

(2019) 11 DEL CK 0098

In the Delhi High Court

Case No : Letters Patent Appeal No. 172 Of 2019

Hindustan Petroleum Corporation Ltd & Ors

APPELLANT

Vs

Vipin Kumar

RESPONDENT

Date of Decision : 08-11-2019

Acts Referred:

Mysore State Civil Services General Recruitment Rules, 1957 — Rule 43(b)

Citation : (2019) 10 AD(Delhi) 660

Hon'ble Judges : G.S. Sistani, J; Jyoti Singh, J

Bench : Division Bench

Advocate : Priyanka Das, Alakh Alok Srivastava, Chandan Kumar Singh

Final Decision : Allowed

Judgement

Jyoti Singh, J

C.M. Appl. No. 36160/2019 (for taking additional documents on record)

1. This is an application seeking permission to place additional documents on record.

2. For the reasons stated therein, the application is allowed and the additional documents are taken on record.

Application stands disposed of.

LPA 172/2019

3. The present appeal has been filed by Hindustan Petroleum Corporation Limited and Ors., (hereinafter referred to as the appellants) against the judgment dated 20.2.2019 passed by the learned Single Judge whereby the writ petition filed by the respondent herein has been allowed. Order dated 21.5.2018 passed by the Appellant Corporation and the impugned ACR for the year 2014-15 was set aside and the appellants herein were directed to promote the petitioner from Salary Grade 'D' to the salary Grade 'E' with retrospective effect with all consequential

benefits.

4. For the sake of convenience, the appellants herein, who were respondents in the writ petition, will be referred herein as appellants and the respondent herein, who was the petitioner in the writ petition, would be referred to as the respondent hereinafter.

5. The respondent joined the service of the appellants on 28.10.1991 as an Officer Training (Management Employee). Under the Career Development Policy, respondent was promoted in the 'Management Cadre' in Entry Level Salary Grade 'A'.

6. Subsequently, the respondent was promoted to Grade 'B' and from Grade 'B' to 'C' and finally from 'C' to 'D' in 2007. As per the eligibility conditions and the minimum length of service, the respondent was due to be considered for promotion from salary Grade 'D' to 'E' by a DPC in 2011. Promotions in the Appellant Corporation are governed by 'HPCL Promotion Policy-Management Employees'. Vide Office Memorandum dated 14.5.2009 the Government of India mandated that full APAR of an employee, including the remarks of the reviewing/accepting Authority, were to be communicated to him, within a reasonable period. The 'Performance Appraisal System' of the appellants is governed by Rule 8.1 of the Personnel Manual.

7. For the APAR year 2014-15 respondent submitted his goals and targets through Online Performance Management System. These were required to be approved by the then Reporting Officer and further by the Reviewing Officer. As per the case of the respondent, the goals and targets submitted by him were returned back to him by his Reporting Officer on 6.9.2014 with certain remarks. The respondent modified his goals and targets as per the comments and resubmitted the same on 18.9.2014. However, on 20.10.2014, these were returned back by the Reviewing Officer with certain more comments. The respondent resubmitted the goals and targets on 4.12.2014 but only to be returned on 31.12.2014 with certain comments. Finally, on 20.3.2015 the Reporting Officer approved the targets resubmitted by the respondent on 29.1.2015 and the Reviewing Officer approved them on 15.4.2015.

8. It was the case of the respondent in the writ petition that the Annual Performance Management Report for the year 2014-15 had been marked as 'Below Target' against 3 out of 32 counts, in the first six monthly assessment i.e. HRD-1 or 'H1'. However, his performance subsequently improved and he was marked as 'meeting target' in all the 32 counts in his next six-monthly assessment i.e. HRD-2 or H2. Thus, by the end of 2014-15 respondent was marked as 'Meeting Target against all counts annually'.

9. The respondent had averred in the petition that in the month of October, 2015 he did not receive his Monthly Expected Bonus/Performance related payment and it was then that he sensed that he may have been given a low rating in his APAR for the year 2014-15, though he had never been communicated any low rating.

On the basis of this presumption, the respondent submitted a representation dated 27.10.2015 against his down graded rating, pertinently even mentioning the grading of '4'.

10. On 15.1.2016, the appellants released the list of employees promoted on being recommended by the DPC which had been held in January, 2016, but the name of the respondent did not figure therein.

11. Respondent then submitted his grievance to the Management Employee Relations Committee (MERC) and also attended an oral hearing on 27.1.2016 regarding his rating of '4' in the APAR. On 20.9.2016, an order was passed by the appellants rejecting the representation.

12. Aggrieved by the action of the appellants, the respondent filed W.P.(C) 5795/2017 before this Court, which was disposed of on 11.4.2018 directing the appellants to reconsider the representation dated 27.10.2015 and pass a speaking order. Vide order dated 21.5.2018 the appellants rejected the representation once again. It is this rejection and the grievance against the APAR 2014-15, which brought the respondent before the learned Single Judge by filing W.P.(C) No. 6862/2019.

13. Before the Single Judge, the stand of the appellants was that the directions passed by this Court on 11.04.2018 were duly complied with, by passing a detailed speaking order dated 21.05.2018. The appraisal and performance of the respondent was reviewed at various levels by different management superiors as well as at the Head Quarter level including the MERC which was the Appellate body and only thereafter, the rating of '4' given for the APAR 2014-2015 was finally approved. Reliance was placed on the judgment of the Apex Court in the case of Saroj Kumar vs. Union of India (2015) 12 SCC 198 on the proposition that after the ACRs have been communicated and representation rejected, the Tribunal should not treat the remarks as uncommunicated. On the proposition that the Courts in a judicial review should not interfere in the decision of a Selection Committee, reliance was placed on the judgment of Dalpat Abasaheh Solunke and Ors. vs. Dr. B.S. Mahajan and Ors. (1990) 1 SCC 305 and Union of India & Anr. vs. S.K. Goel & Ors. (2007) 14 SCC 641.

14. The learned Single Judge held that since the impugned APAR was not communicated to the respondent before the DPC was held, despite the grading being downgraded to '4', it was in violation of the law laid down by the Apex Court in the case U.P. Jal Nigam & Ors. vs. Prabhat Chandra Jain & Ors. (1996) 2 SCC 363, Dev Dutt Vs. Union of India (2008) 8 SCC 725, Sukhdev Singh vs. Union of India & Ors. (2013) 9 SCC 566, High Court of Judicature at Patna, through R.G. vs. Shyam Deo Singh & Ors. (2014) 4 SCC 773, Daljit Singh Grewal vs. State of Punjab & Ors. (2015) 9 SCC 680, Union of India vs. V.S. Arora & Ors. [order dated 31.05.2012 passed in W.P.(C) 5042/2012] etc. The learned Single Judge also noted the law laid down by the Apex Court in the case of Abhijit Ghosh Dastidar Vs. Union of India & Ors. (2009) 16 SCC 146 and held that the

downgrading in the APAR of the respondent had an adverse effect on his promotion and since it was not communicated, the same was to be ignored by the DPC. Reliance was also placed on an O.M. dated 14.05.2009 issued by the Government of India regarding communication of the APARs along with the remarks of the Reviewing Officer and the Accepting Authority.

15. The learned Single Judge also looked into the concerned APAR for the year 2014-15 and came to a finding that the rating given to the respondent was not justified. If the respondent had achieved the parameter of 'Meeting Target' in the later half of the year i.e. in the H2 assessment, then he could not have been given the remark of

'Below Target' on three counts, annually i.e. for the entire year 2014-15. Notice was also taken of the fact that in the next performance year, the respondent had achieved 'Exceeding Target' and that in his entire career of 27 years, the respondent had never been rated as low as '4'. For the detailed reasons set out in the judgment, the learned Single Judge quashed the APAR of 2014-15 as being a 'downgraded' ACR not having been communicated, before the holding of DPC. Direction has been given by the learned Single Judge to the appellants to promote the respondent from salary grade 'D' to the salary grade 'E' with retrospective effect, after ignoring the rating '4' given for the year 2014-15, with all consequential benefits.

16. Aggrieved by the said judgment, the appellants have filed the present appeal.

17. At the outset, it is contended by the learned counsel for the Appellants that the direction given by the learned Single Judge to promote the respondent is not sustainable in law as it is not for the Courts to direct promotion of any employee. At best, in case it is found that an employee has been wrongly denied promotion, the Court can direct only reconsideration. It is in the domain of the Selection Committee, which has experts, to decide whether an employee has to be recommended for promotion or not based on his service record and profile.

18. Learned counsel further contends that the process of selection can be challenged only if it is vitiated on the ground of bias/malafide. Reliance is placed on the judgment of the Apex Court in SBI vs. Md. Mynuddin (1987) 4 SCC 486, wherein it was held as under:-

"5. Whenever promotion to a higher post is to be made on the basis of merit no officer can claim promotion to the higher post as a matter of right by virtue of seniority alone with effect from the date on which his juniors are promoted. It is not sufficient that in his confidential reports it is recorded that his services are "satisfactory". An officer may be capable of discharging the duties of the post held by him satisfactorily but he may not be fit for the higher post. Before any such promotion can be effected it is the duty of the management to consider the case of the officer concerned on the basis of the relevant materials. If promotion has been denied arbitrarily or without any reason ordinarily the court can issue a direction to the management to consider the case of the officer concerned for

promotion but it cannot issue a direction to promote the officer concerned to the higher post without giving an opportunity to the management to consider the question of promotion. There is good reason for taking this view. The court is not by its very nature competent to appreciate the abilities, qualities or attributes necessary for the task, office or duty of every kind of post in the modern world and it would be hazardous for it to undertake the responsibility of assessing whether a person is fit for being promoted to a higher post which is to be filled up by selection. The duties of such posts may need skills of different kinds - scientific, technical, financial, industrial, commercial, administrative, educational etc. The methods of evaluation of the abilities or the competence of persons to be selected for such posts have also become nowadays very much refined and sophisticated and such evaluation should, therefore, in the public interest ordinarily be left to be done by the individual or a committee consisting of persons who have the knowledge of the requirements of a given post, to be nominated by the employer. Of course, the process of selection adopted by them should always be honest and fair. It is only when the process of selection is vitiated on the ground of bias, mala fides or any other similar vitiating circumstances other considerations will arise. The nature of the writ that can be issued in cases like the one before us has been considered by this Court in the *State of Mysore v. Syed Mahmood* [AIR 1968 SC 1113 : (1968) 3 SCR 363 : (1970) 1 Lab LJ 370 : 1968 Lab IC 1291.] . In that case Rule 43(b) of the Mysore State Civil Services General Recruitment Rules, 1957 required promotion to be made by selection on the basis of seniority-cum-merit, that is seniority subject to the fitness of the candidate to discharge the duties of the post from among persons eligible for promotion. While making selections for promotions to the post of senior statistical assistants from the cadre of junior statistical assistants, the State Government did not consider the case of the respondents therein who were junior statistical assistants, and published a list promoting persons ranking below them in point of seniority. The respondents therein filed writ petition before the High Court. The High Court while refusing to quash the seniority list directed the appellant-State to promote the respondents as from the dates on which their juniors were promoted and treat their promotion as effective from that date. In the appeal filed against the judgment of the High Court this Court observed that while making selections for promotion to the post of senior statistical assistants from the cadre of junior statistical assistants in 1959, the State Government was under a duty to consider whether having regard to their seniority and fitness they should be promoted. Since the promotions were irregularly made the respondents therein were entitled to ask the State Government to reconsider their case. In the circumstances, this Court observed, that the High Court could only issue a writ to the State Government compelling it to perform its duty and to consider whether having regard to their seniority and fitness, the respondents should have been promoted on the relevant dates when officers junior to them were promoted and that instead of issuing such a writ the High Court had wrongly issued a writ directing the State Government to promote them with retrospective effect. This Court further

observed that the High Court ought not to have issued such a writ without giving the State Government an opportunity in the first instance to consider their fitness for promotion in 1959. The ratio of the above decision is that where the State Government or a statutory authority is under an obligation to promote an employee to a higher post which has to be filled up by selection the State Government or the statutory authority alone should be directed to consider the question whether the employee is entitled to be so promoted and that the court should not ordinarily issue a writ to the government or the statutory authority to promote an officer straightway. The principle enunciated in the above decision is equally applicable to the case in hand."

19. Learned counsel next contends that if the direction of the learned Single Judge is given effect to, it will effect the promotion of other persons, who have been already promoted but have not been made a party to this petition. Relying on J.S. Yadav Vs. State of UP & Ors. (2011) 6 SCC 570, it is argued that an unsuccessful candidate is bound to implead the successful candidate, whenever a selection process is challenged. Thus, the impugned judgment would have the effect of unsettling the settled promotions and seniority.

20. Learned counsel next contends that it is not for the Courts to interfere in the performance ratings and marks given by the concerned authorities in the APARs/ACRs. He submits that the performance appraisal of the respondent is based on the assessment of his performance on half yearly basis whereby half-yearly targets as well as annual targets have been set for the employees and the performance is accordingly recorded under the caption 'H1 Milestone (April-September) and H2 Milestone (October-March)'. Thus, merely achieving the target in one half of the year, i.e. during the H2 assessment, does not ipso facto imply that the overall performance of the officer was meeting the target for the entire year of the APAR. It is submitted that this system of half-yearly appraisals is followed uniformly for all employees of the Appellant Corporation.

21. Learned counsel further submits that the Reporting/Reviewing officer had rated the respondent on the basis of his performance. Various factors such as initiative, alertness, resourcefulness, dependability, cooperation, adaptability, effectiveness, etc. have to be seen including the 'targets achieved' and the Reporting and Reviewing Officers are best suited to assess these parameters and grade the respondent. Learned counsel further points out that the H1 Milestone in respect of KPI -1 and KPI-4 i.e. Survey of new lighting techniques and fixtures and online housing maintenance system respectively were mentioned as 'NIL' by the respondent as he could not achieve those targets. Tailormade targets were subsequently finalized by the respondent during the fag end of H1 for the first time and was rightly rated by the Reporting officer as 'Below Target'. Similar explanation has been given by the learned counsel for rating against KPI-8.

22. Learned counsel thereafter contended that the law laid down by the Apex Court in the case of Dev Dutt (supra) and subsequently in various judgment is that a downgraded or a Below Benchmark grading in an APAR must be

communicated to an employee, before he is considered for promotion as the same can have an adverse effect on his promotion. He submits that the law therefore, requires only communication of an adverse/downgraded ACR and thereafter, if a representation is received, then the same would have to be considered. The argument is that once the representation has been considered and rejected, the Courts cannot interfere in the finding of the authority, who has, with its expertise taken a conscious decision to uphold the rating/adverse remarks in the ACRs. It is submitted that although in the present case, the ACR of 2014-15, which had a low rating of '4' had not been communicated before the DPC, but the respondent was very well aware of the said rating and had, in fact, made a representation dated 27.10.2015 against the said APAR. The said representation was considered after receiving comments from the Reporting and the Reviewing Officer and was rejected on 20.09.2016. However, pursuant to the orders of this Court in the earlier writ petition, the representation was reconsidered and rejected by a detailed speaking order dated 21.05.2018. The counsel thus submits that the law as laid down in *Dev Dutt* (supra) and other judgments, had been followed in letter and spirit and this Court should not interfere in the APAR after the representation had been rejected.

23. Learned counsel for the respondent, on the other hand, submits that the respondent had joined the Appellant Corporation in 1991 and was subsequently promoted on three occasions. He had an illustrious and unblemished career. In his entire service with the appellant, he has never received a rating of '4'. He has also contended that the APAR with the low rating of '4' was never communicated to the respondent and the DPC was held for promotion from salary grade 'D' to salary grade 'E' taking into account this APAR. Learned counsel submits that while it is true that he had made a representation against the APAR of 2014-2015 but that was because at the relevant time, he had been denied his monthly bonus and performance related payment and he had presumed that he had been given a low rating of '4'. This representation accordingly to the learned counsel was not based on a formal communication of the APAR and thus the law as laid down by the Apex Court in *Dev Dutt* (supra) and other judgments, requiring communications of downgraded ACR had been completely violated. Learned counsel points out that the appellants cannot dispute the fact that that rating of the respondent was for the first time officially made known to him only through their reply dated 20.09.2016, while responding to his representation. Learned counsel contends that it is absolutely wrong for the appellants to have marked the respondent as 'Below Target' for 3 counts out of 32 in the year 2014-2015. As per the assessment policy, the Reporting Officer assesses the performance of an employee in H1 and flags the areas requiring improvement at the end of six months and the employee is expected to improve himself in the next six months of the assessment year i.e. in the phase of H2. He thus submits that the respondent had in the H2 phase achieved the parameter of 'Meeting Target' and therefore, the 'Below Target' assessment in the H1 part should not have influenced the overall rating.

24. Learned counsel for the respondent further contends that the rating of '4' is completely unjustified and is not commensurate with his performance during the said period. He has drawn the attention of this Court to the impugned APAR which is filed on the Court record and is at page 189 onwards. It is submitted that though it is an annual APAR but the assessment is made in two parts on half yearly basis.

25. Learned counsel for the respondent had questioned the remarks of target achievements given in his APAR for different KPIs. He submits that if for KPI-1, the input for 'Pilot Project Implemented' was sufficient to qualify for the remark, 'Meeting Target' in H2 then why the same was not good enough for the same remark in H1.

Similar submissions have been made for the 'Below Target' remarks given in other KPIs and which we quote as under:

"(b) KPI-4: Online Housing Maintenance System -

It is quite axiomatic from a bare perusal of the enclosed Performance Management Report of the Petitioner for the year (2014-2015) that against the aforesaid KPI-4, for the identically same input of "HMS is re-energized" recorded by the Petitioner in both H1 and H2, the Respondents have given their different Remarks as "Below Target" for H1 and "Meeting Target" for H2. The humble submission of the Petitioner is that if the input of "HMS is re-energized" was sufficient to qualify for remark "Meeting Target" in H2 then why the same was not also given at "Meeting Target" in H1. This clearly shows the sheer arbitrariness and non-application of mind on the part of the Respondents while giving remarks of "Below Target" in H1 to the Petitioner towards this KPI-4 and thus such remarks are liable to be outrightly rejected.

(c) KPI-8: NPCB Canteen Renovation: It is quite axiomatic from a bare perusal of the enclosed Performance Management Report of the Petitioner for the year (2014-2015) that against the aforesaid KPI-8, the Petitioner has given his comments - "M/s Hind Ware yet to commence jobs. Site Handed Over". In H1 to which the Respondents have given their remarks as "Below Target" in H1 whereas when the Petitioner has given his comments - "PO placed. Concept frozen. Job not yet commenced by the Party." then he has been given remarks of "Meeting Target". In this regard, it is respectfully submitted that the captioned NPCB Canteen Renovation meant that the Office Canteen of the GMO-North Zone, Scope Minor, Delhi, was required to be vacated for at least 3-4 months as lunch was being served to approximately 200+ employees in that canteen. Decision to put canteen out of service was only to be taken after discussions with different SBUs/ Department Head and above all the non-management employees' Unions. Moreso, an agreement was to be reached regarding alternate source or type of lunch to be served for 3 months. Such large scale co-ordination with different SBU heads and placing the PO was beyond the authority and control of the petitioner and at the most he could have requested his supervisor

to expedite the same, which he regularly and consistently did.

It is noteworthy to mention here that subsequently, the Petitioner was able to complete the entire NPCB Canteen Renovation work in record time of 1.5 months as against the total stipulated time of 6 months, for which he was rated "Exceeding Target" in the next performance year. Hence, such remarks of "Below Target" in the year (2014-15) is utterly malafide and unfounded and thus the same is liable to be rejected in the interest of justice. Without prejudice and without admitting, the humble Petitioner submits that even if it is assumed that the Petitioner's performance was found to be "Below Target" in H1 (first six months) against this single KPI, then too it cannot be construed to be a lapse warranting comment like "considerable number at targets not met" by any stretch of imagination and it cannot culminate into rating '4' of the Petitioner, particularly considering that the said target was admittedly met in the next six months i.e. by the end of the year (2014-2015)."

26. Learned counsel for the respondent has drawn the attention of this Court to a table captured by him in his petition indicating his ratings in the ACRs from the year 2005-06 to 2016-17, to contend that in the entire career of 27 years, he never had a grading of '4' except in the impugned ACR. We quote the table for ready reference:

YEAR

REMARK

RATING

2005-06

Very Good

2

2006-07

Very Good

2

2007-08

Very Good

2

2008-09

Very Good

2

2009-10

Good

3

2010-11

Good

3

2011-12

Good

3

2012-13

Good

3

2013-14

Very Good

2

2014-15

Average

4

2015-16

Good

3

2016-17

Very Good

2

27. Learned counsel for the appellant, in rejoinder, has referred to the HR policy followed by the appellants for assessment of the ACRs and has explained the manner in which the comments on account of target and goal achievements are made in the ACRs and ratings are given. It is also submitted that the respondent had the remedy of filing an appeal to the MERC against the rejection of his representation, which he has chosen not to avail of and the petition was premature.

28. We have heard the respective counsels for the parties and examined their rival submissions.

29. We shall first deal with the contention of the appellants that the learned Single Judge could not have given direction to promote the respondent. We find force in the submission of the counsel for the appellants as regards this contention. Recommending for promotion and granting promotion is in the domain of the Selection Committee/DPC constituted by the experts in the field. It is not for the Courts to substitute themselves as members of the Selection Committee. Likewise, it is not in the domain and jurisdiction of the Court to even direct an employer to promote their employee. If in a given case, the court comes to a conclusion that the Selection Committee has committed an error in not recommending an employee or there is illegality in action such as considering uncommunicating 'below bench mark' or 'downgraded' or 'adverse' ACRs, then the only direction that a court can give is to reconsider the employee for promotion based on the correct parameters. Thus, this part of the direction of the learned Single Judge directing the appellants to promote the respondent deserves to be set aside.

30. In so far as the contention that selection can be challenged only if it is vitiated on ground of bias / mala fide, is concerned, there cannot be a quarrel on this proposition of law. Perusal of the writ petition would show that the respondent has specifically alleged bias in his writ petition. In Ground 'K' it is averred that the arbitrariness and mala fide of the appellants while passing the order on the representation is evident from page 4 of the order wherein they have falsely attributed delay in approval of goals and targets for the year 2014-15 to the petitioner. Respondent has further averred that the revised goals and targets submitted by the petitioner were never objected to by his Reporting Officer and were approved on 18.09.2014, but the Reviewing Officer on account of his bias kept objecting to the same and finally this culminated into downgrading of his ratings from '3' to the rating of '4'. It is also averred that the revised goals and targets were finally approved by both the Reporting and the Reviewing Officer, though after an inordinate delay of more than two and half months, which reflects a bias and prejudice approach. Similar allegations have been made in Ground 'L', 'M', and 'N' of the writ petition. Thus, it is open to this Court to examine the APARs and the selection process questioned in this writ petition, by the respondent. It has been held by the Apex Court and this Court in several judgments that the decision making process and the process adopted by the Selection Committee can be examined by the Courts, where the decision making process is arbitrary or motivated with mala fides.

31. The next contention of the appellants is that if the relief is granted to the respondent it will affect the promotion of others, who have been promoted but have not been made a party to the petition. Insofar as this contention of the appellants is concerned, in our view, the same has no merit. The respondent has taken a clear stand that the promotion sought by him was on 'stagnation' basis. The respondent has submitted that the appellants have two streams of promotion, one on 'seniority-cum-merit' basis and the other on 'stagnation' basis. He has submitted that the appellants have never segregated the list of

officers based on mode of promotion and therefore it is impossible to classify and differentiate and the respondent is not in a position to identify the parties who would be affected by his promotion in his stream. There is no rebuttal to this argument by the appellants since the appellants have not been able to segregate the officers promoted through various streams. The respondent has rightly not impleaded any officer as it is impossible to identify which officer would be affected if the respondent is promoted by way of the present writ petition.

32. The appellants have contended that Court cannot interfere in the performance rating and marks given by the concerned authorities in the ACRs in the Judicial Review and therefore no interference is called for, in the impugned APAR. This proposition is also undisputed. However, the controversy in the present case largely revolves on whether the impugned ACR was communicated to the respondent before it was reckoned as a part of his profile in the DPC, held for his promotion to salary grade 'E'. There is no dispute between the parties that the impugned ACR had a rating of '4'. There is also no dispute by the appellants that the earlier and the subsequent ACRs of the respondent had ratings of '2'/'3'. Thus, the impugned ACR is the only APAR which is a downgraded APAR with remarks which are adverse in nature. There can hardly be any debate on the impact of this ACR on the promotion of the respondent. The law which has develop in the recent past starting from the judgment of the Apex Court in *Dev Dutt* (supra) followed by several judgments by the Apex Court and this Court leave no manner of doubt that an ACR of an employee, which is adverse or downgraded or below bench mark would have to be communicated. In fact, following the judgment of *Dev Dutt* (supra), the Central Government has issued an OM dated 14/05/2009 wherein in fact it is now a mandate to the Government with effect from 2010 that all APARs of an employee would have to be communicated as a matter of course adverse or otherwise. The object and rationale behind this decision is that the real purpose of an ACR is to assess the performance of an employee and grade him as per his performance. The objective of writing an ACR is also to inform the employee if he is lacking in his duties or performance or any other trait and to caution him to improve his performance. It is only when the ACR is communicated to an employee, he would know the drop in his performance, enabling him to improve. Thus, as per the law as it stands now, the employer has a mandate to communicate the APARs to the employee in the regular course, annually. It goes without saying that when an APAR/ACR is adverse or downgraded, it becomes all the more imperative to communicate the same to the employee and that too, well before his consideration for promotion in any ensuing Selection Committee. The main grievance of the respondent is that his APAR of 2014-15 was downgraded and the rating was brought down to '4' and yet the same was not communicated to him before the DPC for his promotion was held. This he pleads is against the law laid down by several judgments such as *Dev Dutt* (supra), *Shekhawat* (supra), *Sukhdev* (supra) to name a few. This plea of the respondent is certainly open to examination in exercise of the power of judicial review by a Constitutional Court.

Thus, we reject the contention of the appellants that the Single Judge could not have examined the impugned APAR.

33. The question that arises at this stage is what is the effect of non-communication of APAR of 2014-15 before the DPC was held. The facts in the present case are a little peculiar. Although it is an undisputed fact that the impugned ACR was never communicated to the respondent herein prior to the holding of the DPC but the fact of the matter is that the respondent on having learnt of a low grading in the said ACR had made a representation to the appellants on 27.10.2015, which was before the DPC was held. The same was rejected on 20.9.2016 but the order was not challenged by the respondent. Another significant fact which cannot be overlooked is that in the earlier round of litigation between the parties, a Single Judge of this Court in WP(C) 6862/2018 had in fact taken cognizance of the said representation and had directed the appellants to consider the same and pass a speaking order. Even this order was never challenged by the respondent. Thus, what emerges is that the respondent had availed the remedy of representing against the impugned ACR. The entire line of judgments from *Dev Dutt* (supra) to *Sukhdev Singh vs. Union of India & Ors.* (2013) 9 SCC 566, a judgment by three Judges of the Apex Court lay down the law that if there is a below benchmark or a downgraded ACR rendered against an employee then the same must be communicated to the ratee and he must be given a chance to represent against the same. In our view, this stage has already been achieved in the case of the respondent. Not only has he made a representation raising a grievance against the ACR but by virtue of an order of the coordinate Bench, the appellants have also looked into the said grievance and passed a speaking order. Thus, it is not open for the respondent to contend that the law as laid down by the Apex Court in the judgments of *Dev Dutt* (supra) etc. has not been followed. The letter and spirit of these judgments would have to be seen, which is an opportunity to the employee to ventilate his grievance, if any ACR/APAR is below a benchmark, nothing more and nothing less. In our view, though the learned Single Judge was right in his observations that the rating of 4 given in the ACR for the year 2014-2015 was not communicated formally but seen in light of attending circumstances, there was no ground to direct that it should be ignored.

34. The learned Single Judge while deciding the writ petition has laid emphasis on the fact that the respondent had achieved the targets in the period covered by the second half of the ACR and therefore, the non-achieving of targets in the first period should not have influenced the overall rating as the ACRs have to be assessed on annual basis. The appellants have brought on record the HR policy which deals with the assessment of the ACR. It has been explained that the system which was invoked till 2004, had undergone modifications with a view to increase focus and bring rigor in the performance of the employees and therefore, a new policy was brought into effect on 25.05.2012. The salient features of the said policy are as under:

"i. The key performance indicators (KPIs) i.e. the outcomes envisaged from a particular position shall be set for the entire year. The Officers will be required to define and set half yearly targets at the beginning of the year. The targets with milestone shall be for two periods, half-yearly 1 (HI) and half-yearly 2(H2).

ii. The performance review / assessment shall be for half yearly milestones, in addition to the annual review and assessment process.

iii. The reporting and review of performance against the set targets shall thus be based on more substantial period i.e. six months, where meaningful achievements can be reported and reviewed.

iv. As per the communication, the target setting exercise was supposed to be completed on or before 15th of June of the particular year".

35. The appellants have further explained that the said policy was disseminated to the environment and all officers were aware of the criteria of assessment. In fact, vide a communication dated 07.09.2012 detailed revised criteria was laid down, which are as under:

"i. The appraisee ought to complete his HI Review (April to September) against each KPI and HI feedback by the Reporting Officer was supposed to be given under two sections, assessment section and feedback section. While the Reporting Officer is required to provide HI feedback to the Appraisee on a 3-point scale against each KPI as against each quadrant in the system based on his / her performance and contribution during the period, simultaneously the Reporting Officer is also required to provide HI feedback under the areas of significant contributions made, performance enhancement required and behavioural feedback as against the feedback under each quadrant.

ii. After completion of the HI Review by the Reporting Officer, the same is routed to the Appraisee for comments which is thereafter routed to the Reviewing Officer for his comments. The comments of the Reviewing Officer thereafter is routed back to the Reporting Officer which completes the HI review process.

iii. Similar to HI, the Appraisee completes his H2 Review against each KPI and thereafter H2 feedback is given by the Reporting Officer.

iv. Once H2 Assessment and feedback are completed, the HRD II document is generated which forms of Annual Review wherein the Reporting Officer assesses the appraisee under three areas viz. significant contributions made, areas where performance was not in line with the targets and behavioral feedback. The HRD II document is thereafter routed to the appraisee for his annual self review with specific mention of the significant personal contributions made by him during the year including the contributions beyond KPI/targets. The appraisal is thereafter routed for completion of the rating process by the Reporting / Reviewing Officers.

V. The circular also envisaged that the deadlines for HI Self Review was 15th October and all Officers were requested to adhere to the timelines for successful

completion of the appraisal circle".

36. A perusal of the criterion of assessment clearly indicates that the ACRs were to be assessed in two parts. The appraisee had to complete his H1 review (April to September) against KP-1 and H1 feedback by Reporting Officer was supposed to be given under two sections viz. assessment and feedback. After completion of the H1 review by the Reporting Officer, the same is routed to the Appraiser for comments and from there to the Reviewing Officer. The comments of the Reviewing Officer having been rendered, the ACR comes back to the Reporting Officer. This completes the H1 Review Process. The H2 process is completed in a similar manner and thereafter, the HRD-II document is generated wherein the Reporting Officer assesses the Assessee in three areas viz. significant contributions made; areas where performance was not in line with the targets and behavioural feedback. This document is then routed to the Appraiser for his annual self-review. The deadlines for the review are also mentioned in the Policy. It is further evident from a reading of the Policy that the appraisal is finally reviewed by a Moderation Committee, where a group of senior officers with special knowledge of the job profile and the technicalities, assess the performance of the officers on set parameters, which are clearly laid down in the Policy itself.

37. We thus find that a detailed system of assessment of an officer has been laid down in the Policy and there are several checks and balances within the system to ensure that the employee is assessed as per his performance. The appellants have also taken the Court through the ACR and a perusal of the ACR of 2014-15 does reveal that when the goals and target were submitted by the respondent, they were assessed by the Reporting Officer and reviewed by the Reviewing Officer and thereafter, the ACR was sent back to the respondent. The appellants are correct in their submission that a perusal of the HRD-1 document would show that the goals and targets had not been finalized by the respondent even after expiry of H1 (September).

38. The appellants have also explained how the observations of the learned Single Judge against the three KPIs was not correct. A detailed analysis of the assessment has been given as under:

KPI

Target for the year

H1 Target (Apr to Sept)

H2 Target (Oct to Mar)

KPI-1: Survey of new lighting techniques & fixtures

Presentation

H1 Milestone: Nil

H2 Milestone: Presentation

Appraisee HI comments: Market survey done and presentation made. Pilot project implemented at 8th floor GM Office area

Measurement standards H1 : Below Target

Rationale for H1 rating: No target was fixed for H1 against KPI-1 deliberately, since much could not be achieved during H1 and on 11/5/2015 after the appraisal year, when comments were submitted by appraisee, activities completed during H2 was captured in H1, which led to the Reporting Officer assess as below target for H1.

Appraisee H2 comments : Pilot project implemented.

Measurement standards H2 : Meeting Target

Rationale for H2 rating : Since the target was met, the Reporting Officer assessed accordingly during H2.

KPI

Target for the year

H1 Target (Apr to Sept)

H2 Target (Oct to Mar)

KPI-4: Online Housing Maintenance System

Implementation of Housing Maintenance System

H1 Milestone: Nil

H2 Milestone: Registering of housing complaints through HMS.

Appraisee HI comments: HMS is re-energized

Measurement standards H1 : Below Target

Rationale for H1 rating: No target was fixed for H1 against KPI-1 deliberately, since much could not be achieved during H1 and on 11/5/2015 after the appraisal year, when comments were submitted by appraisee, activities completed during H2 was captured in H1, which led to the Reporting Officer assess as below target for H1.

Appraisee H2 comments : HMS re-energized.

Measurement standards H2 : Meeting Target

Rationale for H2 rating : Since the target was met, the Reporting Officer assessed accordingly during H2.

KPI

Target for the year

H1 Target (Apr to Sept)

H2 Target (Oct to Mar)

KPI-8: NPCB Canteen Renovation

Completion of canteen renovation and closure of AR35 lakhs

H1 Milestone: Finalization of concepts, 3D specs, Tender & PO

H2 Milestone: Completion of renovation of canteen by February 15

Appraisee H1 comments: M/s. Hindware yet to commence jobs. Site handed over

Measurement standards H1 : Below Target

Rationale for H1 rating: Finalisation of Tender & PO was within H1 target, but the PO was admittedly placed only during H2 thereby not meeting the target.

Appraisee H2 comments : PO placed, concept frozen. Job not yet commenced by the party

Measurement standards H2 : Meeting Target

Rationale for H2 rating : Since the target was met, the Reporting Officer assessed accordingly during H2.

39. Having perused the said assessment, we do not find any infirmity in the assessment carried out by the appellants. In fact, the MERC in its speaking order, has captured the grievance of the respondent and has dealt with it based on the records, the goals achieved, targets met and the on-ground performance of the respondent. Relevant part of the order is extracted hereinunder:

"It is also observed that with regard to the management canteen renovation activity which has been highlighted by the Officer as a significant contribution, the task interalia includes commencement of canteen renovation activity, placing of PO for additional items. It is obvious that the online appraisal system having embargo with regard to the word limits, only significant targets/ KPIs are being captured in a broader perspective and all incidental and connected activities which flows from the particular KPI though are not captured need to be accomplished by the concerned appraisee, so as to enable the Assessing Officer (Reporting Officer/Reviewing Officer) to take a holistic view in the matter and comment upon the achievements of the individual appraisee. It is also imperative that in order to accomplish/ execute a particular KPI, necessary coordination / follow up with the concerned needs to be carried out by the appraisee. It transpires from the representation that Officer had attempted to justify his action and raised the allegation of bias against the observation of his RO thereby rating the Officer's performance against the particular KPI as "below target" on the pretext that the activity involved discussion with different SBU/

Department Head, unions including making provisions for alternative source / type of lunch for approx. three (3) months, which was not conveyed to Officer post decision/discussion in the matter. However, neither did MERC find any documents on record nor Officer had relied upon any communication taking up the matter with the concerned functionaries/ SBU Heads for resolving the issue. As mentioned earlier, once the activity has been captured under a particular KPI, the concerned appraisee needs to put his best efforts to accomplish the same, including the hurdles, if any. But it transpires from the Officer's representation that he had cited non-intimation of the decision as the reason for not achieving the target, which under no stretch of imagination can be construed as justified. Further, in the later part of the representation, it is noted that he has highlighted regarding placing a Purchase Order dated 22.8.2014 upon a party and subsequently basis the new concept formulated for renovating the canteen, it transpires that no separate PO for the extra item amounting to approx.Rs.13 lakhs was placed. It is quite obvious that in the absence of proper and specific job description, no vendor would commence the job particularly when the extra items for which the PO was not placed was valued approx.Rs.13 lakhs. In the Officer's representation, MERC noted that the Officer did not put forth the facts/ chronology of events, as to what effective steps had been taken by him for placing the revised PO incorporating all the items, on the contrary admitted that LPR for Rs.12.76 lakhs had been prepared only on 1.7.2015 i.e. after the end of the Financial year 2014-15. In view thereof, the aforesaid activity cannot be considered as his significant contribution for the financial year 2014-15 and MERC did not find any cogent reason with regard to contention put forth by the officer In raising the allegation of bias against his Reporting Officer.

With regard to the mention of non-completion of the specs/jobs for aluminum windows at Kaushambi which had been highlighted by his Reporting Officer, MERC noted that though the officer has contended that aluminum windows were never a part of the Officer's KPIs, but as mentioned above each and every minute task/details need not be recorded in the appraisal document(s)/ KPI. Admittedly, the officer was assigned for Maintenance and Repair activities at office, housing complexes under North Zone and accordingly, any task related to the assigned portfolio were integral part which were required to be accomplished by the Officer, particularly when the activity was part of the NPCB budget. The Officer's admittance of preparing LPR and forwarding the same to the Purchase Department itself reflects that the job was within the scope of his portfolio/ assignment. It is observed that the officer had contended that despite forwarding the duly approved LPR to Purchase Department, the tender was not floated for almost 3 to 4 months and attempts were made by the Purchase Department to cover up his delay by way of suggesting that LPRs should be made for sliding windows instead of openable aluminum windows. MERC do not find any document on record submitted by the Officer to substantiate that he had ever followed up with the Purchase Department after forwarding the LPR and even for the sake of argument, the officer had to relent upon the advice of Purchase

Department, no reason could be accorded in his representation as to why he promptly failed to initiate fresh LPR basis the advice of the Purchase Department and prepared the LPR only on 30.7.2015 after the end of the Financial Year 2014-15. In such backdrop, it transpires that having failed to initiate timely action to discharge his role/obligation, he had attempted to put the blame on other departments/functionaries and the lack of coordination with other stakeholders is clearly evident in not accomplishing the aforesaid target as mentioned in his KPI. Significantly, MERC noted that in the behavioural feedback given to him, it is observed that the same has been captured by the Reporting Officer as "needs to collaborate with stake holders to ensure achievement of desired results". In such backdrop, MERC do not find any merit with regard to the allegation of bias levelled against his Reporting Officer in this regard.

As regards, the activity pertaining to Fixed Asset ledger reconciliation, his KPI clearly has a mention regarding the aforesaid target and it is observed that the Reporting Officer had captured the fact that Fixed Asset reconciliation has been completed for Kaushambi, Noida GMO-North Zone, Kautilya Marg etc. and FAIL reconciliation has been completed whereby 63 nontraceable assets have been deleted from the ledger. Thus, the Officer's achievement with regard to the Fixed Assets ledger reconciliation had duly been captured by his Reporting Officer and as per the target, wherein he was required to complete the 100% activity by December 2014 having been completed within the time frame, had duly been rated as "meeting targets" in respect of the aforesaid KPI."

40. The appellants have been able to substantiate, the overall rating of 4 rendered in the impugned ACR. It is seen that the respondent was rated 'Very Poor/Below Average' under certain heads, such as Organizational Commitment, Team Spirit, Profit, Objectives, etc. as per the rating on the 3-point scale by the Reporting Officer. In H1 and H2 , the online system allocates score against each KPIs and the total score of all KPIs is aggregated and linked to the Rating Band in a 5-point rating scale. The respondent, having been assessed 'meeting the target' against 12 KPIs out of 15, naturally got an overall rating of 4.

The said rating has been concurred with, by the Moderation Committee and the Countersigning Authority.

41. We do not see any anomaly in the methodology of rating, which is not even questioned before us or the assessment carried out by the appellants.

42. As regards the contention of the respondent that the targets were met in the second half of the ACR period, it needs to be only noted that once the ACR is required to be rendered in two halves, if the ratee does not perform well in one part of the year and fails to achieve the required targets and goals, the performance in the later part of the year, cannot overshadow the performance in the earlier part of the ACR period.

43. Learned counsel for the appellants has also specifically argued that the Policy required the targets with the milestones to be achieved separately in two halves

of the year, i.e. H1 and H2 period. It is also argued that after the completion of the H1 review by the Reporting Officer, in terms of the requirement of the Policy dated 07.09.2012, the Reporting Officer had routed the reporting to the appraiser/respondent for his comments and after receiving those comments, the same were placed before the Reviewing Officer. The same procedure was followed for the assessment in H2 review. Thus, it cannot be said that the respondent did not have a chance to raise his grievance on the appraisals done for both parts of the said ACR.

44. Learned counsel for the respondent has relied upon the judgment of Baddula Lakshmaiah and others vs. Sri Anjaneya Swami Temple & Others, (1996) 3 SCC 52 1996 and Management of Narendra & Co. Pvt. Ltd. Vs. Workmen of Narendra & Co. (2016) 3 SCC 340 to argue that the appellate powers under a Letters Patent Appeal are very restricted and merely because a better or more plausible view other than the Single Judge is possible, it would not be a ground to interfere. In our view, the law laid down by the said judgments cannot be questioned. However, in the present case, it is apparent that the learned Single Judge has decided the case going beyond the law laid down in the judgments of Dev Dutt (supra) and several others, mentioned above, and has interfered in the assessment given by the various levels of reporting which was not in the domain of the learned Single Judge. The direction to promote the respondent is also against the law laid down by various courts.

45. Reliance by the learned counsel for the respondent on the judgments of Dev Dutt (supra), Sukhdev (supra) etc. is misplaced in the facts of the present case inasmuch as it is an undisputed fact that the respondent had made a representation aggrieved by the impugned ACR. A learned Single Judge of this Court had taken note of the said representation and directed the appellants to dispose of the said representation. The respondent never challenged that order and allowed the appellants to decide the representation and pass a speaking order. The judgments of Dev Dutt (supra) and other judgments relied upon are only to the effect that a below Benchmark grading in the ACR has an adverse effect on promotion and therefore, must be communicated to the ratee, enabling him to make a representation. None of these judgments in our view, deal with a situation where the representation has been made and rejected.

46. We thus find merit in the appeal. The judgment dated 20.02.2019 passed by the learned Single Judge is hereby set aside and the appeal is allowed with no order as to costs.