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

+ **W.P.(C) 13497/2018**

JAI KANT SINGH

..... Petitioner

Through: Ms. Saahila Lamba, Advocate.

versus

UNION OF INDIA AND ORS.

..... Respondents

Through: Ms. Barkha Babbar, Advocate for
UOI.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE TALWANT SINGH

ORDER

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06.12.2019

1. The Petitioner has filed this petition seeking writ of certiorari quashing order dated 7th September, 2015 issued by the Respondent by which benefit of 2nd financial upgradation under Assured Career Progression Scheme ('ACP') to Petitioner was denied and to grant second financial upgradation under ACP Scheme to Petitioner with effect from 29th October, 2007 with all consequential benefits.

2. In brief the case of the Petitioner is that he was enrolled in the rank of constable in Border Security Force ('BSF') on 25th May, 1983 and he got promotions in due course. The Government of India introduces ACP scheme for Central Government Civil Employees on 9th August, 1999. Initially, there was some confusion regarding extension of this scheme to Central Armed Police Force, however, this issue was resolved on 22nd September, 2014 where an office order was issued by the Director General of BSF and

pursuant thereto 2nd financial upgradation under ACP scheme was extended to Head Constables of BSF who had completed twenty four years of service between 9th August, 1999 and 31st August, 2008. The Petitioner had completed twenty-four years of service on 29th May, 2007 hence he was entitled to 2nd upgradation under ACP scheme but the same was not granted to him although it was granted to its counterparts. The Petitioner made enquiries when he did not get the 2nd financial upgradation under the ACP Scheme and he learnt that he was denied the same on the ground that the Petitioner was graded 'average' in his ACR for the years 2004-05 and 2006-07. The Petitioner made a representation to the competent authority mentioning therein that these grading were never communicated to him and he be given an opportunity for getting the same upgraded so that he is able to avail the benefits of the ACP Scheme.

3. On 7th September, 2015 an order was issued by the Respondents giving reasons that the benefit of ACP Scheme was not given to the Petitioner as sum total of marks given in Group-I of his grading for the last five years (2002-03 to 2006-07) related to ACR/APAR and Group-II for awards and punishments has been found to be 101 but for promotion list D of the second ACP it is essential that the incumbent should have minimum 50% marks in both the groups and total score of marks in both groups should be 60% or 114. Petitioner was short of 13 marks to reach the said criteria of 114 marks.

4. On 20th January, 2016 Petitioner submitted representation to the competent authority again submitting that he was never communicated the

average grading awarded to him for the years 2004-05, 2006-07 and the same may be reviewed and upgraded so that Petitioner become eligible for grant of ACP Scheme. On 23rd February, 2016 Respondents issued a letter stating that the application for upgradation has been returned as the time limit for getting an ACP/APAR review is one month whereas ACRs sought to be reviewed by Petitioner are 11 years and 11 months beyond limitation period, hence an appeal for review of average grading cannot be made. Petitioner submitted a detailed representation on 31st October 2018 to the competent authority requesting for grant of ACP Scheme as the average grading awarded to him in the year 2004-05 and 2006-07 cannot be taken into consideration as the Petitioner was never communicated the said grading and hence he did not get an opportunity to seek review/upgradation of the same. No response was received; hence the present writ petition was filed by the Petitioner.

5. In response to the notice issued, a detailed counter affidavit has been filed by the Respondents mentioning therein that Petitioner's case was duly scrutinized for grant of 2nd financial upgradation under ACP Scheme by Department Screening Committee ('DSC') after completion of 24 years of services on 29th May, 2007 but he could not qualify for the same. The bench mark grading in ACRs was required to be Good since the same is a prescribed condition for grant of financial upgradation. The ACR grading in respect of the Petitioner for the last five years under consideration has been detailed as under:

- | | | | |
|------|---------|---|-----------|
| (i) | 2002-03 | - | Good |
| (ii) | 2003-04 | - | Very Good |

- | | | | |
|-------|---------|---|---------|
| (iii) | 2004-05 | - | Average |
| (iv) | 2005-06 | - | Good |
| (V) | 2006-07 | - | Average |

6. Since, the Petitioner was given 'average' grading for 2004-05 and 2006-07, hence he was found unfit by DSC for grant of 2nd financial upgradation. The Petitioner requested for review/upgradation of average remarks vide his three applications/letters dated 16th August, 2015, 20th August, 2015 and 20th January, 2016 on the ground that average grading was not communicated to him. The same were returned because as per the policy applicable the time limit to request for review of ACR was one month and Petitioner had represented after 11 years and 10 months. Since, as per the O.M. dated 10th April, 1989 'Average' reports were not treated as adverse so there was no occasion to communicate the same to the Petitioner. The Petitioner could not obtain an average aggregate grading of 60% to qualify for ACR, hence he was not given the benefit of ACP. It was accordingly conveyed to him by a letter dated 7th September, 2015.

7. In the reply on merits, it was mentioned that the average grading was not the only reason for denial of ACP Scheme to Petitioner, as he could not obtain the proper marks in the other heads/fields also. The chart including the calculation of the marks given to the Petitioner is given hereinbelow:

<u>Group-I</u> (Total 150 Marks)				<u>Group-II</u> (Total 40 Marks)			Total 190 Marks	Remarks
<u>ACR</u> 120 Marks	Marks	Trg/Courses 30 Marks	Total 150 Marks	Reward 20 Marks	Punishment 20 Marks	Total 40 Marks		
(1)		(2)	(3)	(4)	(5)	(6)	(7)	(8)
2002-2003 GOOD	18	Nil marks obtained by the	81 marks obtained by the	Nil marks obtained by the	Nil	20 (If a candidate does not	101	Unfit. Petitioner could not obtain an
2003-2004	21							

VERY GOOD		Petitioner	Petitioner	Petitioner		have any punishment for last five years he will be given full marks i.e. 20)		overall aggregate of 60% to qualify (i.e. Total Marks of Group-I & II = 190. That 60% of 190 marks is 114 but Petitioner obtained only 101 marks)
2004-2005 AVERAGE	12							
2005-2006 GOOD	18							
2006- 2007 AVERAGE	12							

8. The Petitioner was falling short by 13 marks to qualify for grant of 2nd financial upgradation under the ACP Scheme. It has been prayed that in view of the above, the writ petition be dismissed with cost.

9. We have heard arguments and have perused the record. It is an admitted case that the average grading for the years 2004-05 and 2006-07 was never communicated to the Petitioner on time and when he came to know about his average grading, representations given by him were rejected on the ground that he had sought review/upgradation after 11 years and 10 months since the time for seeking review/upgradation was only one month. One fails to understand that on the one hand, the average grading was not communicated at the relevant time and on the other hand how could the Petitioner apply for review/upgradation within one month therein. As soon as the Petitioner came to know about the average grading for the years 2004-05 and 2006-07, he applied for review/upgradation but the same was rejected as being delayed.

10. The law in this regard has been laid down by the Supreme Court in the matter of *Dev Dutt v. Union of India (2008) 8 SCC 725* as discussed in the

decision dated 3rd September, 2019 in W.P.(C) No.10370/2015. Same is reproduced hereunder:

“17. It must be noted that the judgment of the Supreme Court in ***UP Jal Nigam v. Prabhat Chandra Jain (1996) 2 SCC 363*** referred to in the above OM was distinguished by the Supreme Court in ***Dev Dutt v. Union of India (2008) 8 SCC 725***. There, the Supreme Court made it explicit that “every entry must be communicated to the employee concerned, so that he may have an opportunity of making a representation against it if he is aggrieved”. The Supreme Court rejected the contention of the Respondent Union of India that only an adverse entry needs to be communicated to an employee. The Supreme Court emphasized that it was not the nomenclature that was relevant, but the “effect which the entry is having which determines whether it is an adverse entry or not”. In particular, it was pointed out that “the grant of ‘good’ entry is of no satisfaction to the incumbent if it in fact make it ineligible for promotion or has an adverse effect on his chances”.

18. In paras 13 to 18 of the decision in ***Dev Dutt v. Union of India (supra)*** it was held as under:

“13. In our opinion, every entry (and not merely a poor or adverse entry) relating to an employee under the State or an instrumentality of the State, whether in civil, judicial, police or other service (except the military) must be communicated to him, within a reasonable period, and it makes no difference whether there is a bench mark or not. Even if there is no bench mark, non-communication of an entry may adversely affect the employee's chances of promotion (or getting some other benefit), because when comparative merit is being considered for promotion (or some other benefit) a person having a ‘good’ or ‘average’ or ‘fair’ entry certainly has less chances of being selected than a person having a ‘very good’ or ‘outstanding’ entry.

14. In most services there is a gradation of entries, which is usually as follows:

- (i) Outstanding
- (ii) Very Good
- (iii) Good
- (iv) Average
- (v) Fair
- (vi) Poor

A person getting any of the entries at items (ii) to (vi) should be communicated the entry so that he has an opportunity of making a representation praying for its upgradation, and such a representation must be decided fairly and within a reasonable period by the concerned authority.

15. If we hold that only 'poor' entry is to be communicated, the consequences may be that persons getting 'fair', 'average', 'good' or 'very good' entries will not be able to represent for its upgradation, and this may subsequently adversely affect their chances of promotion (or get some other benefit).

16. In our opinion if the Office Memorandum dated 10/11.09.1987, is interpreted to mean that only adverse entries (i.e. 'poor' entry) need to be communicated and not 'fair', 'average' or 'good' entries, it would become arbitrary (and hence illegal) since it may adversely affect the incumbent's chances of promotion, or get some other benefit. For example, if the bench mark is that an incumbent must have 'very good' entries in the last five years, then if he has 'very good' (or even 'outstanding') entries for four years, a 'good' entry for only one year may yet make him ineligible for promotion. This 'good' entry may be due to the personal pique of his superior, or because the superior asked him to do something wrong which the incumbent refused, or because the incumbent refused to do sycophancy of his superior, or because of

caste or communal prejudice, or for some other extraneous consideration.

17. In our opinion, every entry in the A.C.R. of a public servant must be communicated to him within a reasonable period, whether it is a poor, fair, average, good or very good entry. This is because non-communication of such an entry may adversely affect the employee in two ways: (1) Had the entry been communicated to him he would know about the assessment of his work and conduct by his superiors, which would enable him to improve his work in future (2) He would have an opportunity of making a representation against the entry if he feels it is unjustified, and pray for its upgradation. Hence non-communication of an entry is arbitrary, and it has been held by the Constitution Bench decision of this Court in *Maneka Gandhi vs. Union of India* (*supra*) that arbitrariness violates Article 14 of the Constitution.

18. Thus it is not only when there is a bench mark but in all cases that an entry (whether it is poor, fair, average, good or very good) must be communicated to a public servant, otherwise there is violation of the principle of fairness, which is the soul of natural justice. Even an outstanding entry should be communicated since that would boost the morale of the employee and make him work harder.”

19. Subsequently, a three-judge bench of the Supreme Court in *Sukhdev Singh v. Union of India* AIR 2013 SC 2741 considered the issue and in para 8 held as under:

“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.”

20. Consistent with the view expressed in *Dev Dutt (supra)*, the DoPT issued an OM dated 13th April 2010, which reads as under:

“Subject: Below Benchmark grading in ACRs prior to the reporting period 2008-09 and objective consideration of representation by the competent authority against remarks in the APAR or for upgradation of the final grading.

The undersigned is directed to say that prior to reporting period 2008-09, only the adverse remarks in the ACRs had to be communicated to the concerned officer for representation, if any to be considered by the competent authority. The question of treating the grading in the ACR which is below the benchmark for next promotion has been considered in this Department and it has been decided that if an employee is to be considered for promotion in a future DPC and his ACRs prior to the period 2008-09 which would be reckonable for assessment of his fitness in such future DPCs contain final grading which are below the benchmark for his next promotion before such ACRs are placed before the DPC, the concerned employee will be given a copy of the relevant ACR for his representation, if any, within 15

days of such communication. It may be noted that only below benchmark ACR for the period relevant to promotion need be sent. There is no need to send the below benchmark ACRs of other years.

2. As per existing instructions, representations against the remarks or for upgradation of the final grading given in the APAR (previously known as ACR) should be examined by the competent authority in consultation, if necessary, with the Reporting and Reviewing Officer, if any. While considering the representation, the competent authority decides the matter objectively in a quasi-judicial manner on the basis of material placed before it. This would imply that the competent authority shall take into account the contentions of the officer who has represented against the particular remarks/grading in the APAR and the view of the Reporting and Reviewing officer if they are still in service on the points raised in the representation vis-à-vis the remarks/grading given by them in the APAR. The UPSC has informed this Department that the Commission has observed that while deciding such representation, the competent authorities sometimes do not take into account the view of Reporting/Reviewing Officers if they are still in service. The Commission has further observed that in a majority of such cases, the competent authority does not give specific reasons for upgrading the below benchmark ACR/APAR grading at par with the benchmark for next promotion.

3. All Ministries/Departments are therefore requested to inform the competent authorities while forwarding such cases to them to decide on the representations against the remarks or for upgradation of the grading in the APAR that the decision on the representation may be taken objectively after taking into account the views of the concerned Reporting/Reviewing Officers if they are still in service and in case of upgradation of the final grading

given in the APAR, specific reasons therefor may also be given in the order of the competent authority.”

11. It is clear from the ratio of the above judgments and more so from O.M. dated 13th April, 2010 that in case an employee is to be considered for promotion and his ACRs prior to 2008-09 is to be considered and there is a final grading in his ACRs, which is below benchmark then the employee is to be served with his ACR for the relevant period to enable him to make a representation. It is clear that every public servant including the Petitioner should be communicated his ACR within a reasonable period. In case the below bench-mark ACRs remain uncommunicated, then there is no occasion for considering the said ACRs for grant of second ACP to the Petitioner. In the period of five years, for which the ACRs are to be considered, we are left with only three ACRs which are ‘Good’ for the years 2002-03 and 2005-06 and ‘Very Good’ for the year 2003-04. If average of these three years is calculated $(18 + 21 + 18 = 57/3)$, it comes to 19 marks and when it is applied for five years, it comes to 95 marks in Group-I. 20 marks were given in Group-II, so the total comes to 115 whereas the required aggregate marks are 114; hence the present Petitioner qualify for grant of 2nd ACP.

12. In view of the above it is ordered that 2nd financial upgradation under the ACP Scheme be provided to the Petitioner from the date it was due to him i.e. 29th May, 2007 with all consequential benefits. Necessary order be passed by Respondents in eight weeks and communicated to the Petitioner within twelve weeks from today.

13. The writ petition is accordingly disposed of in the above terms.

S. MURALIDHAR, J

TALWANT SINGH, J

DECEMBER 06, 2019

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