
(2022) 09 DEL CK 0142

In the Delhi High Court

Case No : Civil Writ Petition No. 2030, 2031 Of 2018, Civil Miscellaneous
Application No. 8391, 8393 Of 2018

Manish Gupta

APPELLANT

Vs

UTI Infrastructure Technology And Services Limited And Anr

RESPONDENT

Date of Decision : 05-09-2022

Acts Referred:

Constitution Of India, 1950 — Article 14, 226

Citation : (2022) 09 DEL CK 0142

Hon'ble Judges : Yashwant Varma, J

Bench : Single Bench

Advocate : Sandeep Sethi, Sanjay Kapur, Megha Kornwal, Arjun Bhatia, Ripu
Daman Bhardwaj, Kushagra Kumar, Aakriti Roy

Final Decision : Allowed

Judgement

Yashwant Varma, J

1. These two writ petitions assail the validity of an order dated 16 January 2018 in terms of which the representations made by the petitioners aggrieved by their non promotion to the post of Assistant Vice President and Deputy Vice President respectively have come to be rejected by the respondents. The petitioners who were working as the Divisional Manager and Project Leader (E-Governance) respectively in the respondent company had earlier approached this Court aggrieved by the denial of promotion by the respondents. That challenge formed subject matter of W.P.(C) 11050/2017 and W.P.(C) 11053/2017. The writ petitions were disposed of on 13 December 2017 permitting the petitioners to represent their case before the respondents who were commanded to duly examine the grievance as expressed and to dispose of the representations by means of a speaking order. It is pursuant to the aforesaid direction that the petitioners made the representations which have come to be rejected by the impugned order of 16 January 2018.

2. For the purposes of considering the challenge which stands raised, the following essential facts may be noticed. Manish Gupta was offered an appointment by the respondents on 07 June 2012 on the post of Divisional Manager. Paritosh Sharma was confirmed on the post of Project Leader (E Governance) on 20 September 2011. Manish Gupta was originally appointed on probation with effect from 14 June 2012. Insofar as the said writ petitioner is concerned, it appears that during the probationary period allegations came to be leveled that he remained absent from duty during the period 29 July to 30 October 2012. He is stated to have rejoined on 31 October 2012. In the meanwhile, and as per the procedure for verification as prevalent in the respondent company, a background check was undertaken with the said writ petitioner's erstwhile employer. The said employer is stated to have informed the respondent that the experience certificate as submitted by the petitioner was forged. On the said information being received, the petitioner Manish Gupta was called upon to furnish an explanation on 30 October 2012. Upon finding that the explanation as proffered was unsatisfactory, the said writ petitioner was transferred to the Corporate Office at Navi Mumbai with effect from 20 November 2012. The petitioner however remained on unauthorised leave from 9 November 2012. Taking the aforesaid facts into account, the services of the said petitioner came to be terminated on 14 December 2012. The petitioner thereafter made various representations praying for reinstatement. The request made was ultimately acceded to and the petitioner was permitted to join on 12 September 2013. The aforesaid joining was considered by the respondents as a fresh appointment.

3. Insofar as Paritosh Sharma is concerned, a Staff Conduct Chargesheet is stated to have been issued against him on 19 November 2013 for alleged misconduct. The said disciplinary proceedings were ultimately closed vide advisory letter dated 21 January 2014 based on the apology and assurance tendered by the said petitioner.

4. The Board of the respondents in its meeting of 23 September 2011 approved the eligibility criteria for promotion to the posts of Assistant Vice President and Deputy Vice President. The aforesaid policy measure is stated to have come into effect from 1 October 2011. The Board while prescribing the eligibility criteria for those promotions firstly set out the minimum years of service which all candidates would have to qualify in the feeder cadre. It further prescribed that the total marks for promotion would be 100 out of which 50 marks would be allocated for performance in an interview and the balance to be evaluated on the basis of seniority and performance appraisal reports. The Departmental Promotion Committee thereafter met on 26 March 2016 and conducted interviews of eligible candidates. 29 officers including Paritosh Sharma were interviewed on that date. The result of that promotional exercise was declared on 22 April 2016. While the aforesaid exercise pertained to the claim of promotion of Paritosh Sharma, the interviews of eligible officers seeking promotion from the post of Divisional Manager to that of Assistant Vice President was conducted on

28 September 2016. The results of the said promotional came to be declared on 07 October 2016. On finding that their names did not find mention in the list of successful officers, the petitioners made various representations and also moved applications invoking the provisions of the Right to Information Act 2005 seeking disclosure of their Annual Performance Appraisal Reports (APAR). They additionally appear to have raised a challenge to the promotion policy itself and the criteria which was adopted by the respondents. Aggrieved by the inaction on the part of the respondents, they preferred the writ petitions noted hereinabove in December 2017. The representations which were made pursuant to the directions issued on that writ petition came to be rejected on 16 January 2018 leading to the filing of the present writ petitions.

5. Insofar as the disclosures made in the impugned orders is concerned, the respondents while dealing with the claim of Manish Gupta have observed as follows: -

"6. As per the promotion policy, the total marks for promotion were 100, out of which 50 marks were allotted for performance in interview and the balance 50 marks were those which were earned by the candidates on the basis of seniority and performance appraisals.

7. Accordingly, the said Departmental Promotion Committee (DPC) on 28.09.2016, conducted promotional interviews of 43 candidates from Divisional Manager to Assistant Vice President. Before the said Departmental Promotion Committee (DPC), the following material was placed for its consideration:-

- i. Performance Appraisal Reports for the last 2 years;
- ii. Length of service in the grade of Divisional Manager.

8. In your case, you were awarded:

6 out of 10 marks for the service rendered

22.5 out of 40 marks for the performance appraisal ratings of last 2 years Total 28.5 marks out of 50.

9. The DPC had awarded you 14.33 marks out of 50 in the Interview. Total you have scored 42.83 out of 100 marks in the said promotional exercise. For being eligible for promotion, a candidate is required to score 75 marks, which are the minimum qualifying marks for the promotion for general category while for SC/ST category, a candidate is required to score 70 marks, which are the minimum qualifying marks. Hence, you were not found fit for promotion.

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11. Accordingly, the Committee went through your representation. After verifying the entire record and after going through your representation, the Committee found no substance/ merit in your representation. The analysis of the Committee was placed before the Board of Directors of the Company. The Board noted the

Committee's conclusion, that laid down procedure has been followed in the promotional exercise. Accordingly, vide letter dated 09.06.2017, you were advised inter-alia as under: -

"With reference to the above, this is to inform you that your said representation for non promotion conducted under Phase II interview process from Divisional Manager to Assistant Vice President has been reviewed by the Committee appointed for this purpose and placed its report before the Board. The Board noted the Committee's conclusion that laid down procedure had been followed in the promotion exercise which may kindly be noted."

6. Explaining the criteria for promotion which was adopted for the post of Assistant Vice President, the respondents have set forth the details in respect thereof in the impugned order, the relevant parts whereof are extracted hereinbelow:-

"1. Criteria for promotion with effect from 01.10.2011:

The eligibility criteria for Promotion to the next grade would be-

Executive - 2 years - Senior Executive - 2 years - Deputy Manager - 2 years - Senior Manager - 2 years - Divisional Manager - 2 years - Assistant Vice President - 2 years - Deputy Vice President - 2 Years - Vice President - 4 Years - Senior Vice President - 4 Years - Executive Vice President

While the above shall be the minimum eligibility criteria for promotion to higher channels of hierarchy, actual promotions shall be based on vacancies, business needs of the organization, seniority, individuals past performance as per appraisals, performance in interview and potential for taking up higher roles and responsibilities.

The promotion process is based on -

Interview Process

Weight age of marks

Performance in the interview

50 marks

No. of years of service in the feeder grade (For each year of service, the candidate shall earn 2 marks subject to maximum of 10 marks)

10 marks

For each six monthly appraisal, the candidate can obtain 10 marks as :

a. Unsatisfactory : 2.5

40 marks

b. Satisfactory : 5

c. Good : 7.5

d. Outstanding : 10

and therefore, for 4 such appraisals in the immediate past 2 years, the candidate would be able to earn 40 marks

Following period PARs were considered- 01st April, 2014 to 30th September, 2014 01st October, 2014 to 31st March, 2015 1st April, 2015 to 30th September, 2015

01st October, 2015 to 31st March, 2016

Total marks

100 marks

The minimum qualifying marks for promotion would be 75 out of 100"

7. It has been pointed out that Manish Gupta in terms of the promotion policy was able to obtain only 42.83 marks whereas the minimum qualifying marks were specified to be 75. Dealing with this aspect the impugned order records as follows: -

"Since you were in the Divisional Manager Grade and appeared interview for the post of Assistant Vice President your minimum eligibility criteria of service is 2 years as of 01.08.2016. As explained in the above paras, consequent upon your reinstatement in the services of the Company, your service was considered afresh from the date of your joining i.e. 12.09.2013. Thus, your total eligible service of 2 years 11 months was considered for appearing for interview.

The minimum qualifying marks for other than SC/ST category employees is 75 out of 100, whereas you have scored 42.83 marks i.e. below the qualifying marks for promotion. The break-up of marks in each category is as below-

Category

Marks

1

Service Period (2*2.11)

6

2

Performance Appraisal Ratings as on 30.09.2014, 31.03.2015, 30.09.2015 and 31.03.2016

22.5

3

Interview Evaluation

14.33

Total

42.83"

8. Turning then to the APARs, the respondents have noted the following rating which was awarded to the said petitioner: -

Sep-14

Overall Assessment out of 200

141

Assessment Rating

Good

Mar-15

Overall Assessment out of 200

103

Assessment Rating

Satisfactory

Sep-15

Overall Assessment out of 200

110

Assessment Rating

Satisfactory

Mar-16

Overall Assessment out of 200

101

Assessment Rating

Satisfactory"

9. Dealing with the grievance of the petitioner of performance appraisal reports having not been communicated to them, the respondents have taken the position that the same are liable to be treated as confidential documents and that consequently the petitioners were not entitled to be informed or accorded an opportunity to represent against the same.

10. Insofar as Paritosh Sharma is concerned, the following disclosures have been made in the impugned order: -

"6. As per the promotion policy, the total marks for promotion were 100, out of which 50 marks were allotted for performance in Interview and the balance 50 marks were those which were earned by the candidates on the basis of seniority and performance appraisals.

7. Accordingly, the said Departmental Promotion Committee (DPC) on 26.03.2016, conducted interviews of 29 candidates for promotion from Assistant Vice President to Deputy Vice President. Before the said Departmental Promotion Committee (PPC), the following material was placed for its consideration: -

- a. Performance Appraisal Reports for the last 2 years;
- b. Length of service in the grade of Assistant Vice President.

8. In your case, you were awarded: -

8 out of 10 marks for the service rendered

22.5 out of 40 marks for the performance appraisal ratings (of last 2 years)

Total 30.5 marks out of 50.

9. The Departmental Promotion Committee (DPC) had awarded you 28 marks out of 50 in the interview. Total you have scored 58.5 out of 100 marks in the said promotional exercise. For being eligible for promotion, a candidate is required to score 70 marks out of 100, which are the minimum qualifying marks for promotion. You were not found fit for promotion.

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11. I have thoroughly analysed the above raised points by you in the light of rules and procedures of UTIITSL.

12. In view of the averment made in your representation dated 18.12.2017, it may not be out of place to mention, the following relevant facts, which are based on available records:

i. You were appointed as Project Leader (E-governance) in Assistant Vice President grade vide offer of appointment dated 11.08.2011, on accepting of the same with the terms and conditions, you reported for joining on 20.09.2011 at NRO, New Delhi.

ii. From the records, it was also observed that your wife Mrs. Geeta Sharma, vide letter dated 02.09.2013 requested to transfer you at Ghaziabad branch on her health grounds, since no one was there to look after the family due to long travel to Office at NRO, Delhi, Based on the above, the Company on compassionate grounds posted you at Ghaziabad branch on 28.10.2013.

iii. You were issued Charge sheet dated 19.11.2013 for alleged act of non

maintenance of secrecy regarding company's affairs and passing the Information by divulging company's Internal administrative matters with the clients and falling to observe / follow the guidelines of the company regarding handing over-taking over charge.

iv. You vide letter dated 02.01.2013 (it appears that inadvertently, the letter date has been mentioned as 02.01.2013 instead on 02.01.2014) received on 08.03.2014, assured to be careful and obey the Office Orders from time to time and requested to close the matter. Your reply to the charge sheet was examined and considering your assurance the aforesaid charge sheet was disposed off vide Advisory letter dated 21.01.2014 stating that "ordinarily, the company would have been Justified in initiating stern action against you, considering your apology and assurance for obeying the orders, it has been decided to take a lenient view and accordingly you are hereby advised to be careful and avoid such occurrence in future." Here it is pertinent to note that you have stated in your representation that the chargesheet was not closed, which is not correct.

The aforesaid facts are mentioned to counter the averments made by you, in your representation.

13. With reference to your Representation dated 18/12/2017 received on 21/12/2017, I find that in past the Representation vide email dated 10.02.2017 was received from you for non promotion conducted under phase 1 from grade Assistant Vice President to Deputy Vice President, stating that

"I have completed more than 5 years in the same grade but not been promoted as yet in spite of my performance and seniority as well in the promotional interview which took place in March 2016 from the AVP to Dy. VP.

I have excelled in the field of project management by way of efficiently delivering all the assigned projects and also attaining the highest standards of Project Management by getting PMP certified (a certification given by PMI organization of USA which is recognized and valuable to all Industries), I have also got the future Chief Information Officer (CIO) award after getting selected out of thousands of senior IT professionals across the country where the jury members were from industries like Indian Oil Corporation, National Informatics Centre (NIC) etc and high end private industries. I have never been rated or communicated to be a non-performer and thereby no remedial steps have also been taken and I must be given a fair chance for promotion.

I humbly request you to arrange for treatment of equally with others in equal circumstances and provide me justice so as to help my mother, wife and our two children to live happily with him keeping our head high as per their educational, technical background and review my promotion and promote me to the next deserving level of Dy. VP at the earliest."

I find from the records that the Promotional Interview from Assistant Vice President to Deputy Vice President was conducted on 26.03.2016 in Phase 1 for

which the results were declared on 22.04.2016. You have not qualified the Promotion. It is pertinent to note that you had forwarded the aforesaid mail on 10.02.2017 i.e. after a gap of nearly 10 months stating the above reasons, which is beyond any reasonable time to represent to the management.”

11. Explaining the criteria for promotion which was adopted for the post of Deputy Vice President, the respondents have set forth the details in respect thereof in the impugned order, the relevant part whereof is extracted hereinbelow:-

“1. Criteria for promotion with effect from 01.10.2011: -

The eligibility criteria for Promotion to the next grade would be-

Executive - 2 years - Senior Executive - 2 years - Deputy Manager - 2 years - Senior Manager - 2 years - Divisional Manager - 2 years - Assistant Vice President - 2 years - Deputy Vice President - 2 Years - Vice President - 4 Years - Senior Vice President - 4 Years - Executive Vice President

While the above shall be the minimum eligibility criteria for promotion to higher channels of hierarchy, actual promotions shall be based on vacancies, business needs of the organization, seniority, individuals past performance as per appraisals, performance in interview and potential for taking up higher roles and responsibilities.

The promotion process is based on -

Interview Process

Weight age of marks

Performance in the interview

50 marks

No. of years of service in the feeder grade (For each year of service, the candidate shall earn 2 marks subject to maximum of 10 marks)

10 marks

For each six monthly appraisal, the candidate can obtain 10 marks as :

a. Unsatisfactory : 2.5

b. Satisfactory : 5

c. Good : 7.5

d. Outstanding : 10

and therefore, for 4 such appraisals in the immediate past 2 years, the candidate would be able to earn 40 marks

Following period PARs were considered- 01st October, 2013 to 31st March, 2014

01st April, 2014 to 30th September, 2014 01st October, 2014 to 31st March, 2015 1st April, 2015 to 30th September, 2015

40 marks

Total marks

100 marks

The minimum qualifying marks for promotion would be 70 out of 100"

12. It has been pointed out that Paritosh Sharma in terms of the promotion policy was able to obtain only 58.5 marks whereas the minimum qualifying marks were specified to be 70. Dealing with this aspect the impugned order records as follows: -

"Since you are in the Assistant Vice President Grade and appeared interview for the post of Deputy Vice President, your minimum eligibility criteria of service is 2 years as of 23.03.2016. Thus, your total eligible service of 4 years was considered for appearing for interview,

Accordingly, the minimum qualifying marks is 70 out of 100, while you have scored 58.5 marks i.e. below the qualifying marks for promotion. The break-up of marks in each category is as below: -

Category

Marks

1

Service Period (2*4)

8

2

Performance Appraisal Ratings as on 30.03.2014, 30.09.2014, 31.03.2015 and 30.09.2015

22.5

3

Interview Evaluation

28

Total

58.5"

13. Turning then to the APARs, the respondents have noted the following rating which was awarded to the said petitioner: -

"Mar-14

Overall Assessment out of 200

125

Assessment Rating

Satisfactory

Sep-14

Overall Assessment out of 200

129

Assessment Rating

Satisfactory

Mar-15

Overall Assessment out of 200

141

Assessment Rating

Good

Sep-15

Overall Assessment out of 200

128

Assessment Rating

Satisfactory"

14. The petitioners who appeared in person have contended that the respondents had failed to provide or communicate the APARs to the petitioners as a result of which their claim for promotion has come to be adversely affected. According to Manish Gupta, the respondent had provided only four out of the 11 available APARs. Paritosh Sharma, on the other hand, contends that only four out of the 12 requested APARs were provided to the petitioner. The petitioners contend that the respondents were obligated to communicate to the petitioners all the APARs irrespective of whether they were adverse or not. They also placed reliance upon a DoPT circular dated 14 May 2009 in support of the aforesaid contention. Dealing with the question of an obligation on an employer to communicate all APARs, the petitioners have placed reliance upon the decisions of the Supreme Court in *Dev Dutt vs. Union of India and Others* (2008) 8 SCC 725 and *Abhijit Ghosh Dastidar vs. Union of India* (2009) 16 SCC 146.

15. Assailing the allocation of marks for the interview and the manner in which it

was conducted, the petitioners alleged that their interview lasted a mere 2 minutes. It is further alleged that the earmarking of 50% of the total marks in the promotional exercise for interview is clearly arbitrary and illegal as was held by the Supreme Court in *Ashok Kumar Yadav and Others vs. State of Haryana and Others* (1985) 4 SCC 417, *Director General, Indian Council for Agricultural Research and Others vs. D. Sundara Raju* 2011) 6 SCC 605 and *Bishnu Biswas and Others vs. Union of India and Others* (2014) 5 SCC 774.

16. Controverting the submissions addressed by the petitioners, Mr. Sethi learned senior counsel appearing for the respondents submitted that once the petitioners had chosen to participate in the selection process, it was not open to them to assail or question the criteria for promotion as evolved. It was further submitted that the argument as raised with respect to the allocation of 50 marks in the interview and the reliance placed on the principles enunciated by the Supreme Court in *Ashok Kumar Yadav* and the other decisions cited by the petitioners is misconceived and fails to bear in mind the fact that different yardsticks have been recognised to apply dependent upon the nature of the post which is sought to be filled by way of promotion, the qualifications and responsibilities attached thereto and its position in the overall career structure of the employer. Mr. Sethi submits that the principles laid down in *Ashok Kumar Yadav* were duly explained by the Supreme Court in its decisions rendered in *Lila Dhar vs. State of Rajasthan and Others* (1981) 4 SCC 159 as well as *C.P. Kalra vs. Air India Through its Managing director, Bombay and Others* 1994 Supp(1) SCC 454. Reliance was also placed on the observations made by the Supreme Court in *Anzar Ahmed v. State of Bihar and Others* (1994) 1 SCC 150 to submit that neither the allocation of marks nor the conduct of the interview can be said to be arbitrary or violative of the principles as propounded by the Supreme Court.

17. However, insofar as the issue of communication of the APARs is concerned, Mr. Sethi, learned senior counsel in his usual fairness conceded that in light of the principles laid down in *Dev Dutt*, all APARs irrespective of whether they be adverse or otherwise are liable to be communicated to the employee. According to learned senior counsel, since there has been an admitted failure to communicate all APARs to the petitioners, it was submitted that the respondents would be ready and willing to re-examine the claim of the petitioners for grant of promotion to the respective posts after communicating to the petitioners the APARs for the entire period which was considered for the purposes of promotion.

18. It may at the outset be noted that while it is true that it is not open to an employee to assail or question the criteria for promotion having once participated in such an exercise, that precept would have no application in the facts of the present case bearing in mind the fact that the criteria for promotion came to be disclosed only after litigation had ensued inter partes. The Court has not been shown any material by the respondents which may have established that the criteria for promotion was made known to aspiring employees and officers prior to the initiation of the promotion process. In fact the policy as adopted by the

respondents for the purposes of promotion came to the fore only once orders came to be passed on the representations preferred by the petitioners. Viewed in that light, the Court finds itself unable to sustain the contention addressed on this score on behalf of the respondents.

19. That then takes the Court to the issue of communication of APAR's. The Court notes that in Dev Dutt, this issue was answered in the following terms:

"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.

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

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

A person getting any of the entries at Items (ii) to (vi) should be communicated

the entry so that he has an opportunity of making a representation praying for its upgradation, and such a representation must be decided fairly and within a reasonable period by the authority concerned.

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

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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.

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22. It may be mentioned that communication of entries and giving opportunity to represent against them is particularly important on higher posts which are in a pyramidal structure where often the principle of elimination is followed in selection for promotion, and even a single entry can destroy the career of an officer which has otherwise been outstanding throughout. This often results in grave injustice and heart-burning, and may shatter the morale of many good officers who are superseded due to this arbitrariness, while officers of inferior merit may be promoted.

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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.

37. We further hold that when the entry is communicated to him the public servant should have a right to make a representation against the entry to the authority concerned, and the authority concerned must decide the representation in a fair manner and within a reasonable period. We also hold that the representation must be decided by an authority higher than the one who gave the entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar to Caesar. All this would be conducive to fairness and transparency in public administration, and would result in fairness to public servants. The State must be a model employer, and must act fairly towards its employees. Only then would good governance be possible.

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41. In our opinion, non-communication of entries in the annual confidential report of a public servant, whether he is in civil, judicial, police or any other service (other than the military), certainly has civil consequences because it may affect his chances for promotion or get other benefits (as already discussed above). Hence, such non-communication would be arbitrary, and as such violative of Article 14 of the Constitution.”

20. The principles as were laid down in Dev Dutt were reiterated by the Supreme Court in Sukhdev Singh vs. Union of India and Others (2013)9 SCC 566, where the following observations came to be made.

“6. We are in complete agreement with the view in Dev Dutt [Dev Dutt v. Union of India, (2008) 8 SCC 725 : (2008) 2 SCC (L&S) 771] particularly paras 17, 18, 22, 37 and 41 as quoted above. We approve the same.

7. A three-Judge Bench of this Court in Abhijit Ghosh Dastidar v. Union of India [(2009) 16 SCC 146 : (2010) 1 SCC (L&S) 959] followed Dev Dutt [Dev Dutt v. Union of India, (2008) 8 SCC 725 : (2008) 2 SCC (L&S) 771] . In para 8 of the Report this Court with reference to the case under consideration held as under: (Abhijit Ghosh Dastidar case [(2009) 16 SCC 146 : (2010) 1 SCC (L&S) 959] , SCC p. 148)

“8. Coming to the second aspect, that though the benchmark ‘very good’ is required for being considered for promotion, admittedly the entry of ‘good’ was not communicated to the appellant. The entry of ‘good’ should have been communicated to him as he was having ‘very good’ in the previous year. In those circumstances, in our opinion, non-communication of entries in the ACR of a public servant whether he is in civil, judicial, police or any other service (other than the armed forces), it has civil consequences because it may affect his

chances for promotion or getting other benefits. Hence, such non-communication would be arbitrary, and as such violative of Article 14 of the Constitution. The same view has been reiterated in the abovereferred decision (Dev Dutt case [Dev Dutt v. Union of India, (2008) 8 SCC 725 : (2008) 2 SCC (L&S) 771] , SCC p. 738, para 41) relied on by the appellant. Therefore, the entries 'good' if at all granted to the appellant, the same should not have been taken into consideration for being considered for promotion to the higher grade. The respondent has no case that the appellant had ever been informed of the nature of the grading given to him."

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."

21. The Court also takes note of the following pertinent observations as were made by this Court in Union of India versus vs. V.S Arora 2012 SCC OnLine Del 3193 in this respect.

"13. Analyzing the above extracted portion from the said decision in Abhijit Ghosh Dastidar (supra), we find that the Supreme Court had affirmed the decision in Dev Dutt (supra), when it observed that - "the same view has been reiterated in the above referred decision relied upon by the appellant". The above referred decision related to Dev Dutt (supra). The principle that was culled out by Abhijit Ghosh Dastidar (supra) from the decision in Dev Dutt (supra) was that non-communication of an ACR would be arbitrary and would be violative of Article 14 of the Constitution. The reasons for this were that the non-communication of an entry of an ACR of a public servant has civil consequences because it could affect his chances for promotion or to receive any other benefits.

14. However, the Supreme Court in Abhijit Ghosh Dastidar (supra) went further and observed categorically that, therefore, the entries "good", if at all granted to the appellant, ought not to have been taken into consideration for being considered for promotion to the higher grade. What this meant was that the below benchmark ACRs, which had not been communicated to an employee, ought not to be taken into consideration for the purposes of considering the promotion of that employee to a higher grade. We must also distinguish between

the stage when ACRs are written and the stage when they are considered by the DPC. What Dev Dutt (*supra*) and, indeed, Abhijit Ghosh Dastidar (*supra*) hold in unison is that the ACRs must be communicated to the concerned employee/officer soon after it is written. Beucase, its non-communication is contrary to the provisions of article 14 of the Constitution. But, this is at the stage when the ACRs are recorded or shortly thereafter. The objective of communicating the ACRs is two-fold. In the first place, as an element of natural justice, the officer concerned gets an opportunity of representing against the ACR before it is too late. Secondly, it also informs and warns the officer concerned that his performance is not upto the mark so that he may improve himself in the next year. However, at the stage of the DPC, the ACRs already stand crystallized and their communication then may not serve any fruitful purpose apart from informing the concerned employee/officer and, perhaps, enabling him to represent against it. But, the second aspect of improvement is lost. Consequently, at the stage of the DPC meeting the practical approach would be to not consider the uncommunicated ACRs as held in Abhijit Ghosh Dastidar (*supra*).

15. It is further to be noted that the directions given by the Supreme Court in the subsequent paragraphs, that is, in paragraph 5 of the said decision were in respect of the particular case before the Supreme Court and the Supreme Court had merely directed that as the appellant therein had retired from service, he would not be entitled to any pay or allowance for the period for which he had not worked in the Higher Administrative Grade. However, it had directed that his promotion would be retrospective with effect from 28.08.2000 and that should be considered for the benefit of re-fixation of his pension and retiral benefits and other benefits as per rules. We are not going by the specific directions given by the Supreme Court in the facts of that case, but by the general principles of law declared by the Supreme Court in the earlier portion of the said decision which is set out in paragraph 4 of the same. The Supreme Court did two things. First of all, it affirmed the view taken by Dev Dutt (*supra*) to the extent that noncommunication of an ACR would be arbitrary and would be violative of Article 14 of the Constitution. Secondly, it concluded that such entries, which are not communicated, should not be taken into consideration for being considered for promotion to the higher grade. Thus, while Dev Dutt (*supra*) had been affirmed by the Supreme Court in Abhijit Ghosh Dastidar (*supra*) on the first aspect, as regards what has to be done with a noncommunicated below benchmark ACR, the Supreme Court in Abhijit Ghosh Dastidar (*supra*) took the view that such an ACR ought not to be considered."

22. In *Murli Dhar Sharma vs. Government of NCT of Delhi & Ors.* 2018 SCC OnLine Del 12322 this Court explained the legal position in the following terms:

"13. In case of *Sukhdev Singh v. Union of India*, (2013) 9 SCC 566, which is decided by Full Bench of the Supreme Court and their Lordships were in complete agreement with view taken in *Dev Dutt (Supra)*.

14. It is important to note that in Sukhdev Singh (Supra), the Hon'ble Supreme Court considered the case of Abhijit Ghosh Dastidar v. Union of India (UOI), (2009) 16 SCC 146, wherein held that the entries could if at all granted to the employee, the same should not have been taken into consideration for being considered promotion to the higher grade, if the entry in the ACR has not communicated to the employee.

15. The similar issue came before this Court in case of Union of India v. V.S. Arora recorded as 2012 (8) AD (Delhi) 365. The issue before this Court in the said case was with regard to the below benchmark ACRs, which were not communicated to the employee. The question was whether when the DPC meets, what does it have to do with regard to those below benchmark and non-communicated ACRs? Does it consider those ACRs or is it the requirement of law that the ACRs should be communicated to the concerned employees even at that stage and that they be given an opportunity to move representation against the same and after the representation are disposed of, the DPC should be reconvened to consider the case of the employees for promotion?

16. The said issue has answered by this Court in para 14 as under:

"However, the Supreme Court in Abhijit Ghosh Dastidar (supra) went further and observed categorically that, therefore, the entries "good", if at all granted to the appellant, ought not to have been taken into consideration for being considered for promotion to the higher grade. What this meant was that the below benchmark ACRs, which had not been communicated to an employee, ought not to be taken into consideration for the purposes of considering the promotion of that employee to a higher grade. We must also distinguish between the stage when ACRs are written and the stage when they are considered by the DPC. What Dev Dutt (supra) and, indeed, Abhijit Ghosh Dastidar (supra) hold in unison is that the ACRs must be communicated to the concerned employee/officer soon after it is written. Because, its non-communication is contrary to the provisions of article 14 of the Constitution. But, this is at the stage when the ACRs are recorded or shortly thereafter. The objective of communicating the ACRs is two-fold. In the first place, as an element of natural justice, the officer concerned gets an opportunity of representing against the ACR before it is too late. Secondly, it also informs and warns the officer concerned that his performance is not upto the mark so that he may improve himself in the next year. However, at the stage of the DPC, the ACRs already stand crystallized and their communication then may not serve any fruitful purpose apart from informing the concerned employee/officer and, perhaps, enabling him to represent against it. But, the second aspect of improvement is lost. Consequently, at the stage of the DPC meeting the practical approach would be to not consider the un-communicated ACRs as held in Abhijit Ghosh Dastidar (Supra)."

23. Turning then to the marks which may be awarded or set apart for the interview, the Court notes that in Ashok Kumar Yadav, the following pertinent

observations came to be entered.

"23. This Court speaking through Chinnappa Reddy, J. pointed out in *Lila Dhar v. State of Rajasthan* [(1981) 4 SCC 159 : 1981 SCC (L&S) 588 : AIR 1981 SC 1777 : (1982) 1 SCR 320] that the object of any process of selection for entry into public service is to secure the best and the most suitable person for the job, avoiding patronage and favouritism. Selection based on merit, tested impartially and objectively, is the essential foundation of any useful and efficient public service. So open competitive examination has come to be accepted almost universally as the gateway to public services. But the question is how should the competitive examination be devised? The competitive examination may be based exclusively on written examination or it may be based exclusively on oral interview or it may be a mixture of both. It is entirely for the Government to decide what kind of competitive examination would be appropriate in a given case. To quote the words of Chinnappa Reddy, J. "In the very nature of things it would not be within the province or even the competence of the Court and the Court would not venture into such exclusive thickets to discover ways out, when the matters are more appropriately left" to the wisdom of the experts. It is not for the Court to lay down whether interview test should be held at all or how many marks should be allowed for the interview test. Of course the marks must be minimal so as to avoid charges of arbitrariness, but not necessarily always. There may be posts and appointments where the only proper method of selection may be by a viva voce test. Even in the case of admission to higher degree courses, it may sometimes be necessary to allow a fairly high percentage of marks for the viva voce test. That is why rigid rules cannot be laid down in these matters by courts. The expert bodies are generally the best judges. The Government aided by experts in the field may appropriately decide to have a written examination followed by a viva voce test.

24. It is now admitted on all hands that while a written examination assesses the candidate's knowledge and intellectual ability, a viva voce test seeks to assess a candidate's overall intellectual and personal qualities. While a written examination has certain distinct advantages over the viva voce test, there are yet no written tests which can evaluate a candidate's initiative, alertness, resourcefulness, dependableness, cooperativeness, capacity for clear and logical presentation, effectiveness in discussion, effectiveness in meeting and dealing with others, adaptability, judgment, ability to make decision, ability to lead, intellectual and moral integrity. Some of these qualities can be evaluated, perhaps with some degree of error, by viva voce test, much depending on the constitution of the interview board.

26. We may now, in the background of this discussion, proceed to consider whether the allocation of as high a percentage of marks as 33.3 per cent in case of ex-service officers and 22.2 per cent in case of other candidates, for the viva voce test renders the selection process arbitrary. So far as ex-service officers are concerned, there can be no doubt that the percentage of marks allocated for the

viva voce test in their case is unduly high and it does suffer from the vice of arbitrariness. It has been pointed out by the Division Bench in a fairly elaborate discussion that so far as the present selections in the category of ex-service officers are concerned, the spread of marks in the viva voce test was inordinately high compared to the spread of marks in the written examination. The minimum marks required to be obtained in the written examination for eligibility for the viva voce test are 180 and as against these minimum 180 marks, the highest marks obtained in the written examination in the category of ex-service officers were 270, the spread of marks in the written examination thus being only 90 marks which works out to a ratio of 22.2 per cent. But when we turn to the marks obtained in the viva voce test, we find that in case of ex-service officers the lowest marks obtained were 20 while the highest marks secured were 171 and the spread of marks in the viva voce test was thus as wide as 151 in a total of 200 marks, which worked out to an inordinately high percentage of 76. The spread of marks in the viva voce test being enormously large compared to the spread of marks in the written examination, the viva voce test tended to become a determining factor in the selection process, because even if a candidate secured the highest marks in the written examination, he could be easily knocked out of the race by awarding him the lowest marks in the viva voce test and correspondingly, a candidate who obtained the lowest marks in the written examination could be raised to the top most position in the merit list by an inordinately high marking in the viva voce test. It is therefore obvious that the allocation of such a high percentage of marks as 33.3 per cent opens the door wide for arbitrariness and in order to diminish, if not eliminate, the risk of arbitrariness, the percentage needs to be reduced. But while considering what percentage of marks may legitimately be allocated for the viva voce test without incurring the reproach of arbitrariness, it must be remembered that ex-service officers would ordinarily be middle-aged persons of mature personality and it would be hard on them at that age to go through a long written examination involving 8 subjects and hence it would not be unfair to require them to go through a shorter written examination in only 5 subjects and submit to a viva voce test carrying a higher percentage of marks than what might be prescribed in case of younger candidates. The personalities of these ex-service officers being fully mature and developed, it would not be difficult to arrive at a fair assessment of their merits on the basis of searching and incisive viva voce test and therefore in their case, the viva voce test may be accorded relatively greater weight. But in any event the marks allocated for the viva voce test cannot be as high as 33.3 per cent.

27. The position is no different when we examine the question in regard to the percentage of marks allocated for the viva voce test in case of persons belonging to the general category. The percentage in the case of these candidates is less than that in the case of ex-service officers, but even so it is quite high at the figure of 22.2 per cent. Here also it has been pointed out by the Division Bench by giving facts and figures as to how in the case of present selections from the

general category the spread of marks in the viva voce test was inordinately high compared to the spread of marks in the written examination so that a candidate receiving low marks in the written examination could be pulled up to a high position in the merit list by inordinately high marking in the viva voce test. The viva voce test in the general category, too, would consequently tend to become a determining factor in the process of selection, tilting the scales in favour of one candidate or the other according to the marks awarded to him in the viva voce test. This is amply borne out by the observations of the Kothari Committee in the Report made by it in regard to the selections to the Indian Administrative Service and other Allied Services. The competitive examination in the Indian Administrative Service and other Allied Services also consists of a written examination followed by a viva voce test. Earlier in 1948 the percentage of marks allocated for the viva voce test was 22 and it was marginally brought down to 21.60 in 1951 and then again in 1964, it was scaled down to 17.11. The Kothari Committee in its Report made in 1976 pleaded for further reduction of the percentage of marks allocated for the viva voce test and strongly recommended that the viva voce test should carry only 300 out of a total of 3000 marks. The Kothari Committee pointed out that even where the percentage of marks allocated for the viva voce test was 17.11, nearly one-fourth of the candidates selected owed their success to the marks obtained by them at the viva voce test. This proportion was regarded by the Kothari Committee as "somewhat on the high side". It is significant to note that consequent upon the Kothari Committee Report, the percentage of marks allocated for the viva voce test in the competitive examination for the Indian Administrative Service and other Allied Services was brought down still further to 12.2. The result is that since the last few years, even for selection of candidates in the Indian Administrative Service and other Allied Services where the personality of the candidate and his personal characteristics and traits are extremely relevant for the purpose of selection, the marks allocated for the viva voce test constitute only 12.2 per cent of the total marks. Now if it was found in the case of selections to the Indian Administrative Service and other Allied Services that the allocation of even 17.11 per cent marks for the viva voce test was on the higher side and it was responsible for nearly one-fourth of the selected candidates securing a place in the select list owing to the marks obtained by them at the viva voce test, the allocation of 22.2 per cent marks for the viva voce test would certainly be likely to create a wider scope for arbitrariness. When the Kothari Committee, admittedly an Expert Committee, constituted for the purpose of examining recruitment policy and selection methods for the Indian Administrative Service and other Allied Services took the view that the allocation of 17.11 per cent marks for the viva voce test was on the higher side and required to be reduced, it would be legitimate to hold that in case of selections to the Haryana Civil Services (Executive Branch) and other Allied Services, which are services of similar nature in the State, the allocation of 22.2 per cent marks for the viva voce test was unreasonable. We must therefore regard the allocation of 22.2 per cent of the total marks for the viva voce test as infecting the selection process

with the vice of arbitrariness.

28. But the question which then arises for consideration is as to what is the effect of allocation of such a high percentage of marks for the viva voce test, both in case of ex-service officers and in case of other candidates, on the selections made by the Haryana Public Service Commission. Though we have taken the view that the percentage of marks allocated for the viva voce test in both these cases is excessive, we do not think we would be justified in the exercise of our discretion in setting aside the selections made by the Haryana Public Service Commission after the lapse of almost two years. The candidates selected by the Haryana Public Service Commission have already been appointed to various posts and have been working on these posts since the last about two years. Moreover the Punjab Civil Service (Executive Branch) Rules, 1930 under which 33.3 per cent marks in case of ex-service officers and 22.2 per cent marks in case of other candidates, have been allocated for the viva voce test have been in force for almost 50 years and everyone has acted on the basis of these rules. If selections made in accordance with the prescription contained in these rules are now to be set aside, it will upset a large number of appointments already made on the basis of such selections and the integrity and efficiency of the entire administrative machinery would be seriously jeopardised. We do not therefore propose to set aside the selections made by the Haryana Public Service Commission though they have been made on the basis of an unduly high percentage of marks allocated for the viva voce test.

29. Now if the allocation of such a high percentage of marks as 33.3 in case of ex-service officers and 22.2 in case of other candidates, for the viva voce test is excessive, as held by us, what should be the proper percentage of marks to be allocated for the viva voce test in both these cases. So far as candidates in the general category are concerned we think that it would be prudent and safe to follow the percentage adopted by the Union Public Service Commission in case of selections to the Indian Administrative Service and other Allied Services. The percentage of marks allocated for the viva voce test by the Union Public Service Commission in case of selections to the Indian Administrative Services and other Allied Services is 12.2, and that has been found to be fair and just, as striking a proper balance between the written examination and the viva voce test. We would therefore direct that hereafter in case of selections to be made to the Haryana Civil Services (Executive Branch) and other Allied Services, where the competitive examination consists of a written examination followed by a viva voce test, the marks allocated for the viva voce test shall not exceed 12.2 per cent of the total marks taken into account for the purpose of selection. We would suggest that this percentage should also be adopted by the Public Service Commissions in other States, because it is desirable that there should be uniformity in the selection process throughout the country and the practice followed by the Union Public Service Commission should be taken as a guide for the State Public Service Commissions to adopt and follow. The percentage of marks allocated for the viva voce test in case of ex-service officers may, for

reasons we have already discussed, be somewhat higher than the percentage for the candidates belonging to the general category. We would therefore direct that in case of ex-service officers, having regard to the fact that they would ordinarily be middle-aged persons with personalities fully developed, the percentage of marks allocated for the viva voce test may be 25. Whatever selections are made by the Haryana Public Service Commission in the future shall be on the basis that the marks allocated for the viva voce test shall not exceed 12.2 per cent in case of candidates belonging to the general category and 25 per cent in case of ex-service officers."

24. In *Inder Prakash Gupta vs. State of Jammu and Kashmir* (2004) 6 SCC 786, the Supreme Court held that where the allocation of marks is one which is capable of being misused, it is liable to be struck down as being violative of Article 14 of the Constitution. It would be apposite to extract the following passages from the decision of the Supreme Court in *Inder Prakash Gupta*:

"34. It is true that for allocation of marks for viva voce test, no hard-and-fast rule of universal application which would meet the requirements of all cases can be laid down. However, when allocation of such marks is made with an intention which is capable of being abused or misused in its exercise, it is liable to be struck down as ultra vires Article 14 of the Constitution of India.

(See *Jasvinder Singh v. State of J&K* [(2003) 2 SCC 132 : 2003 SCC (L&S) 147] and *Vijay Syal v. State of Punjab* [(2003) 9 SCC 401 : 2003 SCC (L&S) 1112] .)

35. It is also trite that when there is requirement of consultation, in absence of any statutory procedure, the competent authority may follow its own procedure subject to the conditions that the same is not hit by Article 14 of the Constitution of India.

(See *Chairman & MD, BPL Ltd. v. S.P. Gururaja* [(2003) 8 SCC 567] .)"

25. However, the aforesaid principles as laid down in *Ashok Kumar Yadav* and the various decisions of the Supreme Court which followed thereafter were duly explained in *Lila Dhar* in the following terms:

"5. How should the competitive examination be devised? The Kothari Committee on Recruitment Policy and Selection Methods in their report said:

"A system of recruitment almost totally dependent on assessment of a person's academic knowledge and skills, as distinct from ability to deal with pressing problems of economic and social development, with people, and with novel situations cannot serve the needs of today, much less of tomorrow.... We venture to suggest that our recruitment procedures should be such that we can select candidates who can not only assimilate knowledge and sift material to understand the ramifications of a situation or a problem but have the potential to develop an original or innovative approach to the solution of problems."

It is now well-recognised that while a written examination assesses a candidate's

knowledge and intellectual ability, an interview-test is valuable to assess a candidate's overall intellectual and personal qualities. While a written examination has certain distinct advantages over the interview-test there are yet no written tests which can evaluate a candidate's initiative, alertness, resourcefulness, dependableness, cooperativeness, capacity for clear and logical presentation, effectiveness in discussion, effectiveness in meeting and dealing with others, adaptability, judgment, ability to make decision, ability to lead, intellectual and moral integrity. Some of these qualities may be evaluated, perhaps with some degree of error, by an interview-test, much depending on the constitution of the Interview Board. O. Glenn Stahl in his Public Personnel Administration points out:

"Any form of written test possesses certain administrative advantages over the oral and performance types. The written form is much easier and cheaper to administer. It can be given to a large number of individuals at the same time, thus conserving the time of the examiners. As a general rule it is easier to evaluate objectively, and the technical proficiency demanded in rating is usually, although not always, less. The oral test has long served as a basic selection tool in private employment but has been more slowly accepted in the public field. This conservatism arises out of three considerations: (1) the difficulty of developing valid and reliable oral tests; (2) the difficulty of securing a reviewable record of an oral test; and (3) public suspicion of the oral as a channel for the exertion of political influence through the destruction of anonymity. Despite these acknowledged disadvantages, however, orals have been used increasingly in public personnel testing and have become important instruments wherever tests of personal attributes are considered essential. As we have noted no satisfactory written tests have yet been devised for measuring such personal characteristics as initiative, ingenuity and ability to elicit cooperation, many of which are of prime importance. When properly employed, the oral test today deserves a place in the battery used by the technical examiner.... The general principle is that resort should never be had to an oral if the relevant factors to be tested can be measured at some other point in the examining process. The reason is that the reliability of the oral, even under the best of conditions, tends to be lower than that of the well designed written test. The oral test should be confined, then, to the evaluation of relevant traits which cannot be measured in any other way. [Ibid., p. 92] "

In the United Nations Handbook on Civil Service Laws and Practice it is said:

"... the written papers permit an assessment of culture and intellectual competence. The interview permits an assessment of qualities of character which written papers ignore; it attempts to assess the man himself and not his intellectual abilities."

6. Thus, the written examination assesses the man's intellect and the interview test the man himself and "the twain shall meet" for a proper selection. If both written examination and interview test are to be essential features of proper

selection, the question may arise as to the weight to be attached respectively to them. In the case of admission to a college, for instance, where the candidate's personality is yet to develop and it is too early to identify the personal qualities for which greater importance may have to be attached in later life, greater weight has per force to be given to performance in the written examination. The importance to be attached to the interview-test must be minimal. That was what was decided by this Court in *Periakaruppan v. State of Tamil Nadu* [(1971) 1 SCC 38 : (1971) 2 SCR 430] , *Ajay Hasia v. Khalid Mujib Sehravardi* [(1981) 1 SCC 722; 1981 SCC (L&S) 258 : AIR 1981 SC 487] and other cases. On the other hand, in the case of services to which recruitment has necessarily to be made from persons of mature personality, interview test may be the only way, subject to basic and essential academic and professional requirements being satisfied. To subject such persons to a written examination may yield unfruitful and negative results, apart from its being an act of cruelty to those persons. There are, of course, many services to which recruitment is made from younger candidates whose personalities are on the threshold of development and who show signs of great promise, and the discerning may in an interview-test, catch a glimpse of the future personality. In the case of such services, where sound selection must combine academic ability with personality promise, some weight has to be given, though not much too great a weight, to the interview-test. There cannot be any rule of thumb regarding the precise weight to be given. It must vary from service to service according to the requirements of the service, the minimum qualifications prescribed, the age group from which the selection is to be made, the body to which the task of holding the interview-test is proposed to be entrusted and a host of other factors. It is a matter for determination by experts. It is a matter for research. It is not for courts to pronounce upon it unless exaggerated weight has been given with proven or obvious oblique motives. The Kothari Committee also suggested that in view of the obvious importance of the subject, it may be examined in detail by the Research Unit of the Union Public Service Commission."

26. The aforesaid position was reiterated in *C.P. Kalra* as would be evident from the following passages:

"6. Mr Rajeev Dhavan, learned counsel for the appellant, put forward three submissions in the main. His first contention was that the viva voce test which reserves 40 per cent marks for the purpose of assessment of merit, was in fact not to assess the merit of the candidate but to eliminate candidates and, therefore, it did not meet the requirement of the law laid down in the decisions referred to by the High Court as well as other decisions cited before us, namely, *Mohinder Sain Garg v. State of Punjab* [(1991) 1 SCC 662 : 1991 SCC (L&S) 555 : (1991) 16 ATC 495] , *Munindra Kumar v. Rajiv Govil* [(1991) 3 SCC 368 : 1991 SCC (L&S) 1052 : (1991) 16 ATC 928] and *Indian Airlines Corpn. v. Capt. K.C. Shukla* [(1993) 1 SCC 17 : 1993 SCC (L&S) 114 : (1993) 23 ATC 407] . According to him such exclusive interview requirement being wholly disproportionate to the level for which selection has to be made can only be

described as unfair, arbitrary and wholly unconnected to the object of the exercise. We do not think that there is any merit in this submission. The promotion policy clearly envisages that merit shall be the primary consideration for promotion to the next higher post. Once the candidates falling within the zone are tested for the purpose of determining their merit on the basis of their performance emanating from the appraisal reports as well as their performance at the interview, the total number of marks secured, if not less than 70 per cent, would entitle the candidate to be placed in the group of meritorious candidates suitable for promotion to the next higher post. Once this group of meritorious candidates is determined, their arrangement in the select list has to be on the basis of the inter se seniority. This method of assessing the merit of the candidate cannot be said to be, in any manner, arbitrary or one which has no relevance to the object to be achieved. The basic idea under the promotion policy is that the managerial post should be manned by candidates of merit and once meritorious candidates are identified, seniority would assume relevance for the limited purpose of their placement in the panel. It is true that on the basis of the appraisal reports and the grading given to each candidate, marks are assigned out of 60 marks. Out of the remaining 40 marks, marks are assigned to each candidate on the basis of the performance at the interview. If a candidate secures 70 per cent and above he is taken to be meritorious enough for promotion to the next higher post. We see nothing arbitrary in the method of determining merit. We, therefore, find it difficult to agree with the learned counsel that the sole purpose of interviews is only to eliminate candidates. When candidates having merit are to be chosen, any method of choice employed will necessarily eliminate those without merit. A cut-off line has to be drawn for determining merit and in this case it is fixed at 70 per cent. There is nothing arbitrary, unfair or irrational about the prescription of the minimum eligibility marks for empanelment. We, therefore, reject this contention.

7. It was next submitted that the promotion policy was unconstitutional as the marks assigned for the interview test were far in excess of the permissible norm or limit. The 40 per cent prescription for interview is based on Rule 2.6 of the promotion policy. This 40 per cent is divided under different heads or factors as stated hereinabove. The submission of the learned counsel for the petitioner was based on the observations of this Court in *Ashok Kumar Yadav* [(1985) 4 SCC 417 : 1986 SCC (L&S) 88] wherein this Court observed that 33.3 per cent marks reserved for oral test were excessive and would suffer from the vice of arbitrariness. The High Court has dealt with this submission and has pointed out that no hard and fast rule can be evolved in this behalf because much would depend on the job requirement for each post and the level of the post. A whole line of decisions were brought to our notice beginning from *Ajay Hasia* case [(1981) 1 SCC 722 : 1981 SCC (L&S) 258] but it would be sufficient for us to refer to the latest decision in the case *Indian Airlines Corpn. v. Capt. K.C. Shukla* [(1993) 1 SCC 17 : 1993 SCC (L&S) 114 : (1993) 23 ATC 407]. In that case this Court after referring to the decisions in *Ajay Hasia* [(1981) 1 SCC 722 : 1981

SCC (L&S) 258] , Lila Dhar [Lila Dhar v. State of Rajasthan, (1981) 4 SCC 159 : 1981 SCC (L&S) 588] , Ashok Kumar Yadav [(1985) 4 SCC 417 : 1986 SCC (L&S) 88] and Rafiquddin [State of U.P. v. Rafiquddin, 1987 Supp SCC 401 : 1988 SCC (L&S) 183 : (1987) 5 ATC 257] observed that a distinction appears to have been drawn in interviews held for competitive examination or admission in educational institutions and selection for higher posts. Efforts have been made to limit the scope of arbitrariness in the former by narrowing down the proportion as various factors are likely to creep in, but the same standard cannot be applied for higher selections and this is clearly brought out in Lila Dhar case [Lila Dhar v. State of Rajasthan, (1981) 4 SCC 159 : 1981 SCC (L&S) 588] . It is, therefore, clear that this Court was also of the view that no hard and fast rule can be laid down in these matters because much would depend on the level of the post and the nature of the performance expected from the incumbent. In that case the method of evaluation was based 50 per cent on ACRs and 50 per cent on interviews and this Court upheld the said method notwithstanding the fact that the weightage for interview performance was as high as 50 per cent. We are, therefore, of the view that the contention that because in the instant case the weightage for the viva voce test is 40 per cent, it is per se excessive and hence arbitrary, cannot be accepted."

27. The Court also deems it apposite to notice the following pertinent observations as were made by the Supreme Court in Indian Airlines Corporation v. Capt. K.C. Shukla (1993)1 SCC 17:

"2. Whether the decision of the High Court is well founded on various aspects shall be examined presently but the alternative relief granted by the High Court probably in an anxiety to be fair and just to those others who had been selected by reducing the interview percentage to 12.5 per cent then working out proportionally the marks obtained by respondent on ACR evaluation and interview and directing to promote him as by this method he would secure the minimum required cannot be accepted as proper exercise of jurisdiction under Article 226. Adjusting equities in exercise of extraordinary jurisdiction is one thing but assuming the role of selection committee is another. The Court cannot substitute its opinion and devise its own method of evaluating fitness of a candidate for a particular post. Not that it is powerless to do so and in a case where after removing the illegal part it is found that the officer was not promoted or selected contrary to law it can issue necessary direction. For instance a candidate denied selection because of certain entries in his character roll which either could not be taken into account or had been illegally considered because they had been expunged the Court would be within jurisdiction to issue necessary direction. But it would be going too far if the Court itself evaluates fitness or otherwise of a candidate, as in this case.

3. Law on the proportion between written test and interview or evaluation on confidential entries and personality test have been laid down in a series of decisions by this Court commencing from Ajay Hasia v. Khalid Mujib Sehravardi

[(1981) 1 SCC 722 : 1981 SCC (L&S) 258] ; Lila Dhar v. State of Rajasthan [(1981) 4 SCC 159 : 1981 SCC (L&S) 588] ; Ashok Kumar Yadav v. State of Haryana [(1985) 4 SCC 417 : 1986 SCC (L&S) 88] and State of U.P. v. Rafiquddin [1987 Supp SCC 401 : 1988 SCC (L&S) 183 : (1987) 5 ATC 257] . Distinction appears to have been drawn in interview held for competitive examinations or admission in educational institutions and selection for higher posts. Effort has been made to eliminate scope of arbitrariness in the former by narrowing down the proportion as various factors are likely to creep in. But same standard cannot be applied for higher selections. Lila Dhar case [(1981) 4 SCC 159 : 1981 SCC (L&S) 588] brings it out fully. In respondent's case the personality of the respondent was being judged by a Committee constituted under the rules for purposes of higher promotional posts and, therefore, it was governed by the ratio laid down in Lila Dhar case [(1981) 4 SCC 159 : 1981 SCC (L&S) 588] and it would be unsafe to strike down the rules as arbitrary when the evaluation was job oriented. Marks to be allotted by the Committee were on professional ability and management capacity. Further the Corporation has amended the rules and narrowed it down in 1991 by reducing the interview marks to 40 per cent only. Moreover after examining the record, which was examined by the High Court, as well, it appears the Committee was neither guilty of arbitrariness nor it violated any rule or regulation in allotting the marks which of course were very low in interview."

28. The position as explained in Indian Airlines Corporation was affirmed by the Supreme Court in K.A. Nagamani vs. Indian Airlines (2009)5 SCC 515. The principles laid down in the various decisions noticed above starting from Lila Dhar clearly establish that the observations made in Ashok Kumar Yadav with respect to the maximum number of marks that may be allocated to an interview is not liable to be read as an inviolable rule. The decisions rendered thereafter have drawn a distinction between an interview that may be held for competitive examinations or admissions in educational institutions and selections for higher posts. The Court notes that in the facts of the present case, the promotional exercise was being undertaken for filling up the post of Assistant Vice President and Deputy Vice President. Bearing in mind the position of these posts in the cadre hierarchy, the Court finds itself unable to sustain the challenge laid by the petitioners to the prescription of 50% marks in the interview. The further allegation leveled by the petitioners that the interview panel conducted an interaction which lasted a mere two minutes is an issue which need not necessarily be gone into or answered for reasons which stand recorded hereinafter.

29. As is evident upon a consideration of the promotion policy that was framed, candidates were to be adjudged on the basis of their performance in the interview and on an evaluation of their performance appraisal reports coupled with their respective position in the seniority list. The division of marks between the interview, number of years of service and performance appraisal were prescribed to be 50, 10 and 40 marks respectively. It is thus manifest that marks

allocated towards performance appraisal constituted a significant component in the entire evaluation exercise. While dealing with the case of the petitioners individually, the respondent had awarded 22.5 marks to Manish Gupta and 22.5 marks to Paritosh Sharma under the head. This allocation of marks, however, was based upon various APARs which had admittedly not been communicated to the petitioners. Both the petitioners in that sense were not only deprived of an opportunity to represent against the remarks as recorded and the ratings which were granted, those APAR's have also impacted the overall marks awarded to them in the promotional exercise. The Court has already found that Dev Dutt clearly obligated the respondents to communicate all APARs to employees. This position in law is also conceded by the respondents.

30. In view of the aforesaid, it would appear to be expedient for the respondents to consider any representations that the petitioners may choose to make for upgradation of the ratings given in the years in question and if those ratings ultimately come to be upgraded, to consider the constitution of a Review Promotional Committee which may be charged with considering the candidature of the petitioners afresh.

31. Accordingly, and for all the aforesaid reasons, the instant writ petitions shall stand allowed in the following terms: -

(i) The order dated 16 January 2018 impugned in these two writ petitions shall stand quashed and set aside to the extent that the individual claims of the petitioners for promotion has come to be negated based upon the award of marks with respect to the performance appraisal ratings awarded to the petitioners on 30 September 2014, 31 March 2015, 30 September 2015 and 31 March 2016 and the marks allocated to them in the interview.

(ii) It shall be open to the petitioners to make representations against the performance appraisal ratings awarded to them for the aforesaid periods. Any such representations that may be made may be placed for due consideration of the competent authority.

(iii) In case the competent authority upon due consideration ultimately comes to find and upgrades the ratings awarded to the petitioners, the respondents shall be consequently obliged to constitute a Review DPC which may conduct interviews of the petitioners afresh and evaluate their claims for promotion accordingly.

32. The prayer for quashing of the promotional orders which were issued by the respondents is refused since none of the promoted candidates have been arrayed as party respondents in the present writ petition. In any case, if the respondents ultimately come to conclude that the petitioners were entitled to be promoted for the panel year 2016-17, it would always be open to them to consider granting them the benefits of notional promotion.