the DoPT OM that the Petitioner cannot as a matter of right claim to be promoted to the T-5 grade, merely because ‘Average’ grading may not be adverse. The DPC is vested with the latitude to determine the weight that is to be accorded ‘Average’ gradings, and make its recommendations on promotion to the next higher grade. Accordingly, the Court is not persuaded that the decision of the DPC can be faulted on this count.

47. Be that as it may, the Court finds that the Respondents have committed a glaring error in not disclosing the Petitioner’s ACRs to him for an inordinately long period of the time. The Petitioner was first made aware of his ACR grades for the years between 1994 and 2004 when the Respondents filed their reply dated 10th November, 2006 in O.A. No.1254/2006. It is pertinent to note that at this point, the Petitioner did not have access to his full ACRs. As noted hereinabove, the first time that the Petitioner was given access to any ACRs is by way of a reply dated 13th September, 2010 to a query filed by him under RTI. Even then, the Petitioner only received ACRs for the period between 1997 and 2000. The Petitioner only received complete access to the remaining ACRs on 4th April, 2011, by way of a reply to another query filed by him under RTI. By this time, the DPC dated 28th January, 2011 had already concluded. Therefore, it is evident that the Petitioner had no reasonable opportunity to make representations against such ACRs, or even apprise himself of his grades before the DPC was convened.

S.NO	YEAR	GRADING	DATE OF COMMUNICATION
1.	1994-1995	AVERAGE	Received in RTI Reply dated 4 th April, 2011
2.	1995-1996	AVERAGE	Received in RTI Reply dated 4 th April, 2011
3.	1996-1997	GOOD	Received in RTI Reply dated 4 th April, 2011
4.	1997-1998	VERY GOOD	Received in RTI Reply dated 13 th September, 2010
5.	1 st April, 1998 to 31 st December, 1998	AVERAGE	Received in RTI Reply dated 13 th September, 2010
6.	1 st January, 1999 to 31 st March, 1999	GOOD	Received in RTI Reply dated 13 th September, 2010
7.	1999-2000	AVERAGE	Received in RTI Reply dated 13 th September, 2010
8.	1 st April, 2000 to 10 th September, 2000	GOOD	Received in RTI Reply dated 4 th April, 2011
9.	11 th September, 2000 to 31 st March, 2001	AVERAGE	Received in RTI Reply dated 4 th April, 2011
10.	2001-2002	GOOD	Received in RTI Reply dated 4 th April, 2011
11.	2002-2003	GOOD	Received in RTI Reply dated 4 th April, 2011
12.	2003-2004	GOOD	Received in RTI Reply dated 4 th April, 2011
13.	1 st April, 2004 to 25 th November, 2004	GOOD	Received in RTI Reply dated 4 th April, 2011
14.	26 th November, 2004 to 31 st March, 2005	GOOD	Received in RTI Reply dated 4 th April, 2011

48. The above table represents the Petitioner's ACR grades for the periods under consideration alongside the dates on which the Respondent furnished complete copies of the ACRs to him. It is seen that from the table that there were as many as three 'Average' gradings that the Petitioner was unable to effectively make a representation against, as they remained uncommunicated until 4th April, 2011, months after the DPC was held on 28th January, 2011.

49. It is well-settled law that communication of ACRs is mandatory and a DPC cannot rely on uncommunicated ACRs for coming to its conclusions. In *Dev Dutt v. Union of India (2008) 8 SCC 725*, it was held as under:

“39. In the present case, we are developing the principles of natural justice by holding that fairness and transparency in public administration requires that all entries (whether poor, fair, average, good or very good) in the Annual Confidential Report of a public servant, whether in civil, judicial, police or any other State service (except the military), must be communicated to him within a reasonable period so that he can make a representation for its upgradation. This in our opinion is the correct legal position even though there may be no Rule/G.O. requiring communication of the entry, or even if there is a Rule/G.O. prohibiting it, because the principle of non-arbitrariness in State action as envisaged by Article 14 of the Constitution in our opinion requires such communication. Article 14 will override all rules or government orders.

40. 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.”

50. This decision of the Supreme Court was followed by ***Abhijit Ghosh Dastidar v. Union of India (2009) 16 SCC 146***, wherein the Court held as paragraph 4 as under:

“In those circumstances, in our opinion, non-communication of entries in the ACR of a public servant whether he is in civil, judicial, police or any other service (other than the armed

forces), it has civil consequences because it may affect his chances for promotion or get other benefits. Hence, such non-communication would be arbitrary and as such violative of Article 14 of the Constitution. The same view has been reiterated in the above referred decision relied on by the appellant. Therefore, the entries "good" if at all granted to the appellant, **the same should not have been taken into consideration for being considered for promotion to the higher grade.** The respondent has no case that the appellant had ever been informed of the nature of the grading given to him.” (emphasis supplied)

51. Furthermore, a Constitution Bench of the Supreme Court in *Sukhdev Singh v. Union of India* (2013) 9 SCC 566, held as under:

“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.

9. The decisions of this Court in *Satya Narain Shukla v. Union of India and Ors.* (2006) 9 SCC 69 and *K.M. Mishra v. Central Bank of India and Ors.* (2008) 9 SCC 120 and the other decisions of this Court taking a contrary view are declared to be not laying down a good law.”

52. Another crucial infirmity in the conduct of the Respondents relates to the manner in which the representations of the Petitioner, specifically regarding the upgradation of his ACR grades, were dealt with by the Respondents. The rejections dated 8th November, 2010 and 10th June, 2011 of the Petitioner's representations are perfunctory at best. The Petitioner has not even been communicated the reasons of the Competent Authority for rejecting his representation for upgradation.

53. In that view of the matter, the impugned orders of the CAT dated 9th January, 2012 in OA No.2493/2011, and 5th October, 2012 in RA No.61/2012 are hereby set aside. The recommendations of the DPC dated 28th January, 2011 are also set aside. The Respondents are directed to hold a Review DPC, in accordance with law, within a period of 8 weeks to consider the Petitioner for promotion first to the T-5 grade and thereafter to T-6 by ignoring such of those ACRs containing the below benchmark grading which were not communicated and which, therefore could not have been taken into account while considering him for promotion in light of the legal position explained in *Abhijit Ghosh Dastidar v. Union of India* (*supra*).

54. If the Review DPC finds the Petitioner fit for promotions to T-5 and T-6 on the above basis, such promotions will relate back to the date that they were actually due and those will be the relevant dates for pay fixation. While the Petitioner shall not be entitled to arrears of pay, those dates will be relevant for all other consequential benefits.

55. The petition and the pending application are disposed of in the above

terms with costs of Rs.20,000/- which will be paid by the Respondents to the Petitioner within four weeks.

S. MURALIDHAR, J.

TALWANT SINGH, J.

DECEMBER 21, 2019

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