

GAHC010010042022



**THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

Case No. : WP(C)/367/2022

PRABIR CHANDRA KAKATI
S/O LATE SIBA CHANDRA KAKATI
RESIDENT OF SAGARIKA PATH, PO ZOO ROAD, PS GITANAGAR, DIST
KAMRUP M ASSAM 781024.

VERSUS

THE STATE OF ASSAM AND 6 ORS
REPRESENTED BY ITS CHIEF SECRETARY GOVT. OF ASSAM, DISPUR
GUWAHATI 06

2:THE PRINCIPAL SECRETARY
TO THE GOVT. OF ASSAM
PERSONNEL (A) DEPARTMENT
GOVT. OF ASSAM
DISPUR GUWAHATI 06

3:APPELLATE AUTHORITY
CONSTITUTED UNDER RULE 11 OF ASSAM SERVICES (CONFIDENTIAL
ROLLS) RULES
1990 REPRSENTED BY CHIEF SECRETARY GOVT. OF ASSAM
DISPUR
GUWAHATI 06

4:THE SECRETARY
TO THE GOVT. OF ASSAM
PERSONNEL (A) DEPARTMENT
GOVT. OF ASSAM
DISPUR GUWAHATI 06

5:THE UNION OF INDIA
REPRESENTED BY SECRETARY
MINISTRY OF PERSONNEL PUBLIC GRIEVANCES AND PENSIONS
DEPARTMENT OF PERSONNEL AND TRAINING

NEW DELHI 110011

6:UNION PUBLIC SERVICE COMMISSION
REPRESENTED BY SECRETARY UPSC
DHOLPUR HOUSE
SHAH JAHAN ROAD
NEW DELHI 110069

7:SRI J.B EKKA
PRINCIPAL SECRETARY TO THE GOVT. OF ASSAM
PANCHAYAT AND RURAL DEVELOPMENT
DISPUR GUWAHATI 06

8:SRI.TONMOY PRATIM BORGOHAIN
IAS
SECRETARY TO THE GOVERNMENT OF ASSAM
PERSONNEL DEPARTMENT
DISPUR
GUWAHATI-781006.

9:SMT. PANCHALI KAKATI
ACS
JOINT SECRETARY TO THE GOVERNMENT OF ASSAM
PERSONNEL DEPARTMENT
DISPUR
GUWAHATI-781006

Advocate for the Petitioner : MR. K N CHOUDHURY, SR. ADVOCATE.

Advocate for the Respondent : MR. D. NATH, SR. GOVT. ADVOCATE.

BEFORE
HONOURABLE MR. JUSTICE KARDAK ETE

JUDGMENT

Date : 25-06-2024

Heard Mr. K. N. Choudhury, learned Senior counsel assisted by Mr. M. D. Das and Mr. A. Das, learned counsels for the petitioner. Also heard Mr. D. Nath, learned Additional Senior Government Advocate for the respondent nos. 1 to 4.

2. By filing this petition, the petitioner challenges the manner in which a remark was entered into his Annual Confidential Report (ACR in short) for the

year 2017-2018 which resulted in depriving him from his promotion to the Indian Administrative Service (IAS in short). The petitioner has also assailed the order dated 28.12.2021 by which the prayer for expunging the adverse remarks in his ACR has been rejected. He further assailed and alleged non-communication of full ACR including the overall grading and assessment of integrity to the petitioner.

3. Facts necessary for consideration of the grievance of the petitioner, in nutshell, are that the petitioner was inducted in the Assam Civil Service through the Assam Public Service Commission. He joined his service on 25.05.1992. He was promoted to the cadre of Senior Grade I vide order dated 31.12.2015 and posted as District Development Commissioner, Dhubri. The petitioner was transferred and posted as Chief Executive Officer, Lakhimpur Zilla Parishad vide notification dated 17.02.2016. Thereafter, he was transferred and posted as Chief Executive Officer, Morigaon Zilla Parishad vide notification dated 05.10.2016. The petitioner was Graded in his ACR as "Outstanding" in the year 2016-2017. The service of the petitioner has been recognised by the authorities concerned for his outstanding efforts and many awards and incentives were given by the authorities. According to the petitioner, all those commendation and national awards of the petitioner from 2016 to 2018 given to the petitioner by the Central Government have been ignored by the Reporting Officer, while making the assessment of ACR of the petitioner. While assessing the ACR, the Reporting Officer has not called for special report from the Commissioner of Division and President, Zilla Parishad, which is an indispensable requirement under the relevant notifications (infra).

4. Alleging malafide against the Reporting Authority i.e. the respondent no. 7, it is contended that the facts regarding the institution of Contempt Case (C)

No. 94 of 2018, may have a bearing in recording the critical/adverse remarks in the ACR of the petitioner by the Reporting Authority i.e. the respondent no. 7, who was the then Commissioner & Secretary of the Department. This Court vide order dated 09.02.2018 passed in WP(C)5828 of 2017, issued a direction to the respondent no. 7, who was also the Reporting Officer of the petitioner for the year 2017-2018, to dispose of the representation in connection with the settlement of Moirabari Bi-weekly market under Morigaon Zilla Parishad. The petitioner disposed of the representation of the petitioner in WP(C) No. 5828 of 2017, though the Commissioner i.e. respondent no. 7, was directed to dispose of the representation. As the respondent no. 7 did not dispose of the representation in compliance with the direction of the Court, a contempt case, referred to above, was filed in which the respondent no. 7 was asked to be personally present before the Court along with the petitioner. Therefore, this fact, according to the petitioner, has irked Respondent No. 7 and led him to act against the petitioner by entering an adverse remark into ACR.

5. It is contended that the petitioner submitted his self-assessment report on his ACR for the year 2017-2018 online on 20.06.2018 and it was closed on 28.02.2019 without its acceptance either by its Reporting Authority, Reviewing Authority or Accepting Authority.

6. It is contended that, though as per Rule, the Reporting Officer was required to record his report before 31.07.2018 and within 30.10.2018, vide memo dated 15.09.2018, but no report was reported by the Reporting Officer in the ACR of the petitioner till its closure on 28.02.2019. The Joint Secretary, Personnel Department force forwarded the self-assessment report on 11.12.2018 from the account of Reviewing Authority with the remark "r" as the Reporting Officer did not record his comments within the stipulated period. The

ACR was again force forwarded by the Joint Secretary, Personnel Department from the account of Accepting Authority with the remarks "manually done on 11.12.2018" as the Accepting Authority did not record his comments within the stipulated period. The Reporting Officer recorded his report on the ACR of the petitioner only on 04.05.2019 after completion of the subsequent financial year 2018-2019. The ACR of the petitioner for the year 2017-2018 was again closed on 28.02.2020 without its acceptance either by the Review Authority or Accepting Authority. Subsequently also the Reviewing Officer did not record his view at all in the ACR of the petitioner. The Accepting Authority accepted the report of the Reporting Officer without reviewing the report of the Reporting Officer only on 11.05.2020 after completion of 2 (two) financial years i.e. 2018-19 and 2019-20. According to the petitioner, such recording of the remarks after one year is against the principle of writing the ACR and the adverse/critical remarks recorded are liable to be set aside. The Accepting Officer also accepted the report of the Reporting Officer without looking into the factors required to be followed by the Reporting Officer.

7. The Under Secretary to the Government of Assam, Department of Personnel and Training, has written a letter to the Chief Secretary of Assam on 12.03.2020 for recruitment by promotion to the Assam Segment of Joint Assam, Meghalaya Cadre of IAS from among members of the State Civil Service of Assam for the select list of 2019 against 11 (eleven) posts. The Secretary to the Government of Assam, Personnel (A) Department submitted the proposal for selection of the candidates for the year 2019 from the State Civil Service Officers of Assam for promotion to the IAS of Assam Segment of Assam, Meghalaya joint cadre vide the letter dated 28.10.2020. The ACR of 33 (thirty-three) eligible ACS Officers were forwarded for consideration. The name of the

petitioner was also forwarded along with the other candidates and his name appeared at Serial No. 24 of eligible Officers for promotion to IAS. The Department by his communication dated 28.10.2020 sent the documents including the Check List to the Selection Committee for promotion to IAS for the year 2019. Column 6 of the Check List is in respect of integrity certificate of the eligible officers and the integrity certificate. The Chief Secretary, Assam certified the integrity of the petitioner with reference to the ACR of the petitioner.

8. The petitioner after having come to know about promotion of Assam Civil Service Officers to IAS, submitted an application on 14.06.2021 to furnish the copy of ACR from 2015-16 to 2019-20, adverse remarks, if any, in the ACR along with the documents particularly the minutes of the meeting of the Selection Committee of UPSC for promotion to the IAS from eligible ACS officers. In response to the letter dated 14.06.2021, the ACR of the petitioner for the year 2017-18 was furnished vide memo dated 01.07.2021. In the ACR for the year 2017-18, certain adverse remarks were recorded by the Reporting Officer and the petitioner was graded as 'Good' by the Reporting Officer.

9. On receipt of the letter dated 01.07.2021, the petitioner submitted an application under the Right to Information Act on 06.07.2021, seeking the documents particularly the copy of the letter of Reviewing Officer communicating the critical remarks to the petitioner, copy of supporting documents, if any, furnished by Reporting Officer in support of the critical remarks recorded in the ACR for the year 2017-18, copy of the grading in the ACR for the year 2016-2017, 2018-2019 and 2019-2020 along with other documents. In response to the application submitted by the petitioner on 06.07.2021, the State Public Information Officer, vide his letter dated

07.08.2021, communicated to the petitioner that the Reporting Officer has not furnished any document in connection with his report in the ACR of the petitioner for the year 2017-18.

10. In response to the online application submitted by the petitioner for furnishing the minutes of the meeting of the Selection Committee of UPSC held on 05.03.2021 for preparation of Select list of 2019 for promotion to the IAS (SCS) from eligible Assam Civil Service Officers from 2019, the Under Secretary (AIS) & CPIO, UPSC, vide his letter dated 04.08.2021 furnished the same to the petitioner. The minutes of the meeting of the Selection Committee for preparation of the Select List of the State Civil Services of Assam against the vacancies of 2019 was held on 05.03.2021. The meeting considered the ACR of 5 years of the eligible officers and "Very Good" is the benchmark for selection of officers for promotion to the IAS. But due to the grading of "Good" in the ACR of the petitioner for the year 2017-2018 the Selection Committee found the petitioner unfit.

11. It is contended that before sending the proposal to the UPSC for selection of Officers for promotion of IAS from the eligible Assam Civil Service Officers of the year 2018, the Joint Secretary to the Government of Assam Personnel (A) Department with reference to OM dated 25.04.2011 issued individual letter dated 08.07.2019 to the eligible officers who were in the zone of consideration furnishing the Xerox copy of ACR for the last 10 years enabling the Officers to submit the representation, if any, regarding the entries and the final grading in their ACR's. But no such communication was made in the year 2020 before sending the proposal to UPSC on 28.10.2020 against the vacancies of 2019. The communication dated 08.07.2020 reflects that copies of the ACR for the period prior thereto were being furnished to the officers manually but the petitioner

was never furnished copies of his ACR for the period of 2017-18 manually ever.

12. Being aggrieved with the recording of adverse remarks in the ACR in the year 2017-18 and grading him "Good", the petitioner filed an appeal on 16.07.2021 before the Appellate Authority constituted under Rule 11 of the Assam Services (Confidential Rolls) Rules, 1990 (the Rules, 1990 in short) to expunge the critical remarks and the grading of "Good" recorded in ACR of the petitioner for the year 2017-18.

13. The petitioner had also approached this Court by way of a Writ Petition being W.P.(C) 5445/2021. This Court has disposed of the said Writ Petition at the motion stage by directing to dispose of the appeal dated 16.07.2021 within an outer limit of 45 days. As the aforesaid appeal filed by the petitioner was not taken up for consideration within the aforesaid period, the petitioner approached the Central Administrative Tribunal, Guwahati Bench by way of a O.A. being O.A. No. 040/00328/2021. The Central Administrative Tribunal disposed of the said O.A. filed by the petitioner by directing that the appeal/representation of the petitioner dated 16.07.2021, as ordered by this Court, should be disposed of immediately on receipt of the order passed in the O.A.

14. It is contended that the petitioner has now been furnished with a copy of the order dated 28.12.2021 passed by the Secretary to the Government of Assam in the Personnel (A) Department, whereby, the appeal preferred by the petitioner has been rejected under Rule 12(1) of the Rules, 1990. As per Rule 10, when the confidential report contains adverse or critical remarks, it is required to be communicated by the Reviewing Officer in writing together with a substance of entire confidential report ordinarily within one month of its acceptance by the Accepting Authority. The critical/adverse remarks in the ACR

of the petitioner for the year 2017-18 was not communicated in compliance of Rule 10 of the Rules, 1990. It is contended that the decision of the Apex Court in **Dev Dutt** case (infra) also mandates such a requirement uploading of the ACR of the petitioner in Online SPARROW system by the Personnel Department after completion of the two financial year i.e. 2018-19 and 2019-20 as contended in the letter dated 01.07.2021 is not in conformity of the Rules, 1990 and it cannot be construed as communication or disclosure in compliance of the provision of the Rules, 1990.

15. It is seen that the Electronic Annual Performance appraisal Report (SPARROW) is an online system to facilitate the electronic filing of PAR by officers in a way that is not only user friendly but also allows to fill from anywhere, anytime as per their convenience. PAR filling process starts at the beginning of the financial year. The PAR Manager creates the workflow of the individual officer and the custodian generates the PAR of the respective Organization officers and sends the blank PAR forms to the individual officer. The Officer fills the PAR for further submission to his / her Reporting Officer. The PAR moves from Reporting officer to Reviewing Officer and to Accepting Officer mandatorily marking CR Section a slip.

16. It is the contention of the petitioner that the remarks of the Reporting Officer in the ACR of the petitioner for the year 2017-18 are inconsistent with each other. It is submitted that the Petitioner in Part II (TO BE FILLED BY OFFICER REPORTED UPON) has specified that all the targets for the above schemes have been completed time to time and in Part III (TO BE FILLED BY THE REPORTING OFFICER), the Respondent No. 7 has in fact commented on the Part II as filled by the Petitioner as "I agree with the self-assessment filled by the Officer". The Reporting Officer in his remark in column 3 remarked that

the petitioner is fit for "Fields as well as Secretariat posting". In column 4 in respect of capacity to promote team spirit and work as member of team, the Reporting Officer views are that the petitioner can maintain cordial relation with the superior and subordinate. In column 7, the Reporting Officer reported that the petitioner is fit for induction into IAS. In column 9 in respect of assessment of nature of work turned out, special responsibilities, extenuating or in aggravating circumstances, the Reporting Officer reported that the petitioner is willing to take responsibility even in extenuating or aggravating situations and performs the duty without complaining. Though the Reporting Officer in his report clearly mentioned that the petitioner is fit for induction into IAS but in his report in column 10 in respect of character and value system, in tendering frank and honest advice, trustworthiness and behavioural pattern the Reporting officer remarks that the petitioner is not very reliable. But in column 8 in respect of integrity, the Reporting Officer remarked that nothing adverse was heard. It is submitted that the remarks of the Reporting Officer in Column 2 A (i) to (vi) and 10 are in contradiction to the remarks recorded in column B (vii), C (viii), 3, 4, 7, 8 and 9. The Reporting Officer has not given any cogent reason for the remarks reported in column 10. The instructions appended to the Rules, 1990 and guidelines clearly mentions that in making remarks of reliability and integrity, the Reporting officer should provide specific instances or complaints of dishonestly or corruption having some foundation else a positive assessment should be made. The underlying purpose is that there is objectivity in reporting and cannot be based on the ipse dixit or subjective satisfaction of the reporting officer. But in the instant case, it is contended that the Reporting Officer has not mentioned any instances for the remarks in column 10 and as such the Remarks recorded has no basis and it is required to be expunged.

17. It is contended that the Reporting Officer in column 7 of the petitioner's report recorded that the petitioner is fit for induction into IAS but the Reporting Officer graded him as "Good". The benchmark laid down for nomination to IAS by promotion is that the candidate should have entry of "Very Good" for last five years. It is clear that recording of "Good" in ACR of the petitioner for the year 2017-18 is in contradiction of his report recorded in column 7. The entry of "Good" in ACR of the petitioner for the year 2017-18 itself is an adverse remark because it requires benchmark of "Very Good" for induction into IAS.

18. The Mr. K.N. Choudhury, learned Senior counsel for the petitioner, submits that the initiation of the Contempt case against the Respondent No. 7 has resulted in the adverse remark in the ACR of the Petitioner as the Respondent No. 7 who was Reporting Officer in case of the Petitioner had personal vendetta and personal grievance against the Petitioner for which the Respondent No. 7 has entered adverse remark against the Petitioner in the ACR for the year 2017-2018. It is specifically submitted that no other circumstances arose during the petitioner's tenure as Chief Executive Officer which might impact the Reporting Officer (Respondent No. 7) to record adverse / critical remarks in the ACR of the petitioner. Lack of objectivity in reporting by Respondent No. 7 is reflective of his malafide or even an abuse of power.

19. Mr. K.N. Choudhury, learned Senior counsel, submits that the Accepting Authority accepted the report of the Reporting Officer without reviewing it by the Reviewing Authority and accepted it mechanically on 11.05.2020 i.e. after almost two years without looking into the guidelines and the timeline as laid down by Office Memorandum dated 31.03.2018 and the letter dated 15.09.2018 which were required to be followed by the Reporting Officer. As such the acceptance of the report of Reporting Officer by the Accepting Authority is liable

to be interfered with.

20. The learned Senior counsel, submits that the disclosure certificate kept in the record by the Joint Secretary, Personnel Department, certifying the disclosure of Annual Performance Appraisal Report of 2017-18 to the petitioner is a blatant lie and against the provisions of the Rule. In the certificate there is nothing in which date the APAR was communicated to the petitioner. Further, the certificate of disclosure kept in the record is in contradiction of communication dated 01.07.2021 in which the stand of the department is that it was uploaded in the SPARROW system.

21. The learned Senior counsel, submits that the petitioner has been assessed as "Outstanding" in ACR for the year 2016-17, which clearly reveals that the grading and remarks of the Reporting Officer in ACR of the petitioner for the year 2017-18 was not at all correct and liable to be interfered with. The Reporting Officer has not given any instances and cogent reasons that the petitioner is not very reliable in character and trustworthiness and as such it is liable to be interfered and expunged. The formation of opinion for recording adverse/critical remarks though based on the subjective satisfaction of the Authority but such satisfaction must be based on valid material.

22. He submits that the petitioner was posted as Chief Executive Officer, Morigaon on 15.10.2016. The work of the petitioner during his tenure as Chief Executive Officer, Morigaon Zilla Parishad was under the supervision of Morigaon Zilla Parishad and no adverse report was furnished by the Zilla Parishad. The critical remarks recorded by the Reporting Officer in ACR of the petitioner for the year 2017-2018, while the petitioner was serving as Chief Executive Officer, Morigaon Zilla Parishad, was without consultation and obtaining special report for the period reported upon from the concerned Commissioner of Division and

also from the President of Morigaon Zilla Parishad before writing the report as per Office Memorandum No. AAP.83/96/243 dated 31.05.2007. The Assam Panchayat Act empowered the Zilla Parishad to supervise the works of the Chief Executive Officer under the elected body of Zilla Parishad about the petitioner's integrity, character, trustworthiness and behaviour. As such, the remarks recorded by the Reporting Officer without consultation with the Commissioner of Division and the President of Morigaon Zilla Parishad are liable to be expunged as there is no basis of such adverse remarks.

23. Mr. K.N. Choudhury, learned Senior counsel, submits that all along the service career of the petitioner, no adverse or critical remarks were communicated to him. The ACR of the petitioner for the year 2016-17, 2018-19, 2019-20 were extremely positive and depicts that his performance was outstanding and that the petitioner is an outstanding officer. On the recommendation of the Selection Committee, the petitioner was promoted from Senior Grade I to Selection Grade cadre to Secretary. The promotion to cadre of Secretary is on an assessment of positive merit and ability.

24. Mr. K.N. Choudhury, learned Senior counsel, submits that a bare perusal of the impugned order dated 28.12.2021 would clearly goes to reveal that same was passed in the most mechanical manner and without any application of mind. In fact, the Appellate Authority has not even applied his mind to the relevant facts, rules and guidelines in force and have simply rejected the application on the sole ground that the Reporting Officer was not inclined to change the overall grading of the petitioner. He submits that the appellate authority is cast with a duty to assign reasons for either accepting or rejecting the view of the Reporting Officer, which, in the instant case, the Appellate Authority has miserably failed. He submits that the Appellate Authority in

exercise of appellate power ought to have verified whether any such materials were there on record which justify the recording of adverse remarks by the Reporting Officer. If there are no materials, the Appellate Authority has the power to expunge the remarks. In the instant case, there was nothing on record which could have been resulted in recording of the adverse remarks against the petitioner. Therefore, he submits that the incorporation of the impugned adverse remarks has been done in most arbitrary, illegal and unreasonable manner and there is no reasonable justification for passing the impugned order dated 28.12.2021.

25. Learned Senior counsel submits that the petitioner has been most illegally sought to be deprived from the due promotion by the manner in which the impugned adverse remarks has been incorporated in the ACR for the year 2017-2018 and the seal of approval to the same by the Appellate Authority would restrict the participation of the petitioner into the IAS. The promotion to IAS is dependent on the remarks attributed to the ACR of the petitioner for the year 2017 to 2018. That when a time line is prescribed for doing an act by the Rule and performance of that act otherwise which does not disclose any discernible principle is arbitrary. The deviation of the Rule and undue delay in recording the remarks is against the provisions of the Rule and the failure to follow the Rule is a determining factor for interference. Inordinate delay in recording the remarks is a ground to expunge the adverse remarks. Therefore, Mr. Choudhury, learned Senior counsel, prays for a direction to set aside the adverse remarks recorded by the Reporting Officer in the ACR of the petitioner for the year 2017-18 along with the grading given in the said ACR as "Good" and also to set aside the impugned order dated 28.12.2021 passed by the Appellate Authority. He further prayed that a direction may be issued to the respondent authorities to upgrade

the ACR of the petitioner for the year 2017-18 and to attribute correct remarks therein, against the adverse remarks after its expunction and to upgrade the petitioner to "Outstanding" and or not to consider the ACR of the petitioner for the year 2017-18, while considering his case for promotion to the Assam Segment of the IAS Assam Meghalaya Joint Cadre and for a direction to nominate/promote the petitioner to the post of IAS of Assam Meghalaya Joint Cadre.

26. Mr K.N. Choudhury, learned Senior Counsel, in support of his submissions, has placed reliance on the following judgments:

- (i). **Dev Dutt vs. Union of India and Ors.**, reported in **(2008) 8 SCC 725**.
- (ii). **Sukhdev Singh vs. Union of India and Ors.**, reported in **(2013) 9 SCC 566**.

27. Mr. D. Nath, learned Additional Senior Government Advocate, while referring to the affidavit filed on behalf of the respondent nos. 1, 2, 3 & 4, submits that the online ACR Management System for the ACS Officers has been implemented w.e.f. the Assessment year 2017-2018. Accordingly, an Office Memorandum dated 31.03.2018 has been issued informing all the concerned officers to take necessary action i.e. submission of self-appraisal/ Recording/ Reviewing/ Accepting the ACRS. Accordingly, a timeline has also been fixed. Though the submission of self - appraisal is fixed w.e.f. 16th May to 15th June, 2018, the petitioner has submitted his self-appraisal on 20.06.2018.

28. He submits that the online ACR for 2017-2018 was closed on 28.02.2019. The Reporting authority recorded the ACR on 04.05.2019 online. Since the reviewing authority has demitted office, the Joint Secretary, Personnel, force forwarded the ACR from the reviewing authority to the Accepting Authority for

reviewing and acceptance on 06.06.2019 in the online system. However, as the Accepting authority is not a part of the online ACR management system, the ACR was sent to the Accepting Authority manually for both review and acceptance. The Accepting Authority reviewed and accepted the ACR and signed on 11.05.2020. The manually reviewed and accepted part of the ACR was uploaded in the ACR management system on 06.10.2020 and the ACR was force forwarded on the same date for disclosing the ACR to the officer. The ACR was available on the portal for submission of representation, if any, by the officer from 06.10.2020 till 31.12.2020, i.e., for a period of 86 days. The ACR was closed automatically by the system on 01.01.2021. The SPARROW web portal for ACR erroneously displayed the date of force forwarding from the Reviewing authority as 11.12.2018 instead of 06.06.2019. The portal also erroneously displayed the date of uploading of the manually reviewed and accepted ACR and force forwarding of the same to the disclosure stage as 11.12.2018 instead of 06.10.2020. Hence, the copy of the ACR forwarded to the Petitioner in response to his application had carried the incorrect dates. The error was pointed out to NIC, Govt. of India, who maintains the portal, vide email dated 12.11.2021. Subsequently, they have rectified the error and the portal is now displaying the correct dates of 06.06.2019 and 06.10.2020 respectively. Similar cases, showing the fast-forwarding date erroneously as 11.12.2018, has also been detected in cases of some other officers.

29. Mr. D. Nath, learned Senior Government Advocate, submits that it is a fact that individual letters and copies of ACRs were sent to officers in the zone of consideration for promotion to the IAS for the select year 2018 to enable the officers to submit their representation against adverse remarks, if any. However, the practice was discontinued from the select year 2019. He submits that Para 2

(ix) of the O.M No. AAP.234/2010/11 dated 25.04.2011, which is cited by the petitioner, does not speak of providing copies of ACRs of the reporting period 2008-09 and after to the officers in the zone of consideration.

30. Mr. D. Nath, learned Senior Government Advocate, submits that the Reporting officer, Dr. J.B Ekka, IAS, respondent No. 7, was requested to offer his views on the representation vide letter No. AAP. 109/2019/37 dated 15.09.2021 and was reminded again vide letter No. AAP.109/2019/63 dated 28.10.2021. After receipt of the reply from respondent No. 7, clarification was sought on the reply vide letter No. AAP.109/2019/65 dated 18.11.2021. Further, clarification was again sought from him vide letter No. AAP.109/2019/68 dated 17.12.2021.

31. Mr. D. Nath, learned Senior Government Advocate, submits that for the ACR of the petitioner for the year 2017-18 the online disclosure in the SPARROW portal was done on 06.10.2020 by the Joint Secretary, Personnel, after the comment of the reviewing and the accepting authority was uploaded on the same date. This is as per the provision of Rule 10 of the Rules, 1990, which allows for disclosure. He submits that the appellate authority rejected the petition after considering all the relevant facts related to it. The order dated 28.12.2021 contains all relevant reasons as to why the petition was rejected.

32. Mr. D. Nath, learned Senior Government Advocate, in support of his submissions, has placed reliance on the following judgments:

- (i). **Dalpat Abasaheb Solunke and Ors. vs. Dr. B. S. Mahajan and Ors.**, reported in **(1990) 1 SCC 305**.
- (ii). **Prabodh Sagar vs. Punjab State Electricity Board and Ors.**, reported in **(2000) 5 SCC 630**.
- (iii). **Union of India and Ors. vs. Ashok Kumar and Ors.**, reported in

(2005) 8 SCC 760.

(iv). **Rajneesh Khajuria vs. Wockhardt Limited and Anr.**, reported in **(2020) 3 SCC 86.**

(v). **Union Public Service Commission vs. M. Sathiya Priya and Ors.**, reported in **(2018) 15 SCC 796.**

33. I have considered the submissions of the learned counsel for the parties and examined the materials available on record.

34. As noted in the beginning, the grievance of the writ petitioner is against the manner in which a remark was entered into his ACR and graded as "Good" for the year 2017-2018 by the Reporting Authority, respondent no. 7, which resulted in depriving him from his promotion to the Indian Administrative Service. The petitioner alleges *malafide* against respondent no. 7. He alleges that that the adverse remarks has not been communicated to him within the relevant period as required under the law. The petitioner also challenges the action of the respondent authorities alleging violation of relevant rules, notifications which regulates the assessment of the ACR of the petitioner and the impugned order dated 28.12.2021 passed by the Appellate Authority, whereby, the prayer of the petitioner for expunging the adverse remarks in his ACR has been rejected.

35. To analyse and appreciate the grievances of the petitioner, this Court deem it apposite to refer and consider the relevant rules and notifications.

36. The Government of Assam framed the Rules, 1990, for writing and maintenance of the confidential report of the employees of the Government of Assam. Rule 5 of the Rules, 1990 provides the procedure for writing the confidential reports. Rule 5 (1) stipulates that confidential report of every

employee shall be written for each financial year, ordinarily within two months of the close of the said year at the latest. Rule 6 provides that the confidential report shall be reviewed by Reviewing Authority ordinarily within one months of its being written. Rule 7 provides that the confidential report, after review, shall be accepted with such modification as may be considered necessary and countersigned by Accepting Authority ordinarily within one month of its review. Rule 9 provides that the Reporting / Reviewing and Accepting of the confidential reports should be completed ordinarily within three months of the close of the Financial Year.

37. Most importantly, Rule 10 of the Rules, 1990 stipulates communication of adverse remarks and provides that "Where a confidential report on an employee contains an adverse or critical remarks, it shall be communicated to him by the Reviewing Officer in writing together with substance of entire confidential report ordinarily within one month of its acceptance by the Accepting Authority when all the three authorities are in the same station. When the three authorities are in different stations, the communication of adverse remark may be made by the Controlling Officer / head of the office after acceptance of the report. In either case, a certificate to the effect that the adverse remarks has been communicated to the person concerned shall be recorded in the ACR before it is sent to safe custody.

38. For maintenance and preparation of Annual Performance Appraisal Report and communication of all entries for fairness, a notification has been issued vide memo no. AAP. 234/ 2010/11 dated 25.04.2011 following the judgment of Hon'ble Supreme Court in the case of **Dev Dutt** (Supra). In the said notification, it is clearly mentioned that the full APAR including the overall grading and assessment of integrity shall be communicated to the concerned

officer after the report is complete and the concerned officer shall be given an opportunity to make representation against the entries and the final grading given in the report. Clause 3 of the notification specified the competent authority and the competent authority is also empowered to modify the APAR.

39. An Office Memorandum No. AAP. 120/2016/41 dated 31.03.2018 has been issued by the Personnel Department, Govt. of Assam, specifying the timeline for writing, reviewing and accepting the ACR which are as follows:

- (a). For Reporting / Recording Authority, the timeline is 16th June to 31st July (45 days).
- (b). For reviewing Authority, the timeline is 1st of August to 15th September (45 days).
- (c). For Acceptance authority, the timeline is 16th September to 31st October (45 days).
- (d). CR Section to disclose, the timeline as 1st November to 30th November and
- (e). Officer Disclosure / Representation (if any), the timeline is 1st to the 15th of December.
- (f). Closure, 28th February.

40. The Secretary to the Government of Assam, Personnel Department, issued a notification vide Memo No. AAP.120/2016/53 dated 15.09.2018 whereby it was informed that all ACS officers were required to complete the Self-Assessment and submit their ACR's within 30.09.2018. It was further directed that if any officer fails to submit the Self-Assessment within the aforesaid time limit in such case the ACR will be force forwarded to the reporting authority who will further send the ACR with comments to higher authority within 30.10.2018.

41. The Commissioner & Secretary to the Government of Assam, Personnel (A) Department, issued an Office Memorandum No. AAP. 83/96/243 dated

31.05.2007 laying down the guidelines for recording, reviewing and accepting of ACR in respect of Chief Executive Officer of Zilla Parishad. In the notification, the authority for reporting, reviewing and accepting has been laid down. The Commissioner & Secretary P&RD Department will be the Reporting Authority, Chief Secretary, Assam is the Reviewing Authority in respect of Chief Executive Officer. It is clearly mentioned that the Reporting Authority shall obtain special report for the period reported upon from the concerned Commissioner of Division and also from the President Zilla Parishad before writing the report.

42. As per Rule 10 of the Services Rules, 1990, when the confidential report contains adverse or critical remarks, it is required to be communicated by the Reviewing Officer in writing together with a substance of entire confidential report ordinarily within one month of its acceptance by the Accepting Authority.

43. Records of report reveals that in Part II, it is specified that all the targets for the above schemes have been completed time to time and in Part III, the Respondent No. 7 has in fact commented on the Part II as filled by the Petitioner as "I agree with the self-assessment filled by the Officer". The Reporting Officer in his remark in column 3 remarked that the petitioner is fit for "Field as well as Secretariat posting". In column 4 in respect of capacity to promote team spirit and work as member of team, the Reporting Officer views are that the petitioner can maintain cordial relation with the superior and subordinate. In column 7, the Reporting Officer reported that the petitioner is fit for induction into IAS. In column 9 in respect of assessment of nature of work turned out, special responsibilities, extenuating or in aggravating circumstances, the Reporting Officer reported that the petitioner is willing to take responsibility even in extenuating or aggravating situations and performs the duty without complaining. Though the Reporting Officer in his report clearly mentioned that

the petitioner is fit for induction into IAS but in his report in column 10 in respect of character and value system, in tendering frank and honest advice, trustworthiness and behavioural pattern the Reporting officer remarks that the petitioner is not very reliable. But in column 8 in respect of integrity, the Reporting Officer remarked that nothing adverse was heard. The remarks of the Reporting Officer in Column 2 A (i) to (vi) and 10 are in contradiction to the remarks recorded in column B (vii), C (viii), 3, 4, 7, 8 and 9. The Reporting Officer has not given any cogent reason for the remarks reported in column 10.

44. The instructions appended to the Rules, 1990 and the guidelines clearly mentions that in making remarks of reliability and integrity, the Reporting officer should provide specific instances or complaints of dishonesty or corruption having some foundation else a positive assessment should be made. It appears that the underlying purpose is that there is objectivity in reporting and cannot be based on the subjective satisfaction of the reporting officer. The Reporting Officer, in the case in hand, appears to have not mentioned any instances for the remarks in column 10.

45. It is noticed that the Reporting Officer in column 7 of the petitioner's report recorded that the petitioner is fit for induction into IAS but the Reporting Officer graded him as "Good". The benchmark laid down for nomination to IAS by promotion is that the candidate should have entry of "Very Good" for last five years. It is clear that recording of "Good" in ACR of the petitioner for the year 2017-18 is in contradiction of his report recorded in column 7. The entry of "Good" in ACR of the petitioner for the year 2017-18 itself would be an adverse remark because it requires benchmark of "Very Good" for induction into IAS.

46. As noted above, the Electronic Annual Performance appraisal Report (SPARROW) is an online system to facilitate the electronic filing of PAR by

officers in a way that is not only user friendly but also allows to fill from anywhere, anytime as per their convenience. PAR filling process starts at the beginning of the financial year. The PAR Manager creates the workflow of the individual officer and the custodian generates the PAR of the respective Organization officers and sends the blank PAR forms to the individual officer. The Officer fills the PAR for further submission to his / her Reporting Officer. The PAR moves from Reporting officer to Reviewing Officer and to Accepting Officer mandatorily marking CR Section a slip.

47. The President of Zilla Parishad exercises administrative, supervision over the Chief Executive Officer. The service of the petitioner was placed by the Government under the disposal of Zilla Parishad. The petitioner was posted as Chief Executive Officer, Morigaon on 15.10.2016. The works of the petitioner during his tenure as Chief Executive Officer, Morigaon Zilla Parishad was under the supervision of Morigaon Zilla Parishad and no adverse report was furnished by the Zilla Parishad. The critical remarks recorded by the Reporting Officer in ACR of the petitioner for the year 2017-2018, while the petitioner was serving as Chief Executive Officer, Morigaon Zilla Parishad was without consultation and obtaining special report for the period reported upon from the concerned Commissioner of Division and also from the President of Morigaon Zilla Parishad before writing the report as per Office Memorandum dated 31.05.2007. The Zilla Parishad supervises the works of the Chief Executive Officer under the elected body of Zilla Parishad about the petitioner's integrity, character, trustworthiness and behaviour. As such, the remarks recorded by the Reporting Officer without consultation with the Commissioner of Division and the President of Morigaon Zilla Parishad is not tenable.

48. It is noted that the online ACR Management System for the ACS Officers

has been implemented w.e.f. the Assessment year 2017-2018. Accordingly, an Office Memorandum dated 31.03.2018 has been issued informing all the concerned officers to take necessary action i.e. submission of self-appraisal/ Recording/ Reviewing/ Accepting the ACES. Accordingly, a timeline has also been fixed. The petitioner has submitted his self-appraisal on 20.06.2018.

49. It is seen that the online ACR for 2017-2018 was closed on 28.02.2019. The Reporting authority recorded the ACR on 04.05.2019 online. The Joint Secretary, Personnel, force forwarded the ACR from the reviewing authority to the Accepting Authority for reviewing and acceptance on 06.06.2019 in the online system. As the Accepting authority was not a part of the online ACR management system, the ACR was sent to the Accepting Authority manually for both review and acceptance. The Accepting Authority reviewed and accepted the ACR and signed on 11.05.2020. The manually reviewed and accepted part of the ACR was uploaded in the ACR management system on 06.10.2020 and the ACR was force forwarded on the same date for disclosing the ACR to the officer. The ACR was available on the portal 06.10.2020 till 31.12.2020.

50. It is stated by the Respondent authorities that the SPARROW web portal for ACR erroneously displayed the date of force forwarding from the Reviewing authority as 11.12.2018 instead of 06.06.2019. The portal also erroneously displayed the date of uploading of the manually reviewed and accepted ACR and force forwarding of the same to the disclosure stage as 11.12.2018 instead of 06.10.2020. Hence, the copy of the ACR forwarded to the Petitioner in response to his application had carried the incorrect dates. The error was pointed out to NIC, Govt. of India, who maintains the portal, vide email dated 12.11.2021. Subsequently, they have rectified the error and the portal is now displaying the correct dates of 06.06.2019 and 06.10.2020 respectively. It is informed that

similar cases, showing the fast-forwarding date erroneously as 11.12.2018, has also been detected in cases of some other officers. On careful consideration, I find that dates of force forwarding appears to be incorrectly displayed as 11.12.2018 and subsequently corrected. Such wrong display which has been corrected subsequently would not have, in my view, caused any prejudice to the petitioner.

51. It is noted that the practice of providing copies of ACR manually has been discontinued from 2019. Record reveals that the online disclosure in the SPARROW portal of ACR of the petitioner for the year 2017-18 was done on 06.10.2020 by the Joint Secretary, Personnel, after the comment of the reviewing and the accepting authority was uploaded on the same date with the certificate of disclosure which is, in my view, as per the provision of Rule 10 of the Rules, 1990. Therefore, in my considered view, the ACR was communicated/disclosed to the petitioner.

52. On perusal of the impugned order dated 28.12.2021 whereby, the appellate authority has rejected the representation for expunction of the critical remarks against the petitioner, goes to show that the relevant facts and procedure provided under the applicable notifications for assessment of ACR have not been taken into consideration by the authority. It is seen that no report was obtained either from the Commissioner of Division or the President of Zilla Parishad. The critical remarks recorded by the Reporting Officer in ACR of the petitioner for the year 2017-2018, while the petitioner was serving as Chief Executive Officer, Morigaon Zilla Parishad was without consultation and obtaining special report for the period reported upon from the concerned Commissioner of Division and also from the President of Morigaon Zilla Parishad before writing the report as per Office Memorandum dated 31.05.2007. The Zilla

Parishad supervises the works of the Chief Executive Officer under the Zilla Parishad about the petitioner's integrity, character, trustworthiness and behaviour. As such, the remarks recorded by the Reporting Officer without consultation with the Commissioner of Division and the President of Morigaon Zilla Parishad is required to be expunged as there is no basis of such adverse remarks. Thus, I am of the considered view that procedural safeguard provided to the Petitioner has not been complied with by the respondent authorities.

53. The grading of "Good" of the ACR may not be adverse in all cases. However, in the present case, grading of "Good" in the ACR of the petitioner for the year 2017-18, would be adverse as the benchmark is "Very Good" for consideration for promotion to the IAS and such grading has resultantly rendered the petitioner unfit for promotion.

54. Although, the learned senior counsel has strenuously argued alleging malafide against the Reporting authority, Respondent No. 7, but the contextual facts negate such an allegation. Hon'ble Supreme court has observed that the expression "mala fide" is not meaningless jargon and it has its proper connotation. Malice or mala fides can only be appreciated from the records of the case in the facts of each case. There cannot possibly be any set guidelines in regard to the proof of mala fides. Mala fides, where it is alleged, depends upon its own facts and circumstances. There must be factual support pertaining to the allegations of mala fides. Mere use of the word "mala fide" by the petitioner would not by itself make the petition entertainable. The Court must scan the factual aspect and come to its own conclusion. In the present case, except an attempt to link up the contempt proceedings referred herein above, there is no other materials on record to show such act of malafide on the part of respondent No. 7. which would clothe the court to come to a conclusion of mala

fide without there being any basic material. Therefore, no malafide is established against the respondent No. 7. It is well settled that burden of establishing malafide is very heavy on the person who alleges it. The allegations of malafides are often more easily made than proved, and very seriousness of such allegations demands proof of a high order of credibility. Herein, in the present case the petitioner has not discharged that onus.

55. Having considered the matter in its entirety, I am of the view that the manner in which a remark was entered into ACR of the petitioner and graded as "Good" for the year 2017-2018 by the Reporting Authority which resulted in depriving him from his promotion to the Indian Administrative Service, is in violation of relevant office memorandum referred to herein above, which regulates the assessment of the ACR of the petitioner. The Appellate authority has not taken into consideration of the relevant facts and notifications while passing the impugned order dated 28.12.2021, whereby, the prayer of the petitioner for expunging the adverse remarks in his ACR has been rejected and as such is not sustainable. However, I am of the view that no *malafide* against the Reporting Authority i.e. the respondent No.7 is established. Further, the remarks, considered adverse or critical in the facts of the present case, has been communicated/disclosed to the petitioner within the relevant period as required under the law, albeit not communicated by Reviewing authority.

56. Now, this court would refer to the judgements of the Hon'ble Supreme Court, relied on by the parties.

57. In the case of **Dev Dutt (Supra)**, the Hon'ble Supreme Court, has held which is reproduced herein below:

"13. In our opinion, every entry (and not merely a poor or adverse entry) relating to an employee under the State or an instrumentality of the State,

whether in civil, judicial, police or other service (except the military) must be communicated to him, within a reasonable period, and it makes no difference whether there is a benchmark or not. Even if there is no benchmark, non-communication of an entry may adversely affect the employee's chances of promotion (or getting some other benefit), because when comparative merit is being considered for promotion (or some other benefit) a person having a "good" or "average" or "fair" entry certainly has less chances of being selected than a person having a "very good" or "outstanding" entry.

14. In most services there is a gradation of entries, which is usually as follows:

(1) Outstanding

(ii) Very Good

(iii) Good

(iv) Average

(v) Fair

(vi) Poor

A person getting any of the entries at Items (ii) to (vi) should be communicated the entry so that he has an opportunity of making a representation praying for its upgradation, and such a representation must be decided fairly and within a reasonable period by the authority concerned.

15. If we hold that only "poor" entry is to be communicated, the consequences may be that persons getting "fair", "average", "good" or "very good" entries will not be able to represent for its upgradation, and this may subsequently adversely affect their chances of promotion (or get some other benefit).

16. In our opinion if the office memorandum dated 10/11-9-1987, is interpreted to mean that only adverse entries (i.e. "poor" entry) need to be communicated and not "fair", "average" or "good" entries, it would become arbitrary (and hence illegal) since it may adversely affect the incumbent's chances of promotion, or to get some other benefit. For example, if the benchmark is that an incumbent must have "very good" entries in the last five years, then if he has "very good" (or even "outstanding") entries for four years, a "good" entry for only one year may yet make him ineligible for promotion. This "good" entry may be due to the personal pique of his superior, or because the superior asked him to do something wrong which the incumbent refused, or because the incumbent refused to do sycophancy of his superior, or because of caste or communal prejudice, or to for some other extraneous consideration.

17. In our opinion, every entry in the ACR of a public servant must be communicated to him within a reasonable period, whether it is a poor, fair, average, good or very good entry. This is because non-communication of such

*an entry may adversely affect the employee in two ways: (1) had the entry been communicated to him he would know about the assessment of his work and conduct by his superiors, which would enable him to improve his work in future; (2) he would have an opportunity of making a representation against the entry if he feels it is unjustified, and pray for its upgradation. Hence, non-communication of an entry is arbitrary, and it has been held by the Constitution Bench decision of this Court in *Maneka Gandhi v. Union of India* that arbitrariness violates Article 14 of the Constitution.*

18. 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.

58. In **Sukhdev Singh (Supra)**, the Hon'ble Supreme Court, has held which is reproduced herein below:

*“7. A three-Judge Bench of this Court in *Abhijit Ghosh Dastidar v. Union of India* followed Dev Dutt. In para 8 of the Report this Court with reference to the case under consideration held as under:*

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 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 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 case, SCC p. 738, para 41) 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.”

9. 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.

10. Insofar as the present case is concerned, we are informed that the appellant has required to be done. The civil appeal is disposed of with no order as to costs. However, it will be open to the appellant to make a representation to the authorities concerned for retrospective promotion in view of the legal position stated by us. If such a representation is made by the appellant, the same shall be considered by the authorities concerned appropriately in accordance with law.

59. In **Dalpat Abasaheb Solunke (Supra)**, the Hon'ble Supreme Court, has held which is reproduced herein below:

“12. It will thus appear that apart from the fact that the High Court has rolled the cases of the two appointees in one, though their appointments are not assailable on the same grounds, the court has also found it necessary to sit in appeal over the decision of the Selection Committee and to embark upon deciding the relative merits of the candidates. It is needless to emphasise that it is not the function of the court to hear appeals over the decisions of the Selection Committees and to scrutinize the relative merits of the candidates. Whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject. The court has no such expertise. The decision of the Selection Committee can be interfered with only on limited grounds, such as illegality or patent material irregularity in the constitution of the Committee or its procedure vitiating the selection, or proved mala fides affecting the selection etc. It is not disputed that in the present case the University had constituted the Committee in due compliance with the relevant statutes. The Committee consisted of

experts and it selected the candidates after going through all the relevant material before it. In sitting in appeal over the selection so made and in setting it aside on the ground of the so called comparative merits of the candidates as assessed by the court, the High Court went wrong and exceeded its jurisdiction."

60. In **Prabodh Sagar (Supra)**, the Hon'ble Supreme Court, has held which is reproduced herein below:

"13. As noted above, the High Court has not highlighted this aspect of the matter, though the same was brought to the notice of the High Court, we do not know for what reasons, neither do we intend to delve into it but the fact remains that the comment of the learned advocate appearing for the Board during the course of hearing before this Court that the litigious spirit of the petitioner has, in fact, brought into effect the exercise of jurisdiction of the writ court to a ludicrous extent. We do find some justification in the criticism of the learned advocate for the Board vis-à-vis the conduct of the appellant- petitioner herein. The petitioner has been, as noted above, from 1989onwards engaged himself in the law courts rather than exerting himself in an effort to improve his capability as the employee of the Board so that the Board and the State obtain maximum benefit from out of the services of the appellant-petitioner but unfortunately his litigious spirit prevailed upon him and as noticed above we do find some justification as regards the comment made by the learned advocate appearing for the Board. Mala fides have been alleged against the statutory Board (Punjab State Electricity Board) but the contextual facts negate such an allegation. Incidentally, be it noted that the expression "mala fide" is not meaningless jargon and it has its proper connotation. Malice or mala fides can only be appreciated from the

records of the case in the facts of each case. There cannot possibly be any set guidelines in regard to the proof of mala fides. Mala fides, where it is alleged, depends upon its own facts and circumstances. We ourselves feel it expedient to record that the petitioner has become more of a liability than an asset and in the event of there being such a situation vis-a-vis an employee, the employer will be within his liberty to take appropriate steps including the cessation of relationship between the employer and the employee. The service conditions of the Board's employees also provide for voluntary (sic compulsory) retirement, a person of the nature of the petitioner, as more fully detailed hereinbefore, cannot possibly be given any redress against the order of the Board for voluntary retirement. There must be factual support pertaining to the allegations of mala fides, unfortunately there is none. Mere user of the word "mala fide" by the petitioner would not by itself make the petition entertainable. The Court must scan the factual aspect and come to its own conclusion i.e. exactly what the High Court has done and that is the reason why the narration has been noted in this judgment in extenso. Tampering of the annual confidential rolls has been alleged but there is no evidence in regard thereto or even to link up the two private respondents therewith. While it is true that the earlier relationship between an employer and employee or between the employees was that of mutual trust, confidence or welfare, presently the situation in general stands polluted and may be even one degree higher than the pollution of the environment, but that does not however clothe the court to come to a conclusion of mala fide without there being any basic evidence being made available to the court.

61. In **Ashok Kumar (Supra)**, the Hon'ble Supreme Court, has held which is reproduced herein below:

“21. Doubtless, he who seeks to establish the charge of bad faith, an abuse or a misuse by the authority of its powers. While the indirect motive or purpose, or bad faith or personal ill will is not to be held established except on clear proof thereof, it is obviously difficult to establish the state of a man's mind, for that is what the employee has to establish in this case, though this may sometimes be done. The difficulty is not lessened when one has to establish that a person apparently acting on the legitimate exercise of power has, in fact, been acting mala fide in the sense of pursuing an illegitimate aim. It is not the law that mala fides in the sense of improper motive should be established only by direct evidence. But it must be discernible from the order impugned or must be shown from the established surrounding factors which preceded the order. If bad faith would vitiate the order, the same can, in our opinion, be deduced as a reasonable and inescapable inference from proved facts. (S. Pratap Singh v. State of Punjab.) It cannot be overlooked that the burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility. As noted by this Court in E.P. Royappa v. State of T.N.3 courts would be slow to draw dubious inferences from incomplete facts placed before them by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration.”

62. In **Rajneesh Khajuria (Supra)**, the Hon'ble Supreme Court, has held which is reproduced herein below:

“16. The act of transfer can be unfair labour practice if the transfer is actuated by mala fide. The allegations of mala fides have two facets one malice in law and the other being malice in fact. The challenge to the transfer is based upon malice in fact as it is an action taken by the employer on account of two officers present in Conference. In a judgment in State of Bihar v. P.P. Sharma, this Court held that mala fide means want of good faith, personal bias, grudge, oblique or improper motive or ulterior purpose. The plea of mala fides involves two questions, namely (i) whether there is a personal bias or an oblique motive, and (ii) whether

the administrative action is contrary to the objects, requirements and conditions of a valid exercise of administrative power. As far as second aspect is concerned, there is a power of transfer vested in the employer in terms of letter of appointment. Even in terms of the provisions of the Act, the transfer by itself cannot be said to be an act of unfair labour practice unless it is actuated by mala fides. Therefore, to sustain a plea of mala fides, there has to be an element of personal bias or an oblique motive. This Court held as under:

"50. Mala fides means want of good faith, personal bias, grudge, oblique or improper motive or ulterior purpose. The administrative action must be said to be done in good faith, if it is in fact done honestly, whether it is done negligently or not. An act done honestly is deemed to have been done in good faith. An administrative authority must, therefore, act in a bona fide manner and should never act for an improper motive or ulterior purposes or contrary to the requirements of the statute, or the basis of the circumstances contemplated by law, or improperly exercised discretion to achieve some ulterior purpose. The determination of a plea of mala fides involves two questions, namely (i) whether there is a personal bias or an oblique motive, and (ii) whether the administrative action is contrary to the objects, requirements and conditions of a valid exercise of administrative power.

*51. The action taken must, therefore, be proved to have been made mala fide for such considerations. Mere assertion or a vague or bald statement is not sufficient. It must be demonstrated either by admitted or proved facts and circumstances obtainable in a given case. If it is established that the action has been taken mala fide for any such considerations or by fraud on power or colourable exercise of power, it cannot be allowed to stand. **

59. Malice in law could be inferred from doing of wrongful act intentionally without any just cause or excuse or without there being reasonable relation to the purpose of the exercise of statutory power. Malice in law is not established from the omission to consider some documents said to be relevant to the accused. Equally reporting the commission of a crime to the Station House Officer, cannot be held to be a colourable exercise of power with bad faith or fraud on power. It may be honest and bona fide exercise of power. There are no grounds made out or shown to us that the first

information report was not lodged in good faith. State of Haryana v. Bhajan Lals is an authority for the proposition that existence of deep seated political vendetta is not a ground to quash the FIR. Therein despite the attempt by the respondent to prove by affidavit evidence corroborated by documents of the mala fides and even on facts as alleged no offence was committed, this Court declined to go into those allegations and relegated the dispute for investigation. Unhesitatingly, I hold that the findings of the High Court that FIR gets vitiated by the mala fides of the Administrator and the charge-sheets are the results of the mala fides of the informant or investigator, to say the least, is fantastic and obvious gross error of law."

23. *We do not find that the appellant has laid any foundation to allege a malice in law. As mentioned in the judgments referred to above, malice in law would be something which is done without lawful excuse or an act done wrongfully and wilfully without reasonable or probable cause. There is power of transfer in the letter of appointment. The appellant has stayed at Sagar for almost 20 years. If an employee is transferred after 20 years and that to the place of headquarters of a company, it cannot be said that the act of transfer was done without lawful excuse. No inference can be drawn that an act was done from ill feeling or spite."*
63. In **M. Sathiya Priya (Supra)**, the Hon'ble Supreme Court, has held which is reproduced herein below:

"15. CAT and the High Court have mainly relied on the grading given in the Annual Confidential Reports of the officers at the State level while coming to their conclusion. But, in terms of the Regulations and the Guidelines framed therein, for categorising the officers, the Selection Committee was required to consider the overall relative assessment of the service records of each of the eligible officers. The Selection Committee is not guided merely by the grading recorded in the Annual Confidential Reports but makes its own assessment on the basis of the quality of the officer as indicated in various columns recorded by the Reporting/Reviewing/Accepting Authority thereunder. In other words, the Selection Committee is not required to compulsorily accept the gradings given in the Annual Confidential Reports as it would amount to merely acting as a post office and the whole process would be nothing but a farce. The grading recorded in the Annual Confidential Report of a

particular year may differ from the grading arrived at by the Selection Committee in respect of the said Annual Confidential Report depending on all relevant material.

18. We are conscious of the fact that the expert body's opinion may not deserve acceptance in all circumstances and hence it may not be proper to say that the expert body's opinion is not subject to judicial review in all circumstances. In our constitutional scheme, the decision of the Selection Committee/Board of Appointment cannot be said to be final and absolute. Any other view will have a very dangerous consequence and one must remind oneself of the famous words of Lord Acton "Power tends to corrupt, and absolute power corrupts absolutely". The aforementioned principle has to be kept in mind while deciding such cases. However, in the matter on hand, it is abundantly clear from the affidavit filed by UPSC that the Selection Committee which is nothing but an expert body had carefully examined and scrutinised the experience, Annual Confidential Reports and other relevant factors which were required to be considered before selecting the eligible candidates for IPS. The Selection Committee had in fact scrutinised the merits and demerits of each candidate taking into consideration the various factors as required, and its recommendations were sent to UPSC. It is the settled legal position that the courts have to show deference and consideration to the recommendations of an Expert Committee consisting of members with expertise in the field, if malice or arbitrariness in the Committee's decision is not forthcoming. The doctrine of fairness, evolved in administrative law, was not supposed to convert tribunals and courts into appellate authorities over the decision of experts. The constraints-self-imposed, undoubtedly-of writ jurisdiction still remain. Ignoring them would lead to confusion and uncertainty. The jurisdiction may become rudderless."

64. Having perused the case laws relied on by the learned counsel for the parties, I am of the view that same are settled proposition of law and rendered in the particular contextual facts of those cases which requires no elaboration for its applicability in the facts and circumstances of the present case.

65. Upon a conspectus of the foregoing, this court is persuaded to take a considered view that the manner in which a remark was entered into ACR of the petitioner and graded as "Good" for the year 2017-2018 by the Reporting

Authority which resulted in depriving him from his promotion to the IAS, is in violation of relevant office memorandums and notifications. The Appellate authority has not taken into consideration of the relevant facts and notifications while passing the impugned order dated 28.12.2021. However, no *malafide* against the Reporting Authority, respondent no. 7, is established. Further, the remarks, considered adverse or critical in the facts of the present case, has been communicated/disclosed to the petitioner within the relevant period as required under the law. However, since the basic foundation of a remark was entered into ACR of the petitioner and graded as "Good" for the year 2017-2018 by the Reporting Authority which resulted in depriving him from his promotion to the IAS, in violation of relevant office memorandums, the superstructure of disclosing the ACR, though made, must fall. Accordingly, the impugned order dated 28.12.2021 is hereby set aside and quashed.

66. As a sequitur to the above, the respondent authorities are directed to reconsider the case of the petitioner by taking into consideration of the applicable rules and office memorandums/notifications and the observations and discussions made herein above and to expunge or ignore the adverse remarks entered into the ACR of the petitioner for the year 2017-18 and thereafter, to grant consequential relief as may be permissible under law.

67. With the above observations and direction the writ petition is disposed of. Parties to bear their own costs.

JUDGE

Comparing Assistant