THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 31.05.2012

+ W.P.(C) 5042/2002

UOI & ANR ... Petitioner

versus

V. S. ARORA & ORS ... Respondent

Advocates who appeared in this case:
For the Petitioner : Mr Ravinder Agarwal with Mr Amit Yadav
For the Respondent : Mr Abhay S. Kushwaha with Ms Vandana Sharma and Mr Abhigya.

AND

+ W.P.(C) 606/2012

UNION OF INDIA AND ANR ... Petitioner

versus

GOVIND JHA AND ANR ... Respondent

Advocates who appeared in this case:
For the Petitioner : Mr Rajesh Katyal
For the Respondent No.1 : Mr Govind Jha -in-person
For the Respondent No.2 : Mr Naresh Kaushik with Ms Amita Kalkal Chaudhary and Mr Aditya Sharda

AND

+ W.P.(C) 3298/2011

UNION OF INDIA AND ANR ... Petitioner

versus

R N KURMI & ORS ... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr R. V. Sinha with Mr R. N. Singh and Mr A. S. Singh
For the Respondent No.1 : Ms Jyoti Singh, Sr Advocate with Ms Tina Bajwa and Ms Sahila Lamba
For the Respondent No.2 : Mr Naresh Kaushik with Ms Amita Kalkal Chaudhary and Mr Aditya Sharda

AND

\+ **W.P.(C) 3300/2011**

UNION OF INDIA AND ANR ... Petitioner

versus

A K VERMA & ORS ... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr R. V. Sinha with Mr R. N. Singh and Mr A. S. Singh
For the Respondent No.1 : Mr O. P. Kalshian

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE V.K. JAIN

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. These writ petitions raise a common issue of law and, therefore, they are being disposed of together. The issue before this Court in these writ petitions is with regard to the below benchmark ACRs (Annual Confidential Reports) which were not communicated to the employees.

The question is whether when the DPC meets, what does it have to do with regard to these below benchmark non-communicated ACRs? Does it ignore those ACRs or is it the requirement of law that the ACRs should be communicated to the concerned employees even at that stage and that they be given an opportunity to move representations against the same and after the representations are disposed of, the DPC should be re-convened to consider the case of the employees for promotion?

2. A series of decisions have been referred to by the learned counsel appearing on both sides. The learned counsel appearing for the petitioners had a twofold contention. In the first place, they submitted that the decision in the case of ***Dev Dutt v. Union of India: (2008) 8 SCC 725*** was in conflict with certain other decisions of the Supreme Court including that of ***Satya Narain Shukla v. Union of India: 2006 (5) SCALE 627*** and ***K. M. Mishra v. Central Bank of India and Others: (2008) 9 SCC 120***. It is for this reason that the Supreme Court itself, in the case of ***Union of India v. A. K. Goel: SLP (Civil) 15700/2009*** by an order dated 29.03.2010, has referred the matter to a Larger Bench. A similar order of reference has been passed in ***Union of India v. Uttam Chand Nahta and Others: SLP***

(Civil) No. 29515/2010 by an order dated 29.11.2010. Thus, according to the learned counsel for the petitioners, this Court should await the decision of the Larger Bench of the Supreme Court.

3. The second point that was urged on behalf of the petitioners was that the decision of the Supreme Court in the case of ***Abhijit Ghosh Dastidar v. Union of India (UOI) and Ors.: (2009) 16 SCC 146*** has already been interpreted by a Division Bench of this Court in the case of ***UOI v. Krishna Mohan Dixit: WP(C) 6013/2010*** and other connected matters decided on 08.08.2010. According to the petitioners, in the latter decision, a clear view has been taken that below benchmark ACRs, which have not been communicated, are not to be simply ignored. But, the employee concerned is to be given an opportunity of making a representation against the same after communication of the said below benchmark ACRs to him and it is thereafter that the DPC is to consider the case of such an employee. The learned counsel for the petitioners also submitted that another Division Bench of this Court in a batch of matters which included WP(C) 8841/2004 and other connected matters, applied the decision in ***Krishna Mohan Dixit*** *(supra).* Thus, according to them, till the Larger Bench decision comes, the

law, as interpreted by ***Krishna Mohan Dixit*** *(supra)*, would apply.

4. On the other hand, the respondents have submitted that starting from the decision of the Supreme Court in ***Dev Dutt*** *(supra)*, the principle has been that a below benchmark ACR, which is not communicated to the employee, cannot be considered by the DPC while examining his case for promotion. They submitted that in ***Dev Dutt*** *(supra)*, the solution provided was that the below benchmark ACRs ought to be communicated to the concerned employee at the stage of consideration by the DPC so that the employee has an opportunity to represent against the same. After the representation is disposed of, the DPC should re-convene and consider the case of the employee. The learned counsel for the respondents submitted that though this was the law, as laid down by the Supreme Court in ***Dev Dutt*** *(supra)*, the subsequent decision in ***Abhijit Ghosh Dastidar*** *(supra)*, which is a decision rendered by a Bench of three Hon'ble Judges of the Supreme Court, took the matter further. The Supreme Court in ***Abhijit Ghosh Dastidar*** *(supra)*, affirmed the view taken by ***Dev Dutt*** *(supra)* to the extent that a below benchmark ACR, if not communicated, cannot be considered by the DPC. However, the Supreme Court in ***Abhijit Ghosh***

Dastidar *(supra)*, further directed that such ACRs should not be considered. Therefore, according to the respondents, the question of communicating the below benchmark ACRs at the stage of the consideration by the DPC, does not at all arise and all that needs to be done is that the below benchmark ACRs ought to be ignored from the purview of consideration.

5. The learned counsel for the respondents further submitted that the view in ***Abhijit Ghosh Dastidar*** *(supra)* has been affirmed and followed in subsequent decisions of the Supreme Court, which includes the decision in the case of ***Union of India v. J. S. Garq: Civil Appeal No. 5319/2003***, decided on 24.11.2009 and ***Union of India v. Ranjana Kale: SLP (C) No. 29929/2010*** decided on 29.11.2010 as also in the case of ***Union of India v. N.K. Bhola: Civil Appeal No. 6937/2011*** decided on 16.03.2012.

6. The learned counsel for the respondents also pointed out that, in fact, even the Union of India has understood the decision in ***Abhijit Ghosh Dastidar*** *(supra)* to mean that the below benchmark ACRs ought to be ignored. According to them, this is amply displayed by the fact that in ***Union of India and Anr. v. Sunil Mathur : SLP (C) No. 7623/2011***, the

learned Additional Solicitor General appearing for the Union of India stated that in view of the judgment of the Supreme Court in ***Abhijit Ghosh Dastidar*** *(supra)*, they may be permitted to withdraw the Special Leave Petition and the Supreme Court permitted such withdrawal. The said order was passed in ***Sunil Mathur*** *(supra)* on 24.01.2012.

7. It was, therefore, contended by the learned counsel for the respondents that the decision of this court in ***K. M. Dixit*** *(supra)*, interpreting the Supreme Court decision in ***Abhijit Ghosh Dastidar*** *(supra)*, would no longer hold good in view of the fact that subsequently the Supreme Court in the case of ***Sunil Mathur*** *(supra)* as also in the case of ***N. K. Bhola*** *(supra)*, have accepted and applied the view taken by the Supreme Court in ***Abhijit Ghosh Dastidar*** *(supra)* of ignoring the below benchmark ACRs.

8. In order to consider the rival contentions, it would be necessary for us to trace the chronology of decisions on the subject. The first decision that we need to refer to is that of ***Satya Narain Shukla*** *(supra)*, wherein the Supreme Court observed as under:

> "The appellant also argued that the remarks made in the ACR were not communicated to him. It was also urged by the appellant that this Court should direct the authorities to

> streamline the whole procedure so that even remarks like 'good' or 'very good' made in ACRs should be made compulsorily communicable to the officers concerned so that an officer may not lose his chance of empanelment at a subsequent point of his service. In our view, it is not our function to issue such directions. It is for the Government to consider how to streamline the procedure for selection. We can only examine if the procedure for selection as adopted by the Government is unconstitutional or otherwise illegal or vitiated by arbitrariness and *mala fides*."

9. A plain reading of the above extracted portion of the said decision indicates that the appellant before the Supreme Court had sought a direction from the Court that the authorities be asked to streamline the entire procedure so that even remarks like "good" or "very good" made in the ACRs, should be made compulsorily communicable to the officers concerned so that the officer may not lose his chances of empanelment at a subsequent point of his service. The Supreme Court, of course, declined to give such a direction. But, at the same time, it also observed that the Court can only examine if the procedure for selection, as adopted by the Government, was unconstitutional or otherwise illegal or vitiated by arbitrariness and *mala fides*. In other words, the Supreme Court in ***Satya Narain Shukla*** *(supra)*, while it refused to give any direction to the

concerned authorities to streamline and /or adopt a particular procedure, it also kept the issue alive by observing that where the constitutionality of the procedure for selection was found to be illegal or vitiated by arbitrariness and or *mala fide*s, the courts would step in.

10. This is exactly what has been done in ***Dev Dutt*** *(supra)*. There, the Supreme Court examined the constitutionality of the procedure of not communicating the below benchmark ACRs. The Supreme Court found that such a step meant that it would violate the principles of natural justice and would also be arbitrary and, therefore, would be contrary to Article 14 of the Constitution of India. Therefore, the Supreme Court came to the conclusion that below benchmark ACRs have to be communicated to the concerned officer/employee. The exact words used by the Supreme Court in this connection are as under:-

> "14. In our opinion, every entry (and not merely a poor or adverse entry) relating to an employee under the State or an instrumentality of the State, whether in civil, judicial, police or other service (except the military) must be communicated to him, within a reasonable period, and it makes no difference whether there is a bench mark or not. Even if there is no bench mark, non-communication of an entry may adversely affect the employee's chances of promotion (or getting some other benefit), because when comparative merit is being considered

for promotion (or some other benefit) a person having a 'good' or 'average' or 'fair' entry certainly has less chances of being selected than a person having a 'very good' or 'outstanding' entry.

xxxx xxxx xxxx xxxx

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.

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

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

11. Thereafter, the decision in the case of ***K. M. Mishra*** *(supra)*, decided on 16.09.2008 needs to be considered. Here, the Supreme Court, while it referred to its earlier decision in ***Satya Narain Shukla*** *(supra)*, it appears that the decision in ***Dev Dutt*** *(supra)* had not been brought to the notice of the Supreme Court, while it was considering the case of ***K. M. Mishra*** *(supra)*. However, the Supreme Court, following ***Satya Narain Shukla*** *(supra)*, made the following observations:-

> "17. Mr. Srivastava then submitted that in the preceding years the appellant had 'Excellent' ratings and in the year 1995 he had 'Very Good'. The rating 'Good' for the year 1996-97 was thus a climb down and it was incumbent upon the authorities to intimate the appellant about his ratings for the two years in question. Since no intimation was given to the appellant the ratings for those two years should not have been taken into account and instead the ratings for the earlier years should have been considered for the purpose of promotion. We are unable to accept the submission. In *Satya Narain Shukla* v. *Union of India and Ors*.: (2006) 9 SCC 69 it was held and observed as follows:
>
> > "29. The appellant also argued that the remarks made in the ACR were not communicated to him. It was also urged by the appellant that this Court should direct the authorities to streamline the whole procedure so that even remarks like "good" or "very good" made in ACRs should be made compulsorily communicable to the officers concerned so that an officer may not lose his chance of empanelment at a subsequent point of his service. In our view, it is not our function to issue such directions. It is for the Government to consider how to streamline the procedure for selection. We can only examine if the procedure for selection as adopted by the Government in unconstitutional or otherwise illegal or vitiated by arbitrariness and *mala fides*.""

12. This takes us to consider the next decision and that is in the case of ***Abhijit Ghosh Dastidar*** *(supra)*. We may point out straightaway that in the series of decisions referred to by the counsel on both sides this is the only decision which has been rendered by a Bench of three Hon'ble Judges of the Supreme Court. All the other decisions are of two Hon'ble Judges of

the Supreme Court. The Supreme Court in ***Abhijit Ghosh Dastidar*** *(supra)* held as under:-

> "4. …….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 to 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.
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> 5. Learned Counsel appearing for the appellant has pointed out that the officer who was immediately junior in service to the appellant was given promotion on 28.08.2000. Therefore, the appellant also be deemed to have been given promotion from 28.08.2000. Since the appellant had retired from service, we make it clear that he is not entitled to any pay or allowances for the period for which he had not worked in the Higher Administrative Grade Group-A, but his retrospective promotion from 28.08.2000 shall be considered for the benefit of re-fixation of his pension and other retrial benefits as per rules."
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> (underlining added)

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

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

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

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

(supra) on the first aspect, as regards what has to be done with a non-communicated below benchmark ACR, the Supreme Court in ***Abhijit Ghosh Dastidar*** *(supra)* took the view that such an ACR ought not to be considered.

16. We, then, have the decision of the Supreme Court in the case of ***Union of India v. R.K. Anand: Civil Appeal No. 7061/2002*** decided on 27.11.2008. Although this decision of the Supreme Court is subsequent to the decision in ***Abhijit Ghosh Dastidar*** *(supra)*, it refers only to the decision in ***Dev Dutt*** *(supra)*. Apparently, the decision in ***Abhijit Ghosh Dastidar*** *(supra)* had not been pointed out by the counsel appearing in that matter. Anyhow, all that ***R. K. Anand*** *(supra)* decides is that it follows the decision in ***Dev Dutt*** (supra).

17. Then comes the decision of the Supreme Court in the case of ***J. S. Garg*** *(supra)*. The Supreme Court, in this case, held that in view of the decision in the case of ***Dev Dutt*** *(supra)*, which had been affirmed by a Three-Judge Bench in the case of ***Abhijit Ghosh Dastidar*** *(supra)*, the appeal was liable to be dismissed. All that this decision shows is that the

line of decisions starting from ***Dev Dutt*** *(supra)* and ending with ***Abhijit Ghosh Dastidar*** *(supra)* was being followed by the Supreme Court.

18. However, in ***A.K. Goel*** *(supra)*, the following order was passed:-

> "In view of the apparent conflict between the decisions of this Court in Dev Dutt Vs. Union of India & Ors. 2008 (8) SCC 725 on the one hand and Satya Narain Shukla Vs. Union of India 2006 (9) SCC 69 and K. M. Mishra Vs. Central Bank of India and Others 2008 (9) SCC 120, these appeals are referred to a Larger Bench. Let the matter be placed before the Hon'ble The Chief Justice of India for this purpose."

19. A similar reference was made in ***Uttam Chand Nahta*** *(supra)* on 29.11.2010. The very same Bench, which made the reference in ***Uttam Chand Nahta*** *(supra)*, on the same day, also decided the case in ***Ranjana Kale*** *(supra)*, where the Supreme Court passed the following order:-

> "It is not in dispute that the issue raised in this special leave petition is directly covered by the decision of this Court in Abhijit Ghosh Dastidar vs. Union of India & Ors. reported in (2009) 16 SCC 146. Following the same, the special leave petition is dismissed."

20. We then have the case of ***Sunil Mathur*** *(supra)*, wherein the learned Additional Solicitor General who appeared for the Union of India stated that in view of the judgment of the Supreme Court in ***Abhijit Ghosh***

Dastidar *(supra)*, the petitioners (Union of India and Others) be permitted to withdraw the Special Leave Petition. Consequently, the Supreme Court granted the permission and dismissed the Special Leave Petition as withdrawn. While doing so, it also directed the petitioners to comply with the orders of the Central Administrative Tribunal within a period of four months from that date. Therefore, considering the circumstance, as indicated in the ***Sunil Mathur*** *(supra)*, we are in agreement with the learned counsel for the respondents that it was even the understanding of the Union of India that the decision in ***Abhijit Ghosh Dastidar*** *(supra)* was the determinative and conclusive ruling holding the field.

21. Finally, we come to the case of ***N. K. Bhola*** *(supra)*. The Special Leave Petition in ***N. K. Bhola*** *(supra)* came up for hearing on 03.12.2010. On that date, in view of the order dated 29.09.2010 passed in SLP(C) No. 29515/2010 [***Uttam Chand Nahta*** *(supra)*], whereby the matter was referred to a Larger Bench, the Supreme Court issued notice. Thereafter, the respondents in ***N. K. Bhola*** *(supra)*, filed an IA being IA 1/2011 in that matter requesting the Supreme Court to modify its order dated 03.12.2010 and to post the matter for hearing in the interest of justice. In the said

application, the following averments were made:-

> "2. That in SLP(C) No. 29515 of 2010 while passing the order dated 29.11.10, this Hon'ble Court had referred to another order of two judges Bench dated 29th March 2010 to the following effect.
>
> > "In view of the apparent conflict between the decisions of this Court in Dev Dutt Vs. Union of India & Ors. 2008 (8) SCC 725 on the one hand and Satya Narain Shukla Vs. Union of India 2006 (9) SCC 69 and K. M. Mishra Vs. Central Bank of India and Others 2008 (9) SCC 120, these appeals are referred to a Larger Bench. Let the matter be placed before the Hon'ble The Chief Justice of India for this purpose."
> >
> > It is also brought to our notice the decision of three judges Bench reported in 2009(16) SCC 146.
> >
> > In view of the fact that the similar issue/ matter has been referred to Larger Bench, we feel that this issue is also be considered by the Larger Bench. Accordingly, we order notice and post the matter alongwith Civil Appeal of 2010 and SLP(C) No. 15770 of 2009 etc.
> >
> > Both the parties are directed to maintain status quo prevailing as on date until further orders.
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> > Counsel of both the parties are permitted to raise all points before the Larger Bench."
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> The True copy of order dated 29th November 2010 and the true copy of order dated 03.12.2010 of this Court are annexed herewith as Annexure R-1 and Annexure R-2 respectively.
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> 3. The respondent No. 1 respectfully submit that though the case of Dastidar 2009 (16) SCC 146 was brought to the notice of the reference Bench but the court was not apprised that the case of Dev Dutt Vs. UOI & Ors., 2008 (8) SCC 725 was

followed in three Judge Bench decision reported in Abhijit Ghosh Dastidar Vs. UOI 2009 (16) SCC 146.

4. As the controversy has already been laid to rest by a Larger Bench in Abhijit Ghosh Dastidar case, there is no need for consideration of the same issue by the Larger Bench and there is no conflict of judgments of this Hon'ble Court."

22. Thereafter, on 21.02.2012, when the said IA No. 1/2011 came up for hearing, the Supreme Court issued notice thereon. The learned counsel for the appellant/non-applicant waived service of notice in the application and prayed for time to seek instructions on the question as to whether or not the issue raised in the appeal before the Supreme Court was concluded by a Three-Judge Bench decision of the Supreme Court in ***Abhijit Ghosh Dastidar*** *(supra)*. On 16.03.2012, when the matter was again placed before the Supreme Court, it allowed IA No. 1/2011. The main appeal was also taken up for consideration and the Supreme Court dismissed the appeal in the light of the order dated 24.01.2012 passed in SLP(C) No. 7623/2011 [i.e. (***Sunil Mathur*** *(supra)*].

23. It is, therefore, clear from the aforesaid sequence of events that the Supreme Court and, particularly so, in ***N. K. Bhola*** *(supra)*, accepted the contention that the issue stands settled by ***Abhijit Ghosh Dastidar*** *(supra)*, notwithstanding the fact that a reference had been made to a Larger Bench

in the case of ***A. K. Goel*** *(supra)* and ***Uttam Chand Nahta*** *(supra)*. We are also in agreement with the contention raised by the learned counsel for the respondents that the decisions of Division Benches of this Court in ***K. M. Dixit*** *(supra)* and WP(C) No. 8841/2004 and other connected matters, which had been referred to by the learned counsel for the petitioners, would lose significance in view of the clear decisions of the Supreme Court, particularly in the case of ***N. K. Bhola*** *(supra)*. More so, in view of the specific averments made in the said IA No. 1/2011 therein which was allowed by the Supreme Court.

24. Therefore, the position that emerges is that the decision in ***Abhijit Ghosh Dastidar*** *(supra)* holds the field. Now, what is it that ***Abhijit Ghosh Dastidar*** *(supra)* decides? It has, in the first instance, while affirming ***Dev Dutt*** *(supra)*, concluded that non-communication of an ACR is violative of the constitutional rights of a government servant/employee. In the second instance, it has stated that such below benchmark ACRs ought not to be taken into consideration while the question of promotion of a particular government servant is in contemplation. Now, that leaves us with the further question as to what is to be done after we ignore/do not consider the below benchmark ACRs. In this regard, we have clear guidelines contained

in Chapter 54 of the Manual on Establishment and Administration for Central Government Offices, which have been issued by the Government of India for DPCs (G.I., Dept. of Per. & Trg., O.M. No. 22011/5/86-Estt.(d), dated the 10th April, 1989 as amended by O.M. No. 22011/5/91-Estt.(d), dated the 27th March, 1997 as amended / substituted vide Dept. of Per. & Trg., O.M. No. 22011/5/98-Estt.(d), dated the 6th October, 2000). The relevant portion of the guidelines reads as under:-

> "6.2.1. Confidential Rolls are the basic inputs on the basis of which assessment is to be made by each DPC. The evaluation of CRs should be fair, just and non-discriminatory. Hence –
>
> (a) The DPC should consider CRs for equal number of years in respect of all officers considered for promotion subject to (c) below.
>
> (b) The DPC should assess the suitability of the employees for promotion on the basis of their Service Records and with particular reference to the CRs for **five preceding years** irrespective of the qualifying service prescribed in the Service/ Recruitment Rules. The 'preceding five years' for the aforesaid purpose shall be decided as per the guidelines contained in the DoP&T, O M. No. 22011/9/98-Estt. (D), dated 8-9-1998, which prescribe the Model Calendar for DPC read with OM of even number, dated 16-6-2000. (If more than one CR have been written for a particular year, all the CRs for the relevant years shall be considered together as the CR for one year.)
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> xxxx xxxx xxxx xxxx

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

xxxx xxxx xxxx xxxx"

25. From the above, it is clear that the DPC should consider the confidential reports for equal number of years in respect of all the employees considered for promotion subject to (c) mentioned above. The latter sub-paragraph (c) makes it clear that when one or more confidential reports have not been written for any reason during the relevant period, the DPC should consider the CRs of the years preceding the period in question and if, in any case, even these are not available, the DPC should take the CRs of the lower grade into account to complete the number of CRs required to be considered as per sub-paragraph (b) above. If this is also not possible, all the available CRs should be taken into account. We are of the view that the same would apply in the case of non-communicated below benchmark ACRs. Such ACRs would be in the same position as those CRs which have not been written or which are not available for any reason.

Thus, it is clear that below benchmark ACRs, which have not been communicated, cannot be considered by the DPC and the DPC is then to follow the same procedure as prescribed in paragraph 6.2.1 (c), as indicated above.

26. In view of the foregoing discussion, the writ petitions are dismissed. There shall be no order as to costs. The impugned orders of the Tribunal stand modified to the extent indicated above. The compliance time is extended by a further period of 3 months from today.

BADAR DURREZ AHMED, J

V.K. JAIN, J

MAY 31, 2012
SR