

**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)

**RECALL APPLICATION NO. 01/NB/DB/2020  
[IN CLAIM PETITION NO. 20/NB/DB/2014]**

1. Prakash Chandra Dumka, s/o Late Shri Chandra Mani Dumka, serving as General Manager, SIDCUL, Dehradun.
2. Uttam Singh Chauhan, s/o Shri Chait Ram, serving as ADM (F/R) Udham sing Nagar.
3. Harbeer Singh, s/o Shri Sardar Singh, serving as Apar Mela Adhikari, Haridwar.
4. Chandra Singh Martolia, s/o Late Shri Bhim Singh Martolia, serving as Municipal Commissioner, Nagar Nigam, Haldwani, District Nainital.
5. Hemant Kumar Verma, s/o Late Sri Jeewan Lal Verma, serving as Additional Commissioner, State Tax, Dehradun.
6. Jagdish Chandra Kandpal, s/o Late Shri Heera Ballabh Kandpal, serving as ADM(E), Udham Singh Nagar.
7. Bir Singh Budhiyal, s/o Shri Dev Singh, serving as ADM (F&R) Dehradun, District Dehradun.
8. Girish Chandra Gudwant, s/o Shri Manohar Chandra Gudwant, serving as Secretary, MDDA, Dehradun, District Dehradun.

**.....Recall applicants**

**vs.**

1. State of Uttarakhand through its Secretary, Revenue Department, Government of Uttarakhand, Secretariat, Dehradun.
2. Chief Revenue Commissioner/ Chairman Board of Revenue, Dehradun.
3. Secretary, Karmik Department, Govt. of Uttarakhand, Dehradun.
4. District Magistrate, Udham Singh Nagar, Uttarakhand.
5. District Magistrate, Chamoli, Uttarakhand.

**.....Respondents.**

Present: Sri Alok Mehra, Advocate for the recall applicants.

Sri Kishore Kumar, A.P.O., for the Respondents.

Sri T.C.Pandey, Advocate, for the petitioner (in original claim petition)

**JUDGMENT****DATED: DECEMBER 31, 2021****Justice U.C.Dhyani**  
**Shri Rajeev Gupta**

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**BACKDROP**

Recall application has been filed by applicant Prakash Chandra Dumka and seven others (hereinafter referred to as 'review/recall applicants') to recall the judgment and order dated 09.10.2017 passed by this Tribunal in 20/NB/DB/2014, Chandra Singh Imlal vs. State & others (Sri Chandra Singh Imlal shall be hereinafter referred to as the 'petitioner') .

2. Since application for recalling the order dated 09.10.2017 has been filed on 18.03.2020, therefore, an application under Section 5 of Limitation Act, 1963, has also been filed to condone the delay in filing the review/recall application.
3. Petitioner filed a claim petition for quashing the ACR entries with a prayer to promote him notionally to the post of Deputy Collector by treating him eligible for promotion against the selection year 2004-05, instead of selection year 2012-13. The review/recall applicants were not party to the said claim petition. *Vide* judgment and order dated 09.10.2017, passed in Claim Petition No.20/NB/DB/2014, this Tribunal directed the respondents to hold review DPC and consider the case of the petitioner for promotion from the date of his entitlement.

Earlier, Review/recall applicants No. 4,5 and 6 preferred Writ Petition (S/B)No. 113/2010, which was allowed by Hon'ble High Court *vide* judgment dated 27.04.2011, pursuant to which, they were promoted to the post of Deputy Collector *vide* order dated 07.05.2012 *w.e.f.* 08.04.2010. The petitioner was party respondent in that writ petition. He also preferred SLP No. 24709/24710 of 2011 against judgment dated 27.04.2011, before Hon'ble Supreme Court, which SLP

was disposed of *vide* order dated 13.07.2017. Hon'ble apex Court found no ground to interfere with the judgment and order dated 27.04.2011. The applicants have already been granted promotion *vide* order dated 07.05.2012 *w.e.f.* 08.04.2010 on the post of Deputy Collector pursuant to the judgment and order dated 27.04.2011, passed by Hon'ble High Court, which order has been affirmed by Hon'ble Supreme Court *vide* order dated 13.07.2017. The applicants came to know that a review DPC is being conducted for the post of Deputy Collector. They immediately sent a representation to the Additional Chief Secretary (Personnel) and Secretary, Uttarakhand Public Service Commission, through their Learned Counsel on 09.10.2018, wherein they have narrated the fact that they have been granted the promotion pursuant to the judgment dated 27.04.2011, as upheld by Hon'ble Apex Court on 13.07.2017. At the time of giving the representation, the applicants had no knowledge about the judgment dated 09.10.2017 passed by this Tribunal. When their representation was not decided for a considerably long period of time, one of the review/recall applicants went to the office of the concerned department in the Secretariat in the last week of January, 2020. On enquiry, it was revealed to him that review DPC was going on pursuant to the judgment dated 09.10.2017 of this Tribunal. The review/recall applicants immediately contacted their Counsel, who advised them to file recall application and bring entire facts before this Tribunal.

The judgment dated 09.10.2017, according to review/recall applicants, has been passed by the Tribunal on concealment of material facts, which has misled the Tribunal in getting the claim petition allowed in his favour.

Hence, the review/recall application.

4. Objections against the delay condonation application in filing review/recall application and review/recall application itself, on merits, have been filed on behalf of respondents. Reference of those objections shall be made, as and when required, during the course of discussion.

## DELAY CONDONATION

5. Rule 17 of the Uttar Pradesh Public Services (Tribunal) (Procedure) Rules, 1992, reads as under:

“17 (1) No petition for review shall be entertained unless it is filed within thirty days from the date of the order of which the review is so sought.

(2).....

(3).....”

6. Section 5 of the Limitation Act, 1963, would be applicable to the applications. Being satisfied with the sufficiency of the reasons thus furnished in support of delay condonation application, delay in filing the recall application is condoned in the interest of justice.

## SCOPE OF REVIEW JURISDICTION

7. This Tribunal, while deciding the Claim Petition on 09.10.2017 (No. 20/NB/DB/2014, Chandra Singh Imlal vs. State and others) directed as under:

“13.7 As there is no dispute and it is admitted by the respondents that annual entries in respect of the years 1997-98, 1998-99, 1999-2000 and 2001-2002 were not communicated to the petitioner but these annual entries were considered by the DPC which adversely affected his chances for promotion, we are of the opinion that the promotion of the petitioner should be reconsidered and a review DPC must be held.

13.8 For the reasons stated above, we pass the following order.

### ORDER

State respondents are directed to uphold a review DPC to consider the case of the petitioner for promotion from the date of his entitlement. As far as un-communicated annual entries are concerned, a decision will be taken in the light of the judgments of the Hon'ble Supreme Court in Dev Dutt Vs. Union of India and others reported in (2008) 8 SCC 725, Sukhdev Singh Vs. Union of India and Ors. reported in 2013 (9) SCC 566 and Prabhu Dayal Khandelwal Vs. Chairman, UPSC and Others reported in 2015 (14) SCC 427. The decision of the promotion to the petitioner will be taken by the respondents on the basis of the recommendation of the review DPC. The holding of review DPC and thereafter decision by the respondents on it will be taken within a period of three months from today. No order as to costs.”

8. A student of Law is well aware of the difference between writ jurisdiction, appellate jurisdiction, revisional jurisdiction and review jurisdiction. They operate in different situations and are governed by different statutory provisions. At present, the review/ recall applicants

pray that order dated 09.10.2017 should be recalled by this Tribunal in review jurisdiction (or recall jurisdiction, by whatever name it is called). The scope of review jurisdiction is very limited. Review is permissible only when (i) there is an error apparent on the face of record, (ii) there is clerical or arithmetical mistake or (iii) for any other sufficient reason. None of these three is attracted in this case. There is no manifest error on the face of record. There is no clerical mistake. There is no other sufficient reason to indicate that the order sought to be recalled should be recalled/ reviewed in the interest of justice.

9. A reference of the decision rendered by Hon'ble Apex Court in *Ajit Kumar Bhuyan and others vs. Debajit Das and others*, (2019) 12 SCC 275, has been given by Ld. Counsel for review/recall applicants. Sri Alok Mehra, Advocate, drew attention of this Tribunal towards para 29 of the judgment rendered in *Ajit Kumar Bhuyan's case (supra)*, as below:

"29. We are of the opinion that it was virtually a case of fraud, at least on three counts. First, by creating ex-cadre post of Executive Engineer only for respondent No.1 and giving him that post when he was much junior to many others. Second, encadrement of respondent No.1 as Executive Engineer by showing that there were thirteen posts when, in fact, there were only ten posts of Executive Engineer on that date. This was done obviously with the purpose of accommodating him. Third, the promotion was given when respondent No.1 was not even eligible as per Rules as he had not put in minimum service of five years. Fraud vitiates every action and cannot be kept under the carpet on the ground that the action challenged was belated, more so when there is a reasonable explanation for such delay."

10. The facts of this case and Ajit Kumar Bhuyan's decision (*supra*) are entirely at different pedestal. The authorities in Ajit Kumar Bhuyan's case, it appears, were hell bent upon accommodating the beneficiary of that case, details of which have been given in the decision itself by Hon'ble Apex Court, which action of the authorities have promoted the Hon'ble Apex Court to term the action of the authorities as 'fraud', which are not the facts in the case in hand. Even if it be conceded, only for the sake of arguments, that the Respondent State was inclined to help the petitioner Chandra Singh Imlal, the fact remains that the decision in the case of Ajit Kumar Bhuyan (*supra*) was given by Hon'ble Apex Court in appellate jurisdiction and not in review jurisdiction. The

review/recall applicants of this case can still seek appropriate remedy before the appropriate forum, available to them in law, if they are so advised, against the judgment dated 09.10.2017, passed by this Tribunal in claim petition no. 20/NB/DB/2014, in view of fresh cause of action that might have accrued to them, in law.

#### **REVIEW ON THE GROUND OF NON-JOINDER**

11. The next question, which arises for consideration of this Tribunal is- whether the review/recall application can be allowed on the ground that the review/recall applicants were necessary parties to the claim petition No. 20/NB/DB/2014.
12. It has been held, in a catena of decisions, that even an Appellate Court cannot set aside the order/ decree, on the ground of non-joinder of party, where there is no injustice caused by such non-joinder. Here, the review/recall applicants have invoked review/recall jurisdiction to rectify the mistake , as projected by them, in the recall application. Apparently, no injustice has been caused to the review applicants, if they were not party(ies) in Claim Petition No. 20/NB/DB/2014.

#### **RELIEFS SOUGHT BY THE PETITIONER**

13. Claim Petition No. 20/NB/DB/2014 was filed by the petitioner, in the Tribunal for the following reliefs:

“(a)That in view of the facts and grounds as mentioned above the petitioner prays, that this Hon’ble Tribunal/ Court may graciously be pleased to quash the impugned annual confidential reports to that extent of 1997-98, 1998-99, 1999-2000, 2001-02----- which was downgraded by the accepting authorities from outstanding to very good, good or good to satisfactory, without recording any reasons or without giving any findings in the annual confidential records.

(b) To issue order or direction to the authorities concerned to give notional promotion to the petitioner treating him eligible/ suitable incumbent for given promotion from the post of Tehsildar to the post of Deputy Collector, against the selection year 2004-05 instead of selection year 2012-13.”

#### **FACTS OF CLAIM PETITION**

14. The facts of the claim petition, as were highlighted by this Tribunal, while delivering the judgment on 09.10.2017 are necessarily to be gone into while considering present review/recall application. The facts were as follows:

“ 2.1 The petitioner belongs to the Revenue Department of the Government of Uttarakhand and he was confirmed as Tahsildar on 28.06.2004.

2.2 As confirmed Tahsildar, the petitioner became eligible for promotion to the post of Deputy Collector. The criterion for promotion is merit and the promotions are made in consultation with the Uttarakhand Public Service Commission (for short the Commission).

2.3 The State Government sent a proposal to the Commission for promotion from the post of Tahsildar to the post of Deputy Collector in 2006. The name of the petitioner was also included in the list of eligible candidates. The Commission after holding the meeting of the DPC recommended promotion to 16 candidates and on the basis of the recommendation of the Commission, the promotion order of 16 officers was issued on 01.03.2007 against the vacancies of promotion quota for the years 2005-06 and 2006-07. The name of the petitioner was not there in the list of promotions made on 01.03.2007 as he was not recommended by the Commission.

2.4 Thereafter, the State Government issued another promotion order in 2012 and in this list also, the name of petitioner was not there.

2.5 It is pertinent to mention here that the Commission has devised a formula to ascertain the “merit” which is the criterion for the promotion and the same is reproduced below:-

.....

2.6 When the petitioner was not promoted in 2007 and 2012 according to the formula of merit as above in Paragraph 2.5, he approached the Government under the Right to Information Act, 2005 and came to know for the first time on 07.08.2013 that his Annual Confidential Reports (ACRs) for four years were as under:-

1997-98

“*Ati Uttam*” by the Reporting Officer and “*Uttam*” by the Accepting Officer.

1998-99

“*Utkrish*” by the Reporting Officer and “*Achchha*” by the Accepting Officer.

1999-2000

“*Utkrish*” by the Reporting Officer and “*Ati Uttam*” by the Accepting Officer.

2001-2002

“*Utkrish*” by the Reporting Officer and “*Ati Uttam*” by the Accepting Officer.

2.7 The contention of the petitioner is that ACRs of above mentioned four years have never been communicated to him and, therefore, he did not get any opportunity to represent against the same.

2.8 It has also been contended by the petitioner that the ACRs given by the Reporting Officers in these four years have been downgraded by the Accepting Officers without giving any reason while it was necessary

as per the Government Order NO. 914/XXX (2)2005 dated 5<sup>th</sup> July, 2005. The said G.O. is reproduced below:-

.....

2.9 The petitioner submitted a representation to the Government (Annexure: A 11) for non-communication of ACRs and also in respect of downgrading of his ACRs resulting in the adverse effect on marks for the purpose of ascertainment of "merit" as per the formula of the Commission (reproduced in paragraph 2.5 of this order) but the same remained undecided.

2.10 The petitioner was, however, promoted to the post of Deputy Collector in 2013 on the basis of the recommendations of the Commission for the vacancies of the promotion quota pertaining to the year 2012-13 when he was found fit for the promotion in accordance with the Commission's formula of "merit".

3. Respondents have opposed the claim petition and it has been stated in their joint written statement that according to the "Uttarakhand Government Servants (Disposal of Representation Against Adverse Annual Confidential Reports and Allied Matters) Rules, 2002 only the *Praticool Varshik Pravishiti* (Adverse Annual Entry) is required to be communicated to the employees. Since the petitioner had not been given any Adverse Annual Entry, the entries need not be communicated to the petitioner. As there is no Adverse Remark in any annual entry of the petitioner, no annual entry was communicated to the petitioner as per the said rules."

15. The judgment was given on the basis of various landmark decisions rendered by Hon'ble Apex Court, details of which are as under:

"7. The issue of non-communication of non-adverse ACRs and downgrading of ACRs has been dealt with by the Hon'ble High Court at Nainital and the Hon'ble Supreme Court and the law has been laid down in this respect. We would now like to take up the leading case-laws pertaining to this issue.

8. In the case of **Sukhdev Singh Vs. Union of India (UOI) and Ors.(2013)9 SCC 566**, the three judges bench has held as under:----

"3. ....in the case of **Dev Dutt v. Union of India and Ors.** (2008) 8 SCC 725, this Court had an occasion to consider the question about the communication of the entry in the ACR of a public servant (other than military service). A two Judge Bench on elaborate and detailed consideration of the matter and also after taking into consideration the decision of this Court in *U.P. Jal Nigam (1996)2 SCC 363* and principles of natural justice expounded by this Court from time to time particularly in *A.K. Praipak v. Union of India (1969) 2 SCC 262*; *Maneka Gandhi v. Union of India (1978) 1 SCC 248*; *Union of India v. Tulsi Ram Patel (1985) 3 SCC 398*; *Canara Bank v. V.K. Awasthy (2005) 6 SCC 321* and *State of Maharashtra v. Public Concern for Governance Trust (2007) 3 SCC 587* concluded that every entry in the ACR of a public service must be communicated to him within a reasonable period whether it is poor, fair, average, good or very good entry. This is what this Court in paragraphs 17 & 18 of the report in *Dev Dutt (2008) 8 SCC 725* at page 733:



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

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

4. Then in paragraph 22 at page 734 of the report, this Court made the following weighty observations:

It may be mentioned that communication of entries and giving opportunity to represent against them is particularly important on higher posts which are in a pyramidal structure where often the principle of elimination is followed in selection for promotion, and even a single entry can destroy the career of an officer which has otherwise been outstanding throughout. This often results in grave injustice and heart-burning, and may shatter the morale of many good officers who are superseded due to this arbitrariness, while officers of inferior merit may be promoted.

5. In paragraphs 37 & 41 of the report, this Court then observed as follows:

We further hold that when the entry is communicated to him the public servant should have a right to make a representation against the entry to the concerned authority, and the concerned authority must decide the representation in a fair manner and within a reasonable period. We also hold that the representation must be decided by an authority higher than the one who gave the entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar to Caesar. All this would be conducive to fairness and transparency in public administration, and would result in fairness to public servants. The State must be a model employer, and must act fairly towards its employees. Only then would good governance be possible.

In 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.

6. We are in complete agreement with the view in *Dev Dutt* (2008) 8 SCC 725 particularly paragraphs 17, 18, 22, 37 & 41 as quoted above. We approve the same.

7. A three Judge Bench of this Court in *Abhijit Ghosh Dastidar v. Union of India and Ors.* (2009) 16 SCC 146 followed *Dev Dutt* (2008) 8 SCC 725. In paragraph 8 of the Report, this Court with reference to the case under consideration held as under:

Coming to the second aspect, that though the benchmark "very good" is required for being considered for promotion admittedly the entry of "good" was not communicated to the Appellant. The entry of 'good' should have been communicated to him as he was having "very good" in the previous year. In those circumstances, in our opinion, non communication of entries in the ACR of a public servant whether he is in civil, judicial, police or any other service (other than the armed forces), it has civil consequences because it may affect his chances for promotion or get other benefits. Hence, such non-communication would be arbitrary and as such violative of Article 14 of the Constitution. The same view has been reiterated in the above referred decision relied on by the Appellant. Therefore, the entries "good" if at all granted to the Appellant, the same should not have been taken into consideration for being considered for promotion to the higher grade. The Respondent has no case that the Appellant had ever been informed of the nature of the grading given to him.

8. 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."

9. Apart from some paragraphs which have been quoted in *Sukhdev Singh* judgment above, it would also be appropriate to mention following paragraphs also from the judgment of *Dev Dutt Vs. Union of India and Others*:-

"10. In the present case the bench mark (i.e. the essential requirement) laid down by the authorities for promotion to the post of Superintending Engineer was that the candidate should have 'very good' entry for the last five years. Thus in this situation the 'good' entry in fact is an adverse entry because it eliminates the candidate from being considered for promotion. Thus, nomenclature is not relevant, it is the effect which the entry is having which determines whether it is an adverse entry or not. It is thus the rigours of the entry which is important, not the phraseology. The grant of a 'good' entry is of no satisfaction to the incumbent if it in fact makes him ineligible for promotion or has an adverse effect on his chances.

11. Hence, in our opinion, the 'good' entry should have been communicated to the appellant so as to enable him to make a representation praying that the said entry for the year 1993-94 should be upgraded from 'good' to 'very good'. Of course, after considering such a representation it was open to the authority concerned to reject the representation and confirm the 'good'

entry (though of course in a fair manner), but at least an opportunity of making such a representation should have been given to the appellant, and that would only have been possible had the appellant been communicated the 'good' entry, which was not done in this case. Hence, we are of the opinion that the non-communication of the 'good' entry was arbitrary and hence illegal, and the decisions relied upon by the learned Counsel for the respondent are distinguishable.

12. Learned Counsel for the respondent submitted that under the Office Memorandum 21011/4/87 [Estt.'A'] issued by the Ministry of Personnel/Public Grievance and Pensions dated 10/11.09.1987, only an adverse entry is to be communicated to the concerned employee. It is well settled 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."

10. The Hon'ble Supreme Court in the case of Prabhu Dayal Khandelwal Vs. Chairman, UPSC and Others 2015 (14) SCC 427 decided on 23.07.2015 has held as under:-

"2. It is not a matter of dispute, that the benchmark for promotion to the post of Chief Commissioner of Income Tax, under the prevailing DoPT guidelines was "very good". In other words only such of the Commissioners of Income Tax, whose service record was "very good" would be treated as satisfying the "merit" component in the process of selection. When the claim of the Appellant arose for consideration, the five Annual Confidential Reports which were liable to be taken into consideration were, for the years 1995-1996 to 1999-2000. of the aforesaid Reports, in three the Appellant was graded as "good" (for the years 1995-1996, 1996-1997 and 1998-1999), and in the remaining two he was graded as "very good" (for the years 1997-1998 and 1999-2000). On account of the fact, that the Appellant did not satisfy the benchmark stipulated in the DoPT guidelines, he was not considered fit for promotion, to the post of Chief Commissioner of Income Tax.

5. In so far as the issue of non-consideration of the claim of the Appellant is concerned, we are satisfied that the proposition of law relevant for the controversy in hand, was declared upon by this Court in Abhijit Ghosh Dastidar v. Union of India and Ors. (2009) 16 SCC 146, wherein a three-Judge Division Bench of this Court, held as under:

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

8. 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 Annual Confidential Report 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 of promotion or getting 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 [Dev Dutt v. Union of India and Ors. (2008) 8 SCC 725] 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.

6. The aforesaid position of law has again been affirmed by this Court in Sukhdev Singh v. Union of India and Ors. (2013) 9 SCC 566, wherein another three-Judge Division Bench of this Court, has concluded as under:

8. 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 up-gradation 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.

7. In the above view of the matter, we are satisfied that the impugned order passed by the High Court, deserves to be set aside, inasmuch as, the claim of the Appellant could not be ignored by taking into consideration, un-communicated Annual Confidential Reports for the years 1995-1996, 1996-1997 and 1998-1999, wherein the Appellant was assessed as "good". In the absence of the aforesaid entries, it is apparent, that the remaining entries of the Appellant being "very good", he would be entitled to be considered fit for the promotion, to the post of Chief Commissioner of Income Tax, on the basis of the then prevailing DoPT guidelines, and the remaining valid Annual Confidential Reports.

8. On the issue, whether the representations filed by the Appellant against the Reports for the years 1995-1996, 1996-1997 and 1998-1999 need to be taken to their logical conclusion, we are of the view, that since almost two decades have passed by since the aforesaid Annual Confidential Reports were recorded, it would be too late in the day to require the Authorities to adjudicate upon the representations made by the Appellant as against the un-communicated Annual Confidential Reports.

9. In the above view of the matter, we are satisfied, that the Respondents ought to be directed to reconsider the claim of promotion of the Appellant, to the post of Chief Commissioner of Income Tax, for the vacancies which arose during the years 2000-2001 and 2001-2002 on the basis of the communicated reports for the years 1997-1998 and 1999-2000, within a period of three months from today. Ordered accordingly.

10. In case the Appellant is found to be entitled for promotion to the post of Chief Commissioner of Income Tax, he shall be promoted to the said post, with effect from the date of his entitlement. In such an eventuality, he shall also be entitled to all arrears of salary, as would have been payable to him, if he had been promoted as Chief Commissioner of Income Tax at the right time. Simultaneously, he would be entitled to revision of his retiral benefits.

11. In case the Appellant is found suitable for promotion, this order should not be taken as permitting the authorities, to interfere with the promotions already made. Suffice it to state, that to accommodate the Appellant, it shall be open to the authorities to create a notional post, for giving effect to the instant order.”

11. The Division Bench of Hon'ble High Court at Nainital in the case of Jeewan Chandra Joshi writ petition (SB) No. 95 of 2016 decided on 17.06.2016 has also held as under:-

“2. Briefly put the case of the petitioner is as follows:

Petitioner was appointed as Assistant Engineer in the year 1982; promoted as Executive Engineer in the year 2010 and given notional promotion in 2004 as such. Subsequently, he was promoted as Superintendent Engineer w.e.f. 31.05.2013 and notionally promoted as such w.e.f. 24.06.2010. Though there was a DPC held in the year 2009, the petitioner could not be selected. A DPC, however, was held on 05.01.2016 and it recommended four persons and the four persons were promoted by order dated 25.02.2016. Subsequently, it came to know that two junior persons, namely, the respondent nos. 3 & 4 have been recommended for promotion, but petitioner was not recommended. He came to know from the DPC that he has been placed in the second category of 'good' in terms of Rule 4(v) of the Procedure for Promotion Rules, 2013. Petitioner, on coming to know about the facts, filed an application under the Right to Information Act for copy of the ACRs of 05 years. According to him, he was rated 'very good' for four reporting years. For the year 2010-11, though the Superintending Engineer, which was reporting officer, rated as 'outstanding', but the reviewing authority downgraded it by two steps, namely, 'good' without recording any reason. The petitioner filed representation claiming promotion, disregarding the adverse entry in view of judgment of Hon'ble Supreme Court in the case of 'Dev Dutt Vs. Union of India and others', reported in (2008) 8 SCC 725. Not meeting the desired response, petitioner is before us.

4. According to Mr. Vinjay Kumar, Advocate who appears for the respondent no. 3, who has been promoted pursuant to DPC and who is admittedly junior to the petitioner, there is no challenge to the adverse entry and the petitioner should represent against the adverse entry. Furthermore, he submitted that Dev Dutt,s case (Supra) does not say anywhere that if there is an adverse entry, without doing anything about it, a person can seek relief.

5. Per contra, Mr. Manoj Tewari, learned senior Counsel appearing for the petitioner would rely on the decision of Hon'ble the Supreme Court in the case of 'Prabhu Dayal Khandelwal Vs. Chairman, UPSC and others', reported in 2015 (6) Supreme 692 wherein Hon'ble Supreme Court interalia has held as follows:

“7.In the above view of the matter, we are satisfied that the impugned order passed by the High Court, deserves to be set aside, inasmuch as, the claim of the appellant could not be

ignored by taking into consideration, un-communicated Annual Confidential Reports for the years 1995-1996, 1996-1997 and 1998-1999, wherein the appellant was assessed as "good". In the absence of the aforesaid entries, it is apparent, that the remaining entries of the appellant being "very good", he would be entitled to be considered fit for the promotion, to the post of Chief Commissioner of Income Tax, on the basis of the then prevailing DoPT guidelines, and the remaining valid Annual Confidential Reports."

6. We notice that it is a case, where the petitioner challenged his non-recommendation of promotion on the basis of the un-communicated remarks. The tribunal granted relief and it was set-aside by the High Court, which was interfered by the Hon'ble Supreme Court and the Hon'ble Supreme Court held in paragraph no. 7 as above, which we have already adverted to. No doubt, Mr. Vinay Kumar, learned counsel appearing for respondent no. 3 relied on paragraph 8 of the above judgment, which reads as follows:

"8. On the issue, whether the representations filed by the appellant against the Report for the years 1995-1996, 1996-1997 and 1998-1999 need to be taken to their logical conclusion, we are of the view, that since almost two decades have passed by since the aforesaid Annual Confidential Reports were recorded, it would be too late in the day to require the Authorities to adjudicate upon the representations made by the appellant as against the un-communicated Annual Confidential Reports."

7. But, we must notice that the Hon'ble Supreme court has actually proceeded on the basis that if there is non-communication, adverse remarks will be liable to be ignored in the matters of promotion.

8. Learned senior counsel appearing for the petitioner would submit that in the light of the judgment of Hon'ble Supreme Court in Dev Dutt's case, the entries, which were not traditionally considered adverse, have now to be communicated, and it is virtually treated as adverse.

9. Mr. Pradeep Joshi, learned Standing Counsel for the State would submit that in this case, a counter affidavit has been filed on behalf of the State and there is no dispute that the entry was not communicated. In the light of this, we would think that there must be a review DPC held and, depending on the result of the review DPC the orders of promotion will either stand or be liable to be revised.

10. Accordingly, we dispose of the writ petition as follows:

We direct the first respondent to constitute a review DPC and the review DPC will consider the case of the petitioner for promotion and as far as un-communicated remarks are concerned, a decision will be taken in the light of the judgment of Hon'ble Apex Court in '**Dev Dutt Vs. Union of India and others**', reported in (2008) 8 SCC 725, '**Sukhdev Singh vs. Union of India and ors.**', reported in 2013 (9) SCC 566 and '**Prabhu Dayal Khandelwal Vs. Chairman, UPSC and others**', reported in 2015 (6) Supreme 692 in accordance with law, and the orders of promotion of the respondents will be subject to the decision of the review DPC. The review DPC shall be held and be culminated on or before 31.07.2016."

12. Again, the Division Bench of Hon'ble High Court at Nainital in the case of Amar Nath Singh Bisht Vs. State of Uttarakhand and Ors. Writ Petition (SB) No. 101 of 2016 has also held as under:-

“2. Very briefly put, the complaint of the petitioner relates to his not being recommended for promotion to the post of Chief Engineer Level-II. The issue raised is, essentially, covered in favour of the petitioner by virtue of the judgment of this Court passed in Writ Petition (S/B) No. 95 of 2016 Jeewan Chandra Joshi v. State of Uttarakhand. In other words, this is a case, where certain entries in ACR were not communicated to the petitioner. Respondent No. 3 represented by Sri Vinay Kumar stands promoted pursuant to the recommendation of DPC. Respondent No. 3 is junior to the petitioner; equally is the 4th respondent junior to the petitioner. Though served (affidavit of service is filed), the 4th respondent does not appear.

**3. In such circumstances, we follow the judgment passed in Writ Petition (S/B) No. 95 of 2016 Jeewan Chandra Joshi v. State of Uttarakhand**, about the applicability of which, no dispute has been raised by the respondents. The writ petition is allowed. We direct the first respondent to constitute a review DPC and the review DPC will consider the case of the petitioner for promotion to the post of Chief Engineer Level II and as far as un-communicated remarks are concerned, a decision will be taken in the light of the judgments of the Hon'ble Apex Court in Dev Dutt v. Union of India and others reported in (2008) 8 SCC 725, Sukhdev Singh v. Union of India and others reported in 2013 (9) SCC 566 and Prabhu Dayal Khandelwal v. Chairman, UPSC and others reported in 2015(6) Supreme 692 in accordance with law and the orders of promotion of respondent Nos. 3 & 4 will be subject to the decision of the review DPC. The review DPC shall be held and be culminated within a period of six weeks from the date of production of a certified copy of this judgment.”

13.1 In the case-laws described in paragraphs 8 to 12 above, the law is laid down. It is now settled legal position that every annual entry of an employee is to be compulsorily communicated and an opportunity must be provided to the employee to represent against it.

13.2 In the case in hand, admittedly the entries for the years 1997-98, 1998-99, 1999-2000 and 2001-2002 were not communicated to the petitioner and, therefore, he could not get an opportunity to represent against the same.

13.3 It is also clear that the annual entries of the petitioner were downgraded by the Accepting Authority without giving any reasons.

13.4 The non-communication and downgrading of the ACRs have adversely affected the petitioner's chances for promotion and non-communication of ACRs is arbitrary and as such violative of Article 14 of the Constitution.

13.5 By not communicating ACRs to the petitioner and thereby not providing opportunity to the petitioner to make a representation against these entries, there is violation of the principle of fairness, which is the soul of natural justice.

13.6 In view of the judgments described in paragraphs 8 to 12 of this order, the “Uttarakhand Government Servants (Disposal of Representation Against Adverse Annual Confidential Reports and Allied Matters) Rules, 2002 which provides communication of ACR only when it is adverse, becomes arbitrary and hence illegal being violative of Article 14 of the Constitution and, therefore, liable to be ignored.

13.7 As there is no dispute and it is admitted by the respondents that annual entries in respect of the year 1997-98, 1998-99, 1999-2000 and

2001-2002 were not communicated to the petitioner but these annual entries were considered by the DPC which adversely affected his chances for promotion, we are of the opinion that the promotion of the petitioner should be reconsidered and a review DPC must be held.

16. **This Tribunal is, therefore, of the view, in the backdrop of the above narration, that review/ recall applicants do not appear to be necessary parties to the claim petition. Even if it was so, the mistake could not be rectified in review jurisdiction.**

#### **WHETHER CONCEALMENT OF MATERIAL FACTS?**

17. One last question, which arises for consideration of this Tribunal is- Whether concealment of material facts, as alleged by the review/recall applicants, will nullify the order dated 09.10.2017?

18. Ld. Counsel for the review/ recall applicants submitted that the petitioner had full knowledge about his ACR entries for the reporting year 1996-97 to 2005-06, in the year 2010 itself. Petitioner was respondent no.8 in WPSB No. 113/10 Jagdish Kandpal vs. State and others. In the above writ petition, a chart of ACR entries from the year 1996-97 to 2005-2006 was enclosed as Annexure: A 6. Notices of WPSB No. 113/2010 were served upon the petitioner, as has been mentioned in the judgment dated 27.04.2011, rendered by Hon'ble High Court. Petitioner has concealed material facts in his claim petition that he along with other respondents in WPSB No. 113/10 had filed review application No. 300/2011, against the judgment dated 27.04.2011 before Hon'ble High Court. In para 3 of the review application, he has, in clear terms, mentioned the fact that he was served with a notice in writ petition. [*Petitioner submitted in his objections that no notice was served on him*]. Petitioner preferred SLP No. 24709-24710/2011 before Hon'ble Apex Court challenging judgment dated 27.04.2011 in WPSB No. 113/2010 and order dated 18.05.2011 in Review Petition No. 300/11 by Hon'ble High Court. This SLP was filed in the year 2011 itself, as such the petitioner had full knowledge of his ACR entries of 1996-97 to 2005-06 at the time of filing the review application as well as at the time of filing the SLP, as all the



annexures of the writ petition no. 113/2010, including Annexure: No.6, *i.e.* the comparative chart of ACRs was filed before Hon'ble Supreme Court in the SLP filed by the petitioner himself.

It is also the submission of Ld. Counsel for the review/recall applicants that the relief, as prayed for by him in the claim petition should not have been granted as the same amounts to reviewing the judgment of Hon'ble Supreme Court and Hon'ble High Court. Since claim petition was filed much after the judgment dated 27.04.2011, passed in WPSB No. 113/2010 and promotion was granted to the applicants by the recommendation dated 16.04.2012 of the Public Service Commission *w.e.f.* 08.04.2010, after reversion of the promotion of the petitioner, therefore, the review/recall applicants, as also Public Service Commission, ought to have been heard in the claim petition No. 20/NB/DB/2014. According to Ld. Counsel for the review/recall applicants, these facts were already in the knowledge of State Government also, but for the reasons beyond comprehension, the State Govt. did not disclose these facts in the C.A. or in the arguments. It appears that the officer filing the C.A. was under the influence of the petitioner, as he was subordinate to him.

19. Ld. Counsel for the respondents opposed the same. Sri Tribhuwan Chandra Pandey, Ld. Counsel for the petitioner, pointed out that in the objections on behalf of the petitioner, it has been stated that the recall applicants were not necessary parties in the claim petition. According to him, it is incorrect to say that claim petition filed by the petitioner, in this Tribunal, was time barred. The petitioner came to know, for the first time, on 07.08.2013, regarding his Annual Confidential Reports under RTI. Prior to this, the said ACRs were never communicated to him by the department. Even the Tribunal, in its order dated 09.10.2017 has held that the said annual entries were never communicated to the petitioner.

DPC was held on 24.10.2010 for the vacancy of 2007-08 for 19 posts of Deputy Collector, in which 16 posts were for General category

candidates and 03 were for Reserved category candidates and as per recommendation of selection committee, the petitioner was promoted on the post of Deputy Collector, but his promotion was challenged before Hon'ble High Court in WPSB No. 113/2010 and notice of the said writ petition was not served upon the petitioner. The petitioner, therefore, could not contest the WPSB No. 113/10 before Hon'ble High Court. Hence, it is wrong to say that the petitioner had knowledge of the contents of writ petition and this fact is evident from the judgment of Hon'ble High Court, which was passed on 27.04.2011.

The order dated 27.04.2011 came in the knowledge of the petitioner when four persons including the petitioner were reverted, who were promoted to the post of Deputy Collector, on the basis of earlier DPC dated 24.10.2010. Therefore, the order of Hon'ble High court was challenged in Hon'ble Supreme Court in SLP No. 24709-24710/ 2011.

Hon'ble Supreme Court passed an order on 13.07.2017, as follows:

"We have heard learned counsel for the parties.

We do not find any ground to interfere with the impugned order except to direct that the petitioners will not be reverted nor any payment made to them will be recovered back from them on the ground that their promotion in question was not valid.

The special leave petitions are disposed of."

No issue regarding down-gradation of the entries has been resolved by the Hon'ble Court. Neither such issue was raised nor the same was in the knowledge of the petitioner, inasmuch as notice of WPSB No. 113/10 was never served upon the petitioner, according to Sri Tribhuvan Chandra Pandey, Learned Counsel for the petitioner.

When the petitioner came to know about his ACR entries on 07.08.2013, he made representation to the authorities and finally challenged through the claim petition.

Petitioner has further stated that the review/recall applicants have no *locus standi* to recall the order dated 09.10.2017, in which the petitioner had challenged his downgraded annual entries. Petitioner

had legal right to get the notional promotion as per his entitlement. The applicants cannot curtail legal right for getting service benefits by suppressing the petitioner.

According to Ld. Counsel for the petitioner, it is incorrect to say that the petitioner had played fraud upon the Tribunal. The claim petition was filed in the year 2014 and at the time of filing the claim petition, the SLP before the Hon'ble Supreme Court against the judgment dated 27.04.2011 passed in WPSB No. 113/2010 was pending for adjudication, which was disposed of on 13.07.2017. The SLP was not dismissed, but was disposed of with the direction that the petitioners will not be reverted nor any payment made to them will be recovered back from them on the ground that their promotion in question was not valid. Hence, no material facts have been concealed.

The delay in filing the recall application has also been objected on the ground, *inter alia* that the same has been filed after about three years, when orders passed by the Tribunal have been executed by the concerned department. The review/recall applicants, according to the petitioner, are trying to mislead the Tribunal to get unlawful order, which is not sustainable in the eyes of law.

20. Sri Kishore Kumar, Ld. A.P.O. submitted, on the strength of the affidavit filed by Sri Vinod Kumar, the then SDM, Nainital, that the Addl. Chief Secretary (Personnel), Govt. of Uttarakhand, has passed Memorandum/ Order on 19.06.2020, to show that the seniority of the petitioner has been decided in pursuance of Tribunal's direction dated 09.10.2017, whereby a direction was given to hold review DPC. Memorandum/ Order dated 19.06.2020 has given the chronology of events leading to the issuance of such Memorandum/ Order. The Memorandum has also quoted the operative portion of the judgment dated 27.04.2011 passed by Hon'ble High Court in WPSB No. 113/10, Sri Jagdish Kandpal & others vs. Uttarakhand Public Service Commission, as below:

“In the circumstances, the writ petition succeeds. The Commission is directed to apply the marks obtained by the petitioners and respondent Nos. 3 to 11 on the basis of the criteria laid down in its said resolution and thereupon determine inter se merit of the petitioners and the said respondents and give recommendation for promotion to those who have obtained better merit in chronological order. This exercise be completed as quickly as possible but not later than two months from the date of service of a copy of this order upon the Commission. After the above exercise is made, the Commission shall make its appropriate altered recommendation to the State Government. The State Government then shall cancel the promotions given to respondent Nos. 3 to 11 or to so many of them who would not find place in the revised recommendation of the Commission. The State Government shall, at the same time, give promotion to those who are re-recommended by the Commission.”

The Memorandum also quoted operative portion of order dated 19.05.2011, passed in WPSB No. 101/2011, Prakash Chandra Dumka and others vs. State and others, as below:

“Writ petition disposed off with the direction that petitioner may also be considered by Public Service Commission as per judgment passed in WPSB No. 113/2010.”

21. Relying upon the affidavit of Sri Bhupal Singh Manral, Secretary, In-Charge (Personnel), Govt. of Uttarakhand, Ld. A.P.O. submitted that the review/recall applicants have no legal right to challenge/ recall the judgment passed by this Tribunal on 09.10.2017, they being unaffected parties. Sri Kishore Kumar, Learned A.P.O. also submitted that the point of limitation (in filing Claim Petition No. 20/NB/DB/2014) cannot be looked into in review jurisdiction.
22. Assuming, for the sake of arguments, that the submissions of Ld. Counsel for the review/recall applicants are factually correct, still the fact remains that these grounds may be available to the applicants in appellate or writ jurisdiction, but not in review jurisdiction. Knowledge of some adverse/ down-graded ACRs is different from communication of those ACRs by the competent authority. If any employee is given adverse remarks, it is incumbent upon the competent authority to communicate those adverse entries to the employee(s) concerned. Likewise, fair, good, very good and excellent entries are also required to be communicated to all the employees in view of the decisions of Hon'ble Supreme Court, a reference of which has been given by this

Tribunal in the judgment dated 09.10.2017. Un-communicated entries are liable to be ignored.

The claim petition was filed by the petitioner for up-gradation of his ACR and also to give notional promotion against the selection year 2004-05, instead of selection year 2012-13. Further, even if the applicants were necessary parties in the claim petition, the judgment rendered therein, cannot be recalled in review jurisdiction. If remedy was available to the petitioner for upgradation of his ACR entries and he has availed that remedy, what was the wrong in it? He cannot be stopped from taking recourse to legal remedy available to him, in law.

23. On the basis of the above discussion, the Tribunal also does not find material substance in the application of the review/recall applicants under Section 340 Cr.P.C. that, the objections, on oath, by the petitioner to recall application are false and he has committed an act of perjury before the Tribunal by making false statement on oath.

#### **INFERENCE**

24. Granting the relief, as prayed for in the recall application, is beyond the jurisdiction of a Review Court.
25. Even if all the factual grounds taken up in the recall application are taken to be true, the same would not attract review jurisdiction to enable the Tribunal to grant relief to the review/recall applicants.

#### **ORDER**

26. The review/recall application, therefore, fails and is dismissed. In the circumstances, there shall be no order as to costs.

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

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

*DATE: DECEMBER 31, 2021*  
*DEHRADUN*  
*VM*