DALJIT SINGH GREWAL

v.

STATE OF PUNJAB & ORS.

(Civil Appeal No.6532 of 2015)

AUGUST 21, 2015

[V.GOPALA GOWDA AND S.A. BOBDE, JJ.]

Service Law – Annual Confidential Reports (ACR) – Adverse entry in – Denial of promtion due to the adverse entires – Held: In view of the facts of the case downgrading the performance of the appellant-official in his ACR for the relevant periods by respondent No. 4 was not valid as the same was done without any authority or competence and was also tainted with malafides *– Therefore the order denying promotional benefits by the rspondents-Departmenet from the year 2001-2002 is liable to be set aside – Respondents are directed to reconsider the claim of the appellant so as to give him promotional post notionally to get pensionary benefits since he had already been prematurely retired.*

Allowing the appeal, the Court

HELD: 1. According to the Punjab Home Guard Class- II Rules, 1988, the appointment to the promotional post is to be made on seniority-cum-merit basis. As per the ACRs placed on record, the appellant has fulfilled the aforesaid requirement of seniority-cum-merit by securing 14 marks, as per the Instructions by Letter No. 4/6/2000-3 PPI/ 13720 dated 6.9.2001, in relation to all aspects entered in the ACR. [Para 39] [553-B-D]

2. The overall grading of the ACR for the period 2000-2001 was based upon the observations made by

A the Reporting Authority, Reviewing Authority and final Accepting Authority. As per the entries made by respondent No. 4, he had agreed to the overall grading i.e. "He is a very good and responsible officer" as given by the Accepting Authority. In such a case, he could not B have downgraded the overall grading in the ACR by using the words "an average officer". Further, if the comments made on 20.05.2004 by respondent No. 4 on the ACR for the year 2000-2001 are being sought to justify the stand of denial of promotion to the appellant to the C post in question, then the clarification needs to take effect from that date, i.e 20.05.2004. In such a case, the appellant was to be assigned 3 marks as per the instructions for the year 2003, when he was ignored for the promotion for the first time. [Para 37] [551-F-H; 552-D A-B]

3. The representations against the adverse remarks for the period 1999-2000 were rejected by respondent No. 4. The appellant had challenged the same by filing E Civil Suit, wherein respondent No. 4 was impleaded. The Civil Suit was decreed in favour of the appellant. The said judgment and decree passed in favour of the appellant has not been implemented by respondent Nos. 4 and 5, despite having attained finality, which clearly reflects the F fact that respondent No.4 was not fair in considering him for promotion to the post of Battalion Commander as provided under Rule 8(2) of the Rules.[Para 39] [552-G-H; 553-A-B]

G 4. As per the record, the appellant was given grade 'A+' for the year 2001-2002, but only 1 mark was assigned, whereas according to the executive Instructions, the grade 'A+' is to be assigned 4 marks. If 4 marks had been assigned for the ACR of the appellant, then he would H have scored 12 marks at the time of consideration for

promotion in the year 2003, whereas admittedly, the appellant was required to achieve only 10 marks in order to be promoted to the post of Battallion Commander. Hence, if the calculation of marks made by the respondents on the various aspects in the ACR of the appellant is believed to be true, then also he has achieved the required benchmark. The action of the respondent No. 4 in deliberately ignoring the claim of the appellant is vitiated in law as the same is contrary to the Rules and records of ACR for the relevant period and Instructions issued by the State Government laying down certain guiding principles. [Para 40] [554-B-E]

5. A perusal of the copy of the ACR for the period 2003-2004 reflects a true picture of the injustice that has been perpetrated against the appellant. The ACR has been written by respondent No. 4 who was the Reporting Authority as the Divisional Commandant. The very same officer was also the Reviewing Authority as Deputy Commandant General. Further, the same officer also happened to be the Final Accepting Authority as the Commandant General. The fact that in the said year also the performance of the appellant had been graded as 'average' clearly reveals the malafide intention of respondent Nos.1-4 in deliberately denying the promotion to the appellant to the post in question. If these illegal downgrading entries in the ACR for the relevant period are ignored, then the appellant would attain 14 marks whereas as per the Instructions dated 06.09.2001, 12 marks were required for promotion to the post as per the benchmark fixed. [Para 38] [552-B-F]

6. In view of the facts of the case, the downgrading of the performance of the appellant in his ACR for the relevant period by respondent No. 4 was not valid as the same was done without any authority and

A **competence. The adverse entries in the ACR have deprived the appellant of his right of promotion to the post in question and therefore, the said adverse entries in the ACRs against the appellant are not legal and valid. [Para 37] [549-E-G]**

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7. The action of respondent No. 4 in denying the promotional benefit to the appellant is tainted with *malafides*. In the writ petition proceedings before the High Court, it was the officer junior to the appellant, who was C **promoted to the post in question, had filed the reply on behalf of all the respondents. The non-filing of written statement by respondent No. 4 traversing the allegations of *malafide* against him proves the *malafide* intention on part of respondent No. 4. [Para 39] [553-D-F]**

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8. The impugned judgment and order passed by the High Court in both the Civil Writ Petition and the Review Application and also the order of denying the promotional benefit by the respondents-Department to E **the post of the Battalion Commander from the year 2001-2002 is set aside. Respondent Nos. 1 to 5 are directed to reconsider the claim of the appellant so that the appellant could get higher post of Battalion Commander notionally to get pensionary benefits as he has been prematurely** F **retired from service on 31.7.2007.[Para 42] [554-G-H; 555-A-C]**

Sukhdev Singh v. Union of India **2013 (9) SCC 566: 2013 (5) SCR 1004 – relied on.**

G *Balbir Singh Bedi v. State of Punjab & Ors.* **(2013) 11 SCC 746: 2013 (3) SCR 376;** *Gurdial Singh Fiji v. State of Punjab* **AIR 1979 SC 1622;** *Dev Dutt v. Union of India & Ors.* **(2008) 8 SCC 725: 2008 (8) SCR 174 – referred to.**

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Case Law Reference A

2013 (3) SCR 376	**referred to.**	**Para 19**
1979 SC 1622	**referred to.**	**Para 27**
2008 (8) SCR 174	**referred to.**	**Para 33** B
2013 (5) SCR 1004 26	**relied on.**	**Para 39**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 6532 of 2015 C

From the Judgment and Order dated 27.08.2013 of the High Court of Punjab and Haryana at Chandigarh in Review Application No. 208 of 2013 in CWP No. 5643 of 2004

Rakesh Kumar Khanna, Rajesh Punj, Debasis Misra, Manju Jetley for the Appellant. D

Nikhil Nayyar, AAG, Kuldip Singh for the Respondents.

The Judgment of the Court was delivered by E

V. GOPALA GOWDA, J. 1. Leave granted.

2. This appeal is directed against the impugned judgment and order dated 27.08.2013 passed by the High Court of Punjab & Haryana at Chandigarh in Review F Application No. 208 of 2013 (O&M) in Civil Writ Petition No. 5643 of 2004 whereby the High Court did not find any merit in the application and dismissed the same.

3.The brief facts of the case are mentioned below :- G

The appellant joined the Punjab Home Guards Department as District Commander in the year 1993 after being selected through Punjab Public Service Commission under the Punjab Home Guard Class-II Rules, 1988. The work H

A of the appellant was appreciated by the ADGP, Railways when a big tragedy on the railway tracks was averted as a result of his efforts. His work and conduct was considered as excellent. The dispute in the instant case arose when he received a letter dated 28.06.2000, wherein the Annual Confidential Report
B (ACR) for the period 1.07.1999 to 31.03.2000 rated his performance as 'average'. The D.G.P-cum-Commandant General had written the following remarks:

> "An mediocre officer, whose performance was
C barely satisfactory. His own officers intrigue and directly make unfounded allegations. This work environment, he has not been able to change."

4. The said assessment of his performance by the Deputy
D Commandant General-cum-Deputy Director, Civil Defence and the D.G.P-cum- Commandant General, Home Guards & Director Civil Defence led the appellant to place a representation dated 07.07.2000 before the DGP-cum-Commandant General, Home Guards and Director Civil
E Defence, Punjab- respondent No.5, requesting the supply of documents on the basis of which his conduct and diligence was graded as 'average'. But no satisfactory response was received by the appellant despite having been made reminder representations dated 18.08.2000 and 25.08.2000 for supply
F of the said documents. On 29.12.2000, Instructions were issued by the Department of Personnel, State Government, Punjab whereby a 'benchmark system' was introduced for promotion to Group-A and Group-B posts.

G 5. On 15.03.2001, the appellant submitted a detailed representation to the Secretary, Personnel, Punjab, Civil Secretariat-respondent No.3 herein, requesting him to re-consider the said Instructions on the ground that the same were violative of principles of natural justice. He also stated in the
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representation that the recording of adverse entries in the ACR must be conveyed to the concerned officers so as to enable them to improve their work accordingly. On 07.05.2001, the appellant received a letter from the Under Secretary, Department of Home Affairs and Justice, informing him that his representations dated 18.08.2000 and 25.08.2000 to the Government had been considered and rejected.

6. The appellant again made a representation on 31.05.2001 to the then Principal Secretary, Department of Home and Justice, requesting that the adverse remarks made in his ACR for the year 1999-2000 be expunged so that he could be promoted to the post of Battalion Commander.

7. On 30.06.2001, the appellant became eligible for promotion to the post of Battalion Commander after completion of 8 years of service as per Punjab Home Guard Class-I Rules, 1988. Rule 8(2) of the Rules provides that the District Commanders having 8 years of experience are entitled to promotion to the post of Battalion Commander on the basis of seniority-cum-merit and that no person could claim promotion on the basis of seniority alone.

8. Ultimately, having received no satisfactory response from the respondent Nos. 3 to 5 despite making several representations, the appellant filed Civil Suit No. 70 of 2001 before the Civil Judge (Sr. Div.), challenging the adverse entries made in his ACR for the year 1999-2000.

9. Meanwhile, the representation of the appellant was rejected by respondent No. 4 by way of a non-speaking order on 08.08.2001.

10. By letter No.4/6/2000-3PPI/13720 dated 06.09.2001, the government modified its earlier Instructions dated 29.12.2000, whereby the benchmark system was introduced

A for promotion to the Group-A and Group-B posts which was approved and published by the Government of Punjab on 18.12.2001. A conscious policy decision was taken to set up Departmental Promotion Committees for considering cases of eligible officers for promotion to Class-I and Class-II (Group
B 'A' and Group 'B') posts, which inter alia reads thus:-

".....a...

.....b...

C

NO. OF VACA NCIE S	NORMAL ZONE	ZONE FOR CONSID ERATIO N SC/ST
1	5	5
2	8	10
3	10	15
4	12	20
	Twice the number of vacanci es plus 4	5 times number of vacanc ies

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E

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xxx xxx xxx

(c) It has been decided to retain the numbering system of evaluation of ACRs as contained in the instructions
G dated 29.12.2000 which is as under:-

Outstanding	4 MARKS
Very good	3 MARKS
Good	2 MARKS
Average	1 MARK

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ACRs for the last 5 years are to be taken into consideration for promotion. The criteria for promotions will be as under:-

1....

2. For promotion to posts falling in Group 'A' other than Head of Department, the minimum bench mark will be Very Good with at least 12 marks. Amongst those meeting this criteria, there would be supersession.

3. In the case of promotion to posts falling in Group 'B' the minimum bench mark will be "Good" and there would be no supersession i.e. promotions would be made strictly on seniority-cum-merit.

XXX XXX XXX.."

11. By the judgment and order dated 15.03.2002, the Civil Judge, (Sr. Div.), Patiala in Civil Suit No. 70 of 2001 decreed the suit in favour of the appellant. The adverse remarks recorded against the appellant in the ACR for the period 01.04.1999 to 31.03.2000 were expunged and all consequential benefits were granted to the appellant.

12. Since no appeal was filed by the respondents against the said judgment and decree of the Civil Judge (Sr. Divn.), the appellant requested the respondents vide representation dated 08.05.2002 to consider him for promotion to the post of Battalion Commander. Thereafter, despite having submitted representations dated 10.05.2002 and 20.06.2002 to the respondent No. 4, no action was taken to implement the decree passed in favour of the appellant.

13. In the meanwhile, the Division Bench of High Court passed an order on 14.01.2003 in CWP No. 4491 of 2001 and CWP No. 11011 of 2001 (filed by some other petitioners,

A who had also challenged Instructions dated 29.12.2000) issuing direction to the State Government for considering the case of petitioners therein, by ignoring the Instructions dated 29.12.2000.

B 14. Two more representations were made by the appellant on 31.03.2003 and 09.04.2003 to respondent No. 4, but no action was taken.

15. Once again, having found that his performance was C shown as 'average' in the ACR for the period 01.04.2001 to 31.03.2002 which was graded by the respondent No.4, the appellant submitted another representation on 16.04.2003 for upgrading his ACR for the period 1999-2000 and 2001-2002 as his controlling officer i.e. Division Commander has awarded D him "A" Grade and Review Authority i.e. Deputy Commandant General also awarded him "+A" which entries were accepted by the final authority i.e. Commandant General, Home Guard-respondent No. 5. He also mentioned in the representation that he was shocked to find that his ACR for the period 2001-E 2002 was downgraded by respondent No. 4 without assigning any reason or affording an opportunity of being heard. As per the departmental procedure, Rules and Instructions, the then Principal Secretary, Home who has not seen the work and conduct of the appellant, could not have downgraded his F performance by making an adverse entry in his ACR. However, no action was taken on this representation made by him.

16. As per the Instructions dated 06.09.2001, at least 12 marks were required for promotion to the post of Battalion G Commander. The appellant was not considered for promotion even after having a decree passed in his favour by the Civil Court which was deliberately not placed before the Departmental Promotion Committee (hereinafter "the DPC") for its consideration. Due to the adverse remarks in the ACR

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for the year 2001-2002, the appellant fell short of this benchmark.

17. The appellant again made representations dated 10.09.2003 and 15.09.2003 to the respondent No. 4 for implementing the judgment and decree passed by the Civil Judge (Sr. Div.) in his favour and requested them to promote him to the post of Battalion Commander. He also got a legal notice issued to the respondents on 06.10.2003. The respondents deliberately ignored the request of the appellant by placing reliance on the Instructions referred to supra and the non-upgraded ACRs for the year 1999-2000, 2000-2001 and 2001-2002, though the suit was decreed in his favour.

18. On 16.02.2004, the appellant issued a legal notice to the respondent Nos. 4 and 5 for upgrading the ACR for the period 2001-2002 from 'Average' to 'Excellent'.

19. A similar issue arose for consideration of promotion and quashing of Instructions regarding the benchmark method introduced by the State Government, Department of Personnel in the case of ***Balbir Singh Bedi v. State of Punjab & Ors.***[1], wherein this Court upheld the validity of the executive Instructions dated 29.12.2000 and 06.09.2001, holding that these Instructions are nothing but a codification of directions issued by this Court regarding promotions and the criteria of seniority-cum-merit in a catena cases.

20.The appellant made a complaint on 11.03.2004 to the respondent no.4 seeking that action be taken against the persons who were tampering with the ACR's to harm the service career of the appellant.

21. Ultimately, the appellant filed CWP No. 5643 of 2004 before the High Court challenging the legality and validity of

[1] (2013) 11 SCC 746

A the Instructions and orders dated 02.05.2003 and 30.01.2004. The said petition was dismissed by the Division Bench of the High Court on 02.04.2004.

22. Meanwhile, the appellant was supplied certain B documents under the RTI Act which had material effect on the merits of his case. The appellant filed SLP (C) No. 14964 of 2004 against the order of the High Court dated 02.04.2004. This Court granted leave in the said SLP and the same was converted into Civil Appeal No. 5192 of 2004 and was directed C to be heard along with the case of ***Balbir Singh Bedi*** referred to supra. The case was dismissed, but the appellant was granted liberty by this Court to file a Review Petition before the High Court.

D 23. The appellant approached the High Court after being granted liberty by this Court in the above referred case and a Review Application No. 208 of 2013 was filed for recall of order dated 02.04.2004. The High Court having found no merit in the Review Application dismissed the same vide its order E dated 27.08.2013. On the issue of the performance of the appellant being graded as 'average', the High Court observed that though it was not clear as to whether the adverse entries in the ACR for the period of 01.04.2001 to 31.03.2002 were conveyed to the appellant, yet it was clear from his F representations that the contents of the reports were in his knowledge and he had specifically represented against its downgrading. The High Court further held that the appellant could not contend that the adverse ACR's were made behind his back. Hence, the present appeal is filed questioning the G correctness of the action of the respondents in not giving promotion to the appellant to the post of Battalion Commander though he was entitled for the same and also challenged the judgment and orders passed in writ petition and also review petition.

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24. Mr. Rakesh Kumar Khanna, learned senior counsel appearing on behalf of the appellant has contended that the High Court erred in not complying with the observations made by this Court in Civil Appeal No. 5192 of 2004, wherein this Court directed that the additional documents obtained by the appellant under the RTI Act were to be considered by the High Court. Thus, the appellant withdrew the Civil Appeal No.5192 of 2004 and filed a Review Application before the High Court in order to produce the documents obtained by him so that the same could be considered by the High Court and pass appropriate orders.

25. It is also contended by the learned senior counsel that the High Court failed to consider the representation dated 16.04.2003 submitted by the appellant to the respondent No. 4, wherein he had requested for the implementation of the judgment and decree dated 15.03.2002 passed in the Civil Suit No. 70 of 2001.

26. It is further contended by the learned senior counsel on behalf of the appellant that the High Court should have taken into consideration the latest judgment of this Court rendered in the case of ***Sukhdev Singh*** *v.* ***Union of India***[2] wherein it was held that all the ACRs whether poor, fair, average, good or very good, must be apprised to the concerned employee/ officer within the stipulated time so that he/ she can take suitable action if he/she is aggrieved by the same. While on the one hand, the High Court presumed that the appellant had knowledge of the downgrading in his ACR, at the same time it was also observed that it was not clear whether the downgrading was conveyed to the appellant.

27. It is further contended by the learned senior counsel appearing on behalf of the appellant that the High Court should

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[2] 2013 (9) SCC 566

A have considered the law laid down in the case of ***Gurdial Singh Fiji v. State of Punjab***[3], wherein this Court has specifically held that the adverse remarks made in the ACR cannot be acted upon by the Authority to deny promotion to a post unless they have been communicated to the concerned person.

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28. It is further contended by the learned senior counsel that the respondent No. 4 could not have downgraded his ACR and that too without conveying the same to him, as he had not personally seen the work of the appellant. There should have C been some reason for the respondents to make adverse entries in his ACR's for the relevant periods by changing the original entries made by the Reporting Authority-respondent No. 5. The adverse entries made in the ACR's of the appellant for the relevant periods were not communicated to him. If there D were any adverse entries in the ACR's, the same should have been communicated to the appellant to enable him to improve his shortcomings or submit a representation against the adverse entries. It was further contended by the learned senior counsel that the favourable entries recorded in the ACR's for E the relevant periods were deliberately not produced before the Selection Committee or DPC by the respondents so that the appellant would not be considered for promotion and promoted to the promotional post, which aspect of the matter should have been taken into consideration by the High Court F while passing the impugned judgment and order in the writ petition and also in the order passed in the review application.

29. On the other hand, Mr. Nikhil Nayyar, the learned Additional Advocate General appearing on behalf of the G respondent Nos. 1 to 5, has sought to justify the impugned judgment and order contending that the same is legal and justifiable on facts and also in law. Therefore, the High Court

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H [3] AIR 1979 SC 1622

has rightly dismissed the Writ Petition and Review Application of the appellant. Hence, the same does not warrant interference by this Court.

30. It is further contended by the learned Additional Advocate General that the DPC considered the ACRs of the past five years of the appellant and on the basis of final marks obtained by him for the relevant ACRs, his claim was not considered by the DPC for promotion as he failed to meet the benchmark criteria laid down as per Instructions dated 29.12.2000 and 06.09.2001 issued by the respondent No. 3. Further, even the Head of the Department did not issue the requisite integrity certificate in favour of the appellant.

31. It was further contended by the learned Additional Advocate General that in an earlier round of litigation before this Court in a similar matter i.e. ***Balbir Singh Bedi*** (supra), this Court upheld the validity of benchmark Instructions dated 29.12.2000 and 06.09.2001 issued for consideration of eligible officers for promotion to the posts of Class I and II viz. Group A and Group B and therefore, the same cannot be ignored. Thus, the appellant cannot be promoted to the post of Battalion Commander.

32. Further, it was contended by the learned Additional Advocate General that there were no adverse remarks in the ACRs of the appellant for the year 2000-2001 and 2001-2002, which were required to be apprised to him.and he was also aware of his adverse ACRs for the years 1999-2000. Therefore, it was rightly held by the High Court that the contents of those reports were within his knowledge. Therefore, there is no error of law committed by the High Court.

33. It is further contended by the learned Additional Advocate General that it was not right on the part of the appellant to request the respondent No. 4 to upgrade his ACRs

A and consequently to promote him to the promotional post retrospectively, which is impermissible in law. In support of his submission he placed reliance on the case of ***Dev Dutt v. Union of India & Ors.***[4], wherein this Court had directed the appellant therein to make a representation before the B concerned authorities to consider his claim for promotion retrospectively.

34. After hearing the learned counsel for both the parties and considering the facts and rival legal contentions urged by C them including the written submissions submitted by the learned counsel for the parties and on perusal of record, we pass the following order in this appeal on merits by assigning the reasons as mentioned herein below.

D 35. The promotion of the appellant to the post of Battalion Commander from the post of District Commandant is governed by Rule 8(1)(2)(i) of the Rules. The aforesaid rule contemplates that 75% of the promotional posts of the Battalion Commander be filled up by promotion amongst the Battalion second in E command. The legal requirement for promotion to the post of Battalion Commander is that the claimant should have been working as a District Commandant for a period of 8 years and the appointment to the said promotional post shall be made by the Competent Authority on seniority-cum-merit basis. No F person shall be entitled to claim promotion on the basis of seniority alone. As per the Punjab State Government Instructions issued on 06.09.2001, certain guidelines have been laid down for DPC to consider the cases of promotion to the post of Class-I and Class-II namely, group 'A' and 'B' posts. G As per the said guidelines, an eligible candidate is promoted on the basis of the seniority-cum-merit criteria, where merit is determined on the basis of benchmark awarded to the various

H [4] (2008) 8 SCC 725

aspects contained in the ACR of the officer, wherein marks are awarded against such entries made in the ACRs of the officers concerned for the relevant period.

36. Further, as per the records obtained by the appellant from the respondents under the RTI Act at the time of his claim for promotion to the post of Battalion Commander was first considered, his ACRs from year 1996 were considered. The Instructions dated 29.12.2000 would be applicable prospectively to the ACRs of the appellant for relevant periods which were prepared after those Instructions were issued. According to the Instructions, officers obtaining 0-14 marks out of a total of 20 marks would be graded over all 'Good'. Thus, the appellant was entitled to promotion as he had been awarded 10 marks as per the proceedings of DPC.

37. The High Court in the impugned judgment further observed that the final reporting authority had downgraded the appellant as an 'average' officer for the above relevant period. As per the executive Instructions dated 10.01.1985 issued by the State Government, the Commandant General is the final Authority for the rank of the District Commander. That being the factual position, the downgrading of the performance of the appellant in his ACR for the above relevant period by the respondent No. 4 was not valid as the same was done without any authority and competence. The adverse entries in the ACR have deprived the appellant of his right of promotion to the post in question and therefore, the said adverse entries in the ACRs against the appellant are not legal and valid. The ACR for the period 2000-2001 is extracted hereunder:

1. **Integrity**	Correct
2. **Conduct**	Very Good

3.Health and Activeness	Very Good
4.Personality and Initiative	Very Good
5.Knowledge and Intelligence	Very Good
6.Dependability/ reliability	Fully Dependable
7.Power to Command	Very Good
8.Efficiency in Parade	Correct
9.Moral courage and efficiency to expose corrupt subordinates	Very Good
10.Impartiality	Impartial
11.Knowledge of English	Very Good
12.Knowledge of Punjabi and Hindi and to make drafts in these languages	Very Good
13.Knowledge of Civil rules and regulations, Home Guard Act, administration instructions and circulars	Very Good
14.Behaviour and to work with each other	Very Good

15.Defect, if any, whether brought to his notice	Not Applicable
16.Whether fit for promotion	At his own term
17.Whether he disposes his work in Punjabi	Yes
18.General Remarks	He is very good and responsible officer

A perusal of the ACR for the period 2000-2001 reveals that though the general remarks stated that "*He is very good and responsible officer*" respondent No. 4 had given a grade which read, *"I agree. An average officer"*. The said entry shows that he had agreed to all the remarks of the ACR given in respect of columns 1 to 18 for that year by the Competent Accepting Authority, but he further stated assessed the officer to be an 'average' officer without assigning any reason whatsoever apart from his competence to make such adverse entries. The overall grading of the ACR is based upon the observations made by the Reporting Authority, Reviewing Authority and final Accepting Authority. As per the entries made by the respondent No. 4, he had agreed to the overall grading as given by the Accepting Authority. In such a case, he could not have downgraded the overall grading in the ACR by using the words "an average officer". Further, if the comments made on 20.05.2004 by the respondent No. 4 on the ACR for the year 2000-2001 are being sought to justify the stand of denial

of promotion to the appellant to the post in question, then the clarification needs to take effect from that date, i.e 20.05.2004. In such a case, the appellant was to be assigned 3 marks as per the instructions for the year 2003, when he was ignored for the promotion for the first time.

38. A perusal of the copy of the ACR for the period 2003-2004 reflects a true picture of the injustice that has been perpetrated against the appellant. The ACR has been written by Mr. Tejinder Singh, respondent No. 4 who was the Reporting Authority as the Divisional Commandant. The very same officer was also the Reviewing Authority as Deputy Commandant General. Further, the same officer also happened to be the Final Accepting Authority as the Commandant General, as is evident from his comment dated 30.09.2004. The fact that in the said year also the performance of the appellant had been graded as 'average' clearly reveals the *malafide* intention of the respondent nos.1-4 in deliberately denying the promotion to the appellant to the post in question. According to the respondents themselves, the executive Instructions dated 06.09.2001 have not been superseded by any other Instructions or rules framed by the competent authority. If these illegal downgrading entries in the ACR for the relevant period are ignored, then the appellant would attain 14 marks. As per the Instructions dated 06.09.2001, 12 marks were required for promotion to the post as per the benchmark fixed.

39. Further, the adverse remarks for the period 1999-2000 were conveyed to appellant vide communication dated 28.06.2000 by the D.G.P-cum- Commandant General. The representations dated 18.08.2000 and 25.08.2000 made by the appellant against the same were submitted to respondent No. 4. The said representation was rejected on 07.05.2001. The appellant had challenged the same by filing Civil Suit No. 70 of 2001, wherein the respondent No. 4 was impleaded as

defendant No. 3. The civil suit was decreed on 15.03.2002 in favour of the appellant. The said judgment and decree passed in favour of the appellant has not been implemented by the respondent Nos. 4 and 5, despite having attained finality, which clearly reflects the fact that the respondent No.4 was not fair in considering him for promotion to the post of Battalion Commander as provided under Rule 8(2) of the Rules. According to the Rules, the appointment to the promotional post shall be made on seniority-cum-merit basis. As per the ACRs placed on record, the appellant has fulfilled the aforesaid requirement of seniority-cum-merit by securing 14 marks, as per the Instructions in relation to all aspects entered in the ACR. The strong reliance placed upon the adverse remarks made by the respondent No.4, who has made the same without assigning any reasons, has resulted in the appellant being denied of the promotional benefit, even though the order of the respondent No. 4 was set aside by the judgment and decree in Civil Suit no. 70 of 2001. The action of respondent No. 4 in denying the promotional benefit to the appellant is tainted with *malafides*. It can further be observed from the record that it was respondent no.7 who had filed the reply on behalf of all the respondents in the writ petition proceedings before the High Court. It is important to note at this stage that respondent No. 7 happens to be an officer junior to the appellant, who was promoted to the post in question. The non-filing of written statement by respondent No. 4 traversing the allegations of *malafide* against him proves the *malafide* intention on part of the respondent No. 4. Therefore, there was no justification for the respondent No. 4 in denying the promotional benefit to the post of Battalion Commander to the appellant and. The learned senior counsel on behalf of the appellant has rightly placed reliance on the case of ***Sukhdev Singh*** (supra), wherein this Court has lucidly laid down the law pertaining to communication of ACR. It was held that if the ACR of the officer concerned is

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A to be used for the purpose of denying promotion, then all such ACRs were required to be communicated to him, to enable him to make a representation against his adverse entries made in the ACRs.

B 40. As per the record submitted by the respondents, the appellant was given grade 'A+' for the year 2001-2002, but only 1 mark was assigned. According to the executive Instructions, the grade 'A+' is to be assigned 4 marks. Accordingly, if 4 marks are assigned for the ACR of the C appellant for the period 2001-2002, then he would have scored 12 marks at the time of consideration for promotion in the year 2003, whereas admittedly, the appellant was required to achieve only 10 marks in order to be promoted to the post of Battallion Commander. Hence, if the calculation of marks made D by the respondents on the various aspects in the ACR of the appellant is believed to be true, then also he has achieved the required benchmark. The action of the respondent No. 4 in deliberately ignoring the claim of the appellant is vitiated in law as the same is contrary to the Rules and records of ACR E for the relevant period and Instructions issued by the State Government laying down certain guiding principles.

41. Therefore, the order of denial of promotion to the appellant, which has been affirmed by the High Court in its F judgment and order passed in the Writ Petition and Review Application is liable to be set aside.

42. For the reasons stated supra, we pass the following order:-

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(1) We set aside the impugned judgment and order passed by the High Court in both the Civil Writ Petition and the Review Application and also the order of denying the promotional benefit by the respondents-Department

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to the post of the Battalion Commander from the year 2001-2002; A

(2) Further, we direct the respondent Nos. 1 to 5 to reconsider the claim of the appellant in the light of our findings and reasons recorded on the contentious factual and legal aspects so that he could get higher post of Battalion Commander notionally to get pensionary benefits as he has been prematurely retired from service on 31.7.2007; and B

C

(3) The said direction shall be complied with within 8 weeks from the date of the receipt of the copy of this order and extend all the consequential benefits for the purpose of fixing his pensionary benefits and other monetary benefits for which he is legally entitled to and submit the compliance report to this Court. D

43. The appeal is allowed in the above said terms with cost of Rs.10,000/- payable to the appellant by respondent Nos. 1 to 4. E

Kalpana K. Tripathy Appeal allowed.