

**BEFORE THE UTTARAKHAND PUBLIC SERVICES TRIBUNAL  
BENCH AT NAINITAL**

Present: Hon'ble Mr. Justice U.C.Dhyani  
----- Chairman  
Hon'ble Mr. Rajeev Gupta  
-----Vice Chairman (A)

**CLAIM PETITION NO. 51/NB/DB/2019**

Kamlesh Kumar Varshney, aged about 56 years, s/o Late Sri Babu Lal Varshney, presently posted as Incharge Joint Secretary, Uttarakhand Education Board, Ram Nagar, District Nainital.

.....Petitioner

vs.

1. State of Uttarakhand through Additional Chief Secretary, Govt. of Uttarakhand, Dehradun.
2. Secretary, School Education, Govt. of Uttarakhand, Dehradun.
3. Director General, School Education, Uttarakhand, Dehradun.
4. State Project Director, Serva Shiksha Abhiyan, Uttarakhand, Narendra Nagar, Tehri Garhwal.

.....Respondents

Present: Sri Anil Anthwal, Advocate for the Petitioner.  
Sri Kishor Kumar, A.P.O., for the Respondents.

**JUDGMENT**

**DATED: NOVEMBER 15, 2021**

**Justice U.C.Dhyani (Oral)**

By means of the present claim petition, the petitioner seeks following reliefs:

- i) *To issue a writ in the nature of certiorari quashing the impugned orders dated 17.07.2019, 12.06.2018 and office memorandum dated 21.06.2013 along with communication dated 18.02.2015 as well as office memorandum dated 19.06.2015 so far relates to the petitioner.*

ii) *Issue writ order or direction in the nature of mandamus directing the respondents to reconsider the petitioner for promotion notionally from the date when the juniors/counterparts of the petitioner have been promoted to the post of Deputy Director Grade Pay Rs. 7600/-*

iii) *To award the cost of the petition in favour of the petitioner.*

2. The genesis of present claim petition may be traced to an earlier claim petition (No. 42/NB/DB/2015) filed by the petitioner, which claim petition was decided by this Tribunal *vide* order dated 18.05.2017. Factual matrix of both the claim petitions is so intrinsically interwoven with each other that one cannot postulate the existence of the latter without the existence of the former. The Tribunal, therefore, finds it appropriate to reproduce the judgment of Claim Petition No. 42/NB/DB/2015 in order to understand the whole controversy, as follows:

“1. The petitioner has filed the present claim petition for seeking the following relief:-

- “(i) To quash the impugned Office Memorandum dated 21<sup>st</sup> June, 2013 passed by Secretary, Secondary Education, Govt. of Uttarakhand (Annexure No.-1).
- (ii) To quash the impugned communication dated 18<sup>th</sup> February 2015, whereby the claimant has been informed by the Secretary, Secondary Education, Govt. of Uttarakhand that in the DPC held on 26<sup>th</sup> September 2014 claimant has been found ‘unsuitable’ for promotion on the post of Deputy Director, Education (Annexure No.-2).
- (iii) To quash the impugned Office Memorandum dated 19<sup>th</sup> June 2015 passed by Additional Chief Secretary, Secondary Education, Govt. of Uttarakhand (Annexure No.-3).
- (iv) To issue direction in the nature of mandamus holding the declaration of the claimant ‘unsuitable’ in the DPC held on 26<sup>th</sup> September 2014 and DPC held on 20<sup>th</sup> June 2015 as illegal being in violation of Rules of 2013.
- (v) To issue direction in the nature of mandamus commanding the respondents to hold the review DPC held on 26<sup>th</sup> September 2014 for the post of Deputy Director, Education and consider the case of the claimant for promotion on the said post in terms of Rules of 2013.

(vi) To award the cost of the petition or to pass such order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case.”

- 2.1 The petitioner is an officer of the Education Department, Government of Uttarakhand.
- 2.2. When the petitioner was posted as District Education Officer (Elementary Education)/District Project Officer, Sarva Shiksha Abhiyan, Pithoragarh, he was awarded Special Adverse Entry for the year 2012-2013 by the Secretary, Department of Education, Government of Uttarakhand on 21-06-2013 finding the petitioner guilty of negligence in the matter of selection of an agency for supplying human resources in district Pithoragarh under Sarva Shiksha Abhiyan (Annexure : 1).
- 2.3 The petitioner has contended in the claim petition that he submitted a representation against the Special Adverse Entry on 10-07-2013 (Annexure : 6) which was rejected by the Additional Chief Secretary, Education, Government of Uttarakhand on 19-06-2015 (Annexure : 3).
- 2.4 The petitioner has further stated that according to Rule 4 of the Uttarakhand Government Servants (Disposal of Representation Against Adverse Annual Confidential Reports and Allied Matters) Rules, 2002 (Annexure : 7), the representation must have been decided by the competent authority within 120 days but the same has been decided after more than 23 months. Further, if the representation is not decided within time as prescribed under Rule 4, the Rule 5 of the said Rules provides that such adverse report shall not be treated as adverse for the purpose of promotion. Hereinafter, the said Rules have been referred as Rules of 2002.
- 2.5 The Education Department made promotion from the post of Education Officer to the post of Deputy Director, Education by holding DPCs on 26-09-2014 and again on 20-06-2015 and the petitioner was not promoted as he had been awarded a Special Adverse Entry for the year 2012-2013. After the promotion made by the respondents, the petitioner was also informed by the Education Department that due to the reason of Special Adverse Entry, he was not found suitable for the promotion in 2014 as well as in 2015.
- 2.6 The contention of the petitioner is that his representation against the Special Adverse Entry was decided much beyond the time limit prescribed in Rule 4 of the Rules of 2002 and according to Rule 5 of the Rules of 2002, the Special Adverse Entry shall not be treated adverse entry for the purpose of promotion. The petitioner has, therefore, been wrongly denied the promotion.
- 3.1 The petitioner has also contended that the promotions from the post of Education Officer to the post of Deputy Director have been made under *Uttarakhand (Lok Sewa Aayog Kee Paridhi Se Bahar) Rajyadheen Sewaon Mein Padonnati Ke Liye Chayan Prakriya Niyamawali, 2013* ". Hereinafter, these Rules have been referred as Rules of 2013. The criterion for promotion is “seniority subject to rejection of unfit”. The

Rule 3 of the Rules of 2013 deals with the procedure of promotion which reads as under:-

*Text.....*

- 3.2. The contention of the petitioner is that as per Rule 3 (1) above, he was included in the "Eligibility List" for promotion from the post of Education Officer to the post of Deputy Director for the DPC dated 26-09-2014. He was at place No. 9 in the seniority list of 18 eligible candidates. As per Rule 3(2) of the Rules of 2013, the ACRs of 5 years (2012-2013, 2011-2012, 2010-2011, 2009-2010 and 2008-2009) were to be considered for determining the "suitability" for promotion. According to Rule 3 (3) of the Rules of 2013, a candidate will be declared "suitable" for promotion if at least 4 out of total 5 ACRs of the candidate have grade "good" or higher. The petitioner had 3 good and 1 outstanding ACRs out of total 5 ACRs and, therefore, he fulfilled the condition of Rule 3 (3) of the Rules of 2013 and he must have been declared "suitable" for promotion by the DPC held on 26-09-2014. The petitioner has also stated that for the said period of 5 years, his integrity for all the years is certified and for no year, it was withheld and, therefore, he also fulfilled the condition laid down under Rule 3 (4) of the Rules of 2013.
- 3.3. The petitioner has contended that in spite of the Special Adverse Entry for the year 2012-2013, he was "suitable" for the promotion in accordance with the Rules of 2013 as he had 4, out of total 5, good and higher ACRs and in all the 5 years his integrity is certified.
- 3.4. The petitioner has also stated in the claim petition that for next DPC dated 20-06-2015, the same position was there as described in paragraphs 3.1 to 3.3 above and the petitioner was "suitable" for promotion in accordance with the Rules of 2013.
- 3.5. The petitioner has, therefore, contended that he could not be declared "unsuitable" for promotion by the DPCs on the basis of so-called Special Adverse Entry and the findings of the DPCs in this regard are in clear violation of the Rules of 2013.
4. Respondents No. 1 to 4 have opposed the claim petition and it has been stated in their joint written statement that the representation of the petitioner against the Special Adverse Entry dated 10-07-2013 has been received by the respondents with an another representation of the petitioner dated 28-02-2015 (Annexure : 12). The representation dated 10-07-2013 was not received by any respondent before 28-02-2015. The respondents have vehemently denied the contention of the petitioner that the representation against the Special Adverse Entry was sent by the petitioner on 10-07-2013 and it was received at that time. It is the contention of the respondents that the representation was sent by the petitioner only on 28-02-2015 as an enclosure of his representation which he submitted on 28-02-2015 against declaring him unsuitable for the promotion by the DPC dated 26-09-2014. It has been further stated by the respondents that the representation of the petitioner against Special Adverse Entry which was received through another representation dated 28-02-2015 was considered by the competent

authority and rejected on 19-06-2015. The Additional Chief Secretary, Education, Government of Uttarakhand, who decided the representation has himself mentioned in his rejection order dated 19-06-2015 that the representation of the petitioner dated 10-07-2013 against the Special Adverse Entry was received with the representation of the petitioner dated 28-02-2015. Respondents have also contended that as per the Rules of 2013, the criterion for promotion is “seniority subject to rejection of unfit” and since there was a Special Adverse Entry given to the petitioner for the year 2012-2013, the petitioner has been rightly found unsuitable for promotion by the DPCs.

5. Learned counsel for the petitioner has also filed the Rejoinder Affidavit and the same averments have been made and elaborated in it which were stated in the claim petition. Learned counsel for the petitioner has also filed the supplementary affidavit by which it has been shown that the representation against the Special Adverse Entry dated 10-07-2013 was sent by the Registered Post to the respondents.
6. We have heard learned counsel for the petitioner as well as learned A.P.O. on behalf of respondents and perused all record carefully.
- 7.1 Learned counsel for the petitioner has argued that the petitioner had sent the representation against the Special Adverse Entry on 10-07-2013 which was decided (and rejected) by the competent authority (respondent No. 1) on 19-06-2105. He has contended that there is inordinate delay in deciding the representation. While Rule 4 (4) of the Rules of 2002 provides that the representation should have been decided within 120 days from the date of receipt of the representation, it has been decided after more than 23 months in gross violation of the Rules of 2002. Learned counsel for the petitioner also stated that Rule 5 of the Rules of 2002 clearly provides that if representation is not decided within the prescribed time limit under Rule 4 of the Rules of 2002, the adverse entry shall not be treated adverse for the purpose of promotion. Since the representation of the petitioner against the Special Adverse Entry has been decided much beyond the time limit fixed under Rule 4 of the Rules of 2002, the adverse entry shall not be treated adverse under Rule 5 of the Rules of 2002 when the promotion of the petitioner was considered by the DPCs on 26-09-2014 and 20-06-2015 and, therefore, he has been declared “unsuitable” for promotion wrongly and in violation of Rule 4 and Rule 5 of the Rules of 2002. Learned A.P.O. has refuted the argument of learned counsel for the petitioner and has stated in his counter argument that the petitioner had not sent the representation against the Special Adverse Entry on 10-07-2013. No such representation has been received by the respondents at that time. The representation of the petitioner against the Special Adverse Entry has been received alongwith his representation dated 28-02-2015 which he gave after he was found “unsuitable” for promotion by the DPC dated 26-09-2014 and was communicated about it *vide* letter dated 18-02-2015 (Annexure : 2 ). The competent authority (respondent No. 1) decided the said representation dated 28-02-2015 on 19-06-2015 and rejected it. The respondent No. 1 deciding the representation has clearly mentioned that the petitioner has sent the representation dated 10-07-2013 against the Special Adverse Entry alongwith his representation dated 28-02-2015.

Therefore, the petitioner did not send any representation against Special Adverse Entry in 2013 and his representation dated 10-07-2013 was first time received on 28-02-2015 as an enclosure with another representation in respect of his non-promotion. The representation against the Special Adverse Entry, which was received on 28-02-2015, has been decided on 19-06-2015 timely in accordance with Rules and there is no violation of any provision of the Rules of 2002. The petitioner has been rightly found “unsuitable” due to Special Adverse Entry by the DPCs held on 26-09-2014 and 20-06-2015.

- 7.2. Learned counsel for the petitioner has stated that the petitioner sent representation against the Special Adverse Entry to the Secretary, Education on 10-07-2013 by the Registered Post and endorsed the copies of it to (i) State Project Director, Sarva Shiksha Abhiyan, Dehradun; (ii) Director General, School Education, Dehradun; (iii) Director, Secondary Education, Dehradun; and (iv) Director, Elementary Education, Dehradun. Learned counsel for the petitioner also filed a supplementary affidavit and filed the extract of the Despatch Register to show that the representation dated 10-07-2013 was despatched to the respondents by the registered post. Perusal of the record filed with the supplementary affidavit reveals that there are entries of despatch of a letter to the Secretary, Education on 19-07-2013 and letters to the State Project Director, Sarva Shiksha Abhiyan and Director General, Education on 20-07-2013. There are no entries of despatch to the Director, Secondary Education and Director, Elementary Education in the despatch register though the petitioner had endorsed his representation dated 10-07-2013 to these two authorities also.
- 7.3. Merely by the entries in the despatch register, it cannot be said that the content of the letters despatched was the representation of the petitioner. The representation of the petitioner is dated 10-07-2013 and the despatch register shows the despatch on 19-07-2013 and 20-07-2013 after 9-10 days which remains unexplained. The petitioner has claimed that he sent his representation dated 10-07-2013 to five authorities but the despatch register shows despatch to three authorities only. It is also pertinent to note that the petitioner was himself the Head of the Office from where the letters were despatched. The petitioner could not show that his representation was received by any of the five authorities to whom it was sent. The petitioner could not produce any document/information to show the receipt of the representation even by any one authority. The petitioner also did not bother to pursue his representation dated 10-07-2013 for nearly two years.
- 7.4. In view of analysis in paragraphs 7.1 to 7.3 above, we are of the view that the petitioner has not been able to establish that he sent the representation dated 10-07-2013 against the Special Adverse Entry and it was received by the respondents. Under these circumstances, it cannot be concluded that the representation of the petitioner was decided by the respondent No. 1 in violation of the Rules of 2002. We would, therefore, not like to interfere with the matter of the “Special Adverse Entry” given to the petitioner.

- 8.1. Learned counsel for the petitioner has also argued that irrespective of Special Adverse Entry awarded to the petitioner for the year 2012-2013, he could not be declared “unsuitable” for promotion by DPCs dated 26-09-2014 and 20-06-2015 as the petitioner was “suitable” for promotion under the Rules of 2013. He has stated that admittedly, the petitioner was included in the “eligible list” of candidates for promotion. Admittedly, the petitioner was senior to other candidates of the “eligibility list” who were promoted. Admittedly, 4 out of 5 ACRs of the petitioner were graded “good” or “higher” and, therefore, he was entitled to be declared “suitable” for promotion under Rule 3 (3) of the Rules of 2013. Learned counsel for the petitioner also stated that admittedly, for all the five years which were considered for promotion (by DPCs dated 26-09-2014 and 20-06-2015), his integrity was certified and, therefore, he also fulfilled the condition laid down under Rule 3 (4) of the Rules of 2013 and in view of this, he could not be declared unfit for promotion by both the DPCs.
- 8.2. Learned counsel for the petitioner has also contended that admittedly, the promotion from the post of District Education Officer to the post of Deputy Director were to be made according to the criterion of “seniority subject to rejection of unfit” and Rule 3 of the Rules of 2013 mentions the procedure of promotion when promotions are made according to the criterion of “seniority subject to rejection of unfit”. He has argued that respondents have not stated in their pleadings as to under which provision of the Rules of 2013, the petitioner has been declared “unsuitable” for promotion in spite of the fact that the petitioner fulfils all the requirements/conditions laid down in the Rules of 2013.
- 8.3. Learned counsel for the petitioner has also pointed out that the position is different when promotions are made according to the criterion of “merit”. If promotions are made according to the criterion of “merit”, then Rule 4 (7) of the Rules of 2013 is applicable which provides that if there is “adverse entry” of a candidate or “integrity withheld” for any year out of 5 years under consideration, the candidate will be declared “unsuitable” for promotion. In the present case, the promotions are to be made according to the seniority (and not by merit) and for the purpose of promotion by seniority, the candidate has to fulfil the conditions laid down under Rule 3 (3) and Rule 3 (4) of the Rules of 2013 which the petitioner fulfils. The petitioner has 4 out of 5 ACRs “good” or “higher” and his “integrity” is certified for all the 5 years and, therefore, the petitioner cannot be declared “unsuitable” for promotion by the DPC on the basis of the Special Adverse Entry. The respondents cannot go beyond the provisions of the Rules of 2013 and apply their own opinion regarding “suitability”/ “unsuitability” for promotion when specific provisions have been made in the Rules of 2013.
- 8.4. In reply to the points raised by learned counsel for the petitioner in paragraphs 8.1 to 8.3 above, learned A.P.O. has, in general, stated that the petitioner has been found unsuitable by the DPCs because of “Special Adverse Entry” given to the petitioner in 2012-2013. He could not demonstrate any Rule/Provision on the basis of which the petitioner was found unsuitable. Learned A.P.O. could also not show as to which provision of the Rules of 2013 is not fulfilled by the petitioner in order

to declare him “unsuitable” for promotion. We have also gone through the written statement filed by the respondents and find that the respondents have not explained/stated the rule/provision under which the petitioner has been found unsuitable for promotion or what provision/rule of the Rules of 2013 is not fulfilled by the petitioner under which he was declared unfit for promotion.

8.5. In view of analysis in paragraphs 8.1 to 8.4 above, we agree with the contention of the petitioner that the petitioner fulfils the conditions laid down in Rule 3 of the Rules of 2013. The criterion for promotion was “seniority subject to rejection of unfit”. The petitioner has 4 out of 5 ACRs “good” and higher than good. His integrity was never withheld. The respondents have failed to explain the basis of declaring the petitioner “unsuitable” for promotion on the basis of the Special Adverse Entry given to the petitioner in 2012-2013. Thus, the petitioner could not be declared “unsuitable” for promotion by DPCs dated 26-09-2014 and 20-06-2015.

9. For the reasons stated above, the claim petition deserves to be partly allowed.

### **Order**

The petition is partly allowed. Respondents are directed to consider the promotion of the petitioner by holding a review DPC meeting in the light of Rule 3 of the Rules of 2013 and the observations made in this order. The exercise to hold the DPC and thereafter, decision on the matter of promotion of the petitioner shall be taken by the competent authority within a period of four months from the date of this order. No order as to costs.”

3. When the order dated 18.05.2017 passed by this Tribunal in Claim Petition No. 42/NB/DB/2015, was not complied with, an execution application No. 09/NB/DB/2019 was filed by the petitioner before this Tribunal, which execution application was decided *vide* order dated 27.05.2019, as below:

“By means of present execution application, the petitioner-executioner prayed for directing the respondents to comply with the order dated 18.05.2017 passed by this Tribunal in claim petition No. 42/NB/DB/2015, the operative portion of which runs as below :-

“The petition is partly allowed. Respondents are directed to consider the promotion of the petitioner by holding a review DPC meeting in the light of Rule 3 of the Rules of 2013 and the observations made in this order. The exercise to hold the DPC and thereafter, decision on the matter of promotion of the petitioner shall be taken by the competent authority within a period of four months from the date of this order. No order as to costs.”

It is the submission of the learned counsel for the petitioner-executioner that the aforesaid order has not been complied with, even



after a lapse of 2 years, which clearly shows laxity on the part of the respondents/OPs.

We would have directed the respondents to show-cause, within stipulated time, as to why the order dated 18.05.2017 has not been complied with? But we proceed on the assumption that non-compliance of the aforesaid order is not the result of wilful disobedience and probably, the said order has not been complied with because the Ministerial staff has not placed and drawn the attention of the authorities concerned towards the said order.

This Tribunal, therefore, thinks it appropriate to serve a reminder by directing the respondents to faithfully comply with the order dated 18.05.2017 passed in claim petition No. 42/NB/DB/2015 without further loss of time, failing which, it will be open to the petitioner/executioner to move another execution application/contempt petition, as the case may be, as per law. If suitable action is initiated against the respondents, for non-compliance of the aforesaid order, in future, they alone will be responsible for it.

Execution application is accordingly disposed of, as of now.

Registry is directed to send a copy of this order to learned A.P.O., through E-mail, with a request to him to bring this order to the knowledge of the authorities concerned.

The petitioner is directed to serve a copy of this order upon the respondents by registered post within a period of 10 days of receipt of certified copy of this order .....

4. Even then the respondents rejected (*bonafide*) claim of the petitioner and have wrongly declared the petitioner unsuitable for notional promotion, in the meeting of DPC conducted on 18.04.2018. The orders on execution petition were passed by this Tribunal on 27.05.2019.

5. The outcome of DPC of 18.04.2018 was conveyed to learned A.P.O. *vide* letter dated 17.07.2019 (Annexure: A1). The present claim petition was filed on 16.10.2019.

6. Counter Affidavit has been filed on behalf of respondents No. 1, 2 & 3 by Sri Minakshi Sundaram, the then Director General, School Education on 02.01.2020. It has been stated that the petitioner was not found fit for notional promotion to the post of Deputy Director in the meeting of DPC dated 18.04.2018. Rejoinder Affidavit has been filed by the petitioner. Written arguments have also been filed on behalf of the petitioner. Learned A.P.O. submitted that the impugned orders have been passed as per the

provisions of law; due procedure has been followed; opportunity of hearing has been given and the impugned order is just and proper.

7. It is the submission of learned Counsel for the petitioner that once the Hon'ble Tribunal has duly considered and passed the judgment and has observed that the ACRs of the petitioner, out of five, are good and higher therefore, the petitioner cannot be declared unsuitable for promotion. Hence, a direction was given to the respondents to consider the promotion of the petitioner by holding review DPC in the light of Rule 3 of the Rules of 2013. It is further submitted that the respondents have failed to decide the representation of the petitioner as per "The Uttaranchal Government Servants (Disposal of Representation against Adverse Annual Confidential Reports and Allied Matters) Rules, 2002" (for short 'the Rules of 2002'), irrespective of special adverse entry awarded in the year 2013. The said special entry could not disable the petitioner for promotion.

8. It is also submitted that respondents have failed to follow the provisions of the Rules of 2002. Rule 5 of the same protects the promotional rights of the petitioner, which (Rule) runs as below:

*"5. Report not to be treated adverse:- Except as provided in Rule 56 of the Uttar Pradesh Fundamental Rules contained in Financial Hand Book, Vol. II, part II to IV. Where an adverse report is not communicated or a representation against an report has not been disposed of in accordance with Rule 4, such report shall not be treated adverse for the purposes of promotion, crossing of Efficiency Bar and other service matters of the Government Servant concerned."*

9. In the decision of U.P. Jal Nigam & others vs. Prabhat Chandra Jain & others, (1996) 2 SCC 363, it was observed that:

*"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*

*confidentials 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.”*

10. In the matter of *Dev Dutt vs. Union of India & others*, 2008(8) SCC 725, Hon’ble Supreme Court has observed that:

*“No rule or government instruction can violate Article 14 or any other provision of the Constitution, as the Constitution is the highest law of the land. The aforesaid Office Memorandum, if it is interpreted to mean that only adverse entries are to be communicated to the concerned employee and not other entries, would in our opinion become arbitrary and hence illegal being violative of Article 14. All similar Rules/Government Orders/Office Memoranda, in respect of all services under the State, whether civil, judicial, police, or other service (except the military), will hence also be illegal and are therefore liable to be ignored.*

*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.”*

11. In the decision of *Sukhdev Singh vs. Union of India and others*, (2013)9 SCC, 566, Hon’ble Supreme Court has observed that:

*“In our opinion, the view taken in Dev Dutt that every entry in ACR of a public servant must be communicated to him/her within a reasonable period is legally sound and helps in achieving threefold objectives. First,*

*the communication of every entry in the ACR to a public servant helps him/her to work harder and achieve more that helps him in improving his work and give better results. Second and equally important, on being made aware of the entry in the ACR, the public servant may feel dissatisfied with the same. Communication of the entry enables him/her to make representation for upgradation of the remarks entered in the ACR. Third, communication of every entry in the ACR brings transparency in recording the remarks relating to a public servant and the system becomes more conforming to the principles of natural justice. We, accordingly, hold that every entry in ACR – poor, fair, average, good or very good–must be communicated to him/her within a reasonable period.”*

12. It appears that the basis of Annexure: A1 was ‘special adverse entry’ given to the petitioner, which, in the backdrop of this case, could not have been given, in view of the decision rendered by Hon’ble Supreme Court in Vijay Singh vs. State of U.P. & others, (2012)5 SCC 242. The observations of the Hon’ble Supreme Court in paras 7, 8, 9,10, 11, 12, 13, 16 and 17 of the decision, are being quoted herein below for convenience:

“7. The only question involved in this appeal is as to whether the disciplinary authority can impose punishment not prescribed under statutory rules after holding disciplinary proceedings.....

.....  
 .....  
 .....

8. Admittedly, the punishment imposed upon the appellant is not provided for under Rule 4 of Rules 1991. Integrity of a person can be withheld for sufficient reasons at the time of filling up the Annual Confidential Report. However, if the statutory rules so prescribe it can also be withheld as a punishment. The order passed by the Disciplinary Authority withholding the integrity certificate as a punishment for delinquency is without jurisdiction, not being provided under the Rules 1991, since the same could not be termed as punishment under the Rules. The rules do not empower the Disciplinary Authority to impose “any other” major or minor punishment. It is a settled proposition of law that punishment not prescribed under the rules, as a result of disciplinary proceedings cannot be awarded.

9. This Court in [State of U.P. & Ors. v. Madhav Prasad Sharma](#), (2011) 2 SCC 212, dealt with the aforesaid Rules 1991 and after quoting Rule 4 thereof held as under:

“16. We are not concerned about other rule. The perusal of major and minor penalties prescribed in the above Rule makes it clear that sanctioning leave without pay is not one of the punishments prescribed, though, and under what circumstances leave has been sanctioned without pay is a different aspect with which we are not concerned for the present. However, Rule 4 makes it clear that sanction of leave without pay is not

one of the punishments prescribed. Disciplinary authority is competent to impose appropriate penalty from those provided in Rule 4 of the Rules which deals with the major penalties and minor penalties. Denial of salary on the ground of “no work no pay” cannot be treated as a penalty in view of statutory provisions contained in Rule 4 defining the penalties in clear terms.”

(Emphasis added)

10. The Authority has to act or purport to act in pursuance or execution or intended execution of the Statute or Statutory Rules. (See: [The Poona City Municipal Corporation v. Dattatraya Nagesh Deodhar](#), AIR 1965 SC 555; [The Municipal Corporation, Indore v. Niyamatulla \(dead\) by his Legal representatives](#), AIR 1971 SC 97; [J.N. Ganatra v. Morvi Municipality, Morvi](#), AIR 1996 SC 2520; and [Borosil Glass Works Ltd. Employees Union v. D.D. Bambode & Ors.](#), AIR 2001 SC 378).

11. The issue involved herein is required to be examined from another angle also. Holding departmental proceedings and recording a finding of guilt against any delinquent and imposing the punishment for the same is a quasi-judicial function and not administrative one. (Vide: [Bachhittar Singh v. State of Punjab & Anr.](#), AIR 1963 SC 395; [Union of India v. H.C. Goel](#), AIR 1964 SC 364; [Mohd. Yunus Khan v. State of U.P. & Ors.](#), (2010) 10 SCC 539; and [Chairman-cum-Managing Director, Coal India Ltd. & Ors. v. Ananta Saha & Ors.](#), (2011) 5 SCC142).

Imposing the punishment for a proved delinquency is regulated and controlled by the statutory rules. Therefore, while performing the quasi-judicial functions, the authority is not permitted to ignore the statutory rules under which punishment is to be imposed. The disciplinary authority is bound to give strict adherence to the said rules.

Thus, the order of punishment being outside the purview of the statutory rules is a nullity and cannot be enforced against the appellant.

12. This very ground has been taken by the appellant from the very initial stage. Before the appellate authority such a ground was taken. Unfortunately, the appellate authority brushed aside the said submission observing that the judgments mentioned by him to the effect that integrity could not be withheld as punishment not prescribed under the statutory rules, had no application to the case, and therefore, in that respect no further consideration was necessary. The order of punishment imposed by the disciplinary authority did not require any interference. The revisional authority rejected the revision as not maintainable observing as under:

“Representation is not maintainable. Withholding of integrity certificate does not come under punishment under 1991 Rules.....Therefore, the revision is returned without hearing on merit on the ground of non maintainability.”

□

(Emphasis added)

13. We fail to understand, if the revisional authority was of the view that integrity could not be withheld as punishment, why the mistake committed by the disciplinary authority as well as by the appellate authority could not be rectified by him. This shows a total non-application of mind. In such a fact-situation, the subordinate officer has to face the adverse consequences without any fault on his part. The grievance raised by the appellant that recording the past criminal history of an accused is relevant in non-bailable offences only as it may be a relevant factor to be considered at the time of grant of bail, and he did not record the same as it was a bailable offence, has not been considered by any of the authorities at all. Undoubtedly, the statutory authorities are under the legal obligation to decide the appeal and revision dealing with the grounds taken in the

appeal/revision etc., otherwise it would be a case of non- application of mind.

16. Undoubtedly, in a civilized society governed by rule of law, the punishment not prescribed under the statutory rules cannot be imposed. Principle enshrined in Criminal Jurisprudence to this effect is prescribed in legal maxim *nulla poena sine lege* which means that a person should not be made to suffer penalty except for a clear breach of existing law. In S. Khushboo v. Kanniammal & Anr., AIR 2010 SC 3196, this Court has held that a person cannot be tried for an alleged offence unless the Legislature has made it punishable by law and it falls within the offence as defined under Sections 40, 41 and 42 of the Indian Penal Code, 1860, Section 2(n) of Code of Criminal Procedure 1973, or Section 3(38) of the General Clauses Act, 1897. The same analogy can be drawn in the instant case though the matter is not criminal in nature.

Thus, in view of the above, the punishment order is not maintainable in the eyes of law.

17. In the result, appeal succeeds and is allowed. The impugned order dated 8.7.2010 withholding integrity certificate for the year 2010 and all subsequent orders in this regard are quashed. Respondents are directed to consider the case of the appellant for all consequential benefits including promotion etc., if any, afresh taking into consideration the service record of the appellant in accordance with law.":

*[Emphasis supplied]*

13. The order of punishment being outside the purview of the statutory rules is a nullity and cannot be enforced against the petitioner.

14. Irresistible conclusion, therefore, would be that the claim petition will succeed by setting aside the impugned orders dated 17.07.2019, 21.06.2013, 18.02.2015 and 19.06.2015 in so far as they relate to the petitioner (Annexure: 1 Colly) with the direction to the respondents to consider the petitioner for promotion notionally from the date his juniors were promoted to the post of Deputy Director, in accordance with law.

15. Order accordingly. No order as to costs.

**(RAJEEV GUPTA)**  
VICE CHAIRMAN (A)

**(JUSTICE U.C.DHYANI)**  
CHAIRMAN

DATE: NOVEMBER 15, 2021  
DEHRADUN  
KNP