

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 16.12.2020

PRONOUNCED ON : 26.02.2021

CORAM

THE HONOURABLE THIRU JUSTICE V. PARTHIBAN

W.P.No.14980 of 2020

&

W.M.P.Nos.18634 to 18636, 19645 & 19699 of 2020

Mr.R.Rajasekaran S/o.Ramasamy Reddiar,
The Additional Director of Industrial Safety and Health,
Madurai-625 020.

... Petitioner

Vs.

1.The State of Tamil Nadu,
rep. by the Additional Chief Secretary to Government,
Labour and Employment Department,
Fort St. George,
Chennai-9

2.The Director of Industrial Safety and Health,
Directorate of Industrial Safety and Health,
SIDCO Industrial Estate,
Guindy,
Chennai-32

3.M.V.Senthil Kumar,
Additional Director of Industrial Safety and Health,
O/o.Additional Director of Industrial Safety and Health,
SIDCO Industrial Estate,
Guindy, Chennai-32

...Respondents

Prayer: Writ Petitions filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorarified Mandamus to call for the records of the proceedings of the first respondent issued in G.O(D).No.497 Labour and Employment (M1) Department dated 06.10.2020 and G.O (D).No.498 Labour and Employment (M1) Department dated 06.10.2020 and quash the same with the consequential direction, directing the first respondent to consider the name of the petitioner for promotion to the post of Director of Industrial Safety and Health by including his name in the panel of Additional Director of Industrial Safety and Health, fit for promotion to the post of Director of industrial Safety and Health, for the year 2019-2020, with effect from the date of promotion given to the third respondent, with all attendant and monetary benefits.

For Petitioner : Mr.R.Singaravelan, Sr. counsel
for Mr.V.Ravikumar

For Respondents : Mr.S.R.Rajagopal, AAG assisted by
Mr.J.Pothiraj, Spl.G.P.
for RR1 & 2
Mr.V.Vijay Shankar for R3

ORDER

The matter is taken up through web hearing.

2. This Writ Petition has been filed, praying for the issuance of a Writ of Certiorarified Mandamus, to call for the records of the proceedings of the first respondent issued in G.O (D).No.497 Labour and Employment (M1) Department dated 06.10.2020 and G.O(D).No.498 Labour and Employment (M1) Department dated 06.10.2020 and quash the same with the consequential direction, directing the first respondent to consider the name of the petitioner for promotion to the post of Director of Industrial Safety and Health by including his name in the panel of Additional Director of Industrial Safety and Health, fit for promotion to the post of Director of industrial Safety and Health, for the year 2019-2020, with effect from the date of promotion given to the third respondent, with all attendant and monetary benefits.

3. The brief facts and circumstances which gave rise to the filing of the Writ Petition, are stated as under:

4. The petitioner is an Engineering Graduate in Mechanical Engineering and he suffers from 50% disability being Othopaedically handicapped. He was selected for appointment as Assistant Inspector of Factories in the Tamil Nadu Factory Service on 26.03.1989. Pursuant to his selection, the petitioner joined duty on 05.04.1989. As his services were not regularized, the petitioner had approached the then Tamil Nadu Administrative Tribunal by filing O.A.No.4 of 1991. The learned Tribunal after hearing, disposed of the Original Application, directing the competent authority to regularize his services vide order dated 27.03.1996. Pursuant thereto, the petitioner's services came to be regularized with effect from the date of his appointment against 3% reservation for Physically Handicapped quota. Later, the petitioner was promoted to the post of Inspector of Factories and further promoted to the post of Deputy Chief Inspector of Factories on 20.12.2010. The petitioner is presently working as Additional Director of Industrial Safety and Health, since 31.08.2018.

5. According to the petitioner, he has been senior to the 3rd respondent as Deputy Director of Industrial Safety and Health and Joint Director of Industrial Safety and Health and also Additional Director. The posts of Inspector of Factories, Deputy Chief Inspector of Factories, Joint Chief Inspector of Factories, Addl. Chief Inspector of Factories and Chief Inspector of Factories have been re-designated as Deputy

Director of Industrial Safety and Health, Joint Director of Industrial Safety and Health, Addl. Director of Industrial Safety and Health, Senior Additional Director of Industrial Safety and Health and Director of Industrial Safety and Health respectively.

6. From the post of Additional Director, next promotion is to the post of Director of Industrial Safety and Health, which post is the Head of Department (HoD) (Non-IAS). The petitioner is the second Senior most Officer eligible to be considered and promoted to the post of Director of Industrial Safety and Health. The Senior most Officer is one K.Jagadeesan. The post of Director of Industrial Safety and Health fell vacant on retirement of the earlier incumbent K.Manoharan on 31.01.2020. As per Special Rules for Tamil Nadu Factory Service, the post of Director of Industrial Safety and Health is to be filled up by promotion from the post of Additional Director of Industrial Safety and Health and if no eligible candidate is available in the said position from the category of Joint Director of Industrial Safety and Health. The Senior most Officer, namely, K.Jagadeesan though qualified to be considered for the promotion, however, the Special Rules prohibit appointment of Officers who did not have minimum one year left over service before retirement, considering the promotion as HoD and in view of the prohibition, the said Officer (Mr.K.Jagadeesan) who had less than a year of left over service, became ineligible for consideration. In the said circumstances, being the second Senior most, the petitioner became fully eligible to be considered for the promotion, as he is only 52 years of age. According to the Special Rules, the subject promotion is on the basis of merit and ability of the candidates, seniority being considered only whose merit and ability are approximately equal.

7. According to the petitioner, despite a clear vacancy had arisen in January 2020 itself, no prompt steps had been initiated by the first respondent in filling up the vacant post, denying due opportunity to the petitioner towards consideration and appointment. The petitioner, therefore submitted a representation on 10.08.2020 followed by another representation on 07.09.2020 to the first respondent to consider him for promotion to the post of Director of Industrial Safety and Health by taking into consideration his seniority and length of service rendered by him. However, both the representations did not evoke any response from the first respondent, nor any tangible action taken in filling up the post through a regular selection.

8. While matters stood thus, the petitioner was shocked to learn that an order came to be issued suddenly, vide G.O.(D) No.497 Labour and Employment (M1) Department, dated 06.10.2020 according approval of a temporary panel for the post of Director of Industrial Safety and Health consisting only one name of Shri M.V.Senthil Kumar, Additional Director of Industrial Safety and

Health for the year 2019-2020. The said officer is arrayed as 3rd respondent in the Writ Petition. By the said proceedings, the panel was announced and seniors to Mr.Senthil Kumar were given opportunity to prefer an appeal if any in regard to the inclusion of the name of the 3rd respondent in the temporary panel. Immediately after the panel announcement, simultaneously on the same day, another G.O.(D).No. 498 Labour and Employment (M1) Department, dated 06.10.2020 was issued promoting the 3rd respondent as Director of Industrial Safety and Health in the existing vacancy. As per the practice and the Rule, Mr.K.Jagadeesan who was the Senior most Officer, has been favoured with another G.O.(D) No.499 Labour and Employment (M1) Department, dated 06.10.2020 appointing him as Officer on Special Duty, since he did not have minimum one year left over service for the consideration. Being aggrieved by the promotion of the 3rd respondent overlooking his seniority and meritorious service, the petitioner is before this Court, challenging the G.Os. announcing the panel and simultaneous promotion of the 3rd respondent, both dated 6.10.2020.

9. Shri R.Singaravelan, learned Senior Counsel appearing for the petitioner would at the out set, contend that the manner in which the promotion of the 3rd respondent has been pushed through by announcing the temporary panel on 06.10.2020 and inviting appeal/objection from the seniors on one hand and on the other, appointing him on the same day by another G.O., is a mala fide exercise of power. The announcement of the panel and calling for objections from the Senior Officers would have no meaning, if the promotion of the empanelled candidate is simultaneously effected. Such procedure adopted by the Government is arbitrary, irrational and unreasonable and on this ground alone, the impugned orders need to be set aside.

10. The learned Senior Counsel would draw the attention of this Court to Section 7 of the Tamil Nadu Government Servants (Conditions of Service) Act, 2016 (hereinafter referred to 'the Act 2016') which provides for filling up of vacancies to the post of Head of Department (HoD) wherein, the number of names of qualified candidates to be considered shall be fixed as twice the number of vacancies plus 3 in the seniority list in a class, category or service. The learned Senior counsel would submit that the impugned proceedings do not show any such inclusion of eligible officers. The vacancy in the post of Director of Industrial Safety and Health having been declared as '1' by the Department, in terms of proviso to Section 7 of the Act, five candidates ought to have been considered, whereas, in this case, the 3rd respondent alone was included in the panel and subsequently, he was promoted on the same day. Therefore, the selection and promotion of the 3rd respondent is contrary to the provisions of the Act and on this ground also, the impugned proceedings are liable to be interfered with.

11. The learned Senior Counsel would also submit that in terms of Explanation III of Section 7 of the Act, no temporary panel shall be prepared in respect of the posts for which the consultation of the Commission is not required. But in this case, one of the impugned proceedings, particularly G.O.(D) No.497, dated 06.10.2020 declared the panel as temporary which again is contrary to the Rule position. According to the learned Senior Counsel, in the past, appointment to the post of Director has always been on consideration of seniority of Officers in the feeder cadre and unfortunately in the present case alone, the appointing authority has chosen a junior Officer overlooking the seniority of the petitioner. He would further contend that the appointing authority has deliberately delayed the appointment for 9 months in order to make the Senior most Officer K.Jagadeesan ineligible by applying minimum one year service Rule in order to facilitate the appointment of the 3rd respondent. According to the learned Senior counsel, had the process of appointment been initiated properly in terms of relevant instructions on the subject matter, the senior most person could have become eligible as he had more than a year left over service at the relevant time. In any case, the announcement of the panel and the appointment cannot be on the same date which would only make the appointment per se invalid, as no purpose would be served by giving an opportunity to prefer an appeal against the appointment, once the appointing authority has chosen to appoint the junior Officer in preference to the Senior. Therefore, any opportunity of preferring appeal against the appointment of the 3rd respondent is a useless exercise and an empty option.

12. The learned Senior Counsel besides, would submit that the 3rd respondent has been holding the office of the Director as in-charge ever since the vacancy had arisen in January, 2020 illegally. According to him, in the normal circumstances, only the senior most person would be considered for appointment as in-charge Director in the absence of regular appointment to the post. However, in order to facilitate his appointment, the 3rd respondent has been posted as in-charge Director and has been allowed to work for about 9 months paving way for his regular appointment through the impugned orders dated 06.10.2020.

13. The learned senior counsel would also submit that the petitioner being Orthopaedically handicapped, is also entitled to be considered against 'disability quota' apart from his merit, ability and seniority. Therefore, there appears to be something gravely wrong with the appointment of the 3rd respondent which requires intervention of this Court.

14. Per contra, Mr.S.R.Rajagopal, learned Addl.Advocate General appearing for the respondents would stoutly defend the appointment of the 3rd respondent, as according to him, the appointing authority has followed the usual procedure which normally precede such appointment. According to him, 15th April

is the cut off date for consideration whenever a vacancy arises in that particular calendar year. As far as the present selection is concerned, 15th April 2020 is the crucial date for consideration of the eligible Officers. On 15.4.2020 there were only 4 Officers who were found to be eligible for consideration, viz.,

1. Thiru K.Jagadeesan, Addl.Director of Industrial Safety and Health, Coimbatore;
2. Thiru R.Rajasekaran, Addl.Director of Industrial Safety and Health, Madurai;
3. Thiru M.V.Senthil Kumar, Addl.Director of Industrial Safety and Health, Chennai; and
4. Tmt.G.Poongodi, Addl.Director of Industrial Safety and Health, Salem.

15. All the above four officers have been considered by the competent authority and in the process of consideration, the competent authority found that the 3rd respondent was having better merit and ability and therefore, he has been ultimately chosen for the appointment. As far as the 1st Officer is concerned, admittedly, he was not having one year left over service and therefore, he has been appointed as Special Officer on duty on the same date, i.e. 06.10.2020 vide G.O.(D) No.499. But as far as the petitioner is concerned, though he is senior as on date, since the appointment to the Head of the Department is concerned, as per the relevant Rules, merit and ability are the primary criteria and only if the candidates are found to be approximately equal in merit and ability, their seniority would have precedence.

16. As far as the appointment of the 3rd respondent is concerned, merit and ability has been assessed on the basis of Annual Confidential Records (ACRs) for the past 5 years. While examining the ACRs, it was discovered that the 3rd respondent has better ratings than the petitioner and therefore, he has been preferred in fulfillment of the Rule position. The learned Addl.Advocate General would refer to comparative statement of the confidential report/ratings of the officers which is extracted as under:

S.No	Name	Ratings			Total No.of period of service
		Out-standing Good	Very Good		
1	Thiru K.Jagadeesan	2	6	1	17

S.No	Name	Ratings			Total No.of period of service
		Out-standing Good	Very Good		
2	Thiru R.Rajasekaran	0	6	1	14
3	Thiru M.V.Senthilkumar	4	5	1	16
4	Tmt. G.Poongodi	0	2	5	15

17. The learned Addl.Advocate General would submit that the above tabular statement would show that the 3rd respondent has 4 outstanding ratings to his credit during the relevant period, whereas, the petitioner has no outstanding rating to his credit during the said period and so is the 4th respondent Smt.G.Poongodi. Therefore, the promotion of the 3rd respondent cannot be questioned as being invalid or the 3rd respondent has been favoured by the Government/authority for any reasons other than the bona fide administrative exercise. The learned Addl.Advocate General would submit that as far as the impugned proceedings are concerned, it is incorrect to contend that the panel contained only one name, namely, 3rd respondent herein. In fact, 4 names as indicated above, had been considered by the competent authority and after assessment of the inter se merit and ability and also the suitability, final panel was prepared containing the name of the 3rd respondent and thereafter, he has been promoted. Therefore, the contention that the panel has not been drawn in terms of the Rules is contrary to the facts on record. The learned Addl.Advocate General would draw the attention of this Court to various orders passed by the same Department in the past highlighting that the Department has been following the same procedure of empanelling only the number of candidate/s proportionate to the number of vacancy/ies to be filled up and in all cases, the panel name is published and on the same date, promotion is also notified. Therefore, the contention that there is something amiss about the present appointment is unfounded and baseless and contrary to the records.

18. As far as the posting of the 3rd respondent as In-charge Director, the learned Addl.Advocate General would submit that the 3rd respondent was at that point of time, working as Additional Director of Industrial Safety and Health in Chennai, whereas, admittedly, the petitioner was working as Additional Director of Industrial Safety and Health in Madurai and therefore, as a matter of administrative convenience, the 3rd respondent was made in-charge. Therefore, attributing motive to the appointment of the 3rd respondent has absolutely no merit. In regard to preparation of temporary panel which was stated to be against Explanation III appended to Section 7, he would submit that there were litigations pending before this Court

particularly before a Division Bench in W.A.Nos.1272 of 2010 etc., wherein, the seniority of officers at different levels including the post of Director has been the subject matter of the dispute and therefore, all appointments in the Department have been termed as temporary for the last few years in view of pendency of the appeal before this Court.

19. The learned Addl.Advocate General would therefore, submit that there is no illegality in the appointment of the 3rd respondent, as the merit and ability need to be assessed on the basis of ACR ratings and the records pertaining to the appointment would clearly establish that the 3rd respondent has better merit and ability than the petitioner and in which case, his promotion does not call for any intervention from this Court.

20. Mr.Vijay Shankar, learned counsel appearing for 3rd respondent would submit that as far as preparation of temporary panel is concerned, he would draw the attention of this Court to W.A.No.1272 of 2010 etc., batch pending before this Court in regard to seniority of various officers including the petitioner and others and therefore, for the last 9 years, the Department has been preparing only temporary panels for all the promotions. According to the learned counsel, the 3rd respondent has a serious dispute against the assignment of higher seniority to the petitioner overlooking his claim. According to the learned counsel that the entire contention is premised on the presumed fact that there was no inter se consideration of merit and ability of the officers who came within the zone of consideration. But the fact of the matter was that the various officers have been considered including the petitioner herein and on such consideration, the 3rd respondent has been found to be more meritorious as reflected in the ACRs of the candidates concerned.

21. The learned counsel would also draw the attention of this Court to the proviso (5) to Section 7, saying that zone of consideration that is fixed under the proviso, i.e. consideration of 5 qualified candidates, is nothing to do with the panel. He would in fact draw the attention of this Court to various Government Orders issued in the past, G.O.(D) No. 84 Labour and Employment (M1) Department dated 18.02.2014 wherein, promotion was granted from the Deputy Director to the post of Joint Director of Industrial Safety and Health, containing 16 names as against 16 vacancies. Likewise, he referred to another G.O.(D) No. 4 Labour and Employment (M1) Department dated 06.01.2015, wherein, 5 Joint Directors were granted promotion as Additional Directors for the year 2014-15 in the estimated 5 vacancies. On the same lines, he would further refer to G.O.(D) No.583 Labour and Employment (M1) Department dated 05.10.2018 wherein the previous incumbent Mr.K.Manoharan, Senior Additional Director was promoted as Director of Industrial Safety and Health. Similar orders also have been referred to by the

learned counsel stating that the pattern of appointments for the last several years, has been the same in the Department and the same practice has been followed in the present promotion as well.

22. The learned counsel would reiterate and clarify that the panel would only contain the name/s of the Officer/s to be promoted as to the number of vacancy/ies. However, the zone of consideration would include all eligible officers in terms of the Rule position. Therefore, he would submit that the contention of the learned Senior counsel for the petitioner is wrong as if that the impugned panel published did not contain the names of the other eligible Senior Officers. As regards the contention of the learned Senior counsel that on the same date, the panel was published and promotion was also effected, the learned counsel would submit that before the impugned proceedings were issued, the competent authority had followed the procedure of declaring the estimated vacancies followed by consideration of all eligible Officers in terms of proviso to Rule 7 of the Act, 2016 by the authority applying the criteria of inter se merit and ability of the candidates and then cause publication in the notice Board of the final choice and then lastly, the promotion.

23. According to the learned counsel, Schedule XI appended to Section 7, the basis of assessment of merit and ability is the ACR of 5 relevant years and in consideration of the ratings of the ACRs, the 3rd respondent has been found having better grading than the petitioner as indicated in the records which have been tabulated in the counter affidavit filed on behalf of the official respondents. The learned counsel, referred to the definition of Section 2 (c) of the Act, 2016 which defined 'approved candidate' as under:

"approved candidate" means a candidate whose name appears in an authoritative list of candidates approved for appointment to any service, class or category."

He would submit that the 'approved candidate' name alone will be listed in the panel and therefore, the contention of the learned Senior counsel in this regard is without any merit. Moreover, Section 45 of the Act provides an appeal against supersession and in this case, the petitioner has chosen to submit an appeal on 26.11.2020 but without awaiting a decision in the appeal, he has approached this Court. The writ petition may be dismissed on the ground that the petitioner has not exhausted the effective alternative remedy provided under the Act and rushed to this Court, needlessly.

24. The learned counsel would also refer to G.O.Ms.No.121 dated 24.09.2011 which contains elaborate guidelines for preparation and maintenance of ACRs in the Government Departments. He would particularly draw reference to the

instructions mentioned in the G.O. regarding scoring of points, classifying the Officers' performance as 'outstanding', 'very good' and 'good' etc. According to him, if an officer is credited with points between 8 and 10, he would be rated as 'outstanding' and if it is between 6 and 8, he would be rated 'very good' and 4 and 8 as 'good' etc. Therefore, the learned counsel would submit that the promotion of the 3rd respondent is entirely in consonance with the provisions of the Act and also in terms of the instructions issued on the subject.

25. On behalf of the petitioner, a detailed re-joinder affidavit has been filed along with additional typed set of papers. In the rejoinder affidavit, the decision of the Hon'ble Supreme Court of India in Civil Appeal No.7631 of 2002 dated 12.05.2008 in 'Dev Dutt versus Union of India and others' was also referred to, contending that all the Confidential Reports whether poor, fair or average, good or very good must be communicated to the concerned public servant so that he can make representation against the remarks/reports and request for upgradation of the remarks which are adverse to his career prospects. In this case, the petitioner has not received any communication from the authorities concerned on the remarks contained in the ACRs for the relevant period. Therefore, the learned Senior Counsel would contend that it is not open to the authority to rely on that un-communicated ACRs and reject the candidature of the petitioner.

26. In the rejoinder affidavit, it is also contended that the Government issued G.O.Ms.No.368 Personnel and Administrative Reforms (Personnel-s) Department dated 18.10.1993, wherein, it directed to fill up the posts of Head of the Department (non-IAS) and proposal has to be initiated by the Secretary to the Government three months in advance of the prospective date of retirement of the existing incumbent. According to the learned counsel who argued on the basis of the rejoinder that though the first respondent was aware of the retirement of the earlier incumbent K.Manoharan on 31.01.2020, no proposal was initiated in terms of the above G.O. and instead of preparing the proposal, for regular appointment, the 3rd respondent was appointed as Full Additional Charge of the post of Director of Industrial Safety and Health vide G.O.(D) No.63 Labour and Employment Department dated 31.01.2020. Therefore, the delay in preparation of the panel was contrary to the above referred to G.O.

27. In any event, the learned Senior counsel particularly emphasize the fact that after the Supreme Court's decision in Dev Dutt's case, it is imperative on the part of the Department to communicate all the entries in the ACRs up to 'very good' grading to provide an opportunity to the concerned Officer to submit any representation against the remarks. In the absence of any such communication, it is not open to the competent authority to rely on the ACRs at all for the purpose of

consideration of inter se merit and ability of the candidates. In which event, the basis of consideration of merit and ability itself is legally flawed and therefore, the promotion of the 3rd respondent on that basis would have to be declared as invalid. In this connection, the learned counsel would rely upon G.O.Ms.No.121 Personnel and Administrative Reforms (S) Department dated 29.09.2011. In the Government Order, it has been stipulated that the judgment in Dev Dutt's case rendered by the Hon'ble Supreme Court to be followed and the Government in that regard revised the existing pro forma for writing the confidential reports of the Officers of the State. The said G.O. which provides for communication of remarks in terms of the Hon'ble Supreme Court's ruling has not been followed and therefore, on this ground also, the impugned proceedings need to be interfered with.

28. The learned Addl. Advocate General, in reply, would rely on a decision reported in 2020 SCC OnLine SC 391 (Sujatha Kohli vs Registrar General, High Court of Delhi and others) wherein, he particularly draw a reference to paragraph 28 of the judgment which is extracted as under:

"28. On behalf of the appellant, however, a substantial emphasis has been put on the observation made in the impugned order on the requirement of uniform norms for awarding of the grades in ACR; and it has been contended that no objective criteria existed for evaluating an officer. These submissions are also sans merit and do not in any manner advance the cause of the appellant in the present case. This is for the simple reason that the system and method for awarding of the grades in ACR at the relevant time was equally applicable to all the judicial officers; and the gradings, not only of the appellant but of all other officers too, were made by way of the same methodology. Therein too, as noticed, the judicial officers' work and performance was supervised and graded by the committees comprising of three Hon'ble Judges and ultimately, the gradings were finalised by the Full Court. In the impugned order also, the High Court found such system to be a merited one but indicated the want of uniform set of rules or guidelines for all the appraisal committees to follow; and thereafter proceeded to lay down certain norms to be kept in view by the evaluation authorities. The observations by the High Court, essentially meant for improvement of the system with uniform set of guidelines, do not nullify the effect of the ACRs already marked by the existing system. The guidelines indicated by the High Court in the order impugned could only be construed as being meant for future implementation. Nothing

turns upon such observations in relation to the case of the appellant."

29. He would submit that in regard to Dev Dutt's decision, the ACRs which have already been prepared and relied upon need not be nullified and any new format evolved must be implemented for future implementation. The Hon'ble Supreme Court has in fact, overturned the view of the High Court in this regard. In this case, rightly or otherwise, the ACRs are available for the last 5 years which are indicative of the crucial factor of inter se merit of the candidates. This statement has been made by the learned Addl. Advocate General when this Court confronted him that the personal ACRs of all the officers considered for the subject promotion which have been circulated for perusal of this Court, are found to be incomplete and certain discrepancies have been noticed. In fact, this Court has pointed out during the course of the arguments that none of the ACRs for the last 5 years of all the officers, the Accepting Authority's remarks are available, as the column for the Accepting Authority, final acceptance has been uniformly remained blank in the ACRs of all the Officers for all the years. The reply of the Addl. Advocate General to this serious lapse is that the Government have not been following in obtaining the acceptance report of the Accepting Authority in all the ACRs when the Accepting Authority is the Chief Secretary to the Government. According to him, the Chief Secretary, may not have sufficient time at his disposal to make his endorsement as being the Accepting authority of several officers of various Departments. The learned Additional Advocate General would however, submit that ACRs on this account may not be discontinued as uniformly the views of the Accepting Authority are not being recorded.

30. The learned Addl. Advocate General would also refer to this Court's recent decision in respect of one Dr.G.Geetha who questioned the appointment of the Director of Collegiate Education, this Court has set aside the appointment of Director of Collegiate Education under almost similar circumstances, which is reported in "2020 SCC OnLine Mad 4797 (Dr.G.Geetha versus Government of Tamil Nadu, rep. by its Principal Secretary to Government and others)" the decision is also enclosed along with typed set of papers. According to him, unlike in the present case, in that case, ACRs for the last 5 years were not available at all and therefore, this Court had to strike down the appointment as it did not find any basis for the eventual assessment of relative merit and ability of the candidates who came within the zone of consideration for appointment to the post of Director of Collegiate Education. But as far as this case is concerned, the ACRs are very much available for all the officers concerned for the relevant period and the original Files containing the ACRs as well as the documents relating to the promotion of the 3rd respondent have also been produced for consideration of this Court. The learned counsel for the 3rd respondent would also reiterate the above difference and implore

this Court that the decision in Dr.Geetha's case may not have any bearing in this case.

31. Apart from the above submission, the learned counsel for the 3rd respondent, Mr.Vijay Shankar would rely upon the following decisions, viz.,

i) (2010) 5 SCC 692 (N.Suresh Nathan and others versus Union of India and others), wherein, the learned counsel would draw the attention of this Court to paragraphs 39, 40 and 48, which are extracted as under:

"39. In the present case, we find that Rule 5 of the Recruitment Rules states that the post of Assistant Engineer in the Public Works Department, Pondicherry, is a selection post. The Recruitment Rules, however, do not lay down that seniority-cum-merit would be the criteria for promotion to the selection post of Assistant Engineer.

"40. In Jai Narain Misra (Dr.) v. State of Bihar [(1971) 1 SCC 30] a three-Judge Bench of this Court held that the question of seniority was not relevant for promotion to the selection post in the language of the judgment of this Court in Jai Narain Misra (Dr.) v. State of Bihar [(1971) 1 SCC 30] : (SCC p. 32, para 3)

"3. It was not disputed before us that the post of Director of Agriculture is a selection post. Therefore, the question of seniority was not relevant in making the selection. It is for the State Government to select such officer as it considers as most suitable. In this view we think the High Court was not justified in going into the question of seniority nor will we be justified in going into that question."

Thus, the question of seniority in the grade of Section Officers or Junior Engineers is not at all relevant for promotion to the post of Assistant Engineer in the Public Works Department, the Government of Pondicherry.

"41. to 47.

"48. As we have seen, Rule 5 of the Recruitment Rules in the present case states that the post of Assistant Engineer is a selection post and the Recruitment Rules nowhere provide that seniority-cum-merit would be the criteria for promotion. In the absence of any indication in the Recruitment Rules that seniority in the grade of Section Officers/Junior Engineers will be counted for the purpose of promotions to the post of Assistant Engineer, consideration of all Section Officers/Junior Engineers under Clause 1 of Rule

11 of the Recruitment Rules who are eligible for such consideration has to be done on the basis of assessment of the comparative merit of the eligible candidates and the most suitable or meritorious candidate has to be selected for the post of Assistant Engineer. Such a method of selection will be consistent with Rule 5 of the Recruitment Rules and Article 16 of the Constitution which guarantees to all citizens equality of opportunity in matters of public employment."

According to the learned counsel, the above decision has held that in a case of selection post, merit and ability are the prime consideration and not seniority.

ii) (2018) 15 SCC 796 (Union Public Service Commission versus M.Sathiya Priya and others), wherein, the learned counsel would refer to paragraph 17 which is extracted as under:

"17. The Selection Committee consists of experts in the field. It is presided over by the Chairman or a Member of UPSC and is duly represented by the officers of the Central Government and the State Government who have expertise in the matter. In our considered opinion, when a High-Level Committee or an expert body has considered the merit of each of the candidates, assessed the grading and considered their cases for promotion, it is not open to CAT and the High Court to sit over the assessment made by the Selection Committee as an appellate authority. The question as to how the categories are assessed in light of the relevant records and as to what norms apply in making the assessment, is exclusively to be determined by the Selection Committee. Since the jurisdiction to make selection as per law is vested in the Selection Committee and as the Selection Committee members have got expertise in the matter, it is not open for the courts generally to interfere in such matters except in cases where the process of assessment is vitiated either on the ground of bias, mala fides or arbitrariness. It is not the function of the court to hear the matters before it treating them as appeals over the decisions of the Selection Committee and to scrutinise the relative merit of the candidates. The question as to whether a candidate is fit for a particular post or not has to be decided by the duly constituted expert body i.e. the Selection Committee. The courts have very limited scope of judicial review in such matters."

The learned counsel would submit that in selection matter, the Courts have limited scope of judicial review since the selection committee consists of experts in the field and it is not for the High Court to sit over the assessment made by the assessing authority/Selection Committee.

iii) 2019 SCC OnLine 1476 (Union Public Service Commission versus Jawahar Santhkumar and others), wherein, the learned counsel would draw the attention of this Court to paragraphs 26 and 27 which are extracted as under:

"26. The ratio of the above decision squarely applies to the case in hand. When the Selection Committee has given its own classification, the court cannot sit in appeal over the assessment made by the Committee of experts. In Union Public Service Commission v. M. Sathiya Priya, (2018) 15 SCC 796, the Supreme Court held as under:-

"17. The Selection Committee consists of experts in the field. It is presided over by the Chairman or a Member of UPSC and is duly represented by the officers of the Central Government and the State Government who have expertise in the matter. In our considered opinion, when a High-Level Committee or an expert body has considered the merit of each of the candidates, assessed the grading and considered their cases for promotion, it is not open to CAT and the High Court to sit over the assessment made by the Selection Committee as an appellate authority. The question as to how the categories are assessed in light of the relevant records and as to what norms apply in making the assessment, is exclusively to be determined by the Selection Committee. Since the jurisdiction to make selection as per law is vested in the Selection Committee and as the Selection Committee members have got expertise in the matter, it is not open for the courts generally to interfere in such matters except in cases where the process of assessment is vitiated either on the ground of bias, mala fides or arbitrariness. It is not the function of the court to hear the matters before it treating them as appeals over the decisions of the Selection Committee and to scrutinise the relative merit of the candidates. The question as to whether a candidate is fit for a particular post or not has to be decided by the duly constituted expert body i.e. the Selection Committee. The courts have very limited scope of judicial

review in such matters."
(underlining added)

"27. In the present case, we find that neither the decision of the Selection Committee nor the decision-making process suffers from any arbitrariness. Since there was down-grading of the first respondent for the assessment year 2004, the first respondent was not included in the Select List. On overall assessment of service records, the name of the first respondent was not included in the Select List due to the statutory limit of its size and as officers with higher grading in the Select List were available as per the provisions of Regulation 5(5) of the Regulations. The High Court was not right in holding that the Selection Committee has miserably failed to assess all the aspects of the case in their proper perspective and that the promotions made to the IAS for the vacancies of the year 2004 is vitiated and the same is to be reviewed. The impugned judgment of the High Court cannot be sustained and is liable to be set aside."

The above case also lays down the ratio that when the Selection Committee has made its assessment, the Court cannot sit over the assessment made by the Committee of experts. Therefore, he would submit that this Court may not substitute its views or assessment of the Selection Committee and interfere with the appointment of the 3rd respondent who has been admittedly found to be more meritorious than others.

32. As regards the proposition of the Hon'ble Supreme Court in regard to two aspects of the issue, namely, the position of seniority in appointment towards selection post, the scope of interference by the Courts in assessment of suitability, is clear and binding on this Court. But what is to be seen is whether the facts and circumstances of the case on hand invites the application of the legal principles laid down by the above decisions would be known only when this Court unravels the rival contentions of the learned counsels coupled with the revelation to be discovered from the relevant files and documents produced for perusal by the official respondents. Any law laid down either by the Apex Court or by the High Court is to be applied, provided the factual matrix of the case fit into the legal groove, leaving no scope for distinguishing material variations of the case. Therefore, in that consideration, this Court proceeds to consider the lis on the basis of the competing contentions of the parties.

33. Considered the submissions of the learned Senior counsel, Shri R.Singaravelan for the petitioner, Shri S.R.Rajagopalan, learned Addl. Advocate General for the official respondents and Mr. Vijay Shankar, learned counsel for 3rd

respondent. Perused the pleadings and the materials placed on record.

34. The dispute and the controversy in this Writ Petition call for adjudication by this Court from a multi dimensional points of view. In the process of consideration, this Court has to necessarily deal with the several aspects as to the sustainability of the promotion of the 3rd respondent as Director of Industrial Safety and Health.

35. The learned Senior counsel for the petitioner at the outset questioned the very procedure adopted by the competent authority in announcing the panel containing only one name vide G.O.(D) No. 497 dated 06.10.2020 and on the same day, approved the promotion of the 3rd respondent. According to the learned Senior counsel, the procedure followed by the Department is alien to service jurisprudence for the reason that when a panel is announced it should normally contain the names of the Officers who had come within the zone of consideration and only thereupon the selection would be set in motion among the empanelled candidates and final promotion would be effected from one among the Officers from the panel.

36. In this case, according to the learned Senior counsel, panel itself contained only the name of the 3rd respondent, overlooking the seniority of the petitioner and therefore, the opportunity of filing an appeal against the inclusion of the 3rd respondent in the panel has become a fait accompli as on the very same day, promotion has been effected.

37. For the above objection, the answer from the official respondents is that 4 eligible candidates were in fact considered, on the crucial date, i.e. 15.4.2020 and inter se assessment was made and the 3rd respondent found to be relatively meritorious than the other candidates and therefore, his name was included and he was promoted. This has been the practice in the past consistently followed in all appointments from the post of Deputy Director upwards.

38. This Court has summoned the original Files and the ACRs of the Officers who were said to have been considered for the subject promotion. As contended by the learned Addl. Advocate General, the Files clearly reflected that the Department had been following the same pattern in respect of all appointments/promotions consistently for the last few years, namely, panel containing only the names of the Officers to be eventually promoted. In fact, as rightly pointed by the learned counsel for the 3rd respondent that the panel would contain only the names of the officers proportionate to the vacancies notified. For example, if there are 5 vacancies in the post of Additional Director, only 5 Officers would be empanelled and promoted and so on and so forth. In this case, the notified vacancy was one, being the post of Head of the Department and

therefore, the selected candidate alone was empanelled and promoted. Whether the procedure adopted by the Department is valid or not, on factual consideration, this Court finds no mala fides could be attributed in the present selection on this aspect. Although much has been contended on behalf of the petitioner, questioning the procedure followed by the Department in accommodating the 3rd respondent alone in the panel, but in the face of the consistency, as it could be seen in the file, no palpable deviation is found in support of the said contention of the petitioner.

39. The learned Senior counsel for the petitioner additionally submitted that 5 candidates ought to have been considered in terms of Section 7 of the Act as well as the relevant instructions issued by the Government. As far as this objection is concerned, this Court is convinced and satisfied with the answer of the official respondents that only 4 candidates were found to be eligible on the crucial/cut of date fixed for the present selection, i.e. 15.4.2020 and those 4 candidates names were mentioned in the counter affidavit filed on behalf of the first respondent. The files produced before the Court would clearly support the answer.

40. One other issue was raised on behalf of the learned Senior counsel for the petitioner was that Explanation III to Section 7 clearly mandates that no temporary panel should be prepared for appointment to posts which do not come under the purview of the Public Service Commission. On behalf of the respondents, it was submitted that there are pending litigations before this Court in regard to inter se seniority of various officers at different levels for the past few years, therefore, the Department has always been constrained, in terming all the panels over the years at various levels of promotion, including the post of Director as temporary only. In fact, the learned counsel for the 3rd respondent has pointed out a pending case before this Court regarding seniority issue between the petitioner herein and the 3rd respondent. Therefore, this Court is of the view that the submission of the learned Senior counsel on that aspect may not be valid. When litigations are pending on inter se seniority concerning the Officers of the Department, the Department is bound to term the panels as temporary only.

41. Leaving aside the above, the fact that the Department has been following the same pattern of appointments in the past, should the practice to be endorsed by this Court, when the same is put to challenge by the aggrieved officer in the present selection is the moot point for principal consideration of this Court. According to the learned Senior counsel, Shri R.Singaravelan, G.O.(D) Nos.496 and 497 announcing the panel did not reflect that there was consideration of all the other officers and in the absence of any statement in the G.O., there was no way the Officer could have known whether he/she was considered at all in the subject selection. This Court finds

that the submission has considerable force for the reason that when Officers come under evaluation based on their inter se merit and ability for promotion to the post of Head of Department, the Department is under a legal obligation to announce the panel first containing the names of the eligible officers and then call for any objections from any officers who have been overlooked or any officer has been unjustly included. Such procedure whether explicitly stated in the Rule or in the instructions issued by the Government or not, to be read into any promotional exercise, otherwise, any opportunity being provided to Senior Officers calling for objections/appeal in the face of inclusion of any junior in the panel would be inane and a useless formality.

42. For illustration, after promotion is effected, an appeal is submitted by an aggrieved Senior Officer to the Government and if the appeal is allowed, then the consequence of allowing the appeal would be to undo the appointment/promotion already made to the dismay of the Officer concerned. Such a scenario is not in the interest of either the administration or in the interest of any officer favoured with promotion in the first place and put his appointment on a cliff hanger. Therefore, jurisprudential fairness demands that the empanelment of eligible officers in terms of the service regulations must be announced first, notifying the officers concerned that they were being considered for the subject appointment and thereupon the process of inter se assessment could be undertaken, before the final declaration of promotion of the Officer from the panel. This practice if adopted, would clear the air of any misgiving, particularly in the suspecting mind of the Senior Officer as to the bona fides of the appointment overlooking his claim.

43. As far as the case on hand is concerned, panel was announced on 6.10.2020 vide G.O.(D) No.497 Labour and Employment (M1) Department and on the same date, another G.O.(D) No.498 Labour and Employment (M1), was issued promoting the 3rd respondent as Director of Industrial Safety and Health. In the opinion of this Court, though the Department has been following the same pattern, as evident from the Files produced, yet when the procedure adopted all along is found to be not in order in compliance with fairness and good faith in making the appointment, such procedure has to be necessarily discontinued. This Court is therefore, of the considered view that announcing the appointment on the same day of the empanelment is grossly unjust, arbitrary and adoption of such procedure even if it leads to the appointment of the right Officer, the same would become too easily vulnerable to judicial challenge.

44. Several submissions have been made on behalf of the parties on the aspect of the elaborate procedure provided for preparation of panel as laid down by the guidelines issued by the Government vide G.O.(Ms).No.368 Personnel and Administrative Reforms Department dated 18.10.1993. The said G.O. provides a

detailed procedure for preparation of the panel of officers at various levels. One of the advocated guidelines is filling up of the posts Heads of the Department (non IAS) wherein, it is stipulated as below:

"Filling up of posts of Heads of Department:-

(1) To fill up a single vacancy in respect of Heads of Department, the claims of the first five qualified candidates in the seniority list should be considered and a panel of at least two names should be got approved in order to meet any contingency. According to the orders issued in the Government Order fifth read above, to be eligible for promotion as Head of Department an officer should have not less than one year's service left before retirement. Those who do not have such a minimum period of left over service but are otherwise found to be fully qualified and are fit for promotion as Head of Department and deserve recognition on the crucial date of preparation of panel, should be compensated by appointing them as officer on Special Duty with a specific assignment and with the same scale of pay as that of the Head of Department.

(2) Proposals to fill up the posts of Heads of Department (non-IAS) will have to be initiated by the Secretaries to Government themselves 3 months in advance of the prospective date of retirement of the existing incumbent as all the relevant particulars would be available in the Secretariat. If the initiative to send proposals is left with the Heads of Department themselves, there are found to be delays caused by subjective considerations, such promotion proposals will have to be suitably monitored by the Secretaries to Government themselves so that orders are issued before the retirement of the existing incumbent and the case of those who have a minimum service before retirement of the previous incumbent are not omitted because of administrative delay."

45. The above instruction contemplate among others that in filling up one vacancy against the post of Head of Department (HoD) atleast a panel of 2 names should get approved in order to meet any contingency. In this case, admittedly, this has not been followed, as the 3rd respondent alone was shown to have been included in the approved panel. Apart from minimum one year service requirement, one other important procedure laid down is initiation of the process of filling up of posts three months in advance of the prospective date of retirement of the existing incumbent.

46. The said procedure has been evolved with a purposeful view to avoid any delay in appointment to sensitive posts, namely, Heads of the Department (non IAS) and presumably to take

care of the period between announcement of the panel and the appeal time. If only the Department had followed this procedure in letter and spirit, it could have avoided the undue haste resulting in announcing the panel on 06.10.2020 and effecting the promotion to the 3rd respondent on the same day, i.e. on 06.10.2020. The Department was well aware that the vacancy was due to arise in January 2020 consequent on the ensuing retirement of the incumbent Mr.K.Manoharan, the then Director, but for some unknown reasons, the process of selection has been delayed and this necessitated the appointment of the 3rd respondent as in-charge Director from January 2020 onwards. In fact, the learned Senior Counsel for the petitioner strongly objected to the 3rd respondent's appointment as even In-charge Director, as normally, in such situation, a Senior Officer is always preferred. However, the explanation from the Government for posting the 3rd respondent as In-charge Director appeared to be valid as the petitioner had been posted in Madurai as Additional Director whereas the 3rd respondent had been working in Chennai at the relevant period of time. Therefore, administratively, it was convenient for the Department to post the 3rd respondent as Director in-charge.

47. In any case, the time line fixed by the above said G.O. has not been followed and there has been no explanation at all forth coming from the Government on this issue. This is more so when the Government had issued G.O.(D) No.421, dated 16.07.2019 approving the estimated vacancy for the post of Director of Industrial Safety and Health in Tamil Nadu Factory Service for the year 2019-20 as '1'. When the vacancy was notified and approved as early as in July, 2019, why the Government has taken to fill up the vacancy for more than a year, raises a doubt as to the bona fides of the appointment of the 3rd respondent. In fact, in this regard, the learned Senior Counsel for the petitioner submitted that among the empanelled officers, Senior most Officer was one K.Jagadeesan and if the vacancy has been promptly filled up, the said K.Jagadeesan could have been considered for the subject appointment as at that point of time, he had more than a year service left and the bar for consideration by applying one year Rule was non-existent at that time. As there was undue delay in the appointment, the said Jagadeesan became ineligible for appointment as Director due to one year Rule. Whether the said submission of the learned Senior counsel is valid or not valid, as no concrete finding could be conclusively rendered by this Court on the said objection. This Court is not inclined to form any definite view without any clinching material on that aspect. However, deciding the validity of the impugned appointment is to be undertaken on the available relevant materials and concrete legal principles than to colour the appointment in the realm of presumptions and surmises.

48. Having dealt with initial procedural aspect, the most crucial consideration of this Court is the criteria adopted for

assessment of inter se merit and ability of the candidates in contention. As per Rule 2(b) of Special Rules for Tamil Nadu Factory Service r/w Section 7 of the Tamil Nadu Government Servants (Conditions of Service) Act, 2016, the appointment to the post of Director of Industrial Safety and Health is on the basis of merit and ability. Once the merit and ability are the ultimate basis for assessment of the suitability of the candidate, the seniority is to be relegated to back burner, unless the merit and ability of two Officers have been found to be approximately equal. In that contingency, the inter se seniority of the Officer would obviously clinch the appointment. This aspect was very strongly pleaded by the learned Additional Advocate General and also the learned counsel for the 3rd respondent.

49. A fulcrum of the case of the Government, supported by the 3rd respondent is, admittedly the 3rd respondent enjoyed better ratings in his ACRs for the last 5 years. This is reflected in the comparative statement incorporated in the counter affidavit filed on behalf of the respondents 1 and 2. This Court has perused the relevant ACRs and found that the 3rd respondent has been given outstanding ratings on certain periods of service. On the other hand, the petitioner has not been rated outstanding for any relevant period which had come under the consideration of the subject promotion. The grading given in the ACRs alone are the relevant materials relied upon for the entire purpose of assessment of the inter se merit and ability of the candidates came within the zone of consideration.

50. From the submissions of the respondents, the validity of the selection needs to be tested on the simple comparison of the merit and ability of the Officers on the basis of gradings they received in the last 5 years in terms of Rule position and the guidelines issued thereunder. To that extent, this Court may not find fault with the basis of the assessment of suitability, namely, merit and ability, since various attributes of the Officers have been commented upon and recorded by their superiors, namely, Reporting Officer Reviewing Officer sans Accepting Authority.

51. What is surprising and shocking to this Court is that in none of the original ACRs produced for perusal pertaining to the 4 officers, the columns for 'views of the Accepting Authority' have been obtained and left completely blank. In fact, this Court was informed that the ACRs have not been put up before the Accepting Authority for his views. In the absence of the views of the Accepting Authority, whether the incomplete ACRs could be relied upon by the Department raises more questions than answers. In consideration of this aspect of the issue, it is relevant to refer G.O. Ms.No.121 P & AR Department dated 29.09.2011. This G.O. was a consequence of the decision of the Hon'ble Supreme Court of India rendered in Dev Dutt's case. In the said decision, the Hon'ble Supreme Court has laid down a

land mark judgment as to the communication of adverse entries to the Officers concerned which include not only 'poor', 'fair', 'average', good but also very good. Taking cue from the Hon'ble Supreme Court's decision, the Government had taken a decision to revise the existing proforma for writing ACRs of the Officers in the State and in Annexure-I which contained a new format wherein detailed columns have been provided for Reporting Officers to make his remarks followed by the remarks of the Reviewing Authority and final remarks of the Accepting Authority.

52. In Annexure II appended to the above said G.O., "Guidelines for filling up the format of Annual Confidential Reports" have been provided and the very first paragraph under the caption 'General Introduction' reads as under:

"Guidelines for filling up the format of Annual Confidential Reports:

1. General Introduction:

1.1 The Annual Confidential Report is an important document. It provides the basic and vital inputs for further development of an officer. The officer reported upon, the Reporting Authority, Reviewing Authority and the Accepting Authority should therefore, undertake the duty of filling up the form with a high sense of responsibility."

53. As far as the Accepting Authority is concerned, paragraphs 6 & 7 of the Guidelines read as under:

"6. Points to be noted by accepting authority:

6.1 The accepting authority is required to indicate if he/she agrees with the assessment made by the reporting authority/reviewing authorities. In case of difference of opinion, he/she is required to give details and reasons for the same in the column specifically provided for the purpose in the format.

7. There should be more openness in the system of appraisal. The Annual Confidential Reports, including the overall grade and integrity, should be communicated to the Officer reported upon immediately after it has been finalized by the accepting Authority."

54. From the above instructions, there cannot be two opinions that the ACRs would be construed as valid materials for the purpose of present assessment only if the Accepting Authority makes his final remarks. In the absence of participation of the Accepting Authority, the ACRs have to be divested of its relevance, as being inchoate, incomplete and resultantly invalid basis on which the inter se could be premised. When the learned Addl. Advocate General was confronted on this aspect, it was admitted that in the case of these Officers, the Accepting Authority is the Chief Secretary to the Government and due to his position, and being hard pressed for

time, the ACRs of the Officers never used to be placed before him for his views. This Court, at this, is more astonished than impressed by the unfortunate explanation from the Government side.

55. The above submission appears to be a pathetic surrender of the Government that the legal requirements could not be fulfilled to the hilt and notwithstanding the same, the ACRs are the only basis on which inter se merit and ability of the candidates was assessed. The Government itself appears to have no clue as to what is the benchmark that they have evolved in promoting the Officers to different levels and cadres. It emerges from the course of arguments and from the files that process of comparison of Officers would be based on the ACR gradings and whoever managed to score little higher grading than his/her competitor, he/she would be preferred in the appointment. Such open-ended selection process in the matter of promotion to Head of Department would not lead to wholesome and proper assessment of the officers who come within the zone of consideration. This is more particularly so for the following reasons.

56. The above said G.O., i.e. 121 P&AR Department dated 29.09.2011 was issued in terms of the ruling of the Hon'ble Supreme Court in Dev Dutt's case. In fact, the learned Senior Counsel heavily relied on this legal proposition and he would draw reference particularly to paragraph 39 of the judgment, which is extracted hereunder:

"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."

57. As per the above dictum, 'good' and 'very good' ratings have also to be communicated to the Officer concerned. This is due to the fact that when the Officer aspires to be promoted to the higher echelons of service, higher the promotion, stricter the benchmark will be. In the case on hand, securing rating 'very good' is also has an an effect to be an adverse entry if

benchmark of outstanding is to be preferred, while undertaking the comparative exercise among the Officers in the reckoning. In this case, particularly, the benchmark itself being not evolved or revealed, the right to represent against every rating be it 'good' or 'very good' becomes more invaluable and mandatory and that opportunity cannot be denied to any officer. In this case, the Government has not been following such practice at all, though they have promptly issued G.O.Ms.No.121, dated 29.9.2011 in terms of the ruling of the Hon'ble Supreme Court in Dev Dutt's case.

58. This Court is aghast as to how the Government could run its higher administration with such poor understanding of the legal imperatives and requirements that need to be adhered to before proceeding with the appointments to higher echelons of administrative service. It is trite law to hold that uncommunicated adverse remarks cannot be relied and acted upon by the administration. In this case, uncommunicated 'very good' remarks of the petitioner cannot be relied upon and as a corollary such uncommunicated remarks pertaining to the petitioner cannot be allowed to ennure to the advantage of the 3rd respondent. In that view of the matter, this Court finds that over looking the claim of the petitioner on the basis of the so-called inter se merit and ability cannot be countenanced both in law and on facts, notwithstanding the conclusion of this Court that the ACRs are incomplete material, which cannot support the criteria of comparative assessment of the candidates.

59. Apart from the fact of the incompleteness of the ACRs, this Court also finds that very strangely many of the ACRs appear to be not properly dated or signed. It appears that the authorities have either no or scant regard for orderly and methodical upkeep of the ACRs. The authorities probably never attach due importance to proper maintenance of ACRs and they consider the same as an empty procedural formality or a ritual to be gone through as a matter of course. It is high time the Government took a conscious decision to streamline the procedure for the regular upkeep of the ACRs and monitor the aspect of maintenance of ACRs of the officers of the State which alone would reflect the individual merit and ability of various cadres. The important Concept of recording ACRs of the officers evolved over a period of time with a view to promote quality, fairness and good governance in the higher services of the Government by having the most suitable Officer at the helm in public interest has been unfortunately given a cavalier treatment by the Government. This Court has to come to this conclusion not because of this case alone, but because in another similar case which came up for consideration before this Court in respect of the appointment of Director of Collegiate Education, wherein, this Court found that no ACRs were available at all for the relevant years in respect of the Officers who had come within the zone of consideration and whatever ACRs that had

been maintained, had been haphazardly and recklessly maintained without least conforming to the norms laid down for maintaining the ACRs. This Court on learning of the serious lapses of not maintaining valid ACRs had to strike down the appointment in W.P.No.12495 of 2020 by order dated 29.10.2020.

60. On behalf of the official respondents, dutifully the learned Addl. Advocate General has relied upon a decision reported in 2020 SCC OnLine SC 391 (Sujatha Kohli vs Registrar General, High Court of Delhi and others) regarding the maintenance of ACRs that any guidelines issued changing the procedure of maintaining the ACRs would be made applicable only for the future implementation. The observation of the Hon'ble Supreme Court in that matter would have no application at all to this case, since as stated above, the Government itself has promptly issued G.O. Ms.No.121 P & AR Department, dated 29.09.2011 mandating the Departments to follow the principles laid in Dev Dutt's case scrupulously and new format has been revised and issued under the above said G.O. The ACRs which have been taken up for consideration pertaining to the last 5 years prior to the date of the selection, which mean that ACRs are post 2011 format. Therefore, the reliance placed by the learned Addl. Advocate General is on the cited decision is completely misplaced and liable to be rejected as having no application at all.

61. As regards the contention of the learned counsel for 3rd respondent, Mr. Vijay Shankar referring to a decision reported in 2018) 15 SCC 796 (Union Public Service Commission versus M.Sathiya Priya and others), the same is in relation to the appointment to the selection post, where merit and ability take the precedence and not seniority. This Court finds that one does not require a decision to state that any appointment to the selection post, merit is always the primary and principal consideration and the seniority is only a secondary aspect. In regard to two decisions relied upon by the learned counsel viz., (2010) 5 SCC 692 and 2019 SCC OnLine 1476 (cited supra) as to the limited scope of judicial review in replacing the assessment of the Selection Committee Members by the Courts, indisputably it is not within the domain of this Court to interfere with the assessment of the experts of the Selection Committee Members by venturing into the subjective consideration of the suitability of the candidates in the normal exercise of its jurisdiction. At the same time, the power of judicial review cannot be resisted on such contention by the respondents, when this Court finds that the so-called subjective consideration of the inter se assessment of merit and ability of the candidates lacked any basis and fundamentally flawed. This is not a case where presence of some materials forming the substratum of the assessment of the candidates with reference to their merit and ability. On the other hand, this Court finds complete absence of legally acceptable materials other than the defective ACRs of the officers, which alone was the explanation of the

respondents, satisfying the mandatory requirements of merit and ability. In this appalling scenario, interference with the impugned appointment of 3rd respondent will be the spontaneous judicial reaction towards advancing the cause of fair-play and good administration

62. Further, it is also submitted on behalf of the respondents that relative merits as between the Officers who came within the zone of consideration was put to assessment before the final choice fell on the third respondent. In order to appreciate the said selection this Court scanned through the Office Files which disclose that the competent authority had indeed considered four officers on the basis of the ACRs, as averred in the counter affidavit of the official respondents, this Court is not fully convinced even on merits that where there was any objective or subjective consideration of inter se merit and ability of the candidates and whether there was any proper assessment at all. From the files what could be deduced is, the Government has gone about its business perfunctorily on the basis of the defective ACRs, without a modicum of any other evaluation method in order to select the most suitable candidates for the job. It is very obvious and forthright that appointments in the department through selection method are being done on a trifle consideration, without evolving proper criteria which should normally go into the inter se assessment of the candidates. The criteria that are professed and practiced in these appointments i.e., merit and ability are mere decorative or cosmetic expressions, and would remain as inane requirement in the Rules, unless the expressions are supported in actuality, with quality oriented judging standards.

63. While perusing the Files, this Court finds from the Circulation Note, there is a detailed reference that four Officers have been considered and the 3rd respondent is stated to be preferred as he has been having better ratings than the other three eligible Officers. The Circulation Note has been prepared in August, signed by the Joint Secretary, Additional Chief Secretary, dated 18.08.2020 Secretary (P&AR), Additional Chief Secretary (Finance), Chief Secretary, dated 19.08.2020, Hon'ble Minister of Labour, on 20.08.2020 and finally, the Hon'ble Chief Minister, on 05.10.2020 and thereafter, the panel was published on 06.10.2020. In fact, the Files also disclose that the case of the petitioner was considered and there is an endorsement made on 17.08.2020 that his name need not be considered for appointment in terms of the relevant provisions of the Service Rules. In the face of such endorsement, providing opportunity to the petitioner to prefer an appeal against the empanelment of the 3rd respondent vide G.O.(D) No.497 dated 06.10.2020, in the opinion of this Court amounts to fulfillment of useless formality. When an opportunity of appeal is contemplated in the procedure, it must be real and effective and not sham and nominal. A post-decisional hearing after the clear endorsement of the competent authority in the file even as early as on

17.08.2020 amounted to hoodwinking the procedural fairness and reducing the appeal exercise a travesty.

64.This Court has also discovered from the File that procedural relaxation has been obtained from the competent authority in relation to Explanation III of Section 7 of the Act that preparation of temporary approval. To that extent, the Government has complied with the procedural requirement and ensured such a minor infraction is not to affect the selection. But unfortunately while adopting a fastidious approach on one hand, on the other, the Government have allowed a wholesale violation of the mandatory procedure to creep into the selection and eventually sullied the appointment of the third respondent, in the bargain.

65.In the light of the above narrative, the appointment/promotion of the third respondent cannot be countenanced in law. When the Court interferes with the impugned appointment, especially, in respect of the post of HOD, it cannot allow its decision, resulting in dislocation of the administrative apparatus with leadership vacuum. When this Court has discovered and witnessed incurable procedural infraction in the impugned appointment, such appointment cannot be allowed to continue even on temporary or ad hoc basis till a regular incumbent is selected and promoted on the basis of proper evaluation criteria to be evolved henceforth by the Government, as maintaining of the existing ACRs of the officers concerned cannot be relied upon. This position may continue for a few more years, till the department is ready and willing to streamline the procedure for maintaining the ACRs of the officers in tune with their own order/instructions and in line with the law laid down by the Hon'ble Supreme Court in Dev Dutt's case. In the interregnum, it is imperative that an ad hoc or additional procedure to be framed and put in place, so that higher levels of appointment in the department do not become easily vulnerable to challenge and possible interference by the Courts. In similar circumstances, while setting aside the order of the Director of Collegiate Education, this Court recently has directed the Government to evolve a fair procedure in the process of assessment of inter se merit and ability of the Officers, in paragraph 48 (W.P.No.12495 of 2020, dated 29.10.2020) which reads as under:

"48. In the circumstances, the Government is directed to evolve a fair procedure in the process of assessment of inter se merit and ability of the Officers, without giving any room or scope for possible abuse in the future selection. In this regard, the Government may also constitute a high power Committee comprising eminent administrators with vast experience for framing definite and proper guidelines in order to evolve proper standards of benchmark to be applied uniformly in respect of appointments to all selection posts."

66. The above direction will hold good for the present appointment as well, as it is too late in the day to cure the defects in the ACRs and no legitimate consideration would emerge even if the petitioner is now afforded an opportunity to prefer any representation against the entries in the ACRs, which had already become a stumbling block for him to reach his career pinnacle as Director of Industrial Safety and Health. In the circumstances, the High Power Committee comprising eminent administrators with vast experience as suggested in para 48 extracted above, to be formed and be directed to evolve proper parameters and procedure for appointment to Heads of the Department or any high or equivalent posts. On the basis of the Report of the Committee, action could be initiated for filling up of the post of Director of Industrial Safety and Health. The criteria and parameters evolved by the Expert Committee may have to be the basis for future selection till the ACRs of all the Officers concerned are maintained in terms of the Government order/instruction and the law on the issue with due importance to the remarks contained in the ACRs and that alone will ensure that the appointments to be made on inter se merit and ability would be supported by bona fide evaluation as otherwise, any appointment justified on the specious plea of merit and ability without any legal backing could only make the case of the appointment authority hallow and would be susceptible to Court's interference. It is therefore, peremptory that the Government takes the suggestion of this Court with all earnestness and draw a time line for the formation of Committee and seek its Report expeditiously.

67. As far as the filling up of the post of Director of Industrial Safety and Health in the interregnum, is concerned, from the Files it could be seen that the petitioner has been enjoying good rating over all and has not come under any cloud at all. The denial of the present appointment to him is only on the basis of the 3rd respondent having an edge over him in view of he being rated outstanding on few occasions. Therefore, the petitioner by virtue of his present seniority is not unfit to be appointed before the regular selection is concluded and completed. When any ad hoc arrangement is to be made, till a regular selection and appointment to the post takes place, normally, senior most eligible officer would be preferred. Needless to mention that in ad hoc appointment merit and ability do not come up for consideration, as such appointment is to be made without any selection process. Therefore, the choice will always fall on the senior most officer waiting in the wings.

68. In consideration of the overall scenario, in all fairness, this Court is of the view that ad hoc appointment in the interregnum is necessary and imminent to man the post of Director of Industrial Safety and Health for smooth continuance of the administration. In such circumstances, the petitioner as on date is admittedly the senior most eligible officer and therefore, he may be posted as Director In-charge in transition

for securing the ends of justice. The official respondents are, therefore, directed to fill up the post of Director in the meanwhile by appointing the petitioner as In-charge Director, till a regular selection is conducted and concluded and appointment made in terms of the suggestions of this Court, as above.

69. This Court is, however, not inclined to deal with the issue whether the petitioner herein is entitled to be shown preference in the appointment on a regular basis against disability quota. This issue has not been canvassed seriously nor any materials emerged during the course of the submission as to whether the post of Director (HOD) can be earmarked for the person with disability and apply the principle of reservation on this account.

70. In the light of the above discussion, the impugned proceedings, viz., G.O(D).No.497 Labour and Employment (M1) Department dated 06.10.2020 and G.O(D).No.498 Labour and Employment (M1) Department dated 06.10.2020 are hereby set aside. No costs. All connected WMPs are hence closed. Consequently, the directions as contained in paragraph 68 to be implemented forthwith.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

Suk

To

1.The Additional Chief Secretary to Government,
Labour and Employment Department,
Fort St. George, Chennai-9

2.The Director of Industrial Safety and Health,
Directorate of Industrial Safety and Health,
SIDCO Industrial Estate, Guindy, Chennai-32

3.M.V.Senthil Kumar,
Additional Director of Industrial Safety and Health,
O/o.Additional Director of Industrial Safety and Health,
SIDCO Industrial Estate, Guindy, Chennai-32.

+1cc to Mr.Vijay Shankar, Advocate, S.R.No.11816.

+2ccs to Mr.Ravikumar, Advocate, S.R.No.11763.

W.P.No.14980 of 2020

MG(CO)
CSR 30.03.2021