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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 13473 of 2013****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR. JUSTICE MAULIK J. SHELAT**

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Approved for Reporting	Yes	No
	✓	
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SUSHEEL PATIL

Versus

INDIAN RAILWAY CATERING AND TOURISM CORPORATION LTD & ORS.

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Appearance:

MR GAUTAM JOSHI, SENIOR COUNSEL for MR AADITYA D BHATT(8580)
for the Petitioner(s) No. 1

CHANDNI S JOSHI(9490) for the Petitioner(s) No. 1

MR SUDHIR M MEHTA(2058) for the Respondent(s) No. 1,2,3,4

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CORAM: HONOURABLE MR. JUSTICE MAULIK J. SHELAT**CAV JUDGMENT**

1. Time and again, the Honourable Supreme Court of India, in its various authoritative pronouncements, held that delay in communicating the Annual Confidential Report (**ACR**) [now termed as the Annual Performance Assessment Report (**APAR**)] and/or non-communication of the ACR/APAR to an

employee by the State and its instrumentalities would result into the violation of the principles of natural justice with regard to the career advancement of the employee, despite such law, the Respondent herein, being an arm of the Union of India, apparently has not followed such dictum, which resulted in the denial of promotion to the petitioner.

2. The present petition is filed under Articles 14, 16 and 226 of the Constitution of India, seeking the following reliefs:

“A) Your Lordships may be pleased to issue a writ of certiorari or any other appropriate writ, order or direction, declaring the requirement of benchmark of 21 out of 25 in the last 5 years confidential reports for promotion from E-3 to E-4 grade, as stipulated in the IRCTC Promotion Policy, 2012, as unreasonable, arbitrary and discriminatory and thus violative of Articles 14 and 16 of the Constitution and striking down the same;

B) Your Lordships may be pleased to issue a writ of certiorari or any other appropriate writ, order or direction, declaring consideration, by the respondent authorities, of annual Performance Appraisal Reports with rating below the benchmark for promotion without prior communication of the APARs to deny the petitioner of his right to be considered for promotion as contrary to the law laid down by the Hon'ble Supreme Court of India, contrary to the principles of natural justice, arbitrary and unfair and thus violative of Articles 14 and 16 of the constitution and quashing

and setting aside the same;

C) Your Lordships may be pleased to issue a writ of mandamus or any other appropriate writ, order or direction directing the respondent authorities to consider the petitioner for being promoted from E-3 to E-4 grade in accordance with the provisions contained in the IRCTC Promotion Rules, 2007;

D) Pending admission and final hearing of this petition, Your Lordships may be pleased to restrain the respondent authorities from making any promotion from E-3 to E-4 grade; and

E) Your Lordships may be pleased to pass any other and/or further order, as deemed fit, in the interest of justice."

3. THE SHORT FACTS, AS PER THE CASE OF THE PETITIONER, READ THUS:

3.1. The petitioner was appointed in Grade E-2 of Junior Management in the respondent-Indian Railway Catering and Tourism Corporation Ltd. (hereinafter referred to as "**IRCTC**") in the year 2005. Later on, as per the prevailing IRCTC Promotion Policy and Rules, 2007 (hereinafter referred to as "**the Rules, 2007**") of the respondent, the petitioner was promoted to Grade E-3 on 9th March 2009. At that point of time, as per the said rules, minimum 3 years of regular service in the lower grade requires to get promotion to the higher

grade and only the suitability of the candidate judged from his performance and the confidential reports but there was no benchmark set with regard to the performance and the confidential reports.

- 3.2.** The petitioner, having completed 3 years of service in the said grade, was eligible to be considered for further promotion to Grade E-4 i.e. Middle Management. At that time, in the year 2012, the aforesaid Rules, 2007 came to be substituted by the revised IRCTC Promotion Policy and Rules, 2012 (hereinafter referred to as "***the Rules, 2012***"), which came into force with effect from 1st September 2012.
- 3.3.** As per the said rules, 2012, the benchmark has been introduced to get promotion from Grade E-3 to E-4 apart from other Grades. The benchmark fixed 21 out of 25 (last 5 years' ACRs) to consider for said promotion. The points for each APAR, as per the said rules, are as follows:

CLASSIFICATION	BENCHMARK SCORE
Outstanding	5
Very Good	4
Good	3

Average	2
Below Average	1

3.4. Prior to the aforesaid Rules, 2012, to get promotion from the Grade E-2 to E-5, there was no benchmark fixed by the respondent as not having been found in its Rules, 2007. As stated above, as per the Rules, 2007, minimum 3 years of regular service in the immediate lower grade shall be required for a person to be eligible to get promotion to the next higher grade. Whereas, as per the Rules, 2012, the respondent has introduced for first time a benchmark to get it eligible for promotion from Grade E-2 to E-5, apart from minimum 3 years of regular service in the immediate lower grade as aforesaid.

3.5. It is remained undisputed fact amongst the parties that the respondent had not served each year's APAR to the petitioner at regular intervals in the last 5 years prior to 2013; rather, the pleading suggests that on being sought for by the petitioner, the respondent had communicated the APARs for the period of 2008-09, 2009-10, 2010-11 and 2011-12 in one lot to the petitioner on 2nd April 2013. The petitioner's APARs for the years 2008-09 to 2011-12 were 'Very Good', 'Good',

'Average/Fair', and 'Average', respectively; since the cumulative score did not reach the benchmark of 21 fixed under the Rules, 2012, for promotion from Grade E-3 to E-4, the Petitioner was deemed ineligible for promotion.

3.6. The petitioner appears to have submitted a representation on 22nd April 2013 for the upgradation of his APAR, wherein also, he complained of not getting the APAR every year, thereby, not have had a chance to improve his efficiency every year. Such representation was rejected by the respondent on 20th September 2013 and the Departmental Promotional Committee (DPC) met on the same date, had not considered the case of the petitioner for promotion to Grade E-4, as not met with the said benchmark.

3.7. Being aggrieved by the decision of the respondent in not considering the petitioner for promotion from Grade E-3 to E-4, he has approached this Court by way of the present petition.

4. SUBMISSIONS OF THE PETITIONER:

4.1. Mr. Gautam Joshi, learned Senior Counsel with Mr. Aaditya Bhatt, learned advocate for the petitioner, would submit that non-communication of the APAR by the respondent every year

would be violative of the principles of natural justice and also violative of Articles 14 and 16 of the Constitution of India. It is submitted that due to late communication of the APARs, that too by providing them in one lot of all previous relevant years' APAR to the petitioner, is nothing but an arbitrary action on the part of the respondent, which requires to be quashed and set aside.

4.2. Mr. Joshi, learned Senior Counsel, would further submit that as per the settled legal position of law and as per the Office Memorandum dated 14th May 2009 issued by the Department of Personnel and Training (DOPT), Government of India, binding to the respondent, it was incumbent upon the respondent to communicate the APAR regularly every year to the petitioner, thereby, the petitioner would have a chance to improve his working year on year, and could achieve higher APAR in the next year. It is submitted that due to non-communication of the APAR every year by the respondent it resulted in a situation, whereby, the petitioner could not have an opportunity to improve his efficiency to achieve higher excellence in the service.

4.3. Mr. Joshi, learned Senior Counsel, would further submit that

as per various decisions of the Honourable Apex Court, it was a constitutional obligation upon the respondent to serve the APAR every year to the petitioner and having not done so, it violated the principles of natural justice. It is submitted that due to the late receipt of the last few years' APARs in one lot, the petitioner could not effectively represent and had no chance to get himself improved to achieve the highest APAR year after year.

4.4. Mr. Joshi, learned Senior Counsel, would further submit that the communication of the APAR every year to the petitioner is having a laudable object, thereby, the petitioner not only gets a chance to represent if dissatisfied with the APAR, but on getting such remarks from his superior, also have a chance to improve himself, which ultimately benefits him to get promotion to a higher grade.

4.5. Mr. Joshi, learned Senior Counsel, would further submit that as per Rules, 2007, there was no benchmark set out by the respondent to get promotion to a higher grade by the petitioner, inasmuch as, minimum 3 years of regular service in the immediate lower grade shall be required for promotion to the next higher grade. Whereas, due to the introduction of

Rules, 2012, the respondent for the first time introduced the benchmark, whereby, the petitioner needs to achieve 21 points out of 25, to be counted from his last 5 years' APARs/ACRs. It is submitted that when the respondent for the first time introduced the benchmark in the year 2012, and having not communicated the APARs every year in time, such benchmark could have been considered prospectively rather than retrospectively, inasmuch as, it could have been applied after 5 years of the introduction of Rules, 2012, subject to the respondent regularly communicating the APARs to its employees.

- 4.6.** Mr. Joshi, learned Senior Counsel, would further submit that the respondent communicating all APARs in one lot is nothing but an empty formality; rather, it is illusory to send all APARs in one lot, just to overcome the dictum of the Hon'ble Apex Court.
- 4.7.** Mr. Joshi, learned Senior Counsel, would submit that after the year 2011–12, when the respondent communicated the APAR every year to the petitioner and as such, APARs of the petitioner from 2012–13 to 2021–22 would suggest that his performance was either 'Very Good' or 'Outstanding', as the

case may be. Had all required APARs been communicated by the respondent to the petitioner in time prior to 2012, considering his service record and performance after 2012, he would have definitely secured at least minimum of the benchmark, thereby got promoted to Grade E-4 from Grade E-3.

- 4.8.** Mr. Joshi, learned Senior Counsel, would lastly submit that by no stretch of imagination, the respondent can be allowed to say that it had communicated all APARs for the period 2008–09 to 2011–12 within reasonable time. It is submitted that there is no explanation worth name forthcoming from the side of the respondent as to why it had not communicated the relevant APARs every year to the petitioner. It is further submitted that due to the negligent act on the part of the respondent, the petitioner is the sufferer who was deprived from getting promotion at the relevant point of time, when the DPC met on 20th September 2013. It is further submitted that when the respondent is at fault of not communicating the APARs every year, the benchmark as set out in Rules, 2012, cannot be pressed into service; rather, the case of the petitioner requires to be considered for promotion to Grade E-4 from Grade E-3

without applying the said benchmark.

4.9. To buttress his argument, Mr. Joshi, learned Senior Counsel would rely upon the following decisions:

- (i) Dev Dutt V/s. Union of India reported in (2008) 8 SCC 725;*
- (ii) Abhijit Ghosh Dastidar vs. Union of India and others reported in (2009) 16 SCC 146;*
- (iii) Sukhdev Singh vs. Union of India and others reported in (2013) 9 SCC 566;*
- (iv) Manoj Sitaram Lokhande vs. State of Gujarat, 2016 (0) AIJEL-HC 236565.*

4.10. Making the above submissions, Mr. Joshi, learned Senior Counsel would request this Court to allow the present writ petition.

SUBMISSIONS OF RESPONDENTS:

5. *Per contra*, Mr. Sudhir Mehta, learned advocate for the respondents, would vehemently oppose the present petition as follows:

5.1. There is no merit in the claim of the petitioner that he was not communicated with the APARs by the respondent. It is submitted that prior to the promotional exercise undertaken by

the respondent in the year 2013, all previous years' APARs were communicated to the petitioner for the period 2008–09 to 2011–12 on 2nd April 2013. It is further submitted that for reasons best known to the petitioner, no representation was made by the petitioner against the APARs for the periods of 2008–09 and 2009–10. The representation for the period 2010–11 and 2011–12 was duly considered by the respondent and the same was rejected on 20th September 2013 and such decision was communicated to the petitioner, which is not under challenge.

5.2. The DPC, having met on 20th September 2013, found that the petitioner had not secured the minimum benchmark to get it eligible to be promoted from Grade E-3 to E-4, thereby, was not granted promotion to the petitioner. It is a settled legal position of law that the right to get promotion is not a fundamental right; rather the right to be considered is only fundamental right.

5.3. The respondent had followed the principles of natural justice by communicating all previous years' APARs to the petitioner, thereby, he could submit his representation. The representation of the petitioner was duly considered by the DPC, but having

not found any substance, it was rejected. The petitioner, having not cleared the minimum benchmark, i.e., 21 points, as per Rules, 2012, was not granted promotion.

5.4. The decisions of the Honourable Apex Court and this Court relied upon by the petitioner would not be applicable to the facts of the present case, inasmuch as, in none of the decisions of the Honourable Apex Court, any time limit has been set out, whereby, the respondent was under a legal obligation to communicate the APAR within stipulated time. The ratio of the cited decisions is also not applicable to the facts of the present case, as the petitioner was duly communicated with all APARs. The petitioner chose to make representation only for the period 2010–2011 and 2011–12; rather having accepted the APARs for the period of 2008–09 and 2009–10, recorded by the Reviewing Authority, later on cannot allow to complain for late communication of APARs.

5.5. It is also not correct as submitted by the petitioner that his case requires to be considered for promotion as per Rules, 2007 instead of Rules, 2012. The respondent is well within its rights to change promotional rules and is also entitled to introduce a benchmark which was not fixed in its earlier promotion rules.

It is also settled legal position of law that when promotional exercise is undertaken by employer, the rules prevailing at that point of time would be applicable and not the rules prevailing when the promotional post felt vacant.

5.6. The petitioner was offered to participate in the promotional exercise undertaken by respondent in the year 2019, but he chose to stay away from such exercise, citing reasons of the pendency of this petition. The petitioner cannot be allowed to take undue advantage of mere delay in communicating APARs, as it would be a procedural irregularity and not any illegality. The petitioner is unable to show any real prejudice caused to him by such late communication; rather, the self-appraisal note filled in by the petitioner himself, which was submitted to the respondent would indicate that the petitioner was well aware about remarks of his APARs every year.

5.7. Mr. Mehta, learned advocate for the respondents, would rely upon the following decision:

(i) State of Himachal Pradesh and others V/s. Raj Kumar and other reported in (2023) 3 SCC 773.

(ii) Hardev Singh V/s. Union of India and others reported in (2011) 10 SCC 121.

- 5.8. Making the above submissions, Mr. Mehta, learned advocate for the respondents, would request this Court to reject the present writ petition.
6. No other or further submissions are being made by any of the learned advocates appearing for the parties.

POINT FOR DETERMINATION:

7. Having heard learned advocates of both sides, and having perused the pleadings of the parties, following issue germen for my consideration.

(i) *Whether, in the facts and circumstances of the case, the inordinate delay by the Respondent in communicating the relevant years' APARs to the Petitioner, and the sending of such APARs in one lot, would amount to unfair action violating the principles of natural justice, thereby causing prejudice to the Petitioner's eligibility for promotion from Grade E-3 to E-4 ?*

ANALYSIS

8. The facts which are observed hereinabove are not in dispute. The promotion Rules, 2007 of the respondent, whereby, the petitioner secured his first promotion from Grade E-2 to E-3 -

Junior Management on the basis of serving minimum 3 years in Grade E-2. There was no benchmark fixed in the Rules, 2007 to get higher promotion from Grade E-2 to E-8. The said position was materially changed by the respondent in the year 2012 when respondent for the first time introduced the benchmarks in the Rules, 2012, which came into force with effect from 1st September 2012. As per the Rules, 2012, apart from minimum 3 years of service in a particular grade/post, the employee concerned needs to secure the benchmark as fixed in the Rule 11 of the Rules, 2012. The counting of the benchmark is based on the points for each CR's-APAR's of the last 5 years.

8.1. The relevant Rules 11 and 18 of the Rules, 2012, read as under:

“(11). PROMOTION FROM E2 TO E5 LEVEL

11.1 Promotion from E-2 to E-5 level will be made on the basis of performance and confidential reports.

11.2 A person will be eligible for being considered for promotion to the next higher grade on completion of 3 years regular service.

11.3 A selection committee comprising of GGM level officers will be nominated out of which at least one officer should be from HR department and one from the concerned department. The approving authority is MD.

For E-2 to E3 the benchmark for promotion with regard to record of service is as follows:

<i>Year in E2 grade</i>	<i>Benchmark</i>
<i>3</i>	<i>12</i>
<i>4</i>	<i>15</i>
<i>5</i>	<i>17</i>

For E-3 to E-4 the benchmark is 21 out of 25 (last 5 years CR's)

For E-4 to E-5 the benchmark will be 13 out of 15 (last 3 years CR's)

(18) Benchmark – for the purpose of benchmark, the points for each CR's will be given as follows:

- a) Outstanding-5*
- b) Very Good-4*
- c) Good-3*
- d) Average-2*
- e) and below Average-1”*

(emphasis supplied)

Undisputedly, the petitioner had not secured minimum benchmark of 21 points as cumulative score of his last 5 years' ACRs - APARs prior to 2013 was less than 21, i.e., the benchmark fixed by the respondent as per said the Rules, 2012,

to get it eligible for promotion from Grade E-3 to E-4. So, his case was not considered by the DPC for promotion.

- 8.2.** As observed above, prior to the DPC meeting, on the request made by the petitioner, previous years APARs for the period of 2008–09 to 2011–12 were provided by the respondent to the petitioner, albeit in one lot. The petitioner made representation to respondent for entry made in the APARs for year 2010-11 and 2011-12, but said representation was rejected.
- 8.3.** It also requires to take note of the undisputed fact that as per the Office Memorandum dated 14th May 2009 issued by the Department of Personnel and Training (DOPT), Government of India, within reasonable time, respondent was supposed to communicate APAR to the petitioner. As can be seen from the pleadings of the parties, at relevant point of time, respondent had not adhered to said binding circular of the Government, inasmuch as communicated all APARs in question to the petitioner in one lot.
- 9.** Thus, in view of the aforesaid facts and circumstances, even though the petitioner was communicated the previous years' APARs by the respondent and his representation was rejected

prior to the DPC meeting, the question still remains to answer, as to whether it can said that the respondent observed the principles of natural justice and acted in a fair manner when it communicated all relevant previous years APARs to the petitioner in one lot.

10. To appreciate the controversy germane to the matter and to satisfactorily decide the point for determination, certain judicial precedents on the subject need to be taken into account.

10.1. In the case of *Dev Dutt* (supra), the Honourable Apex Court laid down the law that it was a legal obligation on the part of the State and its instrumentality to communicate all ACRs/APARs to its employee irrespective whether it adverse or not. It held that the purpose of communication of ACRs would be twofold: (i). The communication of the ACR to know about the assessment of the work and conduct by his superior, which would enable the employee to improve his work in the future, (ii). The employee would have an opportunity of making a representation against the entry made in the ACR if he feels it is unjustified, thereby, to pray for its upgradation. It has been so observed and held that the communication of

ACRs to the employee is fairness in action on the part of the State, which is the soul of natural justice.

10.2. The relevant observations of the Honourable Apex Court in the case of *Dev Dutt* (supra) read thus:

“12. It has been held in Maneka Gandhi v. Union of India [(1978) 1 SCC 248 : AIR 1978 SC 597] that arbitrariness violates Article 14 of the Constitution. In our opinion, the non-communication of an entry in the ACR of a public servant is arbitrary because it deprives the employee concerned from making a representation against it and praying for its upgradation. In our opinion, every entry in the annual confidential report of every employee under the State, whether he is in civil, judicial, police or other service (except the military) must be communicated to him, so as to enable him to make a representation against it, because non-communication deprives the employee of the opportunity of making a representation against it which may affect his chances of being promoted (or get some other benefits). Moreover, the object of writing the confidential report and making entries in them is to give an opportunity to a public servant to improve his performance, vide State of U.P. v. Yamuna Shanker Misra [(1997) 4 SCC 7 : 1997 SCC (L&S) 903] . Hence such non-communication is, in our opinion, arbitrary and hence violative of Article 14 of the Constitution.

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 benchmark or not. Even if there is no benchmark, 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.

17. In our opinion, every entry in the ACR 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 v. Union of**

India [(1978) 1 SCC 248 : AIR 1978 SC 597] that arbitrariness violates Article 14 of the Constitution.

18. Thus, it is not only when there is a benchmark 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.**

24. What is natural justice? The rules of natural justice are not codified nor are they unvarying in all situations, rather they are flexible. They may, however, be summarized in one word: fairness. In other words, what they require is fairness by the authority concerned. Of course, what is fair would depend on the situation and the context.

26. In our opinion, our natural sense of what is right and wrong tells us that it was wrong on the part of the respondent in not communicating the “good” entry to the appellant since he was thereby deprived of the right to make a representation against it, which if allowed would have entitled him to be considered for promotion to the post of Superintending Engineer. **One may not have the right to promotion, but one has the right to be considered for promotion, and this right of the appellant was violated in the present case.**

29. In Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant [(2001) 1 SCC 182 : 2001 SCC (L&S) 189 : AIR 2001 SC 24] this Court held (AIR vide para 2): (SCC p. 188)

“2. ... the doctrine (natural justice) is now termed as a synonym of fairness in the concept of justice and stands as the most accepted methodology of a governmental action.”

(emphasis supplied)

30. In *Union of India v. Tulsiram Patel* [(1985) 3 SCC 398 : 1985 SCC (L&S) 672 : AIR 1985 SC 1416] (AIR vide para 97) a Constitution Bench of this Court referred to with approval the following observations of Ormrod, L.J. in *Norwest Holst Ltd. v. Secy. of State for Trade* [(1978) 3 WLR 73 : (1978) 3 All ER 280 : 1978 Ch 201 (CA)] : (All ER p. 295a-b)

“The House of Lords and this Court have repeatedly emphasised that the ordinary principles of natural justice must be kept flexible and must be adapted to the circumstances prevailing in any particular case.”

(emphasis supplied)

31. Thus, it is well-settled that the rules of natural justice are flexible. The question to be asked in every case to determine whether the rules of natural justice have been violated is: have the authorities acted fairly?

32. In *Swadeshi Cotton Mills v. Union of India* [(1981) 1 SCC 664 : AIR 1981 SC 818] this Court following the decision in *Mohinder Singh Gill v. Chief Election Commr.* [(1978) 1 SCC 405 : AIR 1978 SC 851] held that the soul of the rule (natural justice) is fair play in action.

35. Thus natural justice has an expanding content and is not stagnant. It is therefore open to the court to develop new principles of natural justice in appropriate cases.

36. 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.

(emphasis supplied)

10.3. The aforesaid decision in the case of ***Dev Dutt*** (supra) is confirmed by the Full Bench of the Honourable Apex Court in the case of ***Sukhdev Singh*** (supra), wherein it was held thus:

“8. In our opinion, the view taken in Dev Dutt [Dev Dutt v. Union of India, (2008) 8 SCC 725 : (2008) 2 SCC (L&S)

771] 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.”

(emphasis supplied)

10.4. Prior thereto, in the past also, the Honourable Apex Court in terms, has criticized the action of the State when found that there was an inordinate delay in communicating the ACRs to its employee, by observing that it lost its significance if there is an inordinate delay made in communication of the ACR to the employee. It went on to say that it frustrates right of the employee to make effective representation.

10.5. In the case of *State of Haryana vs. P.C. Wadhwa reported in (1987) 2 SCC 602*, it was observed as under:

“14. The whole object of the making and communication of adverse remarks is to give to the officer concerned an opportunity to improve his performances, conduct or character, as the case may be. The adverse remarks should not be understood in terms of punishment, but really it should be taken as an advice to the officer concerned, so that he can act in accordance with the advice and improve his service career. The whole object of the making of adverse remarks would be lost if they are communicated to the officer concerned after an inordinate delay. In the instant case, it was communicated to the respondent after twenty-seven months. It is true that the provisions of Rules 5, 6, 6-A and 7 are directory and not mandatory, but that does not mean that the directory provisions need not be complied with even substantially. Such provisions may not be complied with strictly, and substantial compliance will be sufficient. But, where compliance after an inordinate delay would be against the spirit and object of the directory provision, such compliance would not be substantial compliance. In the instant case, while the provisions of Rules 5, 6, 6-A and 7 require that everything including the communication of the adverse remarks should be completed within a period of seven months, this period cannot be stretched to twenty-seven months, simply because these Rules are directory,

*without serving any purpose consistent with the spirit and objectives of these Rules. We need not, however, dilate upon the question anymore and consider whether on the ground of inordinate and unreasonable delay, the adverse remarks against the respondent should be struck down or not, **and suffice it to say that we do not approve of the inordinate delay made in communicating the adverse remarks to the respondent.***

(Emphasis supplied)

10.6. Likewise, in the case of *Baidyanath Mahapatra vs. State of Orissa and another reported in (1989) 4 SCC 664*, noticing the fact that adverse entries for several years were communicated in a lot to the employee by the State (like case on hand), the Honourable Apex Court observed that the object of communicating entries is defeated by such action of the State. It has been so held that an adverse entry awarded to a government servant must be communicated to him within a reasonable period to afford him opportunity to improve his working and conduct and also to make representation in the event he considered it unjustified. But such belated communication of entries in one lot is a denial of reasonable opportunity to the government servant to improve his

performance; rather, it would be impossible for him to make effective representation against adverse entries having been received after an inordinate delay. The pertinent observations read thus:

“6. The adverse entries for the years 1969-1970, 1970-1971, 1972-1973 and 1975-1976 were communicated in a lot to the appellant in 1978, although under the instructions issued by the State Government the adverse entries must be communicated by December of each year. The purpose of communicating adverse entries to the government servant is to inform him regarding his deficiency in work and conduct and to afford him an opportunity to make, amend, and improve his work and further if the entries are not justified the communication affords him an opportunity to make representation. If the adverse remarks awarded to a government servant are communicated to him after several years, the object of communicating entries is defeated. It is therefore imperative that the adverse entries awarded to a government servant must be communicated to him within a reasonable period to afford him opportunity to improve his work and conduct and also to make representation in the event of the entry being unjustified. In the instant case, adverse entries relating to a number of years were communicated to

*the appellant in one lot under a letter dated 27-2-1978 contrary to the instructions issued by the State Government as contained in Circular No. 29 dated 19-2-1953. **Belated communication of the entries resulted in denial of reasonable opportunity to the appellant to improve his performance. Further since adverse remarks for several years were communicated with inordinate delay it was impossible for the appellant to make an effective representation against the same.** The appellant's representation against the aforesaid entries was rejected on 12-3-1981 on the ground that the representation was barred by time. Since the communication of the adverse entries was itself highly belated the representation against those adverse remarks should have been considered on merits and the same could not be rejected on the alleged ground of delay as the Government itself was guilty of inordinate delay in communicating the adverse remarks to the appellant."*

(emphasis supplied)

11. Having considered the aforesaid case law, the principle deduced from their ratios is that the action of the State towards its employee must be just and fair, and whenever there is unfair action on the part of the State or its instrumentality observed by the Court, the same would be considered in violation of the principles of natural justice. In such circumstances, the action

requires to be struck down. It is also held that the rule of principles of natural justice are flexible and it would be the duty of the Court to see in each case as to whether the rules of natural justice have been observed, inasmuch as, whether the authorities acted fairly or not. As held above, the purpose of communication of ACRs/APARs every year within reasonable time to a public servant is to help him to work harder and achieve more, which helps him in improving the work and to get better results. The purpose of communicating the APARs would get frustrated if all APARs are communicated in one lot to a public servant as by doing so, neither the public servant had an opportunity to effectively make his representation due to unreasonable delay in getting such APARs, nor had a chance to improve his work, thereby not helping him to get it consider for promotion when not secured minimum benchmark. Whenever, it has been observed that the State or its instrumentality acted in unfair manner, i.e., it communicates all relevant previous years' APARs in one lot to its employee, the whole object of making the entry in the APARs would be lost due to inordinate delay made in its communication. Such an action on the part of the State or its instrumentality cannot

be approved or encouraged by this Court as it is not fair by any means.

12. Now, taking note of the aforesaid undisputed facts of the present case that the respondent had also communicated all APARs for the period of 2008–09 to 2011–12 in one lot to the petitioner only on 2nd April 2013, thereby, it frustrated the object and purpose of communicating the APARs to the petitioner. This Court cannot oblivious of the fact that aforesaid communication of all APARs in one lot cannot by any stretch of imagination considered as communicated by the respondent within reasonable time. This Court cannot countenance the submissions of the respondents that mere delay in communicating APARs to the petitioner would not prejudice his right to be considered for promotion. It cannot be termed as mere irregularity as portrayed by the respondent. At the cost of repetition, the object and purpose of communicating the APAR regularly each year to the petitioner was not only to give an opportunity to submit his representation if aggrieved by the entry made in the APAR, but also to give him a chance to improve himself in his service to achieve higher excellence, which ultimately could have benefited him to secure the

minimum benchmark as set out by the respondent when it introduced Rules, 2012. It also brings transparency in the recording the remarks in APARs. All these would lead to observe and fulfil the principles of natural justice. Even, the inordinate delay in communicating the APARs to the petitioner would also frustrate his right to effectively submit his representation. This amounts to violation of the principles of natural justice as the aforesaid act of the respondent is highly unjustified and unfair to the petitioner.

13. Furthermore, all previous years' APARs were communicated to the petitioner by the respondent on a request being made by the petitioner and its decision taken the day on which by the DPC met for promotion. It can also be gainsaid that the appraisal filled in by the petitioner would give him an idea about the entry to be made in the APAR every year. In my view, unless and until, the petitioner got the APAR every year within reasonable time from the respondent, he had no chance to get a clear picture about his work assessed by his superior and simultaneously had no opportunity to improve his standard of working to achieve his optimum standard.
14. It has been pointed out during the course of arguments that in

subsequent years from 2012–13 onwards until 2021–22, on getting the APAR every year from the respondent, the petitioner not only improved his standards but achieved either 'Very Good' or 'Outstanding' entries in his APARs for the said years'. This itself shows that on getting the APAR every year, the petitioner was made aware about his work and assessment by his superior, thereby he achieved the excellence in his service. The said fact cannot be overlooked by this Court.

15. There is no cavil that rules prevailing at the time of the promotional exercise undertaken by the employer require to be taken note of, and not those prevailed at the time the promotional post fell vacant. [See: **Raj Kumar** (supra)]. It is also undisputed position of law that right to consider for the promotion is fundamental right and not to get promotion. [See: **Hardev Singh** (supra)]. But at the same time, when the action of the respondent is found arbitrary, violative of Article 14 the Constitution of India, and so also against the principles of natural justice as its unfair, whereby, due to such an unfair action of the respondent, the right to be considered for promotion of the petitioner gets violated as aforesaid, such an arbitrary and unfair action on the part of the respondents

requires to be struck down by this Court.

16. It is trite that whenever this Court found the action of the State is arbitrary, violative of Article 14 of the Constitution of India, or against the principles of natural justice, such an action of the State requires to be interfered by this Court.
17. Having considered the aforesaid facts and circumstances of the case and applying the ratios of the aforesaid decisions to the facts of the present case, I am of the view that the action of the respondent in not communicating previous years' APARs within a reasonable time to the petitioner prior to 2013 is nothing but an unfair action on its part, which is violative of the principles of natural justice. There is no justifiable reason forthcoming from the side of the respondent in not communicating the APARs within reasonable time, this amounts to arbitrary action, which is violative of Article 14 of the Constitution of India. As such, right of the petitioner either to effectively made representation or to improve his standards got severally affected due to high handedness of the respondent by belatedly communicated the APARs. Thus, in view of the aforesaid, the action of the respondent impugned in this petition is hereby struck down.

CONCLUSION:

18. The upshot of the aforesaid observations, discussions and reasons would lead to the following inescapable conclusion:

18.1. The respondent's inordinate delay in communicating the APARs for the years 2008–09 to 2011–12 in one lot to the petitioner is unjust, unfair, unreasonable, and unsustainable in law.

18.2. Since there was an inordinate delay on the part of the respondent in communicating the APARs to the petitioner as aforesaid, it would be violative of the principles of natural justice and so also Articles 14 of the Constitution of India as due to such inordinate delay and sending all the APARs in one lot, the petitioner could neither had a chance to improve his working to achieve optimum standard nor effectively represented against the remarks made in the APARs.

18.3. The Respondent alone should be blamed for not communicating the APARs to the Petitioner within a reasonable time; thereby, his right to be considered for promotion to Grade E-4, which is his fundamental right, was not only frustrated but violated.

18.4. Due to the Respondent's failure to communicate the APARs each year within a reasonable time, the Petitioner should not be made to suffer; rather, it is incumbent upon the Respondent to consider the Petitioner's case for promotion without taking into account the benchmark fixed under Rule 11 read with Rule 18 of the Rules, 2012.

19. Thus, in view of the aforesaid conclusion, the respondent is hereby directed to hold meeting of the DPC within one month from today to consider the case of the petitioner for promotion from Grade E-3 to E-4 without taking into account the benchmark as per the Rules, 2012. Nonetheless, other criteria which requires to be taken into consideration as per Rules, 2012 to consider the case of the petitioner for promotion may be taken note by the DPC.

20. If the petitioner is found eligible for promotion from Grade E-3 to E-4, an appropriate order shall be passed by the competent authority of the respondent. Such promotion shall be given effect from the date on which his junior was promoted, albeit without any monetary benefits; however, all notional benefits, including continuity of service in the promotional post, shall be extended by the respondent.

- 21.** In view of the foregoing conclusion, the present writ petition is allowed. Rule is made absolute, to the aforesaid extent. There shall be no order as to costs. Direct Service is permitted.

NILESH

(MAULIK J. SHELAT, J)