

FORM NO – 4

(SEE RULE 11 (1))

IN THE ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOLKATA

ORDER SHEET

APPLICATION No : T A 20/2012 (OJC NO. 2882/2001)

APPLICANT (S)	Narayan Chandra Mohanty
RESPONDENT (S)	<u>Engineer-in-Chief (E in C) Army HQ & Anr</u>
Legal Practitioner of applicant	Legal Practitioner for Respondent (s)
Mr. Bisikesan Pradhan	Mr. Anup Kumar Biswas (Res. 1-5)

NOTES OF THE REGISTRY	<u>ORDERS OF THE TRIBUNAL</u>
	Order Sl. No. : 15 Dated : 21.07.2014
	<p>This matter was initially filed before the Hon'ble Orissa High Court as a Writ Petition being OJC No.2882/2001 in which the applicant, who at the relevant point of time, was serving in the Indian Army as a Nb. Subedar, had challenged his non-promotion to the rank of Subedar allegedly on the basis of adverse ACR of 1999. After coming into force of the AFT Act, 2007, the said Writ Petition was transferred to this Tribunal in terms of the Section 34 of the said Act and accordingly it has been renumbered as TA 20/2012.</p> <p>2. Mr. Bisikesan Pradhan, Learned Advocate appears on behalf of the applicant and Mr. Anup Kr. Biswas, Learned Advocate appears on behalf of the respondents. The application is taken up for hearing.</p> <p>3. The admitted facts of the case are that the applicant was enrolled in Bengal Engineering Group, Roorkee on 9-9-1974 as Sapper "Radio Operator". During the course of service, he obtained Diploma in Civil Engineering, which was a two year course from the College of Military Engineering. After passing</p>

the said examination he was posted to GE(P) Bhatinda with effect from 20-8-1986 as Naik. The applicant was subsequently promoted to the rank of Havildar on 5-9-1989 with seniority wef 26 Aug 1989 and then he was further promoted to the rank of Naib Sub on 2-4-1996 with Seniority from 1-10-1995 at his own turn along with his batch mates.

4. The next promotion in the channel was to the rank of Subedar for which he was screened by the DPC held on 21-4-99. According to the Army Headquarter letter dated 10-10-1997, for promotion to the rank of Subedar, none of the preceding three years' ACRs, which are considered, should be less than "High Average". If three years ACRs are not available in the Feeder rank, then ACR in the next below rank can be considered. In the DPC held in April 1999, preceding three years ACRs, i.e. 1996, 1997 and 1998 were considered, out of which 1996 ACR was in the rank of Havildar and the other two ACRs were in the rank of Nb. Sub. However, the applicant's case could not be recommended as his ACR for 1996 was "Average" which was less than "High Average". His case was again considered by the next DPC meeting held on 26-5-2000. This time also his case could not be recommended due to lack of required ACR criteria. On this occasion, ACRs for three preceding years, i.e. of 1997, 1998 & 1999 were considered but in view of "Average" report in 1999 ACR, he could not be recommended. He was considered for the third time in the DPC held on 26 Sep 2001. On this occasion also, he could not be recommended because in the preceding three years ACR i.e. for 1999, 2000 and 2001, so far as 1999 ACR was concerned, it was 'average', and hence below the yardstick of "High Average". Therefore, as per extant policy, he could not be recommended. The applicant thereafter retired from service in the rank of Nb Sub and he could not be promoted in the rank of

Subedar. After retirement he got all his retirement benefits as entitled.

5. The grievance of the applicant is that only because of 1999 ACR in which he was graded as "Average" by the concerned I.O., who, according to the applicant, bore grudge against him, he was deprived of his due promotion. He made a statutory complaint on 13-9-2000 (wrongly mentioned by the petitioner as 15-9-2000) (Annexure-I) against his non-promotion and seeking quashing of the 1999 ACR. According to the applicant, no action was taken on the same and he retired without getting his due promotion while his juniors got such promotion. The applicant has alleged that the said ACR of 1999 was arbitrarily written by the concerned IO since he threatened to ruin his career due to personal enmity. His further contention is that 'average' report which impacted his promotion ought to have been communicated to the applicant giving him an opportunity to make representation. Such opportunity was not given to him at all. He has prayed for quashing of the 'average' remark recorded in 1999 ACR and for granting him promotion to the rank of Subedar with effect from the date his junior got such promotion with all consequential benefits.

6. During the course of hearing Mr. Pradhan has very fairly submitted that at this stage there is no scope for the applicant to enjoy the promotion physically and his only prayer is for granting notional pay benefit on pro forma promotion with reference to his junior and consequential enhanced pensionary benefit by virtue of such notional promotion to the higher rank of Subedar.

7. The respondents have contested the application. They have, as such, not denied the facts stated above. So far as statutory complaint is concerned it is submitted that the

statutory complaint filed by the applicant on 13-9-2000 was forwarded to the Central Command on 3-1-2001, but the same was returned 'un-actioned' on the ground of delay. It is further submitted that the JCO applicant came to know about 'average' remarks in his ACR for the year 1999 in March 2000 when he was denied promotion due to non meeting of ACR criteria, but he submitted the statutory complaint on 13-9-2000 which was not tenable in accordance with para 12 of AO 1/99. It is further stated that the case of the applicant was considered for promotion on three occasions, but as he did not meet the ACR criteria as per policy, he could not be recommended for promotion.

8. Mr. Pradhan, Id. Advocate for the applicant has mainly raised an allegation that the ACR was written by the concerned I.O. who was inimical to the applicant. However, no such averment has been made in the application. Mr. Pradhan has clarified that in statutory complaint, the applicant has taken this point and even mentioned the name of the concerned I.O. i.e. Lt Col Viresh Dhri who was posted as his superior at the relevant point of time. The said IO allegedly wanted to utilise the applicant for his personal job and entrusted with other personal assignments which had no connection with his official position. However, on some occasion when the applicant could not comply with such personal assignments due to other constraints, he (the IO) threatened to ruin his career. The second contention raised by Mr. Pradhan is that 'average' grading has affected his promotion as the applicant was not considered by the DPC and therefore, it is to be treated as 'adverse' and hence ought to have been communicated officially. His argument is that even though 'average' may not be adverse as such but since there was fall in grading from 'high average' or 'above average' to

'average', in terms of the various judicial pronouncements, the respondents ought to have communicated the 'average' ACR of 1999 by giving an opportunity to the applicant to make appropriate representation for its review and expunction. Mr. Pradhan has relied on some decisions as annexed in his written notes of arguments which are as follows :

a) 2012(1) AFLJ 247 (**Nb Sub Syed Athar Javed vs. Union of India & Ors** decided by AFT, Principal Bench on 7.12.2011 in TA 718 of 2009)

b) 2011(1)AFJLT 249 (**Sanjay Kaul vs. Union of India & Ors** of Hon'ble Delhi High Court decided on 16 Aug 2002 in CWP 5835 of 2001)

c) TA No.61 of 2012 (**Jaswant Singh vs COAS, AHQ New Delhi and Others** decided by AFT, Chandigarh Bench on 3.5.2013- unreported)

9. Mr. Anup Kumar Biswas, learned advocate for the respondents has submitted that it is not a case that the applicant has not at all been considered. He contends that consideration for promotion is a right but not the actual promotion. The applicant was considered on three occasions, but due to lack of ACR criteria during the preceding three years as required under the relevant policy, he could not be recommended by the DPC. He has submitted that 'average' grading is not an adverse entry and therefore there was no need to communicate the same to the applicant as demanded.

10. Mr. Biswas has also submitted before us the relevant departmental files including the DPC proceedings which we have carefully perused.

11. Having considered the contentions advanced by the Id. Advocates for both sides and having carefully going through the documents placed on record including the original records/DPC proceedings, we find that the applicant's case was duly

considered by the DPC on consecutive three occasions along with others, but since he lacked ACR criteria for preceding three years in terms of policy, which is not disputed by Mr. Pradhan himself, the applicant could not be declared fit for promotion. We also agree with the view of the Id. Adv. For the respondents that consideration for promotion is a right of an employee but not the promotion. Promotion is recommended based on comparative merits of the candidates in the zone of consideration and only more meritorious candidates are selected.

12. So far as the allegation against IO as raised by the Id. Adv. For the applicant, it is contended by Mr. Biswas, Id. Adv. for the respondents that without impleading the concerned officer, the applicant cannot make unfounded and baseless wild allegations without giving the person an opportunity to defend. Without entering into this aspect, we find on perusal of the subject ACR of 1999 that not only the IO but the RO also agreed with the grading awarded by the IO. RO being superior authority and no allegation has been made against him, in our considered opinion, the contention of the Id. Adv. for the applicant cannot be accepted.

13. Now, turning to the legal issue raised by Mr. Pradhan that since the 'average' grading in 1999 ACR has impacted on the promotion of the applicant, the respondents ought to have communicated the same to applicant by giving him an opportunity to the applicant to improve himself. He has relied on the decision of Principal Bench of AFT in the case of **Nb Sub Syed Athar Javed** (supra) wherein it was held by relying upon some decisions of the Hon'ble Apex Court and Hon'ble Delhi High Court that adverse remarks which reflect on the conduct, reputation and character of the incumbent should be

communicated to the individual so that the officer reported upon gets opportunity either to improve himself or to explain his conduct. We have gone through this decision. There also 'average' remark in 2000 ACR which impacted on the promotion of the applicant therein to the rank of Subedar. In that case it was noticed by the Tribunal that the IO, who gave 'above average' grading to the applicant in 1998 and 1999, became his RO in 2000 and he downgraded the applicant from 'high average' as awarded by the IO in 2000 ACR by two steps to 'average'. In that context, the Tribunal held that the concerned IO, who became the RO of the applicant, ought to have counselled the applicant properly and could not arbitrarily downgrade him and accordingly expunged the said remark. Obviously, the facts of the case in our hand are different. Here allegation is made against the IO and not against RO who is superior and his remarks will prevail. In this case, both IO and RO have awarded the same grading; the RO thus agreed on the appraisal of IO. Therefore, the decision in the cited case has no application.

14. In the case before the Chandigarh Bench of AFT, i.e. in **Jaswant Singh** (supra), it is noticed that the respondents therein admitted that adverse remarks were not communicated to the applicant and based on un-communicated adverse remarks, he was denied promotion. There is no dispute with the established principle that adverse remarks have to be communicated and non-communication of adverse reports cannot be taken into consideration while considering for promotion. The facts of the case before us are distinguishable.

15. Now, coming to the decision of the Hon'ble Delhi High Court in **Sanjay Kaul's** case (supra), we find that the Hon'ble Delhi High Court relied on the earlier decisions of the Hon'ble Apex Court in **Gurdial Singh Fijji –v- State of Punjab & Ors**, AIR

1979 SC 1622, **Amar Kant Choudhury –v- State Bank of India**, AIR 1984 SC 531, **UP Jal Nigam –vs- Prabhat Chandra Jain**, JT 1996(1) SC 641, **Biswanath Prasad Singh –vs- State of Bihar**, JT 2001(1) SC 161 etc. has held that not only adverse remarks but even fall in grading like ‘very good’ to ‘good’, which has adverse impact on promotion or entries which are below the bench mark for promotion, has to be communicated. Relying on this decision, Mr. Pradhan has contended that since there was fall in grading from ‘above average’ or ‘high average’ to ‘average’ which has impacted the applicant’s promotion and since ‘average’ is below bench mark, the said remark was required to be communicated.

16. At this stage, we need to consider this aspect in some details with reference to the latest pronouncements of the Hon’ble Supreme Court on this issue. As it appears, the ibid decision of the Hon’ble Delhi High Court in **Sanjay Kaul’s** case (supra) was rendered in Aug 2002 primarily basing on the two-judge Bench decision of the Hon’ble Supreme Court in the case of **UP Jal Nigam & Ors –vs- Prabhat Chandra Jain & Ors**, JT 1996(1) SC 641. However, subsequently, in another two-judge Bench decision in the case of **Major Bahadur Singh –vs- UOI & Ors**, (2006) 1 SCC 368 it was held that decision in **UP Jal Nigam’s** case has no universal application and that decision would be confined to the employees of **UP Jal Nigam** only which is a public sector undertaking mainly on the ground that Govt. have separate set of rules for recording of ACR and communication of averse entries.

17. In view of such divergent view, the matter was referred to a larger Bench in **Sukhdev Singh –vs- UOI & Ors** (Civil Appeal No. 5892/2006) by an order dt. 12.12.2006 by a Division Bench of the Hon’ble Supreme Court. The referral order dt. 12.12.06

inter alia reads as follows :-

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The question as to whether such a down gradation of Annual Confidential Report would amount to adverse remark and thus it would be required to be communicated or not fell for consideration before this Court in **U.P. Jal Nigam and Ors. Vs. Prabhat Chandra Jain and Ors.** (1996) 2 SCC 363 in the following terms:

"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 downgrading 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 have a positive grading. All that is required by the authority recording confidential in the situation is to record reasons for such downgrading 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, not be reflected in such variations, as otherwise, they shall be communicated as such. It may be emphasised 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. In the instant case we have seen the service record of the first respondent. No reason for the change is mentioned. The downgrading 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."

Several High Courts as also the Central Administrative

Tribunal in their various judgments followed the decision of this Court in **U.P. Jal Nigam**(supra), inter alia, to hold that in the event the said adverse remarks are not communicated causing deprivation to the employee to make an effective representation there against, thus should be ignored. Reference may be made to 2003(1) ATJ 130, **Smt. T.K.Aryaveer Vs. Union of India & Ors.**, 2005(2) ATJ, Page 12, 2005(1) ATJ 509-**A.B. Gupta Vs. Union of India & Ors.** and 2003(2) SCT 514- **Bahadur Singh Vs. Union of India & Ors.** Our attention, however, has been drawn by the learned Additional Solicitor General appearing for the respondents to a recent decision of this Court in **Union of India & Anr. Vs. Major Bahadur Singh - (2006) 1 SCC 368** where a Division Bench of this Court sought to distinguish the **U.P. Jal Nigam**(supra) stating as follows:

"8. As has been rightly submitted by learned counsel for the appellants **U.P. Jal Nigam** case has no universal application. The judgment itself shows that it was intended to be meant only for the employees of **U.P. Jal Nigam** only."

With utmost respect, we are of the opinion that the judgment of **U.P. Jal Nigam**(supra) cannot be held to be applicable only to its own employees. It has laid down a proposition of law. Its applicability may depend upon the rules entirely in the field but by it cannot be said that no law has been laid down therein. We, therefore, are of the opinion that the matter should be heard by a larger Bench."

18. Before the larger Bench could render its decision, a three-Judge Bench decision came in **Dev Dutt –vs- UOI & Ors**, (2008)SCC 725 wherein identical issue was considered and all previous decisions including **UP Jal Nigam (supra)** and **Major Bahadur Singh (supra)** were considered. Relevant paragraphs of **Dev Dutt's** case are quoted below :-

"17. In our opinion if the Office Memorandum dated 10/11.09.1987, is interpreted to mean that only adverse entries (i.e. 'poor' entry) need to be communicated and not 'fair', 'average' or 'good' entries, it would become arbitrary (and hence illegal) since it may adversely affect the incumbent's chances of promotion, or get some other benefit.

18. For example, if the bench mark is that an incumbent

must have 'very good' entries in the last five years, then if he has 'very good' (or even 'outstanding') entries for four years, a 'good' entry for only one year may yet make him ineligible for promotion. This 'good' entry may be due to the personal pique of his superior, or because the superior asked him to do something wrong which the incumbent refused, or because the incumbent refused to do sycophancy of his superior, or because of caste or communal prejudice, or for some other extraneous consideration.

19. In our opinion, every entry in the A.C.R. of a public servant must be communicated to him within a reasonable period, whether it is a poor, fair, average, good or very good entry. This is because non-communication of such an entry may adversely affect the employee in two ways : (1) Had the entry been communicated to him he would know about the assessment of his work and conduct by his superiors, which would enable him to improve his work in future (2) He would have an opportunity of making a representation against the entry if he feels it is unjustified, and pray for its upgradation. Hence non-communication of an entry is arbitrary, and it has been held by the Constitution Bench decision of is Court in **Maneka Gandhi vs. Union of India** (AIR 1978 C 597) that arbitrariness violates Article 14 of the Constitution.

20. Thus it is not only when there is a bench mark but in all cases that an entry (whether it is poor, fair, average, good or very good) must be communicated to a public servant, otherwise there is violation of the principle of fairness, which is the soul of natural justice. Even an outstanding entry should be communicated since that would boost the morale of the employee and make him work harder.

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."

In para 41 of the judgement it is clearly stated as follows :-

*"41. 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 & Ors Major Bahadur Singh**, 2006 (1) SCC 368. But they will apply to employees of statutory authorities, public sector corporations and other instrumentalities of the State (in addition to Government servants)."*

19. Later on, another three-judge Bench of the Hon'ble

Apex Court presided over by the then Hon'ble Chief Justice, considered the identical issue in **Abhijit Ghosh Dastidar –vs- UOI & Ors**, (2009) 16 SCC 146. Relying on the earlier decision in **Dev Dutt's** case (supra), in para 4 of the said judgement it has been held as under :

“4) It is not in dispute that the CAT, Patna Bench passed an order recommending the authority not to rely on the order of caution dated 22.09.1997 and the order of adverse remarks dated 09.06.1998. In view of the said order, one obstacle relating to his promotion goes. *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.*”

19. The larger Bench decision (three judge Bench) in **Sukhdev Singh –vs- UOI & Ors** has been rendered recently on 23 April 2013 and reported in AIR 2013 SC 2741. The said larger Bench agreed with the view taken in **Dev Dutt's** case and in para 6 of the report has held that -

“6. We are in complete agreement with the view of this Court in Dev Dutt particularly paragraphs 17, 18, 22, 37 & 41 as quoted above.”

20. In other words, the legal position now is that every entry in ACR, whether poor, fair, average, good or very good, which has a possible impact on promotional prospect, must be communicated to the employee within a reasonable period but this principle will not be applicable in case of military personnel. The exception has its own logic. The conditions of service and standard of discipline maintained in Indian Army or Air Force or Navy are quite different from those of civilians working under the Govt. Various Govt. orders and instructions issued from time to time for civilians are not automatically made applicable to Indian army. They are adopted in appropriate cases with suitable modifications to suit the purpose of the Army. Therefore, exception has been made for military personnel in the *ibid* decisions in **Dev Dutt’s** and **Abhijit Ghos Dastidar’s** cases keeping in view the decision in **Major Bahadur Singh’s** case (*supra*) and agreed to in the latest **Sukhdev Singh’s** case as indicated.

21. At this stage, it will be appropriate to reproduce the relevant portion of the judgement in **Bahadur Singh’s** case (*supra*) which will make the position clear so far as practice and procedure followed in Indian Army as it relates to reflection and communication of ACRs :-

“ As submitted by learned counsel for the appellants the standards for demonstrated performance in the case of Major, Lieutenant Colonel and Colonel are different. The appellant had filed the writ application making a grievance that there were some adverse remarks which were not communicated. The absence of parameters was not specifically highlighted in the writ petition. It appears that on 6th May, 1987 a paper on the selection system was circulated. Paragraph 3 thereof reads as follows:

	<p><i>"Promotion upto the rank of substantive major is carried out based upon the length of service, provided the officer fulfills the mandatory requirements of such a promotion. However, promotions above the rank of Major are done through process of selection." This is indicative that the promotion is virtually on merit-cum-seniority basis. The document in question elaborately provides the guidelines for assessment. Some of the relevant provisions need to be noted. They are as follows:</i></p> <p><i>"Assessment of the officer is based on the comparative merit of the overall profile of the officers within his own batchee. Needless to say, the grading of the Board is to be assessed from the material placed before the board, and not from personal knowledge, if any.</i></p> <p>In case of doubt, benefit must go to the "Service"." Objectivity in the system of Selection is ensured by the MS Branch, by the following:</p> <p><i>"Concealment of the identity of the officers being considered to the members of the Board. The MDS placed before the members does not contain the officer's particulars, date of birth, names of the reporting officers or the numbers of the fmnn/unit the officer has served, thereby denying any identification of the officer under consideration. (Applicable for Nos. 2, 3 & 4 Selection Board)." Instruction for Rendition of Confidential Reports of officer for 1989 has also been detailed and the following procedure of Assessment is relevant:- "The Personal Qualities and variables of Demonstrated Performance have been selected after a considerable research on Confidential Reports over a period of years to cover the inherent attributes considered essential for the job content of an Army Officer. Each quality has been defined. Marks are required to be entered by the IO and the RO in the columns against each quality. Two marks each have been allotted for three gradation (viz. Above Average 8 or 7, High Average 6 or 5, Low Average 3 or 2) to differentiate within the same." In the case of Majors, Lieutenant Colonels and Colonels, three sets of Demonstrated Performance variables have been provided in the CR forms. These variables correspond to "Regimental and Command Assignments".</i></p> <p>The difference in approach from Captains and below and Major, Lieutenant Colonel and Colonel also spaced out from paragraphs 108 and 109. Paragraph 109 is of considerable importance so far as the present case</p>
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concerned. The same reads as follows:

"109. Low and Below Average Assessment

When an officer is assessed 3 marks or less in any Personal Quality or the aspect of Demonstrated Performance, then it is a matter of concern since, by an large, officers are required to demonstrate at least High Average performance. In order to establish the cause and for the purpose of natural justice, the assessment needs adequate and explicit elaboration. Further, such assessment should invariably be supported by verbal and written guidelines for improvement, details of which also need to be mentioned in the pen-picture." A reading of para 109 shows that three marks or less is considered to be adverse and in such cases verbal and written guidelines for improvement are to be given and the details are to be mentioned in the pen picture. The brief contents (pen picture) and objectivity of the report is provided in paragraph 113

A reference is also necessary to the instructions issued on 3rd February, 1989. Paragraph 103 is of considerable importance and reads as follows:

"103. Assessment contained in a CR will not to be communicated to the officer except in the following contingencies:- (a) When figurative assessment any where in the CR is Low or Below Average (i.e. 3 marks). In such cases extract of figurative assessment (i.e. 3 or less) will be communicated to the officer.

(b) When the brief comments (pen picture) contains adverse or advisory remarks. In such cases completes pen picture (excluding the box grading) together with comments on Guidance for Improvements will be communicated to the officer. Further, the box grading will also need communication to the officer when assessment is low or Below Average (3 or less)." According to the modalities provided for recording and communication of adverse entries clearly indicate as to in which cases the communication of adverse or advisory remarks are to be made. Word "Advisory" is not necessarily adverse. Great emphasis was laid on the instructions dated 21.8.1989 titled "Reflection and Communication of adverse and advisory remarks in the Confidential Reports". The same reads as follows:

"The actual pen picture comprises the brief comments given at Paragraphs 13(e)/19(a) of the ACR forms for Majors to Colonels or Paragraphs

13/15 of the ACR Form for Captains and below

Therefore adverse/advisory remarks, if any, should be endorsed in these paragraphs/sub paragraphs only. The information to be given under the Column "Verbal or Written Guidance for Improvement" (i.e. Para 18(b)/19(b) or Para 15/16) is only to support the adverse/advisory remarks reflected in the pen picture. If there are no adverse/advisory remarks reflected in the pen picture, there is no requirement of including details of verbal or written guidance for improvement given to the ratees during the reporting period. It is reiterated that "Performance Counselling is a continuous process and, therefore, the ratee must be given appropriate "Guidance for improvement" as and when noticed." A reading of the instructions clearly indicate that there are different stages: first is the counseling, second is the guidance and third is the consequences of the officer failing to show desired improvement. Only when an officer fails to show the desired improvement the adverse/advisory remarks are included in his Confidential Report so that cognizance is taken for his weakness while planning his future placements. The High Court has clearly overlooked these aspects and on that ground alone the judgment is vulnerable. Additionally, it is noticed that the writ- petitioner had merely made a grievance of non-communication but the High Court quashed the entry for 1989-90 which is clearly indefensible. In the fitness of things, therefore, the High Court should re-hear the matter and consider the grievances of the writ-petitioner in the background of the parameters which clearly exist. We make it clear that we have not expressed any opinion on the merits of the case as the matter is being remitted to the High Court for fresh consideration.

The appeal is accordingly disposed of."

22. In view of the legal position discussed above, we are of the view that even though the argument advanced by Mr. Pradhan may be applicable to civilians and civil offices, but it has no application in Indian Army where working environment is quite different. However, we would like to observe that in the Army the span of service especially in lower echelon is short as compared to civilians. Therefore, their chance of promotion is

also very limited. Without compromising with other organizational aspects, it is for the Army authorities and Govt. of India in MoD to take a pragmatic view to apply the above principles of law laid down by the Hon'ble Apex Court in the matter of reflection and communication of ACRs even though it may not be adverse but may affect chance of promotion, as we find in the instant case that though average remark is not treated as adverse as per army instructions, but it has surely affected the promotion of the applicant, who could not get his last promotion in his service career because of 'average' remark in one of his ACR. Therefore, for better personnel management and for maintaining transparency, the authorities may consider to frame suitable policy, without jeopardizing to the organizational effectiveness, to communicate below bench mark grading even if it is not adverse, but 'average', 'above average' or 'high average', so that chance of promotion of an army personnel is not blocked or diminished. This will boost the morale of the service personnel. However, framing of policy is in the exclusive domain of the executives and the Govt. As the policy now stands, we cannot find any irregularity or illegality in not communicating the 'average' report reflected in his 1999 ACR, which is not considered as adverse.

23. That apart, we are of the view that even though the ibid ACR was not formally communicated to the applicant, but he was very much aware of this entry in 2000 for which he made the statutory complaint. Unfortunately, the respondents did not respond to this statutory complaint and as it appears from the counter affidavit, the same was returned merely on technical ground of delay.

24. We also need to consider the grievance of the applicant that even though he filed a statutory complaint against his non-

promotion as also against the 1999 ACR raising some allegation against the IO, but no action was taken by the authorities. We find from the counter affidavit that the said complaint was returned un-actioned on technical ground. We cannot but deprecate such lackadaisical attitude of the concerned authority. Making a statutory complaint in respect of a grievance is a statutory right to the army personnel. Therefore, when such a complaint is made, it is also the duty of the authorities to respond to it with due urgency and not to sit tight over it or reject it without any consideration taking some technical plea. Had his complaint been looked into on merit, perhaps, the applicant would not have filed a court case at all. The authorities should consider this aspect and take remedial measures so that statutory complaints are dealt properly and responded quickly.

25. In the result, we find no merit in the application which is liable to be dismissed. Accordingly, the TA stands dismissed subject, however, to the observations made by us in para 22 and 24 above.

26. Let original records be returned to the respondents on proper receipts.

27. Let a plain copy of the order duly countersigned by the Tribunal Officer be furnished to both sides on observance of due formalities.

(LT. GEN K.P.D.SAMANTA)
MEMBER(A)

(JUSTICE RAGHUNATH RAY)
MEMBER(J)