

STATE PUBLIC SERVICES TRIBUNAL, INDIRA BHAWAN, LUCKNOW.**COURT NO. 6**

PRESENT:- Hon'ble Mr. R.S. Singh, Vice Chairman (Judicial)
 Hon'ble Mr. S.K. Raghuvanshi, Member (Admn)

1. REFERENCE APPLICATION NO. 289 OF 2016
2. REFERENCE APPLICATION NO. 290 OF 2016
3. REFERENCE APPLICATION NO. 291 OF 2016
4. REFERENCE APPLICATION NO. 292 OF 2016

Ashok Kumar Bansal, aged about 57 years,
 son of Sri N.R. Bansal, resident of 480/3, Sadbhavna Park,
 Mangal Pandey Nagar, District Meerut, presently posted as
 Project General Manager, U.P. State Highway Authority at
 District Muzaffarnagar.

..... Applicant.

Versus

1. State of U.P. through the Principal Secretary,
 Public Works Department, Govt. of U.P., Civil Secretariat,
 Vidhan Bhawan, Lucknow.
2. The Engineer-in-Chief, Public Works Department,
 Government of U.P., Nirman Bhawan, Mahatma Gandhi
 Marg, Lucknow.

.....Respondents.

JUDGMENT

(Delivered by Hon'ble Mr. S.K. Raghuvanshi, Member (Admn))

Reference Applications No. 289 of 2016, 290 of 2016, 291 of 2016 and 292 of 2016 have been preferred u/s 4 of the **U.P. Public Services (Tribunal) Act, 1976** by the same applicant who has claimed identical relief in all the cases i.e. quashing of the annual entries or part thereof, allegedly not recorded in a lawful manner, of respective years and ignoring them while considering his candidature for promotion to the post of Superintending Engineer and above. Since in all these reference applications similar question of law is involved, and, moreover, the governing facts/factors are almost alike, they are taken up together for disposal by a common judgment.

2. The main facts involved in all the four reference applications are that after his selection by U.P. Public Service

Commission, the applicant was appointed as Assistant Engineer, whereupon he joined as such on 02.12.1983. In view of his work, conduct and performance on the said post, he was promoted to the post of Executive Engineer on 15.06.2007. The criterion for promotion to the next higher post of Superintending Engineer, according to the applicant, is 'seniority' plus 'merit'. For the purpose of evaluation of a candidate's merit, the remarks made in his character roll, along with his service records, are considered by the Departmental Promotion Committee (hereinafter referred to as DPC), which awards him marks on the basis of the same. The grading awarded to him in his Annual Confidential Reports (hereinafter referred to as ACRs) under consideration is the sole basis of awarding marks. A higher grading fetches higher marks. The applicant was hopeful that in view of his qualification, seniority and merit, he would be considered and promoted to the post of Superintending Engineer and above, but he was not aware of what remarks and grading his ACRs carried. To be sure about the same, he sought information under the **Right to Information Act, 2005** (hereinafter referred to as RTI Act, 2005) vide his application dated 16.05.2014 about the remarks awarded to him from the year 2004-05 to the year 2013-14. The Public Information Officer (hereinafter referred to as PIO) of Public Works Department (hereinafter referred to as PWD) provided him the requisite information by means of his letter dated 19.06.2014 (Annexure No. A-1).

3. So far as Reference Application No. 289 of 2016 is concerned, dwelling upon the ACR remarks awarded to him for the year 2008-09 (Annexure No. A-2), the applicant has stated that for the period 01.04.2008 to 31.07.2008, he was graded 'outstanding' by the reporting authority but the reviewing/concurring authorities without any reason toned it down as 'very good'. The applicant has further informed that for the period 01.04.2008 to 15.01.2009, he was graded 'good' by the reporting authority but the same was unduly downgraded by the reviewing/concurring authorities. Thus, the category awarded to

the applicant by the competent authority(s) was brought down by the higher authority(s) not only without assigning any reason thereof or affording him any hearing, but also without communicating the same to him. In other words, the applicant was kept in the dark about what really lay in his ACR for the year 2008-09 till he got the relevant information from the PIO of the department. It is in this background that the applicant has sought redressal of his grievance. The ground taken by him is that the act of pushing down his grading by the concerning authority(s) without considering the remarks awarded by the subordinate authority(s) and overshadowing his/their assessment of his performance without affording any hearing to him or assigning any reason thereof is in contravention of the relevant government instructions as well as appropriate judicial pronouncements. Moreover, the higher authority(s) has/have overstepped his/their powers by summarily placing him in the lower category.

4. So far as Reference Application No. 290 of 2016 is concerned, deriving a clue from the ACR remarks awarded to him for the year 2004-05 (Annexure No. A-2), the applicant has stated that for the period 01.04.2004 to 28.02.2005, he was graded 'very good' by the reporting/reviewing authorities, but the concurring authority for the period 01.07.2004 to 28.11.2004 toned down this category to 'fair' without mentioning any reason thereof. The applicant has pointed out that the same authority, who has chosen to downgrade his remarks, has maintained the category 'very good' for the period 29.11.2004 to 14.03.2005. The aforesaid downgrading has been slammed by the applicant on those very grounds which have been taken in Reference Application No. 289 of 2016.

5. In Reference Application No. 291 of 2016, the applicant's grouse is that in the year 2007-08, he was graded 'outstanding' by the reporting authority, but the reviewing authority and the concurring authority arbitrarily placed him in the category "very good" and 'good' respectively. Similarly, the reporting authority

for the period 01.01.2008 to 31.03.2008 categorized him as 'very good', but no remarks were awarded by the reviewing/concurring authorities as the period of the said assessment was less than three months. The applicant has questioned the above downgrading on the grounds enumerated in the two above-noted reference applications.

6. Finally, in Reference Application No. 292 of 2016, the applicant, as is evident from Annexure A-2, was graded in the year 2011-12 as "very good" by the reporting authority for the period 08.08.2011 to 31.03.2012, as "very good" by the reviewing authority for the period 01.09.2011 to 31.03.2012 and as "very good" by the concurring authority for the period 01.04.2011 to 31.08.2011, but, for the period 01.09.2011 to 31.03.2012, the concurring authority toned down the remarks as "good" without taking the requisite steps prescribed by law. Thus, the concurring authority threw him into an obvious disadvantage. The grievance ventilated by the applicant is again the same as indicated in the above three reference applications. He has slammed the action of the concurring authority who, allegedly without having any regard for the legal requirements laid down for downgrading the character roll in the same assessment year, toned down his performance from the higher category to the lower category.

7. We find that the common ground for filing these reference applications is that the concerning authority/authorities has/have allegedly disagreed with the heartening and, therefore, elating assessment recorded by the subordinate authority/authorities without any rhyme or reason and imposed upon him downgraded remarks without assigning any reason thereof or providing him an opportunity of hearing or communicating the same to him for the purpose of giving him an opportunity to make a representation, if he so intended, to the authority obviously higher than the one who gave him the entry (which is undeniably deprecating, and, therefore, damaging in comparative terms). Thus, the applicant is apprehensive that his service

prospects are likely to be adversely affected on account of the impugned downgrading of his ACR remarks. With this apprehension in mind he has sought by means of these reference applications to emphasize that the higher grading/gradings recorded by the subordinate authority/ authorities carries/carry higher marks while the downgraded remarks by virtue of carrying lesser marks are likely to deprive him of the service benefits for which a higher benchmark is provided. Terming the impugned remarks as arbitrary, illegal, unilateral, discriminatory and mala fide, the applicant has asked for the quashing of the same along with issuance of a direction to the respondents not to take them into consideration while providing him promotion with attendant service benefits.

8. The respondents, in all these reference applications, filed the CA/WS, wherein they disagreed with the applicant that the criterion for promotion to the post of Superintending Engineer is seniority-cum-merit. Highlighting that the criterion for the aforementioned promotion is 'merit', they pointed out that as per rule only the names of those officers who have completed fifteen years of regular service including six years of service on the post of Executive Engineer can be included in the eligibility list. In this continuation, they clarified and explained the government policy in respect of recording ACRs of government employees. Shedding light on the three-tier grading system i.e. reporting/reviewing/accepting authorities, they asserted that the views of the accepting/concurring authority are of a conclusive nature, as he has before him the assessment(s) made by the two subordinate authorities before recording his quintessential evaluation. Thus, the accepting/concurring authority is fully empowered to agree or disagree with the observations of the two authorities. He is not a rubber stamp, bound to okay what has been submitted before him. If there is a difference of opinion between the reporting authority and the reviewing authority, it is the accepting authority who has to ultimately examine what is going to be befitting and well-deserved for the employee who is going through the process of the assessment of his annual

performance. Highlighting the independent role of all the three authorities with regard to the assessment of the concerned employee(s), the respondents stated that the case of lowering the grade of the applicant by the higher authority(s) has not to be treated as a case of downgrading. According to various judicial pronouncements, downgrading actually denotes the awarding of a lower category to some employee in comparison with the grading awarded to him in the preceding year. In the instant cases, the higher authority(s) has/have run down the applicant's performance. Thus, it is a case of stepping down in the same assessment year. It has also been pleaded that the questioned ACRs of respective years hardly fall under the category of an adverse entry and hence no cause of action has in fact arisen to the applicant for filing the instant reference applications. It has been further submitted that in view of Section 4(i) of the **U.P. Public Services (Tribunal) Act, 1976**, the matters in hand do not fall within the jurisdiction of the Tribunal as they have not sprung from the applicant's grievance related to any order (आदेश) or any omission (लोप) or any inaction (उपेक्षा) of the State Government. Furthermore, the contents of Reference Application No. 289 of 2016 are related to the year 2008-09, Reference Application No. 290 of 2016 to the year 2004-05, Reference Application No. 291 of 2016 to the year 2007-08 and Reference Application No. 292 of 2016 to the 2011-12, meaning thereby that they are barred by Section 5 of the **U.P. Public Services (Tribunal) Act, 1976**. In such view of the matter, all these reference applications are not maintainable and deserve to be dismissed with costs.

9. We can see that the applicant, in all these reference applications, filed the Rejoinder Affidavit, wherein he gainsaid the statements made in the CA/WS and stated that the entire concept of recording ACRs by the reviewing and accepting authorities who have a different opinion has changed in the light of the law laid down by the Hon'ble Supreme Court. The current scenario is that if they intend to tone down the remarks and grading given by the reporting authority, it is their bounden duty

not only to record reasons for their disagreement but also afford the incumbent an opportunity of hearing. It has also been made mandatory to furnish a copy of the ACR to him so that he might be in a position to prefer a representation, if he so desired, for upgradation of the same. The Hon'ble Supreme Court has also laid down that the downgraded remarks will amount to adverse remarks. It has also been explained by the applicant that downgrading, in the context of ACRs, has to be taken to specify the remarks and grading recorded by the reviewing and accepting authorities who step down the remarks and grading recorded by the subordinate authority/authorities in the same assessment year. It has further been stated that downgrading also stands for the downgraded remarks and grading awarded to a government servant in a subsequent year as compared with those awarded in the preceding year. In respect of the plea that the matters in hand do not fall within the jurisdiction of the Tribunal, the applicant stated that since the Hon'ble Supreme Court in a number of cases has laid down the law that downgraded remarks amount to adverse remarks, he does undoubtedly have a cause of action which can be rightly adjudicated upon by the Tribunal. So far as the plea of limitation is concerned, the applicant denied the same and asserted that since it was after receiving the letter dated 19.06.2014 sent by the PIO of the department that he could have access to, and knowledge about, the impugned remarks, the reference applications were clearly not time-barred.

10. We have heard Sri Shireesh Kumar, learned Counsel for the applicant as well as Sri K.P. Singh, learned Presenting Officer appearing on behalf of the respondents and perused the record available on the file.

11. It is not disputed that the State Government has not framed any statutory rules for regulating its policy of recording the ACRs of its employees. The prevalent policy, it is common knowledge, is regulated by executive instructions issued from time to time. The said policy involves the three-tier grading system i.e. reporting, reviewing and accepting authorities. It is

also in everyone's knowledge that these authorities can award any of the five categories/gradings to a government servant. They are 'excellent' or 'outstanding', 'very good', 'good' and 'fair' in descending order. The fifth and last category, which is obviously of an adverse nature, is 'bad' or 'poor'. The common practice is that where the criterion for promotion to some post is 'merit', the top category fetches three marks. The next category i.e. 'very good' awarded to a government employee entitles him to get two marks. The remaining two categories, which are not adverse, guarantee only one mark. In other words, a higher grading fetches higher marks. Thus, briefly stated, for the purpose of evaluation of a candidate's merit, the remarks made in his character roll in a particular period along with his service records are considered by the DPC, which generally adopts the outlined arrangement for awarding marks.

12. It is well known that the GOs/executive instructions in the absence of a statute on the point have the force of such a statute. This view has been taken by the Hon'ble Apex Court in **Nagpur Improvement Trust Vs. Yadaorao Jagannath Kumbhare and Others (1999) 8 SCC 99** as well as in **Ashok Kumar Srivastava Vs. Ram Lal and Others 2008 (3) SCC 148**. Since there are no statutory rules, the State Government's policy reflected in the various GOs has force of a statute. The obvious inference is that these GOs by implication have a binding effect.

13. It will be worthwhile to add that the object of writing annual confidential report of a government employee has been explained by the Hon'ble Apex Court in a judgment reported in **1997 (4) SCC 7 State of U.P. Vs. Yamuna Shankar Misra and Another**. We tend to quote para 7 of the said judgment hereunder:

"It would, thus, be clear that the object of writing the confidential reports and making entries in the character rolls is to give an opportunity to a public servant to improve excellence. Article 51-A(i) enjoins upon every citizen the primary duty to constantly endeavour to prove excellence, individually

and collectively, as a member of the group. Given an opportunity, the individual employee strives to improve excellence and thereby efficiency of administration would be augmented. The officer entrusted with the duty to write confidential reports, has a public responsibility and trust to write the confidential reports objectively, fairly and dispassionately while giving, as accurately as possible, the statement of facts on an overall assessment of the performance of the subordinate officer. It should be founded upon facts or circumstances. Though sometimes, it may not be part of the record, but the conduct, reputation and character acquire public knowledge or notoriety and may be within his knowledge. Before forming an opinion to be adverse, the reporting officers writing confidential reports should share the information which is not a part of the record with the officer concerned, have the information confronted by the officer and then make it part of the record. This amounts to an opportunity given to the erring/corrupt officer to correct the errors of the judgment, conduct, behaviour, integrity or conduct/corrupt proclivity. If, despite being given such an opportunity, the officer fails to perform the duty, correct his conduct or improve himself, necessarily the same may be recorded in the confidential reports and a copy thereof supplied to the affected officer so that he will have an opportunity to know the remarks made against him. If he feels aggrieved, it would be open to him to have it corrected by appropriate representation to the higher authorities or any appropriate judicial forum for redressal. Thereby, honesty, integrity, good conduct and efficiency get improved in the performance of public duties and standard of excellence in service constantly rises to higher levels and it becomes a successful tool to manage the services with officers of integrity, honesty, efficiency and devotion."

14. So the picture that emerges is that in the hierarchical set-up of the State Government the process of recording ACRs is set into motion by the reporting authority, furthered by the reviewing authority and finalized by the accepting/concurring authority. The GO dated 28.03.1984 provides that in the event of conflict between the gradings awarded by these authorities, the grading given by the accepting authority shall prevail. The said GO further provides that unless there are clear and specific reasons which will have to be reduced in writing, a government servant may generally not be graded as 'उत्कृष्ट' (outstanding). In other

words, to be categorized as outstanding, the incumbent must deservedly and legitimately earn that place. Touching upon the independent role of the above authorities, the Hon'ble Supreme Court in the Constitution Bench decision rendered in the case of **Bachchittar Singh v. State of Punjab, AIR 1963 SC 395** has held that “internal notings on the files during the process of decision- making do not confer any enforceable right upon a litigant seeking benefit from the same. Unless the order is duly authenticated by the competent authority and is issued and thereafter communicated, the whole situation is in a flux and the authority is prone to change its mind mid-way and to decide the same issue in a completely different manner than it earlier proposed.”

15. The prevalent legal position, it is reiterated, is that the accepting authority is not prevented from agreeing or disagreeing with the observations of the two authorities. Similarly, the reviewing authority is not bound by the category awarded by the subordinate authority. It too cannot be questioned that if there is a difference of opinion between any two authorities, it is the higher authority whose opinion has to take precedence. It is also settled that if some authority disagrees with the lower authority, he can rightfully substitute the latter's remarks by his own, but if these remarks run down an employee's performance, not only logical and cogent reasons have to be recorded but an opportunity of hearing is also to be provided to the incumbent. Moreover, the downgraded remarks have to be communicated to him. This will give him an opportunity to represent against them.

16. The CA/WS, we can see, raises the plea of limitation in an emphatic manner. Stating that the subject matter of these reference applications is related to the years 2008-09, 2004-05, 2007-08 and 2011-12 respectively, while they have been filed in February, 2016, the respondents urged that if the applicant had any grouse with regard to the ACRs of the said years, he could have approached the Tribunal in the prescribed time-limit of one year. Since the applicant did not spring into action well in time, his claim is barred by Section 5 of the **U.P. Public Services**

(Tribunal) Act, 1976. The above contention seems to have been suitably responded to in the RA which invites attention to the letter dated 19.06.2014 (Annexure No. A-1) by means of which the PIO of PWD, taking cognizance of the applicant's application dated 16.05.2014 submitted under the RTI Act, 2005, made the attested photocopies of his ACRs for the year 2004-2005 to the year 2013-14 available to him. It cannot be denied that the applicant did not have any information regarding his impugned entries before he received the abovementioned letter dated 19.06.2014. In other words, the disputed entries could be available to him only when he was able to procure the sought-after information about them. It was only at that point of time that the cause of action actually arose to him. As he filed the instant reference applications in February, 2016, the plea that they are time-barred is obviously not maintainable.

17. The CA/WS, filed in all these reference applications, seeks to challenge the jurisdiction of the Tribunal to adjudicate upon the instant matters on the ground that the applicant is not aggrieved by any order of the State Government meaning thereby that no cause of action has in fact accrued to him. Explanation given in Section 4(1) of the **U.P. Public Services (Tribunal) Act, 1976** informs that "order" means an "order" or "omission" or "inaction" of the State Government. Replying to the objection raised by the respondents, the applicant has pointed out in the RA that the Hon'ble Supreme Court has ruled more than once that though the downgraded remarks might not have been classified as adverse remarks, they overtly/covertly carry adverseness which can hit the incumbent's career at any point of time. In these circumstances, the applicant does undeniably have a cause of action which justifies the filing of the instant reference applications u/s 4 of the **U.P. Public Services (Tribunal) Act, 1976**. On scrutiny of facts as well as the record available on the file, we find substance in the applicant's submission and emphatically turn down the objection of the respondents.

18. What transpires from the contents of the preceding paragraph is that if the applicant had not used his right under the RTI Act, 2005, he would have never come to know what remarks and grading his ACRs for the year 2004-2005 to the year 2013-14 actually carried. In other words, the annual entries which had been awarded to him by the three authorities from time to time in the above period would have never come to his knowledge, and he would have continued to be in the dark about them, if he had not approached the PIO of the department. We are aware that at the relevant time only those entries which carried the grading 'bad' or 'poor' were thought to be adverse and the rule provided for the communication of such entries only. The applicant's annual entries for the year 2004-2005 to 2013-14 do not appear to have been communicated to him as they perhaps carried one of the four positive gradings/categories and were certainly not adverse or 'bad' or 'poor'.

19. With the issuance of the GO dated 01.02.2013 (Annexure No. A-12) the system of communicating every remark, made in the character roll, to the concerned government servant was officially introduced. The result was that every government servant thereby earned a right to be duly acquainted with, and informed of, his annual entries well in time and this gave him an opportunity to make a representation for upgradation, if he so desired, of the remarks which he considered unjust and inappropriate. His representation, if he had made any, had to be decided by an authority higher than the accepting officer. Para 6 of this GO reads as follows:

“ 6. यह भी निर्णय लिया गया है कि यदि सन्तोषजनक (Satisfactory), उत्तम/अच्छा (Good) तथा अति उत्तम (Very Good) ग्रेडिंग के सापेक्ष प्रविष्टि प्राप्तकर्ता कार्मिक द्वारा प्रत्यावेदन दिया जाता है तो उसके निस्तारण हेतु निम्नलिखित व्यवस्था होगी:—

1. यदि प्रविष्टि प्राप्तकर्ता कार्मिक अंकित की गयी ग्रेडिंग से सहमत नहीं है और उसके विरुद्ध समुचित कारण सहित प्रत्यावेदन देना चाहता है, तो वह प्रविष्टि संसूचित किये जाने के दिनांक से दो माह के भीतर अपना प्रत्यावेदन स्वीकर्ता प्राधिकारी से एक पंक्ति ऊपर के प्राधिकारी को प्रस्तुत कर सकेगा। यदि स्वीकर्ता प्राधिकारी

से एक पंक्ति ऊपर का कोई प्राधिकारी उपलब्ध न हो, तो स्वीकर्ता प्राधिकारी को ही अपना प्रत्यावेदन प्रस्तुत कर सकेगा।

2. यथास्थिति एक पंक्ति ऊपर के प्राधिकारी अथवा स्वीकर्ता प्राधिकारी द्वारा प्रत्यावेदन प्राप्ति के दिनांक से एक युक्तियुक्त समय के भीतर समुचित प्राधिकारी, जिसने प्रविष्टि अंकित की है, से आख्या प्राप्त की जायेगी।

प्रतिबन्ध यह होगा कि समुचित प्राधिकारी जिसने प्रविष्टि अंकित की है, आख्या भेजने से पूर्व सेवा में न रह गया हो या सेवानिवृत्त हो गया हो या निलंबित हो, से आख्या अपेक्षित नहीं होगी।

3. एक पंक्ति ऊपर के प्राधिकारी अथवा स्वीकर्ता प्राधिकारी, यथास्थिति, द्वारा प्रविष्टि अंकित करने वाले प्राधिकारी की आख्या के साथ और यदि कोई आख्या अपेक्षित न हो, तो समस्त तथ्यों के आलोक में प्रत्यावेदन पर विचार करते हुए दो माह के भीतर सकारण आदेश पारित किया जायेगा।

4. उपर्युक्तानुसार पारित आदेश संबंधित सरकारी सेवक को लिखित रूप से संसूचित किया जायेगा।

5. प्रस्तर-6 (3) के अनुसार पारित किया गया आदेश अंतिम होगा, अर्थात् इस संबंध में कोई द्वितीय प्रत्यावेदन ग्राह्य नहीं होगा।”

20. It would be helpful to mention here that the aforesaid GO dated 01.02.2013 has stemmed from the Hon'ble Supreme Court's verdict dated 12.05.2008 (Annexure No. A-8) delivered in **Civil Appeal No. 7631 of 2002 (Dev Dutt Vs. Union of India & Others)** reported in **(2008) 8 SCC 725**. Para 2 of the said GO reproduces para 36, para 37, para 39 and para 40 of the Hon'ble Supreme Court's decision mentioned hereinabove:-

"36. In our opinion, fair play required that the respondent should have communicated the 'good' entry of 1993-94 to the appellant so that 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.

37. Originally there were said to be only two principles of natural justice: (1) the rule against bias and (2) the right to be heard (audi alteram partem). However, subsequently, as noted in **A.K. Kraipak's case (supra)** and **K.L. Shephard's case (supra)**, some more rules came to be added to the rules of natural justice, e.g. the requirement to give reasons vide **S.N. Mukherji Vs. Union of India AIR 1990 SC 1984**. In

Maneka Gandhi Vs. Union of India (supra) (vide paragraphs 56 to 61) it was held that natural justice is part of Article 14 of the Constitution.

39. 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.

40. 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."

21. The aforesaid GO dated 01.02.2013 has also drawn attention to the following direction issued by the Hon'ble Allahabad High Court in Writ Petition No. 479 (S/B)/2010 **State of U.P. & Another Vs. Dev Raj Vishwakarma & Another 2012(1) ADJ 316 (DB)(LB)** on 05.12.2011 (Annexure No. A-15):-

"Considering the background of present case, we hereby direct the Chief Secretary to State Government of U.P. to issue appropriate Government Order/Circular for communication of all the entries (whether poor, fair, average, good or very good) to all the state employees as per dictum of Hon'ble Supreme Court, as laid down in paras 36 & 37 of case

of **Dev Dutt vs. Union of India, (2008) 8 SCC 725**, with a further provision for making representation to the higher authorities and if necessary, appropriate amendment be made in U.P. Government Servants (Disposal of the Representation against Adverse Annual Confidential Reports & Allied Matters) Rules, 1995."

22. It can be instantly understood that the aforesaid G.O. dated 01.02.2013 has flown from the Hon'ble Allahabad High Court's directions quoted hereinabove. It is also clear that the Hon'ble Supreme Court's directions dated 12.05.2008 (contained in para 20 of this judgment and order) too have been duly incorporated in the said G.O. However, it should not be missed that the arrangement propounded by the Hon'ble Supreme Court in **Dev Dutt's case (supra)** on 12.05.2008 could eke out its existence only on 01.02.2013 when the said GO, obviously under the Hon'ble High Court's directions issued in **Dev Raj Vishwakarma's case (supra)** on 05.12.2011, was released. It can also not be overlooked that non-communication of the impugned remarks (concerning the aforesaid years) to the applicant was not in consonance with the principle promulgated by the Hon'ble Supreme Court as above, but since the State Government transformed the same into an executive order after more than four years i.e. on 01.02.2013, the respondents cannot be faulted for not revealing the material in question to the incumbent on their own.

23. A perusal of the file reveals that the dispute involved in the instant cases revolves around the applicant's contention that he has been wronged as the department kept him away from the apparently adverse material which had been incorporated in his ACRs without following the legal procedure related to the recording of annual character rolls. He is also aggrieved that the concerning authority(s) acted in an illegitimate and arbitrary manner by lowering the category of his performance. The learned Counsel for the applicant, during the course of hearing in respect of all the reference applications, unambiguously pointed out that the authority concerned, while disagreeing with the grading awarded by the subordinate authority/authorities, failed to take

notice of the principles of natural justice which had cast a responsibility on him/them to assign reasons why he/they considered it necessary not to subscribe to his/their views and differ from him/them. By dragging the applicant to a lower category in all the reference applications, the higher authority(s) has/have indulged in a patently illegal exercise, which is sure to cause prejudice to the applicant's interests. The learned Counsel for the applicant, with a view to supporting and substantiating his contention, drew attention to the case of Sri P.C. Jain, an officer of U.P. Jal Nigam, who had preferred **Claim Petition No. 84(F)/IV/1993-121(T)/III/1993 Prabhat Chandra Jain Vs. U.P. Jal Nigam and Others** before the Tribunal with the prayer that the downgraded entries recorded in his ACRs be expunged as they are in contradiction to the excellent remarks/grading awarded by various reporting authorities. The above case was allowed by the Tribunal vide judgment and order dated 30.10.1993 (Annexure No. A-5), by means of which the challenged observations made in his ACRs were directed to be done away with. The Tribunal had categorically pointed out that there had been non-observance of the principles of natural justice at the level of the officers, who had run down the boosting comments of the lower authorities without assigning any reason thereof. The order passed by the Tribunal was challenged by U.P. Jal Nigam by means of Writ Petition No. 2244 (S/S) of 1994 **U.P. Jal Nigam Vs. Prabhat Chandra Jain and Another**, in which the Hon'ble Allahabad High Court vide order dated 01.05.1995 (Annexure No. A-6) upheld the Tribunal's stand. Thereafter, U.P. Jal Nigam preferred **Special Leave Petition No. 16988 of 1995 U.P. Jal Nigam and Others Vs. Prabhat Chandra Jain and Another 1996 (2) S.C.C. 363**, which was decided by the Hon'ble Apex Court on 31.01.1996 (Annexure No. A-7). The Hon'ble Apex Court agreed with the Hon'ble Allahabad High Court that confidential reports are an employee's assets since they weigh to his advantage at the various stages of his career advancement. The Hon'ble Apex Court also observed:

“it may be emphasized that even a positive confidential entry in a given case can perilously be

adverse and to say that an adverse entry should always be qualitatively damaging may not be true.”

24. It will be appropriate to remark that the viewpoint taken by the Tribunal in **Prabhat Chandra Jain (supra)** has achieved finality in view of the Hon'ble High Court as well as the Hon'ble Supreme Court adding force and sanctity to it.

25. Referring to the GO dated 26.02.1979 (Annexure No. A-4), the learned Counsel for the applicant threw light on the State Government's stress on the submission of a self-appraisal report by the officer concerned to the reporting authority and then recording of remarks in his ACR by the latter after giving a serious thought to the contents of the self-appraisal report. Thus, the reporting authority is supposed to form an opinion about the work, performance and conduct of the said officer without altogether disregarding or overlooking the facts submitted by him.

26. Advancing his line of argument, the learned Counsel for the applicant emphasized that it is evident that the relevant GOs prescribe that the government servant whose performance is to be assessed has to submit a brief and categorical narration of his work as well his achievements, if any, to the reporting authority who while recording his views in his ACR has to take note of the same. Following the principle laid down by the related government orders, he must try his level best to jot down remarks which reflect a true, impartial, qualitative and objective assessment of the officer concerned. In other words, he should not be swayed away by any impulse or predisposition or personal grudge or prejudice or any kind of influence. The reviewing/accepting authorities too are duty-bound to ensure that their assessment is not biased or unduly subjective or coloured by any unofficial motive. It is also to be kept in mind that in case a higher authority makes up his mind to disagree with the subordinate authority and scratch his own observation, he has to justify his stand in a manner which is not looked upon with suspicion and appears convincing. The decision of disagreeing

with the grading awarded by the subordinate authority/ authorities casts a duty on the higher authority to provide the officer concerned an opportunity of hearing. Highlighting that unless the disagreeing authority vindicates his point of view by assigning satisfactory reasons, his observation is likely to degenerate into an invalid and legally unacceptable exercise, the applicant's learned Counsel referred to the GO dated 12.06.2006 (Annexure No. A-10) and stressed the contents of para 7 of the same:

“ यदि प्रतिवेदक प्राधिकारी द्वारा प्रदत्त ग्रेडिंग को समीक्षक प्राधिकारी द्वारा उच्च (अपग्रेड) अथवा निम्न (डाउनग्रेड) किया जाता है तो उसका पर्याप्त औचित्य दिया जाना अपरिहार्य होगा। उक्त व्यवस्था स्वीकर्ता प्राधिकारी के सम्बन्ध में भी लागू होगी। ”

27. According to the learned Counsel for the applicant, the three authorities, who have been entrusted with the task of recording their views in the ACR of a government servant, play a phenomenal role which they must always keep in mind. While they have to do the said job, they have to recognize without fail that all the five gradings or categories laid down by the relevant GO/GOs carry their own grace/disgrace, particularly in comparative terms. If these authorities omit to be careful and realistic in their assessment or carry out their task in a casual or mechanical way, they are obviously not fair and reasonable towards the career prospects of the officer concerned, who might suffer irreparably on account of their hastily, and not carefully, written remarks. In such view of the matter, the applicant appears to be rightly aggrieved when he questions the legality, validity and correctness of the remarks/gradings awarded to him in his character roll by the accepting authority. It seems to be in the fitness of things to understand that it is not important whether ‘merit’ is the criterion for promotion to the next higher post or ‘seniority subject to rejection of unfit’ is the yardstick for the same. The sole issue is, indeed, of getting distinguished from those who perform less distinctively. In this backdrop, it looks assuring to consider the learned Counsel for the applicant to be correctly focused, when he alleges that the applicant

undoubtedly stands wronged by the action of the disagreeing authority. The following observations of the Hon'ble Apex Court in **Dev Dutt's case (supra)** are significant in this connection:

“Nomenclature of the entry 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. 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.”

28. The learned Presenting Officer, during hearing of the case, relied upon the contents of para 1 of the CA/WS and referred to five judicial pronouncements mentioned therein (**1. Dev Raj Vishwakarma's case (supra)**, **2. Union of India Vs. Major Bahadur Singh (2006) 1 SCC 368**, **3. Dev Dutt's case (supra)**, **4. K.M. Misra Vs. Central Bank of India & Others (2008) 9 SCC 120**, and **5. Abhijit Ghosh Dastidar Vs. Union of India & Others (2009) 16 SCC 146**) obviously with a view to establishing that the applicant has not understood the meaning of downgrading, which actually stands for the awarding of a lower category to some government servant in comparison with the grading awarded to him in the preceding year. According to him, the applicant's case is in fact a case of stepping down in the same assessment year rather than a case of downgrading of entries. Responding to the argument submitted by the learned Presenting Officer, the learned Counsel for the applicant stated that downgrading does not merely stand for the downgraded remarks and grading awarded to a government servant in a subsequent year as compared with those awarded in the preceding year. The learned Counsel added that in the context of an ACR, downgrading also means the remarks and gradings

recorded by the reviewing/accepting authorities, who, or any one of whom, step/steps down the remarks and gradings recorded by the subordinate authority in the same assessment year. In this regard, the learned Counsel for the applicant sought to point out that para 7 of the GO dated 12.06.2006 (Annexure No. A-10) supports his view by using the word 'downgrade' in respect of the gradings stepped down by some higher authority. The State Government, as is evident from the extract of the GO dated 12.06.2006 quoted hereinabove, recognizes the nomenclature 'degrade' for categories run down in the same assessment year. It is, thus, evident that downgrading is not merely the remarks downgraded in a subsequent year.

29. The learned Counsel for the applicant stated in this regard that the Hon'ble High Court in **U.P. Jal Nigam (supra)** has observed, "They (ACRs) are evaluated at various stages of his career including promotions and extension of service at the age of 55 years. Illustratively if an employee legitimately earns an 'outstanding' report which at a **later stage**, at his back and without his knowledge, is reduced to the level of 'satisfactory' without any communication to him, it would certainly affect him at one or the other stage of his career."

30. The above-quoted observation of the Hon'ble High Court, we can see, uses the word '**later stage**' which stands for the stage from the reporting authority to the reviewing authority as well as from the reviewing authority to the accepting authority.

31. On the point of downgrading in the same year, the Hon'ble High Court's observation in Writ Petition No. 149 of 2010 **State of U.P. Vs. Atma Nand Dubey** decided on 17.02.2010 too has to be taken into consideration. The same is as follows:

"We notice that the Tribunal was correct in holding that the Reviewing and Accepting authorities should have given opportunity to the respondent before downgrading the rating in ACR from 'outstanding' to 'very good'."

32. The Hon'ble Apex Court in **Sukhdev Singh Vs. Union of India and Others 2013 (9) SCC 566** (Annexure No. A-16) has held that the law laid down in **Prabhat Chandra Jain (supra)** is not confined to the employees of U.P. Jal Nigam only but to all the government employees.

33. It is to be noted that a larger Bench of three judges of the Hon'ble Supreme Court in the case of **Abhijit Ghosh Dastidar Vs. Union of India and Others (2009) 16 SCC 146** has upheld the judgment delivered in **Dev Dutt (supra)**.

34. In para 8 of **Sukhdev Singh (supra)**, the Hon'ble Apex Court refers to its own findings delivered in two earlier cases as follows:

"8. A three Judge Bench of this Court in **Abhijit Ghosh Dastidar vs. Union of India and others (2009) 16 SCC 146** followed **Dev Dutt**. In paragraph 8 of the Report, this Court with reference to the case under consideration held as under:

"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 get 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 above referred decision 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."

35. It has been further submitted by the learned Counsel for the applicant that one Sri Anil Kumar, Deputy Commissioner,

Commercial Tax, had approached the Tribunal with the prayer that since the entries existing in his confidential reports relating to the years 1988-89, 1989-90, 1990-91 and 1994-95 were converted and downgraded at the higher level without recording sufficient reasons, the consequences whereof would damage the prospects of his career, they should be obliterated. The Tribunal allowed his claim, whereupon the State of U.P. approached the Hon'ble Allahabad High Court, Lucknow Bench, by filing **Writ Petition No. 1633 (S/B) of 2000**. The Hon'ble High Court dismissed the aforesaid writ petition and confirmed the legal requirement of recording sufficient reasons in case of disagreement with the lower officer.

36. We, in continuation, tend to highlight the petitioner's reliance on the case of **Satnam Singh Vs. High Court reported in 1998 (3) U.P.L.B.E.C. 1640** to indicate that an administrative action can be struck down if it is based on no evidence or on non-existent facts. Para 17 of the Hon'ble High Court's judgment delivered in this case reads as follows:

"We have expressed our view that the process of writing entries is subject matter of judicial review. The administrative action can be struck down if it is based on no evidence or on non-existent facts or if no reasonable man can arrive at the same conclusion. The test of reasonableness regarding striking down of the administrative action is discussed in Seventh Edition of 'ADMINISTRATIVE LAW' by Sir H.W.R. Wade and C.F. Forsyth at page 308. The discretion should be exercised reasonably, fairly and justly. The proceedings should be limited and bound with the rule of reason and law. The discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glasses and pretences and not to do according to their wills and private affections. It is stated that House of Lords have detected a difference, in that proportionality requires the Court to judge the necessity of the action taken as well as whether it was within the range of courses of action that could reasonably be followed".

37. The applicant has also dwelt upon the Hon'ble Apex Court's emphasis, discernible in the case of **Union of India Vs. Mohan**

Lal Capoor reported in 1974 (1) SCR 797, on recording reasons, which are the link between the material on which certain conclusions are based and the actual conclusion.

38. Attention has also been drawn to the Hon'ble Allahabad High Court's verdict delivered in **Surendra Kumar Vs. State of U.P. and Others 2006 (3) UPLBEC 2834** (Annexure No. A-9) wherein the Sub Divisional Magistrate's remarks categorizing the petitioner (who was posted as Tahsildar) as 'outstanding' for the two years 1995-96 and 1996-97 were downgraded by the Collector, acting as reviewing authority, to 'good' without affording him hearing in this regard. Holding that the Collector by not giving any reason for, or any hearing to the petitioner with regard to, his action, has acted against the principles of natural justice and fair play, the Hon'ble High Court turned down the grading 'good' and ruled that when the character roll of an officer is to be downgraded and the encouraging remarks awarded to him are in the process of being run down, it is necessary not only to assign reasons for the same but also provide him an opportunity of hearing.

39. The common hunch is that the reporting authority who is superior to one whose ACR he is authorized to record is better placed, and definitely much better equipped, to observe, analyze, evaluate, and comment upon, one's working, capability, aptitude, overall efficiency and contribution to one's official responsibilities and commitments as he watches and supervises one's functioning from closer and more intimate quarters. It is presumed in the stated view of the matter that his remarks must attract greater importance as they emanate from an authority who deals with the officer concerned more frequently, and is ordinarily more accessible, and easier to be consulted with, and has every reason to be more familiar with the latter's track record as well as the nitty-gritty of his working and performance. However, in the administrative set-up of various departments of the State Government, a higher officer's views generally have an overriding effect and it is undeniable that sometimes they tend to

push the views of subordinate officers into background almost in an overwhelming and not-so-transparent manner. It appears that in all likelihood the necessity of assigning reasons in case of disagreement was laid down, and made essential, so that no government servant without any rhyme or reason falls a prey to an unsteady, anomalous or unrealistic evaluation of his work, thereby getting wronged for no fault of his own.

40. The above appreciation of facts and legal proposition(s) seeks to disentangle the controversy, which reared its head when the applicant was able to procure his ACRs for the year 2004-05 to the year 2013-14 through the PIO of PWD on 19.06.2014. It was only then that he could actually access the remarks awarded to him by different authorities for different time spans. The applicant is dissatisfied that for the years 2008-09, 2004-05, 2007-08 and 2011-12 the subordinate authority(s) placed him in a higher category after taking into cognizance his overall functioning but the higher authority(s), without appreciating or recognizing the opinion of the subordinate authority(s), humbled his grading by flinging him into a less conspicuous grading. The applicant has complainingly pointed out that the action of the higher authority(s) has cast the shadow of adverseness on the remarks awarded to him for the said period. On being confronted with the question how the downgraded remarks which are not classified as "adverse" are likely to affect the applicant's future prospects, his learned Counsel sought to explain that various service benefits including promotion for which a higher grading is the benchmark, might not flow to the incumbent smoothly and uninterruptedly while his rivals carrying the topmost category "excellent" might leave him behind in the race of career advancement.

41. Looking to the sequence of facts highlighted in these reference applications as well as the law laid down by the Hon'ble Apex Court and the Hon'ble High Court from time to time in respect of the downgrading of the remarks in the same assessment year, we are convinced that the applicant's grouse is

not ill-founded. The subordinate authority(s), while evaluating the applicant's work and performance for the aforesaid period, placed him in a higher category. To be clearer, the subordinate authority(s), who was/were presumably in a position to ensure a closer and more frequent monitoring of the incumbent's work, preferred to award him a higher category. It may be reiterated that the "excellent" grading occupies the most respectable and topmost place in the list of the five categories which can be awarded to a government servant by the reporting/ reviewing/ accepting authorities. So far as the grading "very good" is concerned, it is the second best grading which is almost equally respectful. Then, in descending order, comes the grading "good" followed by the grading "fair". Having deference for the assessment recorded by the subordinate authority(s), the superior authority(s) either corroborated the former's opinion and allowed the applicant to retain the grading recorded by him/them or he/they, without explicit reasons, dragged the applicant down and chose to classify him as a comparatively inferior officer. This state of affairs exhibits that the concerning authority(s) had his/their own views which did not match those of the subordinate authority(s). As no reason or justification for downgrading his/their remarks seems to be in sight, we believe that the applicant has not illogically dubbed the said authority's action arbitrary, unreasoned, quirky and against the principles of natural justice. As has already been stressed hereinabove, though the category "very good" may not amount to an adverse entry in legal parlance as per the relevant GOs focusing on the State Government's policy relating to the recording of ACRs, it has indisputably added the element of adverseness to the remarks which had earlier placed the applicant in the top category. The same can be said about the category "good" which, though not defined as an adverse entry, places the applicant in a less respectable, and, therefore, less advantageous, position. His learned Counsel stated that if the higher authority had any justification or gumption to differ from the subordinate authority(s) and considered the applicant fit only for an inferior category, he was not only duty-bound to assign reasons for

running down his performance for the period in question but also communicate the same to the applicant and provide an opportunity of hearing to him.

42. What we gather from the foregoing discussion is that the spirit of above-noted law is obviously to check arbitrariness as well as every immoderate and indiscriminate effort that an officer intentionally or unintentionally might indulge in while performing his responsibility as an evaluating authority. Why recording reasons in the event of disagreement in cases such as these has been made mandatory should be taken as purporting to achieve the objective that the requirements of fairness, transparency and objectivity are not compromised with even in an exigency and the assessing authorities realize without fail that their role demands from them utmost honesty and seamless fairmindedness. In brief, law asks for full justification in case some competent authority, finding the remarks awarded by the subordinate authority to be exaggerated or extra appreciative, decides to belittle or deprecate them and incorporate his own assessment in the ACR of the employee concerned. As, on many an occasion, it may not be possible for the three authorities to be on the same page, it is the bounden duty of the disagreeing authority to assign reasons before overshadowing, or looking down on, the remarks, which are to be reviewed or accepted, as the case may be, and inserting or adding his own evaluation pushing the incumbent down by a step or more.

43. As we have deliberated on the case of **Dev Raj Vishwakarma (supra)** in para 21 of this judgment and order, the Hon'ble Allahabad High Court had directed the State Government to ensure appropriate amendment in the **Uttar Pradesh Government Servants (Disposal of Representation against Adverse Annual Confidential Reports and Allied Matters) Rules 1995** (hereinafter referred to as Rules 1995), if need be, so that there might be an enabling provision for making a representation against the remarks which the concerned government servant finds hurtful, prejudicial or detrimental to

his career. We were informed during the course of hearing that no such amendment has been effected in the Rules, 1995 till date. However, the same is not cardinal to our discussion, as the GO dated 01.02.2013 has already introduced the requisite system vide its para 6 which has been reproduced in para 19 of this judgment and order.

44. It may be pertinent to add here that Rule 4(1) of the Rules, 1995 requires only adverse reports to be communicated to the affected government servant. We find it meaningful to quote hereinunder Rule 4 of the Rules 1995:

“4(1) Where a report in respect of a Government Servant is adverse or critical, wholly or in part, hereinafter referred to as adverse report, the whole of the report shall be communicated in writing to the Government Servant concerned by the accepting authority or by an officer not below the rank of reporting authority nominated in this behalf by the accepting authority, within a period of 45 days from the date of recording the report and a certificate to this effect shall be recorded in the report.

(2) A Government Servant may, within a period of 45 days from the date of communication of adverse report under sub-rule (1), represent in writing directly and also through proper channel to the authority one rank above the accepting authority, hereinafter referred to as the competent authority and if there is no competent authority, to the accepting authority itself, against the adverse report so communicated:

Provided that if the competent authority or the accepting authority, as the case may be, is satisfied that the Government Servant concerned had sufficient cause for not submitting the representation within the said period, he may allow a further period of 45 days for submission of such representation.

(3) The competent authority or accepting authority as the case may be, shall, within a period not exceeding one week from the date of receipt of the representation under sub-rule (2), transmit the representation to the appropriate authority, who has recorded the adverse report for his comments, who shall, within a period not exceeding 45 days from the date of receipt of the representation furnish his comments to the competent authority or the accepting authority as the case may be.

Provided that no such comments shall be required if the appropriate authority has ceased to be in, or has retired from, the service or is under suspension before sending his comments.

- (4) The competent authority or the accepting authority, as the case may be, shall, within a period of 120 days from the date of expiry of 45 days specified in sub-rule (3), consider the representation along with the comments of the appropriate authority, and if no comments have been received, without waiting for the comments, and pass speaking orders-
 - (a) rejecting the representation; or
 - (b) expunging the adverse report wholly or partly as he considers proper.
- (5) Where the competent authority due to any administrative reasons, is unable to dispose of the representation within the period specified in sub-rule (4), he shall report in this regard to his higher authority, who shall pass such orders as he considers proper for ensuring disposal of the representation within the specified period.
- (6) An order passed under sub-rule (4) shall be communicated in writing to the Government Servant concerned.
- (7) Where an order expunging the adverse report is passed under sub-rule (4), the competent authority or the accepting authority as the case may be shall omit the report so expunged.
- (8) The order passed under sub-rule(4) shall be final.”

45. It may be further gainful to reproduce Rule 5 of the Rules, 1995:-

“Rule 5. Except as provided in rule 56 of the Uttar Pradesh Fundamental Rules contained in Financial Handbook Volume II, Parts II to IV, where an adverse report is not communicated or a representation against an adverse report has not been disposed of in accordance with Rule 4, such report shall to be treated adverse for the purposes of promotion, crossing of Efficiency Bar and other service matters of the Government Servant concerned.”

46. As we have elaborated earlier, the legal position now provides for communication of every remark, recorded in the character roll, to the concerning government servant. The GO dated 01.02.2013 (Annexure No. A-12) issued in this regard has

been discussed in para 19 of this judgment and order. It may be useful to repeat that a government servant now has a right not only to be kept abreast of what his ACR actually holds in store for him but also raise a dissenting voice against the remarks which by virtue of having the ammunition of adverseness in them are likely to blast his service prospects and, thus, take their toll in days to come.

47. Para 1 of the CA/WS, it has to be noticed, talks about the GOs dated 10.09.1976, 28.03.1984 and 30.10.1986 (a copy of all these GOs is enclosed with the CA/WS) and seeks to intimate that they shed light on the State Government's policy related to the recording of ACRs of a government servant. The corresponding para 3 of the RA, replying to the same, informs assertively that the subsequent GO dated 12.06.2006 (Annexure No. A-10) has superseded/modified/amended these GOs. The correct position which we arrive at is that the contention in respect of these GOs having been superseded by the succeeding GO dated 12.06.2006, in fact, does not hold good. The latest GO, we have to understand, simply purports to effect a partial modification in the G.O. dated 28.03.1984 along with two other GOs dated 26.02.1979 and 05.03.1992 (the last two GOs are other than what the applicant has indicated to have been superseded). Since there is no whisper about the two GOs (dated 10.09.1976 and 30.10.1986) therein, they have unquestionably remained untouched. With a view to clarifying how the GO dated 28.03.1984 stands modified by the GO dated 12.06.2006, it has to be recognized that the former GO provided vide its para 6 that in case of disagreement with the grading recorded by the reporting authority, the reviewing authority will be expected (अपेक्षित होगा) to sufficiently justify his stand and similarly if there is disagreement at the level of the accepting authority, it will be likewise expected from him to give proper justification for the same. The modifying GO, seeking to make the given arrangement definitive and binding, lays down vide its para 7 that if the reviewing authority or the accepting authority, as the case may be, decides to upgrade or downgrade the category of a

government servant, it will be mandatory (अपरिहार्य) for him to give adequate justification with regard to his assessment. Thus, the current scenario is that the officer who chooses to differ from the grading recorded by the lower officer is now bound to satisfactorily justify what makes him take a different view. In other words, while assessing a government servant's performance, the authority who is on a higher pedestal shall exercise the power of upgrading or downgrading his category (recorded by the reporting authority or the reviewing authority) without being oblivious of the fact that it has been made incumbent upon him to vindicate his point of view in a reasonable manner. The effect of the modifying GO will obviously be that if the upgrading or the downgrading of a government servant's category takes place at the level of the differing authority without good cause having been assigned thereof, it may not be considered valid or legally acceptable.

48. Judging on the touchstone of law discussed hereinabove, it is amply clear that the grading awarded by the higher authority(s) to the applicant for the period in question manifestly amounts to downgraded remarks as the category recorded by the reporting authority and, almost in all cases, endorsed by the reviewing authority has been run down by him/them. The plea of non-application of mind on his/their part, in this background, seems to be holding good. The grading "very good" or "good" or "fair" which has instead been authored by him/them without assigning any reason seems to have been rightly called into question by the applicant who has unequivocally pointed out that his career prospects are likely to be affected on account of the inherent adverseness the downgraded remarks seem to be carrying. It is not disputed, rather it is apparent on the face of the record, that the higher authority(s) while toning down the grading awarded by the subordinate authority(s) has/have not mentioned why he/they found his/their opinion not compatible with his/their own. In this view of the matter, his/their disagreement, unreasoned as it is, is undoubtedly unlawful. It, we find, overtly clashes with the principles of natural justice. The

file also explains that no hearing whatsoever was afforded to the applicant before pushing his grading down while it was not only essential but also binding. It is also not disputed that the impugned grading for years together remained uncommunicated to the applicant who came to know about it only when he approached the PIO of PWD by means of his application dated 16.05.2014 moved under the RTI Act, 2005 and thereafter received the requisite information by means of the latter's letter dated 19.06.2014. The aforesaid non-communication, it cannot be denied, has evidently been tantamount to the non-observance of the principles of natural justice as it altogether deprived the applicant of his right to prefer a representation against the downgraded remarks. Under these circumstances, what ultimately surfaces is that the action of the concerning authority/authorities was iniquitous in nature as it had in a way created a situation of gross injustice which revealed itself to him at long last. The learned Counsel for the applicant, we are convinced, is fully justified while he questions the validity and legality of the aforementioned remarks in the light of the law laid down from time to time and seeks their quashing in the interest of justice. In this background, the inescapable inference that we tend to arrive at is that the grading awarded by the higher authority(s) to the applicant for the aforesaid years cannot be sustained as it does not meet the requirements of law.

49. The issue which falls for consideration at this juncture is whether the Tribunal can at all direct a particular grading to be awarded to the applicant and, thus, by implication assume the role of any of the three authorities. The same, we can witness, has been hammered out by the Hon'ble High Court in para 43 of its judgment dated 05.12.2011 delivered in **Dev Raj Vishwakarma's case (supra)** as follows:

"43. This court is of the view that the learned Tribunal cannot take up the role of the reviewing or accepting authority and cannot direct the authorities to take into consideration the views recorded by the Reporting Officer ignoring the entry recorded by the Reviewing or Accepting Authority. While setting aside

entry given by the Reviewing and Accepting Authority, it was incumbent upon the learned Tribunal to remand the matter to the concerned authority with the direction to act in accordance with law."

50. Before we wind up, we seek to recapitulate. ACRs are in the nature of a government servant's assets. The object of writing ACRs on regular basis is clearly to maintain a continuous record of his work, conduct and performance and determine his suitability for elevation in service as well as judge his ability for a particular or demanding assignment. If an ACR is recklessly recorded and does little justice to his flair or forte as well as his qualities or any of his plus points, it might in a way disrupt or destabilize him and eventually imperil his career. It is but to be acknowledged that an adverse remark is a major disincentive and the same in all likelihood might prove to be a stumbling block in the advancement of his career at some point of time. On the other hand, an excellent entry is a highly encouraging and boosting factor which can guarantee his rise even to the dizzy heights of his career. It, at the same time, tends to bring out the best in the concerning government servant. Thus, there is a yawning gap between an adverse entry and an excellent entry. They are, indeed, poles apart. In this backdrop, an authority in whom the power of recording ACRs of his subordinates is vested is required to be fair and honest as well as open-minded and non-partisan, while carrying out his task. Instead of merely reciting their defects and failures, he is supposed to act wisely and thoughtfully and pass over all irrelevant and unsubstantiated material. If he somehow skips to accomplish his job with sense of responsibility and proportion, he is sure to be iniquitous and demotivating. Thus, as an assessing authority, he should in no way be unmindful of the norms and principles prescribed by the relevant executive instructions etc. and must by all means abide by the time schedule laid down for recording remarks. It is also not doubted that the three authorities have to jot down their views in an independent way. What is, in fact, purported to be emphasized here is that, instead of holding their opinion in, they are virtually free to be realistic and unabashed

in their assessment. In short, any consideration other than merit has to be scrupulously kept away by them while writing someone's character roll remarks. It is also settled that the higher authority, who holds a different opinion and finds it necessary to incorporate the same in an employee's ACR, is not stopped from doing so but the preconditions laid down by law for differing from the subordinate authority/authorities have to be strictly observed by him. In other words, he has to invariably record reasons for his disagreement particularly when he seeks to run down the incumbent's performance. In case of upgradation too, he has to assign reasons as indicated in para 7 of the G.O. dated 12.06.2006 quoted in para 26 of this judgment and order. He is also duty-bound to afford the incumbent an opportunity of hearing so that the likelihood of any oversight of something having major implications may be ruled out. It is also mandatory for him to furnish a copy of the said ACR to the incumbent so that he is in no case deprived of preferring a representation, if he so feels, for upgradation of the same. It is also clear that his representation, if there is any, has to be decided by an officer higher than the accepting authority. Law, it needs to be added, spells out that if there is some discordance or difference of opinion between the assessing authorities, the views of the superior authority who is in the leading role have to prevail and all the preceding remarks have to pale into non-consideration. Law has also made it incumbent upon the authority concerned to communicate every remark, recorded in the character roll, to the government servant it is related to. To sum up, the key concern of law is that the objective that the ACRs reflect a true picture of a government servant's work and conduct and are recorded by the three authorities without being forgetful of the prerequisites provided therefor should be achieved without fail.

51. On the basis of the analysis attempted hereinabove, we are of the view that all these reference applications are liable to be allowed and the grading/remarks awarded by the higher

authority(s) to the applicant for the years 2008-09, 2004-05, 2007-08 and 2011-12 respectively require to be quashed.

ORDER

The Reference Applications No. 289 of 2016, 290 of 2016, 291 of 2016 and 292 of 2016 are allowed and the grading/remarks awarded by the higher authority(s) to the applicant in his character roll for the years 2008-09, 2004-05, 2007-08 and 2011-12 as contained in Annexure No. A-2 in all these cases are hereby quashed. An appropriate mention will be made in his service records accordingly. Moreover, all these matters are remanded to the respondents with the direction to act in accordance with law and if the reviewing/concurring authority/authorities concerned (as the case may be) still continues/continue to be in service, he/they may be directed to record his/their remarks again for the respective period/periods in the light of the observations made hereinabove. The respondents shall simultaneously consider the case of the applicant's promotion to the post of Superintending Engineer and above from due date along with all accompanying service benefits without any undue delay ignoring the adverse material quashed hereinabove. The compliance of this judgment and order shall be made by them as early as possible but not beyond a period of two months from the date of receipt of a certified copy of the same.

There will be no order as to costs.

A copy of this judgment and order shall be placed on the record of other connected Reference Applications No. 290 of 2016, 291 of 2016 and 292 of 2016.

(R.S. Singh)
Vice Chairman (Judl)

(S.K. Raghuvanshi)
Member (Admn)

Judgment signed, dated & pronounced today in the open Court.

(R.S. Singh)
Vice Chairman (Judl)

(S.K. Raghuvanshi)
Member (Admn)

Dated: 02.04.2019
Deepa Pal (PA)