
(2012) 06 GAU CK 0089
In the Gauhati High Court
Case No : Writ Petition (Civil) No. 725 of 2011

Salam (O) Th.Lilabati Devi	Vs	APPELLANT
State of Manipur & Ors.		RESPONDENT

Date of Decision : 19-06-2012

Acts Referred:

Citation : (2012) 3 GLT 855

Hon'ble Judges : T.Nandakumar Singh, J

Bench : Single Bench

Advocate : Advocate appeared for the Petitioner: Mr. Kh. Tarunkumar?? Advocate appeared for the Respondents: Mr. Y. Ashang, GA, Advocates appearing for Parties

Judgement

T. Nandakumar Singh, J.—Heard Mr. Tarunkumar, learned counsel appearing for the petitioner and also Mr. Y. Ashang, learned Government Advocate appearing for the respondent Nos1 and 2; none appears for the respondent No.3, in spite of proper service of notice of this writ petition, to him, without showing any cause.

2. On 16.11.2011 Mr. Y. Ashang, learned Government Advocate entered appearance on behalf of the State respondents, i.e. Respondent Nos. 1 and 2 and the respondents were directed to file affidavit inopposition on or before the returnable date, i.e. on 14.12.2011. On 14.12.2011, this Court passed an order that the "service report of the respondent No.3 returned unserved with the report that the respondent No.3 refused to accept notice, but for abundant precaution the learned counsel appearing for the petitioner is allowed to take steps for service of notice to the respondent No. 3 by Dasti service through the Registry of this Bench." Service of notice to the respondent No.3 was effected by Dasti, for that, the petitioner filed an affidavit dated 17.12.2011 that the service of notice to the respondent No.3 had been effected by Dasti service. In spite of giving sufficient opportunity to the respondents, they did not file their affidavits inopposition. Ultimately, on 8.02.2012 this Court further granted 2(two) weeks" time as a last chance for filing affidavit inopposition on behalf of the respondent Nos 1 and 2. The State respondents, i.e. Respondent Nos1 and 2 had opted not

to file their affidavit in opposition in the present writ petition knowing quite well the consequence of not filing affidavit in opposition in the writ petition.

3. On 29.2.2012 Mr. Y. Ashang, learned State counsel had been directed to produce the DPC proceedings positively on 6.3.2012. Again, the learned State counsel had failed to produce the DPC proceedings (related DPC proceedings).

4. This Court may recall the decision of the Apex Court regarding the effect of not filing affidavit in opposition in a case, i.e. *Bir Singh Chauhan Vs. State of Haryana & Anr.* : (1997) 6 SCC 282 ; in that case the Apex Court held that as the respondents have neither filed the counter nor produced the record, the Court is constrained to accept the case of the appellant. Para 4 of the SCC in *Bir Singh Chauhan's* case(supra) read as follows:

"4. We wanted to examine the record to ascertain whether there is any substantial case against the appellant. The respondents have neither filed counter nor produced the record. Under these circumstances, we are constrained to accept the case of the appellant that he is entitled to be considered for promotion under the Rules. We direct the Government to consider his case for promotion on the basis of his service record within four months from the receipt of this order. While doing so, the Government will exclude the material relating to his inspection report."

FACTUAL BACKGROUND

5. The petitioner was initially appointed to the post of L.D.C. on 27.9.74. Thereafter, she was promoted to the post of U.D.C. on 28.01.1998. The petitioner categorically pleaded in the writ petition that since her initial appointment she has been serving to the full satisfaction of her superior officers as well as her fellow colleagues till date.

6. The Director incharge Economics & Statistics, Manipur issued the order being No.DES/1(92)/2001GA Lamphelpat the 26th July,2010 for fixing the final seniority list of U.D.Cs. of the Directorate of Economics & Statistics, Govt. of Manipur as on 15.07.2010; in that final seniority list name of the petitioner appeared at Sl.No.2 and that of the respondent No.3 appeared at SI. No.3. Admittedly, the petitioner is senior to the respondent No.3 in the grade/post of U.D.C.

7. In supersession of all previous Rules issued in this regard and in exercise of the powers conferred by the proviso to Article 309 of the Constitution, the Governor of Manipur was pleased to make the rules regulating the method of recruitment to the posts of Head Clerk/Head Assistant/Office Superintendent in the Departments/Offices other than Police Department under the Government of Manipur, called "The Government of Manipur [Departments/ Offices other than Police Department (Head Clerk/Head Assistant/Office Superintendent)] Recruitment Rules, 1994" vide order being No. 1 /75/79RR/DP Imphal the 30th July, 1994 which was notified in the Manipur Gazette dated September 7,1994.

Under the said Recruitment Rules, the post of Head Clerk is a nongazetted post, and the method of appointment is promotion by selection and U.D.Cs/Junior Accountants with 5(five) years" regular service in their respective grades having passed (a) Accounts Exam, conducted either by A.G Assam or by Government of Manipur and (b) Passed in Office Procedure Exam, conducted by Govt. of Manipur and also the UDCs with 12(twelve) years" regular service in the grade having passed the Exam, in Office Procedure conducted by the Govt. of Manipur, are eligible for promotion to the post of Head Clerk. Admittedly, the petitioner and the respondent No.3 are eligible for promotion to the post of Head Clerk which is a nongazetted post even though the method of promotion is by selection.

8. A Departmental Promotion Committee (for short DPC) in its meeting held on 30.7.2010 recommended the respondent No.3 for promotion to the post of Head Clerk and accordingly the Director incharge, Economics & Statistics, Manipur issued the order being No.DES/I(9)/98GA Lamphelpat the 12th August, 2010 for appointing the respondent No.3 as Head Clerk.

9. Being aggrieved by the said promotion of the respondent No. 3 vide the impugned order dated 12.8.2010 the petitioner submitted a representation to the Director, Economics & Statistics, Govt. of Manipur on 21.8.2010 with a request to hold review DPC of the said DPC which recommended the respondent No.3 for promotion to the post of Head Clerk by superseding the petitioner. In the said representation, the petitioner categorically stated that the bench mark for promotion to the ClassIII post is "Good" according to the Office Memorandum of the Government of Manipur being No. 17/2/80DP Imphal, the 29th April, 1999. The petitioner had never been informed of any adverse entry in her ACR. The petitioner also filed another representation dated 12.10.2010 to the Principal Secretary, Economics & Statistics, Govt. of Manipur for reviewing the said DPC.

10. The Govt. of Manipur issued the said Office Memorandum dated 29.4.1999 which was published in the Extraordinary Gazette No. 137 Imphal, Wednesday, June 9,1999 stating clearly that the Government has carefully considered the various aspects of the subject matter (Departmental Promotion Committee and related matters consolidated instruction on) and decided to reiterate/revise the existing instructions in a consolidated fashion(form) as detailed in the Annexure for the guidance of all the Departments with effect from the date of publication in the Manipur Gazette. Relevant portions of the instructions, i.e. Office Memorandum dated 29.4.1999 to be followed by the DPC in the present case, i.e. para 5.2.1, 5.2.3 and 5.3.1 are reproduced hereunder:

"5.2.1. Confidential Rolls are the basic inputs on the basis of which assessment is to be made by each DPC. The evaluation of CRs should be fair, just and nondiscriminatory. Hence

(a) The DPC should consider CRs for equal number of years in respect of all Officers considered for promotion subject to (c) below.

(b) The DPC should assess the suitability of the Officers for promotion on the

basis of their service record and with particular reference to the CRs for 5 preceding years (except in cases where R/Rs prescribes lesser qualifying service for promotion). However, in cases where the required qualifying service is more than 5 years, the DPC should see the record with particular reference to the CRs for the years equal to be required qualifying service (If more than one CR has been written for a particular year, all the CRs for the relevant year shall be considered together as the CR for one year).

(c) Where one or more CRs have not been written for any reason during the relevant period, the DPC should consider the CRs of the years preceding the period in question and if in any case even these are not available the DPC should take the CRs of the lower grade into account to complete the number of CRs required to be considered as per (b) above. If this is also not possible, all the available CRs should be taken into account.

(d) Where an Officer is officiating in the next higher grade and has earned CRs in that grade, his CRs in that grade may be considered by the DPC in order to assess his work, conduct and performance, but no extra weight age may be given merely on the ground that he has been officiating in the higher grade.

(e) The DPC should not be guided merely by the overall grading, if any, that may be recorded in the CRs but should make its own assessment on the basis of the entries in the CRs, because it has been noticed that sometimes the overall grading in a CR may be inconsistent with the grading under various parameters or attributes.

(f) If the Reviewing authority or the Accepting authority as the case may be, has overruled the Reporting Officer or the Reviewing authority, as the case may be, the remarks of the latter authority should be taken as the final remarks for the purposes of assessment, provided it is apparent from the relevant entries that the higher authority has come to a different assessment consciously after due application of mind. If the remarks of the reporting Officer, Reviewing authority and Accepting authority are complementary to each other and one does not have the effect of overruling the other, then the remarks should be read together and the final assessment made by the DPC.

5.2.2. In the case of each officer an overall grading should be given. The grading shall be one among (i) Outstanding, (ii) Very Good, (iii) Good, (iv) Average/fair and (v) Unit.

5.2.3. Before making the overall grading after considering the CR for the relevant years, the DPC should take into account whether the Officer has been awarded any major or minor penalty or whether any displeasure of any superior Officer or authority has been conveyed to him as reflected in the ACRs. The DPC should also give regard to the remarks against the column on integrity.

Principles to be observed and preparation of panel.

5.3.1. The list of candidates considered by the DPC and the overall grading

assigned to each candidate, would form the basis for preparation of the panel for promotion by the DPC. The following principles should be observed in the preparation of the panel.

(a) Having regard to the levels of the posts to which promotions are to be made, the nature and importance of the duties attached to the posts, a benchmark grade would be determined for each category of posts for which promotion are to be made by selection method. For promotion to all Classes III and II posts/services, the benchmark would be "Good." All Officers whose overall grading is equal to or better than the benchmark should be included in the panel for promotion to the extent of the number of vacancies. They will be arranged in order of their inter se seniority in the lower category without reference to the overall grading obtained by each of them provided that each one of them has an overall grading equal to or better than the benchmark of "Good". Whenever promotions are made for induction to Class I posts or services from Lower Groups and promotion within Class I posts/Services carrying pay scale less than Rs.37005000/ (Prerevised), the benchmark would continue to be "Good". However, Officers graded as "Outstanding" would rank en bloc senior to those who are graded as "Very Good" and Officers graded as "Very Good" would rank en bloc senior to those who are graded as "Good" and placed in the select panel accordingly up to the number of vacancies, Officers with same grading maintaining their inter se seniority in the feeder post.

(b) In respect of all posts which are in the level of Rs. 37005000/ (prerevised) and above, the benchmark grade should be "Very Good". However, Officers who are graded as "Outstanding" would rank en bloc senior to those who are graded as "Very Good" and placed in the select panel accordingly up to the number of vacancies, Officers with same grading maintaining their inter se seniority in the feeder post."

11. The benchmark for the purpose of selection of the candidate for promotion to the Head Clerk, which is a nongazetted Class III post, would be "Good." Under the recruitment Rules for the post of Head Clerk (Class III nongazetted), method of promotion is by selection, but the manner as to how the candidate is to be selected by the DPC or/criteria for selection are not mentioned in the recruitment itself. The said Memorandum dated 29.4.1999 for issuing the consolidated instructions to be considered in selection of candidates for promotion to the selection post had been considered, discussed and accepted by this Court (Division Bench and Single Bench) in a number of cases, some of which are: (i) E. Bhubneshwar Singh & Ors Vs. State of Manipur & Ors: 2005(4) GLT 655 and (ii) Lourembam Deben Singh & Ors Vs. State of Manipur & Ors: 2010(2) GLT 653. The Division Bench of this Court in E. Bhuneshwar Singh's case (supra) clearly held that paragraph 5.3.1 of the Office Memorandum dated 29.4.1999 does not, in any way, violate the provisions of the recruitment Rules in force and there is no infirmity in the Government decision to apply the provisions of the Office Memorandum and paragraph 5.3.1 of the O.M. dated 29.4.1999 will apply

to the selection in hand, i.e. post of Sub Inspector of Police (Civil). This Court also endorsed the view expressed by the Division Bench in E. Bhubneshwar Singh's case (supra).

12. Paragraph 5.3.1 of the said Office Memorandum dated 29.4.1999 contemplates different situations when the promotion to the higher echelon in different services and considerations for selection of the candidates for the post of Head Clerk (nonGazetted) may not be to the extent of gravity of consideration for selection for the higher post like ClassI Gazetted post. In this context the concerned authority of the State having the expertise in the field is prescribing the benchmark as "Good" for the selection post of the lowest rung, i.e. the post of Head Clerk (nonGazetted). The decision of this Court (Division Bench) in E. Bhubneshwar Singh's case (supra) in para 6,7,8,10,12,13,15 and 17 of the GLT read as follows:

"6. Paragraph 5.3.1 of the Office Memorandum dated 29.4.1999 has laid down that in so far as promotion to ClassII and III posts are concerned the benchmark is "Good" and all officers whose overall grading that an officer may acquire on the basis of the appraisal of his ACRs, are required to be placed in the select list in order of seniority and it is from the said list that promotions are required to be made. Paragraph 5.3.1 however, contemplates a different situation when promotions to the higher echelon in different services are under consideration. In such cases, officers are required to be graded as "Outstanding", "Very Good" and "Good" on the basis of the ACRs and service records. Officers, who are graded as "Outstanding", regardless of their seniority, will have precedence over those graded as "Very Good": similarly those who are graded as "Very Good" will have precedence over those graded as "Good".

7. From the above, what transpires is that in so far as the posts in Class II and III are concerned, the criteria prescribed by paragraph 5.3.1 of the Office Memorandum dated 29.4.1999 is essentially one of senioritycummerit whereas for the higher echelons in service, the criteria prescribed is one of meritcumseniority. Applying the requirements spelt out by paragraph 5.3.1 to the instant promotional process, the select list dated 28.3.2003 prepared on the basis of merit, as already noticed, was recast by adhering to the requirements of paragraph 5.3.1 and in this manner the petitioners were excluded from the fresh select list prepared by the D.P.C. in its deliberation held on 7.8.03.

8. The argument advanced on behalf of the appellants has been, indeed, short and precise to put it even more succinctly the contention advanced before the Court is that as the Recruitment Rules have classified the post in question to be a selection post, there could have been no other criteria appalled but one of merit, while making the selection. Selection must necessarily be on the basis of positive merit as revealed by the service record and it is on comparative assessment of the relative merit of all the candidates within the zone of consideration that the selection of the most meritorious had to be made. Paragraph 5.3.1 having laid down a some wheat "diluted: form of assessment of merit by requiring an

eligible candidate to have the grading of "Good" and thereafter seniority being the determining factor to the exclusion of better merit/gradings that may have been secured, what has been prescribed by paragraph 5.3.1 is a criteria of minimum merit, where after precedence is given to seniority. As the second selection by D.P.C. held on 7.8.2003 has been on an application of the requirements spelt out by paragraph 5.3.1 not only the directions to apply the aforesaid provisions, i.e. paragraph 5.3.1 are contended to be contrary to the Rules; the entire exercise performed by the D.P.C. in its meeting held on 7.8.2003, it is argued, is opposed to what has been mandated by the Rules. In support, reliance has been placed on a judgment of the Apex Court in the case of Union of India Vs. Lt. Gen. Ranjen Singh Kadyan, reported in (2000)6 SCC 698. Another decision of the Apex Court in the case of Central Council for Research in Ayurveda & Sidha and another Vs. Dr. K. Santhakumari, reported in (2001)5 SCC 60 as well as the decision of this Court in the case of Bhusan Chandra Roy Medhi Vs. Hemanta Kumar Mahanta and others, reported in 2003(2) GLT 584 has also been pressed into service.

10. The rival arguments, as noted above, having presented an issue of substantial importance requiring an authoritative pronouncement by the Court, we may now proceed to answer the same. Promotions to higher post in service may, under the Rules in force, be made "automatic" i.e. as a matter of right (subject to fitness); or by application of an principle of limited merit or exclusive merit. English Dictionary understands the word "Selection" or "Select" to mean an option, to pick or choose. Selection therefore, implies a process whereby one person is chosen for the post to the exclusion of another. Having regard to the avowed purpose of promotion by selection, the process necessarily implies a selection based on merit. Selection does not recognize a right of automatic promotion. Having regard to the necessity of taking care of all reasonable aspirations in public service, normally, the service rules provide for "automatic" promotion up to certain level in the hierarchy where after the remaining promotions are to be made on the basis of selection. In this manner, the conflicting interests created by reasonable aspirations and the need of an efficient system of administration is counter balanced. As it is open to the State, as the employer, to prescribe the levels to which promotion can be earned as a matter of right, subject to fitness and thereafter on the basis of merit, it must be equally open for the employer to decide the prescribe what percentage of higher posts should be filled up by minimum merit as opposed to relative merit. Merely because a post is classified as a selection post, such classification cannot take away the right of the employer to decide, having regard to the relevant circumstances, e.g., the level of the post, that a particular post should be filled up on the basis of minimum merit whereas another post which is still higher should be filled up by comparative assessment of merit. A selection post does not cease to be so merely because a test of minimum merit has been prescribed, after all the option to reject and pick or chose on the basis of merit which is cardinal to the concept of selection is still available to the employer, though in a

limited manner.

12. The judgment of the Apex Court in the case of Central Council for research in Ayurveda and Sidha (2001) 5 SCC 60 relied upon by the learned counsel for the appellants lays down a proposition more or less to the same effect, as notice above, but in a situation where the service Rules had clearly provided that selection is to be made by application of the principle of meritcum seniority.

13. The two judgments of the Apex Court referred to above, therefore, according to us, ought not to be understood to have laid down any principle of general application that a selection post can only be filled up on an assessment of relative merit as has been contended on behalf of the appellants. Rather we find ample justification for the view that we have taken from a constitution Bench judgment in the case of State of Orissa V. Durga Charan Das reported in AIR 1966 SC 1537 which decision has been incidentally referred to in the case of Central Council of Research in Ayurveda and Sidha(supra).

15. From the above, it is crystal clear that though selection necessarily involves consideration of merit, the quantum or percentage thereof may vary depending on the fact situation. The principle of senioritycummerit cannot be understood to be abhorrent to the concept of selection.

17. For the aforesaid reasons, we take the view that it would be correct for us to hold that paragraph 5.3.1 of the Office Memorandum dated 29.4.1999 and the application of the principle contained in the said paragraph of the said Office Memorandum, does not, in any way, violate the provisions of the Recruitment Rules in force and there is no infirmity in the government decision to apply the provisions of the aforesaid paragraph 5.3.1 of the P.M. dated 29.4.1999 to the selection in hand. Consequently, we find no illegality or infirmity in the proceedings of the D.P.C. held on 7.8.2003 and the recommendation made. Consequently, we dismiss the appeal but having regard to the totality of the facts and circumstances of the case, we make no order as to cost.

13. The petitioner, by invoking the provisions of Right to Information Act, 2005, approached the State Public Information Officer, Directorate of Economics & Statistics Manipur for furnishing comparative Grade in the ACRs of the candidates including that of the petitioner in the said DPC for promotion to the post of Head Clerk; and in response to that the State Public Information Officer, Directorate of Economics & Statistics, Manipur under his letter being No.DES/1 (9)/98(GA)/2341 Imphal, the 12th Sept.2011 furnished the comparative statement of overall Grading in the ACR of the candidates in the DPC held in the year, 2010 for promotion to the post of Head Clerk in the Department of Economics & Statistics, Manipur. The said comparative statement read as follows:

Comparative statement of overall Grading for Officers falling within the zone of consideration

Name of Post: U.D.Cs. Category: G/SC/ST

SI.

Name

Social

Year

5 year

Rank

Remarks

No.

Group

average

20056

20067

20078

20089

200910

Grading

10

11

1.

Smt. R.S. Lily

ST

Removed from Panel due to nonacceptance of promotion

2.

Smt. Th. Lilabati

A/NF

Devi

3.

M. Inaomacha

VG

VG

VG

OS

VG

VG

A

Singh

Average

4.

Direiyang

ST

NFNot

Lungleman

Fit

5.

Smt. L. Komla

OS Out

shini Devi

standing

SI. No.3 is recommended.

Sd/(A.Temba Singh) Under Secy/Fishery Govt. of Manipur

Sd/(L.Arunkumar Singh) Sd/(L.Jugindro Singh) Dy.Director(Admn) Director of Econ.& Statistics:

Govt. of Manipur Manipur.

14. From the comparative statement of the ACRs, it is clear that ACRs of the petitioner for the year, 200809 and 200910 are "Average", i.e. below the benchmark "Good". It is the clearcut pleaded case of the petitioner in the writ petition that the grading "Average" is adverse for the purpose of consideration for selection of the candidate for promotion to Head Clerk inasmuch as the benchmark is "Good" and anything below "Good" is an adverse and also that the said adverse entries were never communicated to the writ petitioner.

15. It is very well settled in the service jurisprudence that an adverse entry in the ACR of an employee which was not communicated to him cannot be considered or acted upon at the time of consideration of that employee for

promotion and also that the adverse entry in the ACR should also be communicated to the employee. It is not the prerogative of the appointing authority to select a person of his choice without any known procedure/yardstick; and the expression, "Prerogative" cannot be used in the context of any statutory provision. Under our Constitution and the statutory framework, there is nothing known as "prerogative". The Apex Court in *Centre for Public Interest Litigation & Ors. Vs. Union of India & Ors.* : (2012) SCC 177 held (para 12,13 and 14 of the SCC) that:

"12. Mr. Harin Raval, ASG appearing for ED, who is normally led by Mr. K.K.Venugopal, learned Senior counsel, argued by placing reliance on a decision of this Court in *Rajiv Ranjan Singh "Lalan"(8) v. Union of India*: (2006) 6 SCC 613: (2006) 3 SCC (Cri) 125, especially paras 50 and 51 of the said decision, those paragraphs are set out below (SCC p.643)

50. The appointment of lawyers is the prerogative of the Government and the prosecuting agency. The petitioners are trying to find fault with every attempt with every step taken. In cases like this the delay is inevitable.

51. It is also settled law that appointment of advocates, Public Prosecutors, etc. is the prerogative of the Government in power and the court has no role to play."

Relying on the aforesaid paragraphs, Mr. Raval submitted that the appointment of lawyers in connection with the present case is the prerogative of the Government.

13. Insofar as the ratio in *Rajiv Ranjan Singh* : (2006) 6 SCC 613: (2006)3 SCC (Cri) 125 is concerned, it was rendered in a totally different fact situation. In the said case, a PIL was filed under Article 32 of the Constitution at a time when the prosecution evidence was almost over and the trial had reached its final stage. At that stage, a prayer was made for change of Public Prosecutor at the instance of the petitioners who were total strangers to the case. On these grounds, the petition was dismissed. In this connection, in the concurring judgment of Ar. Lakshmanan, J. the aforesaid observation about the Government's prerogative to appoint lawyers for the prosecuting agency was recorded.

14. We are of the view that the expression "prerogative" cannot be used in the context of a statutory provision. Under our constitutional and statutory framework, there is nothing known as prerogative. In this connection, we may usefully recall what was said by the eminent jurist N.A. Palkhivala in his treatise *Our Constitution: Defaced and Defiled* (Macmillan: December 1974).The relevant portion reads as follows:

"Our Constitution recognizes no prerogative whatsoever, it recognizes merely rights, duties and discretions. The difference between "prerogative" and "discretion" is clear. A person who has a prerogative can act arbitrarily or irrationally and yet his decision must be treated as legal and valid. On the other hand, if a person has the discretion, and not the prerogative, to make a decision, the discretion can only be exercised fairly and reasonably; otherwise his act is

void on the ground that there was no valid exercise of discretion in the eye of law. (p.103). We are in respectful agreement with this view. In this case, the Court is not changing any Public Prosecutor who has already been appointed. The question in the present case was never an issue in *Rajiv Ranjan Singh* : (2006) 6 SCC 613: (2006)3 SCC (Cri) 125. Therefore, the decision in *Rajiv Ranjan Singh* is not of much relevance here."

16. Justice Madan, as His Lordship then was, in *Central Inland Water Vs. Brojo Nath Ganguly & Anr.*: AIR 1986 SC 151 observed:

"98. Should then our courts not advance with the time? Should they still continue to cling to outmoded concepts and outworn ideologies? Should we not adjust our thinking caps to match the fashion of the day? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of nineteenth century theories? Should the strong be permitted to push the weak to the wall? Should they be allowed to ride roughshod over the weak? Should the courts sit back and watch supinely while the strong trample under foot the rights of the weak? We have a Constitution for our country. Our judges are bound by their oath to "uphold the Constitution and the law". The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws."

17. The Apex Court in *Rajendra Kumar Srivastava & Ors. Vs. Samyut Kshetriya Gramin Bank & Ors* : (2010) 1 SCC 335 held that the prescribing minimum qualifying mark to ascertain minimum merit necessary for discharging the function of the higher post, is not violative of the concept of promotion by senioritycummerit. Para 13 of the SCC in *Rajendra Kumar Srivastava's* case(supra) read as follows:

"13. Thus it is clear that a process whereby eligible candidates possessing the minimum necessary merit in the feeder posts is first ascertained and thereafter, promotions are made strictly in accordance with seniority, from among those who possess the minimum necessary merit is recognized and accepted as complying with the principle of "senioritycummerit". What would offend the rule of senioritycummerit is a process where after assessing the minimum necessary merit, promotions are made on the basis of merit (instead of seniority) from among the candidates possessing the minimum necessary merit. If the criteria adopted for assessment of minimum necessary merit is bona fide and not unreasonable, it is not open to challenge, as being opposed to the principle of senioritycummerit. We accordingly hold that prescribing minimum qualifying marks to ascertain the minimum merit necessary for discharging the functions of the higher post, is not violative of the concept of promotion by senioritycummerit."

18. This Court is in complete agreement with the ratio laid down in *Rajendra Kumar Srivastava's* case (supra). What falls for consideration in the present writ

petition is whether or not the adverse entry, i.e. "Average" which had never been communicated/ informed to the petitioner could be taken into consideration or acted upon by the D.P.C. for promotion to the post of Head Clerk? The answer to this is "NO" for the reasons in the following paras.

19. In the result, in the following paras the Apex Court in a case from this Court, in *Dev DM Vs. Union of India & Ors.*: (2008)8 SCC 725, in a clear and unequivocal term, held that the adverse entry, i.e. any entry less than the benchmark should be communicated to the concerned employee and non communication of the adverse entry was arbitrary and illegal. Para 9,10,16,17,18, 26, 33, 35, 36, 39, 40 and 41 of the SCC read as follows:

"9. In the present case the benchmark (i.e. the essential requirement) laid down by the authorities for promotion to the post of Superintending Engineer was that the candidate should have "Very good" entry for the last five years. Thus in this situation the "good" entry in fact is an adverse entry because it eliminates the candidate from being considered for promotion. Thus, nomenclature is not relevant, it is the effect which the entry is having which determines whether it is an adverse entry or not. It is thus the rigours of the entry which is important, not the phraseology. The grant of a "good" entry is of no satisfaction to the incumbent if it in fact makes him ineligible for promotion or has an adverse effect on his chances.

10. Hence, in our opinion, the "good" entry should have been communicated to the appellant so as to enable him to make a representation praying that the said entry for the year 1993-1994 should be upgraded from "good" to "very good". Of course, after considering such a representation it was open to the authority concerned to reject the representation and confirm the "good" entry (though of course in a fair manner), but at least an opportunity of making such a representation should have been given to the appellant, and that would only have been possible had the appellant been communicated the "good" entry, which was not done in this case. Hence, we are of the opinion that the noncommunication of the "good" entry was arbitrary and hence illegal, and the decisions relied upon by the learned counsel for the respondent are distinguishable.

16. In our opinion if the office memorandum dated 10/11.9.1987, is interpreted to mean that only adverse entries (i.e. "poor" entry) need to be communicated and not "fair", "average" or "good" entries, it would become arbitrary (and hence illegal) since it may adversely affect the incumbent's chances of promotion, or to get some other benefit. For example, if the benchmark is that an incumbent must have "very good" entries in the last five years, then if he has "very good" (or even "outstanding") entries in the last five years, a "good" entry for only one year may yet make him ineligible for promotion. This "good" entry may be due to the personal pique of his superior, or because the superior asked him to do something wrong which the incumbent refused, or because the incumbent refused to do sycophancy of his superior, or because of caste or communal

prejudice, or to for some other extraneous consideration.

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 noncommunication 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, noncommunication 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.

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

33. In our opinion, fair play required that the respondent should have communicated the "good" entry of 199394 to the appellant so that he could have an opportunity of making a representation praying for upgrading the same so that he could be eligible for promotion. Non communication of the said entry, in our opinion, was hence unfair on the part of the respondent and hence violative of natural justice.

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

36. In the present case, we are developing the principles of natural justice by holding that fairness and transparency in public administration requires that all entries (whether poor, fair, average, good or very good) in the annual confidential report of a public servant, whether in civil, judicial, police or any other State service (except the military), must be communicated to him within a reasonable period so that he can make a representation for its upgradation. This in our opinion is the correct legal position even though there may be no rule/G.O. requiring communication of the entry, or even if there is a rule/GO. prohibiting it, because the principle of nonarbitrariness 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.

39. In *Canara Bank v. V.K. Awasthy* (2005) 6 SCC 321 this Court held that the concept of natural justice has undergone a great deal of change in recent years. As observed in para 8 of the said judgment: (SCC p. 329)

"8. Natural justice is another name for commonsense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a commonsense liberal way. Justice is based substantially on natural ideals and human values." In para 12 of the said judgment it was observed (SCC p.330)

"12. What is meant by the term "principles of natural justice" is not easy to determine. Lord Sumner (then Hamilton, L. J) in *R.v. Loc. Govt. Board* (1914) 1 KB 160 described the phrase as sadly lacking in precision. In *General Medical Council v. Spackman*: 1943 AC 627, Lord Wright observed that it was not desirable to attempt "to force it into any Procrustean bed".

40. In *State of Maharashtra Vs. Public Concern for Governance Trust*: (2007) 3 SCC 587 it was observed (vide para 39) (SCC p.606)

"39.... In our opinion, when an authority takes a decision which may have civil consequences and affects the rights of a person, the principles of natural justice would at once come into play."

41. In our opinion, noncommunication 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 noncommunication would be arbitrary, and as such violative of Article 14 of the Constitution."

20. The Apex Court in *Pratap Singh Vs. State of Uttar Pradesh & Anr.* : (2012) 1 SCC 214 held that adverse remark which had been expunged while some are sustained, cannot be taken into consideration without communication to the Appellant. Para 20,21, 22,25 of the *Pratap Singh*'s case (supra) read as follows:

"20. It needs no emphasis that a judicial officer has to be disciplined and must behave as a responsible officer. Indiscipline in the judiciary cannot be tolerated. However, as noted above, the remarks of the District Judge that the appellant was, "irresponsible and undisciplined officer who has no regard for superiors or truth" have been expunged/ substituted by the Inspecting Judge. The effect of such expunction/substitution is that the appellant cannot be considered as an irresponsible or undisciplined officer on the basis of the remarks recorded by the District Judge. The gravity of what has been recorded in Column (3) is, thus, lost.

21. Moreover, the root of the problem between the two senior judicial officers appears to be clash of ego. In the words of Samuel Johnson, "every man is of

importance to himself. The observation noted in Column (3), "He never come to me in the chamber or at the residence to discuss any problem relating to Nazara" indicates that the District Judge was not happy with the appellant for having not given due importance to him.

22. Be that as it may, due to consideration of the remarks by the District Judge and not taking into consideration that such remarks were expunged/substituted as communicated to the appellant vide communication dated 21.10.1997, the very consideration of the appellant's case for promotion in the substantive vacancy in UPHJS under the 1975 Rules by the Selection Committee in its meeting dated 18.5.1998 and by the Full Court in its meeting held on 11.7.1998 gets seriously and vitally affected.

25. In our view, the matter of the appellant's promotion in the substantive vacancy in UPHJS which was considered by the Selection Committee on 18.5.1998 and by the Full Court on 11.7.1998 needs to be reconsidered in the light of the discussion made above and in accordance with law. Since the appellant is likely to superannuate shortly, we expect the High Court on its administrative side to complete this exercise as early as possible and preferably within one month from the date of communication of this order."

21. For the foregoing discussions, the proceeding of the said D.P.C. for promotion to the post of Head Clerk and also the impugned promotion order dated 12.8.2010 on the basis of the said DPC, are hereby quashed. I direct that the said adverse entries be communicated to the petitioner forthwith and she should be permitted to make a representation against the same praying for its upgradation. If the upgradation is allowed, the petitioner should be considered along with the respondent No.3 by holding a Review D.P.C. within a period of 3(three)months from the date of receipt of a certified copy of this order. However, it is made clear that the petitioner should file a representation indicated above within three weeks from today and the representation so filed by the petitioner should be disposed of by the authority concerned within 3 (three) weeks from the date of receiving the representation.

22. Writ petition is allowed to the extent indicated above.