
(2010) 11 AHC CK 0155

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 11746 of 2006

Shahzad Zafar Ali

APPELLANT

Vs

Bharat Petroleum Corporation Ltd.

RESPONDENT

Date of Decision : 11-11-2010

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2010) 11 AHC CK 0155

Hon'ble Judges : Virendra Singh, J; Ashok Bhushan, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Ashok Bhushan, J.—Heard the petitioner in person and Shri R.N. Trivedi, learned Senior Advocate assisted by Shri Vipin Sinha for the respondents.

2. Affidavits between the parties have been exchanged. Additional affidavits filed by the petitioner on 06/3/2010 and counter affidavit to the additional affidavit as well as the rejoinder affidavit has also been filed.

3. Shri R.N. Trivedi, learned Senior Advocate appearing for the Corporation in pursuance of the earlier orders passed by this Court has produced the original file pertaining to promotion exercise conducted in the year 2001-2003, which have also been perused by us.

4. Facts of the case as emerge from the pleadings of the parties are: The petitioner initially an employee of the Indian Oil Corporation was on deputation to the Ministry of Petroleum and Natural Gas. In the year 1991, the petitioner was absorbed by the Bharat Petroleum Corporation Limited ("hereinafter called the "Corporation") in Job Group "D" as Manager. However, he continued to be on deputation in various organisations under the Ministry of Petroleum and Natural Gas during the period February, 1991 to May, 1999. The petitioner was promoted to Job Group "E" as Senior Manager on 01/11/1995. During the period when the petitioner was on deputation, in the year 1997, C.B.I. started investigation in

relation to the assets acquired by the petitioner and his family members. During the period 1994-1996 while inquiry was going on, petitioner was repatriated to the Corporation w.e.f. 05/5/1999. In April, 1998, the Departmental Promotion Committee (hereinafter called the "DPC") of the Corporation promoted various officers from Job Group "E" to "F". The petitioner was not considered, he having not completed 3 years residency period in Group "E". The petitioner claims to have become entitled for promotion in Job Group "F" w.e.f. 01/4/1999. The petitioner was given outstanding Annual Reports for the year 1995-1996, 1996-1997, and 1997-98. Petitioner had sent representation on 09/12/1999 for rewriting the APA of 1998-99. In the year 2001, the DPC again met and considered the case of officers of Job Group "E" for promotion in Job Group "F". The petitioner's case was also considered for promotion, but he being down in the list as per criteria adopted by the Corporation was not promoted. On 26/4/2002, the petitioner sent a representation requesting for ignoring the APA for the year 1998-99. Petitioner prayed in his representation that the decision regarding overdue promotion be taken to the next grade without any further delay. In the year 2003, again the petitioner along with other officers was considered for promotion from Job Group "E to F", but he could not make it being down in the merit list. In the year 2001, when the petitioner was not promoted in promotion to (F level) he submitted a representation on 10/12/2001, to the Chairman and Managing Director of the Corporation against the denial of his promotion. In the year 2003, the promotion exercise from Job Group "E" to "F" was undertaken by the Corporation in which the petitioner was also considered, but he could not be promoted. On 17/2/2004, the petitioner was discharged from the CBI case by Special Judge CBI, Delhi. The petitioner vide letter dated 26/2/2004, informed the respondents about his discharge from the CBI case and claimed promotion to Job Group "F" w.e.f 01/4/1999 and progression to Job Group "G" w.e.f. 01/9/2004. On 08/3/2004, petitioner again sent a representation conveying the dismissal of CBI case and requested for promotion with retrospective effect. Vide letter dated 17/3/2004, Shri S.P. Mathur, the then General Manager (Retail)- North wrote to the ED (Retail) RHQ for looking to the outstanding reports of the petitioner for the last 5 years, the petitioner is recommended for promotion in the next level with retrospective effect from March, 1999. He having been discharged and acquitted by the CBI case on 20/2/2004, the Corporation wrote to the petitioner that the petitioner having not met the required criteria for progression from Job Group "E" to "F" was not promoted and the apprehension that he has been denied promotion due to the pendency of the CBI case was incorrect. In the DPC held on 10/8/2004, the petitioner was considered and recommended for promotion in Grade F. An order dated 08/9/2004 was issued promoting the petitioner in Grade F w.e.f. 01/9/2004. The petitioner submitted an appeal on 24/12/2004, for promotion in Grade "F" w.e.f. 01/4/1999 and progression to Job Group "G" w.e.f. 01/9/2004. The petitioner again made his request vide letter dated 18/3/2005. Again representations were submitted on 25/2/2005, and 08/5/2005 to the Secretary, Ministry of Petroleum and Natural Gas Shakti Bhawan New Delhi. A reply dated

27/5/2005, was issued to the petitioner by the Corporation stating the reasons as to why it was not possible to progress the petitioner to Job Group "F" prior to September 2004, which were communicated to him by letter dated 20/4/2004 and 18/3/2005, hence the request made by the petitioner cannot be acceded. The petitioner thereafter filed this writ petition praying for the following reliefs:

(I) Issue a writ, order or direction in the nature of mandamus thereby directing the respondents to grant promotion in Job Group (JG) "F" to the petitioner w.e.f. 1.4.1999 as well as further promotion to Job Group (JG) "G" to the petitioner w.e.f. 1.9.2002, with all consequential employment benefits including seniority, rank, status, emoluments and allowances and pays etc with immediate effect;

(ii) Award the costs of these proceedings in favour of the petitioner and against the respondents;

(iii) And further issue any other appropriate writs, orders or directions are deemed fit and proper in the facts and circumstances of the case ad to meet the ends of justice.

5. In the writ petition the petitioner has pleaded that he was denied promotion on the pretext of pending CBI case. The petitioner referred to and relied on the circular issued by the DOPT on 31/1/1982, with regard to promotion of employee of public sector undertakings whose conduct is under investigation or against whom a disciplinary/criminal proceedings are pending. The petitioner claimed that after he having been discharged on 17/2/2004, wrote to the respondent No. 1 to give promotion to him with retrospective effect in Job Group "F" and "G". In Job Group "F" w.e.f. 01/4/1999, Job Group "G" w.e.f. 01/9/1994.

6. In the counter affidavit, filed on behalf of the respondents a categorical stand has been taken that the petitioner's promotion was not denied on the ground of pendency of CBI case. It has been pleaded in the counter affidavit that the petitioner after completion of 3 years in Job Group "E" in November, 1998, he was considered in the earliest DPC's held in the year 2001 and 2003. It is stated that in the above DPC's held on 2001 and 2003, petitioner could not be promoted as his position in the merit list was way down and he could not make it in the select list. Subsequently, in the DPC held in the year 2004, he was again considered and promoted. The petitioner's performance appraisal in the year 1991-2003 are quoted in paragraph 4 of the counter affidavit which is to the following effect:

1. 1991 VG 2. 1992 VG1 3. 1993 OS 4. 1994 OS 5. 1995 OS 6. 1996-97 OS 7. 1997-98 GD1 8. 1998-99 GD4 9. 1999-2000 85.5 10. 2000-2001 86.5 11. 2001-02 86 12. 2002-03 85 13. 2003-04 85

7. It has been submitted in the counter affidavit that the basis of promotion in the Corporation is merit-cum-seniority which criteria underwent a change in the year 2002. Till the year 2001, the factors which were taken into account for promotion were:

(I) Residency period

(II) Performance appraisals.

8. The average performance ratings of the previous 3 years were normally taken into account. Till the year 1998-99, the performance of employees in management cadre gets recorded on a descriptive scale which gets converted into a numeral scale of 0-9 with 9 (Outstanding) being highest for the purpose of deciding promotions. In or about the year 2002, the promotion policy underwent certain changes. Promotions were granted only on the basis of the number of vacancies available and there was a lot of stagnation in the rank of Officers due to limited vacancies/job opportunities. In or about the year 2002, the Corporation decided to promote officers on the basis of percentage of the eligible population. The other significant changes that were carried out were taking into account marks awarded as per New Performance Management System and to include the factor of potential assessment with a weightage of 30 percent. Potential assessment is done by the assessing officer to ascertain the potential of the candidate for the higher position. All the candidates who had completed the requisite number of years were ranked on the basis of Seniority (10%), Performance Appraisal (60%) and Potential Assessment (30%).

9. With regard to the DPC held in the year 2001-02, the reasons for non promotion of the petitioner has been given in paragraph 5f and 5g of the counter affidavit which are quoted below:

5f. In the DPC of 2001, there were 149 eligible candidates in the zone of consideration for progression from Job Group E to Job Group F, against 50 vacancies. The candidate who ranked first in the merit list scored 37.5 out of 45 and the last person who made it to the select list secured 31.5 out of 45. Whereas the Petitioner, had scored only 19.5 out of 45 and as such in the merit cum seniority list the Petitioner stood at 148. Since the vacancies were only 50, the Petitioner did not make to the select list.

5g) After changes were brought into force in the year 2002, the first DPC for progression from JG."E" to "F", was held in the year 2003. In this DPC, 55 candidates were eligible to be considered for promotion from Job Group E to Job Group F against an allocation of 12 promotions to Marketing function. The candidate who ranked first in the merit list scored 90.7 out of 100 and the last person who made it to the select list scored 82.8 out of 100. Whereas the Petitioner, had scored 82 out of 100 and as such in the merit cum seniority list the Petitioner stood at 18. Since the vacancies were only 12, the Petitioner did not make to the select list. Even otherwise, on Potential Assessment, the Petitioner had scored only 24.6 whereas the cut off mark as 25 and as such the Petitioner was not found eligible to be considered for promotion.

10. In the rejoinder affidavit, filed to the counter affidavit by the Corporation, petitioner pleaded that the DPC's were also held in the year 1997,1998,1999 and 2000. It was also pleaded in the rejoinder affidavit that several officers were

given promotion on service of 2 years or even less than 2 years. It was claimed that the petitioner could have also been promoted in the year 1998. It was pleaded although the petitioner has submitted representation right from 1999, but he was given reply for the first time in the year 2004 i.e. after 5 years. It was further pleaded that the Hon"ble Supreme Court has held that where entry is a downgrading entry like outstanding in a particular year but a satisfactory entry in the succeeding year, it is to be considered as adverse. Referring to the Annual Reports of the year 1997-98 and 1998-99, it was stated that after completion of Report Writing feed back forms are to be shown to the Appraiser before writing the report, so that he gets a chance to give his perspective. It is further stated that after the report is written, the last page should be shown to the Appraiser and his comments recorded before sending the report to the Reviewer. It is submitted that this vital policy was not followed in the case of the petitioner. It was also submitted that in the reports of the year 1997-98, 1998-99 nowhere signatures of the petitioner were taken. It is submitted that if the petitioner was given an opportunity to explain, then he would have an excellent chance of further promotion. It is further stated that for the first time through the counter affidavit he has been informed about the ratings of Annual Report of 1997-98 and 1998-1999 as "good". In the rejoinder affidavit petitioner claimed that he should be promoted in Job Group "F" w.e.f. 01/10/1998, in Job Group "G" w.e.f. 01/11/2001, and in Job Group "H" w.e.f. 01/10/2004. Letter dated 24/8/1999 was written by the petitioner addressed to the Chairman, PCRA/ Secretary, Petroleum & Natural Gas Shastri Bhawan, New Delhi praying that the APA for the year 1997-98 be rewritten. It was alleged in the letter that the ED, PCRA had written a biased report completely ignoring the realities and facts regarding outstanding work done by the petitioner. Again a letter dated 09/12/99, has also been brought on the record praying for return of APA for the year 1998-99 for a final review with the consultation of the Chairman, PCRA/ Secretary MOP&NG. A supplementary counter affidavit, sworn by R. Ramesh Nair has been filed replying the rejoinder affidavit which was filed by the petitioner. It was pleaded that the petitioner having completed 3 years in Job Group E in November, 1998 should have been considered in the earlier DPC held in the year 2001 for promotion from Job Group E to F. With regard to the DPC's held in the year 1997, 1999 and 2000, it was stated that they were for promotion in other grades and were not concerning promotion from Job Group E to F. It has been further stated that the appraisal for the period 1997-98, 1998-99 was written by the Reporting Officer and duly reviewed by the Reviewing Officer. The reports were duly read to the petitioner on the earliest available occasion as he was under repatriation from PCRA to the parent organisation.

11. In the additional affidavit dated 06/3/2010, filed by the petitioner it is submitted that there is no standard Promotion Policy in the Corporation. It was claimed that for the first time the promotion policy has been challenged by the petitioner in this writ petition. It was stated that in the DPC held in the year 1998 sufficient number of officers were promoted from Group E to F. Promotion list

dated 17/4/1998 has been referred to and the number of vacancies for the year 2001-2003 have been disputed. It is reiterated that promotions have been granted in two years or less than 2 years of service to several officers. The plea of 3 years of residency period is an afterthought. Petitioner in any case was entitled for promotion w.e.f. 01/11/1998 in job Group F. Several officers were promoted with retrospective effect. Adverse reports of 1997-98, 1998-99 were not communicated to the petitioner which were necessary to be communicated in accordance with the principles of natural justice.

12. The petitioner appearing in person during his submission has referred to above mentioned pleadings in his various affidavits and has reiterated his claim of promotion in Job Group "F" w.e.f. 01/4/1998. During his oral submission, much emphasis has been laid down by the petitioner on non recording of appraisal for the years 1997-98 and 1998-99 in accordance with the procedure prescribed and non-communication of the aforesaid appraisals of 2 years which have affected his promotion. The petitioner during his oral submission after being confronted with the materials filed on behalf of the respondents indicating that the petitioner was considered in the year 2001 and 2003, did not dispute that he was considered for promotion in the year 2001-2003, but was not promoted. However, he submits that his non-promotion was on the basis of downgrading of his grade in the aforesaid two years due to biased report submitted by Mr. Dhigra. He submits that the said entries were required to be ignored and not taken into consideration and the earlier, 3 outstanding entries be deserve to be considered for promotion in Grade "F" for the year 1998 itself. Much reliance has been placed by the petitioner on the judgment of the Apex Court in Dev Dutt Vs. Union of India (UOI) and Others, . The petitioner also tried to challenge the promotion policy of the Corporation on the ground that the said policy is not in accordance with the circulars and directions issued by the Government of India Public Sector Undertakings.

13. Shri R.N. Trivedi, learned Senior Counsel appearing for the Corporation refuting the submission of the petitioner contended that no injustice has been done to the petitioner. The petitioner was not denied promotion on the ground of pendency of criminal case of the CBI, rather the petitioner was considered in accordance with the existing promotion policy in the year 2001 and 2003. He submits that for the promotion from Job Group "E" to "F" in April 1998, petitioner could not have been considered since he had not completed 3 years of residency period. He submits that the fact that in earlier orders promotion was granted on residency period of 2 years was due to the policy then existing and no benefit can be taken by the petitioner from the aforesaid promotions.

14. Shri R.N. Trivedi, learned Senior Counsel appearing for the Corporation submits that the petitioner has not challenged the promotion of any of the officers in the writ petition, nor the promotion policy of the Corporation are under challenge. Petitioner cannot be permitted to challenge the promotion policy of the Corporation in the writ petition since neither there is any relief nor sufficient

pleadings in that regard.

15. Shri R.N. Trivedi, learned Senior Counsel appearing for the Corporation further submits that the appraisals of 1997-98, 1998-99 were made in accordance with the procedure prescribed for writing the annual confidential remarks during the relevant period. He submits that insofar as non-communication of the gradings of 1997-98 and 1998-99 are concerned, petitioner was well aware of the said gradings which is apparent from the letters of the petitioner filed in the writ petition. Reliance has been placed on the letters dated 24/8/99 and 09/12/99 filed at page 154 and 163 respectively which clearly indicates that the petitioner was well aware of his gradings of the relevant years and the plea that he was not communicated and was not aware of the gradings is not correct. Reliance has also been placed on the judgment of the Apex Court in U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and others, wherein it has been held that where an adverse element compulsorily communicable, but if the graded entry is of going a step down, like falling from "very good" to "good" that may not ordinarily be an adverse entry since both are a positive grading.

16. It is further submitted that the judgment in the case of Dev Dutt's case (supra) is clearly distinguishable, since in the said judgment there was a benchmark that only officer having achieved good entry was in the zone of consideration and the promotion whereas in the facts of the present case that the petitioner did get good entry in the above mentioned two years which did not take out him from the zone of consideration.

17. Shri R.N. Trivedi, learned Senior Counsel appearing for the Corporation has further referred to the judgment of the apex Court in Abhijit Ghosh Dastidar v. Union of India and Ors. 2009 (16) SCC 146.

18. We have considered the submissions of the learned Counsel for the parties and have perused the record as well as the original file pertaining to the promotion exercise undertaken in the year 2001-2003. As noticed above, petitioner although in the writ petition has come up with the case that he was denied promotion on the ground of pendency of CBI case which ultimately resulted in discharge on 17/2/2004, but in his further pleadings and during his submission the said plea was not pressed any further. Thus, it is clear that the pendency of criminal case by the CBI was not a ground for non-promotion of the petitioner. The petitioner had submitted that he was also entitled to be promoted in April, 1998 when his other colleagues namely, Gautam Mukherjee, Rishi Dev Manchanda and V. Marisamy were promoted. It has been stated on behalf of the Corporation that the aforesaid persons were promoted in Job Group "E" much before the petitioner, their the date of promotion in Group "E" were 01/4/1993, 01/7/1994, and 01/8/1990 respectively, whereas the petitioner was promoted in Grade "E" on 01/11/1995. It has been further stated that in the Corporation, residency period was completed by the aforesaid officers whereas on 17/4/1998 when the aforesaid 3 officers were promoted, petitioner had not completed residency period of 3 years. Petitioner had also submitted that there is no

requirement of 3 years of residency period for promotion. The Corporation has brought on record the circular dated 17/4/1995, relating to promotion policy. The decision taken in the 3/95 Board Meeting dated 12/4/1995 was circulated, under Para 4.2 and 5 the promotion policy was to the following effect.

4.2. It is, therefore, felt that the residency period be increased from 2 to 3 years for all promotions from JG "B1" to "F". For promotion to JG "G1" and above, it will, as hitherto, be left to the discretion of the Board level Departmental Promotion Committee.

5. If the above proposal is approved, then clauses 3.1 (b) and 3.1 (c) of the Promotion Policy shall be modified as under:

EXISTING PROVISION Clause 3.1 (b) For subsequent promotions, an individual should normally put in a minimum of 2 years service in his/her existing grade.

PROPOSED PROVISION Clause 3.1 (b) Similarly, for subsequent promotions, an individual should normally put in a minimum of 3 years of service in his/her existing grade before being considered for promotion to the next grade.

19. The petitioner having not completed 3 years of residency period on 17/4/1998, there was no occasion for consideration of the petitioner in the promotion exercise which resulted in the promotion dated 17/4/1998. After 1998, the DPC for promotion from Job Group "E" to "F" took place only in the year 2001 and 2003. From the relevant materials brought by the Corporation, it is clear that other promotion exercise which were undertaken during the relevant period were not for promotion from Job Group "E" to "F" and were not relevant for the purpose of petitioner's promotion. Insofar as, the non-promotion of the petitioner in the promotion exercise held in 2001, is concerned, it is apparent from the counter affidavit that in the year 2001, 149 eligible candidates were under zone of consideration from Job Group E to F against 50 vacancies. The petitioner who secured only 19.5 out of 45 stood at serial No. 148 in the merit list hence he could not be promoted.

20. Similarly, in the promotion exercise held in 2003, for promotion from Job Group E to F, 55 candidates were eligible to be considered for promotion and total 12 promotions were selected from marketing function. The candidates ranked first in the merit list scored 90.7 out of 100 and the candidate who scored 82.8 out of 100 was the last candidate, whereas the petitioner scored 82 out of 100. The above facts pleaded in para 5 of the counter affidavit are in accordance with the original promotion file of the year 2003, which has been perused by us. Petitioner having secured 82 marks out of 100 could not be promoted and no candidate receiving equal or lower marks was promoted in Job Group E to F. The consideration of the petitioner for promotion in the year 2001 and 2003 are not shown to be erroneous in any manner. The petitioner was considered in accordance with the procedure which was uniformly adopted by the Corporation in considering the cases of all the eligible candidates. The petitioner although has tried to challenge the promotion policy in subsequent pleadings in the writ

petition, but we are not inclined to enter into the issue of challenging the policy in view of the fact that neither there is any specific prayer nor sufficient ground to challenge the said policy.

21. The petitioner has attacked the appraisals for the year 1997-98 and 1998-99. One of the submissions which have been made by the petitioner is that the ACR for the year 1997-98 and 1998-99 were neither communicated nor read to the petitioner. It is submitted that had the aforesaid ACR's were communicated to the petitioner and he be given an opportunity, he would have satisfied the Corporation that his downgrading from outstanding to good was erroneous and he was entitled for higher grading.

22. Shri R.N. Trivedi, learned Senior Counsel appearing for the Corporation submitted that the petitioner was well aware about his ratings for the relevant year. In this context reference has been made to the letter dated 24/8/1999, filed as (Annexure-Y-1) to the rejoinder affidavit by the petitioner and the letter dated 09/12/1999 (Annexure-Y-2) to the rejoinder affidavit. Aforesaid letters are at (pg 154 and 163) of the paper book which indicate that the petitioner was aware about his appraisals for the aforesaid years, but they do not indicate that he was communicated of his appraisals of the aforesaid years. The judgment of the apex Court in U.P. Jal Nigam (supra) has been relied by Shri R.N. Trivedi, learned Senior Counsel appearing for the Corporation. The said case was in respect of recording of ACRs in the U.P. Jal Nigam. There was a rule providing for communication of adverse entries to an employee, but rule did not provide for communication of downgrading of an entry. An observation was made by the apex Court that an adverse element is compulsorily communicable, but if the graded entry is of going a step down, like falling from "very good" to "good" that may not ordinarily be an adverse entry since both are a positive grading. Paragraph 3 of the judgment is quoted below:

Para 3 of the said judgment is quoted below:

3. We need to explain these observations of the High Court. The Nigam has rules, whereunder an adverse entry is required to be communicated to the employee concerned, but not down grading of an entry. It has been urged on behalf of the Nigam that when the nature of the entry does not reflect any adverseness that is not required to be communicated. As we view it the extreme illustration given by the High Court may reflect an adverse element compulsorily communicable, but if the graded entry is of going a step down, like falling from "very good" to "good" that may not ordinarily be an adverse entry since both are a positive grading. All what is required by the Authority recording confidentials in the situation is to record reasons for such down grading on the personal file of the officer concerned, and inform him of the change in the form of an advice. If the variation warranted be not permissible, then the very purpose of writing annual confidential reports would be frustrated. Having achieved an optimum level the employee on his part may slacken in his work, relaxing secure by his one time achievement. This would be an undesirable situation. All the same the

sting of adverseness must, in all events, be not reflected in such variations, as otherwise they shall be communicated as such. It may be emphasized that even a positive confidential entry in a given case can previously be adverse and to say that an adverse entry should always be qualitatively damaging may not be true. In the instant case we have seen the service record of the first respondent. No reason for the change is mentioned. The down grading is reflected by comparison. This cannot sustain. Having explained in this manner the case of the first respondent and the system that should prevail in the Jal Nigam, we do not find any difficulty in accepting the ultimate result arrived at by the High Court.

23. Another judgment referred to by the petitioner is *Gurdial Singh Fiji v. State of Punjab* and Ors. 979 (2) SCC 368, in which the apex Court laid down that adverse entry cannot be acted upon till an opportunity has been offered for representation. Following was laid down by the apex Court in paragraph 17.

17. The principle is well-settled that in accordance with the rules of natural justice, an adverse report in a confidential roll cannot be acted upon to deny promotional opportunities unless it is communicated to the person concerned so that he has an opportunity to improve his work and conduct or to explain the circumstances leading to the report. Such an opportunity is not an empty formality, its object, partially, being to enable the superior authorities to decide on a consideration of the explanation offered by the person concerned, whether the adverse report is justified. Unfortunately, for one reason or another, not arising out of any fault on the part of the appellant, though the adverse report was communicated to him, the Government has not been able to consider his explanation and decide whether the report was justified. In these circumstances, it is difficult to support the non-issuance of the integrity certificate to the appellant. The chain of reaction began with the adverse report and the infirmity in the link of causation is that no one has yet decided whether that report was justified. We cannot speculate, in the absence of a proper pleading, whether the appellant was not found suitable otherwise, that is to say, for reasons other than those connected with the non-issuance of an integrity certificate to him.

24. In *State of Gujrat and Anr. v. Suryakant Chunnial Shah* 1999 (1) SCC 529, apex Court laid down that the purpose of adverse entries is primarily to forewarn the government servant to mend his ways and to improve his performance. Adverse entries are required to be communicated so that the Government servant to whom the adverse entry is given, may have either opportunity to explain his conduct so as to show that the adverse entry was wholly uncalled for. Following was laid down in paragraph 25 which is quoted below:

25. Purpose of adverse entries is primarily to forewarn the government servant to mend his ways and to improve his performance. That is why, it is required to communicate the adverse entries so that the Government servant to whom the adverse entry is given, may have either opportunity to explain his conduct so as to show that the adverse entry was wholly uncalled for, or to silently brood over the matter and on being convinced that his previous conduct justified such an

entry, to improve his performance.

25. Reliance has also been placed on the judgment of the Apex Court in (1968) 33 SCR State of Mysore and Anr. v. Syed Mahmood and Ors. In the aforesaid case, officers junior to the respondents were promoted. The apex Court directed to consider the fitness of the respondents for promotion in 1959 if they were fit to discharge their duties of higher posts. The judgment on which much reliance has been placed by the petitioner is of the Judgment of Dev Dutt's case (supra). In the said case, the apex Court was considering the promotion of officers of Border Roads Engineering Service. As per Para 6.3 (ii) of the guidelines for promotion of departmental candidates which were issued by the Government of India, Ministry of Public Grievances and Pension, vide office memorandum dated 10/4/1989, provides for promotion to all posts which are in the pay scale of Rs. 3700- 5000 and above, benchmark grade should be "very good" for the last 5 years before the DPC. The appellant had been granted good entry for the year 1993-1994 which was not communicated to him. Submission was pressed on behalf of the respondents that good entry is not an adverse entry, hence it was not necessary to be communicated. The apex Court in the aforesaid case laid down that good entry should have also been communicated to the appellant, so as to enable him to make representation for the year 1993-1994. Following was laid down in paragraphs 9,10,11 and 13.

9. In the present case the bench-mark (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 1993-94 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 non-communication of the "good" entry was arbitrary and hence illegal, and the decisions relied upon by the learned Counsel for the respondent are distinguishable.

11. Learned Counsel for the respondent submitted that under the Office

Memorandum 21011/4/87 (Estt. "A") issued by the Ministry of Personnel/Public Grievance and Pensions dated 10/11.09.1987, only an adverse entry is to be communicated to the concerned employee. It is well settled that no rule or government instruction can violate Article 14 or any other provision of the Constitution, as the Constitution is the highest law of the land. The aforesaid Office Memorandum, if it is interpreted to mean that only adverse entries are to be communicated to the concerned employee and not other entries, would in our opinion become arbitrary and hence illegal being violative of Article 14. All similar Rules/Government Orders/Office Memoranda, in respect of all services under the State, whether civil, judicial, police, or other service (except the military), will hence also be illegal and are therefore liable to be ignored.

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 bench-mark or not. Even if there is no bench mark, 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.

26. Further following was laid down by the apex Court in paragraphs 37,38,41, 43 and 44.

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 concerned authority, and the concerned authority 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.

38. We, however, make it clear that the above directions will not apply to military officers because the position for them is different as clarified by this Court in Union of India (UOI) and Another Vs. Major Bahadur Singh, But they will apply to employees of statutory authorities, public sector corporations and other instrumentalities of the State (in addition to Government servants).

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.

43. We are informed that the appellant has already retired from service. However, if his representation for upgradation of the "good" entry is allowed, he may benefit in his pension and get some arrears. Hence we direct that the "good" entry of 1993-94 be communicated to the appellant forthwith and he should be permitted to make a representation against the same praying for its upgradation. If the upgradation is allowed, the appellant should be considered forthwith for promotion as Superintending Engineer retrospectively and if he is promoted he will get the benefit of higher pension and the balance of arrears of pay along with 8% per annum interest.

44. We, therefore, direct that the "good" entry be communicated to the appellant within a period of two months from the date of receipt of the copy of this judgment. On being communicated, the appellant may make the representation, if he so chooses, against the said entry within two months thereafter and the said representation will be decided within two months thereafter. If his entry is upgraded the appellant shall be considered for promotion retrospectively by the Departmental Promotion Committee (DPC) within three months thereafter and if the appellant gets selected for promotion retrospectively, he should be given higher pension with arrears of pay and interest @ 8% per annum till the date of payment.

27. Shri R.N. Trivedi, learned Senior Counsel appearing for the Corporation submitted that the said case is distinguishable, since the criteria for promotion provided for a benchmark i.e. a person shall be eligible for promotion only when he has very good entry and in the present case there is no such ineligibility in consideration for promotion of the petitioner from Job Group E to F on a good entry. He submits that the judgment of Dev Dutt's case (supra) was on its own fact and is not helpful to the petitioner in the present case. In Dev Dutt's case (supra) in paragraph 13 the apex Court held that every entry relating to an employee must be communicated to him and it makes no difference whether there is benchmark or not. The apex Court in Dev Dutt's case (supra) thus has laid down for communication of all entries irrespective of fact whether there is benchmark or not. The judgment of the apex Court in Abhijit Ghosh Dastidar (supra) had relied the above judgment in Dev Dutts' case (supra). Following was laid down in paragraph 8 of Abhijit Ghosh Dastidar's case (supra).

8. Coming to the second aspect, that although 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 annual confidential report 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 of 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, 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.

28. In view of the proposition as laid down above, petitioner was entitled for an opportunity to represent against the entry awarded to him in the years 1997-98, and 1998-99 which were also required to be communicated. Petitioner having already been promoted from Group E to F w.e.f. 01/9/2004, we are of the view that ends of justice be served in directing the Corporation to communicate the appraisals for the year 1997-98 and 1998-99 within a period of one month from today with liberty to the petitioner to submit his representation within a further period of one month. The question of consideration of the petitioner for retrospective promotion as per the DPC held in the year 2001, shall be dependent on the outcome of the decision on the above representation for upgrading of the entries for the year 1997-98 and 1998-99. We make it clear that we are not expressing any opinion with regard to the gradings or otherwise appraisals granted to the petitioner for the year 1997-98 and 1998-99, and it is for the Corporation to consider the said issue and the case of the petitioner for retrospective promotion in the DPC held in 2001 from Job Group "E" to "F" and subsequent promotion accordingly. As observed above, the petitioner is not entitled for the reliefs as claimed in the writ petition except to the extent as directed above.

29. The writ petition is disposed of accordingly.

30. Parties shall bear their own costs.