

CASE NO.:
Appeal (civil) 689 of 2007

PETITIONER:
Union of India & Anr

RESPONDENT:
S.K. Goel & Ors

DATE OF JUDGMENT: 12/02/2007

BENCH:
Dr. AR. Lakshmanan & Altamas Kabir

JUDGMENT:
J U D G M E N T
(Arising Out of SLP (C) NO. 2410 OF 2007)

Dr. AR. Lakshmanan, J.

Leave granted.

The Union of India through Secretary, Department of Revenue, Ministry of Finance, New Delhi is the first appellant in this appeal. The second appellant is the Department of Personnel and Training through its Secretary, Ministry of Personnel & Pension, New Delhi. The first respondent is the contesting respondent. Respondent Nos. 2-5 and the first respondent joined the Indian Customs and Central Excise Service as a Grade A Officer on probation and was promoted as Assistant Collector of Central Excise after selection by the UPSC. Respondent No.1 and other respondents were confirmed in Group A service. In the order, the proforma respondents were placed higher in order of seniority. Thereupon respondent No.1 was promoted as Deputy Collector of Central Excise on an ad hoc basis in the year 1983 and the said appointment was regularized as Deputy Collector of Customs and Central Excise, vide order dated 16.7.1985. The Government of India, Ministry of Finance issued an Office Order No. 187 of 1997 for the ad hoc promotion of respondent No.1 and proforma respondents to officiate in the grade of Commissioner of Customs and Central Excise. The Departmental Promotion Committee (for short "the DPC") was constituted for considering officers for promotion to the post of Commissioner of Customs and Central Excise in April, 1997 and February, 1998. Respondent No.1 represented against the seniority assigned to him and he claimed that his ACR's for the year 1994-1995 had not been properly graded or considered by the DPC and the lower grading given to him by the Reviewing Officer on one ACR was not proper and DPC ought to have considered the higher grading given by the reporting Officer. The Office Order No. 11 of 1999 was issued on 12.1.1999 by the Government of India, Ministry of Finance whereby promotions of these officers were made on the post of Commissioner of Customs and Central Excise. Office Memorandum No. F. No.Q-32012/10/97-AO-II Govt. of India, Ministry of Finance, Department of Revenue was issued whereby the representation of respondent No.1 was rejected for the following reasons stated as under:

"i) The recommendations of the 5th Central Pay

Commission that for promotion to the Central Services, as in the case of IAS Officers, the inter-se seniority as fixed by the UPSC at initial entry into the service, should remain unaffected, is under consideration of the Govt. and a decision in this respect is likely to take time as these involve significant modifications in DPC guidelines. As the recommendations of the Pay Commission are yet to be accepted by the Govt., the existing instructions/guidelines of the Govt. pertaining to DPC are required to be followed.

ii) The provisions of para 6.2.1(e) of the DPC guidelines circulated by DOP&T vide their OM dated 10th April, 1989 were followed by the DPC which met in UPSC and considered the case of Sh. Goel for promotion to the grade of Commissioner. As such, it may not be appropriate to say that the DPC took into consideration the lower grading given to Shri Goel by the reviewing officer and not the higher grading given by the reporting officer.

iii) Although, the reviewing officer had slightly downgraded the overall grading on Shri Goel in the ACR for the year 1994-95 and the ACR also could not be sent to CVC for counter signature, it cannot be concluded that it had adverse impact on the findings of the DPC in the matter of his promotion to the grade of Commissioner. The DPC made its own assessment on the basis of the entries in the ACRs and overall grading of the reviewing /reporting officers was of no consequence.

iv) It is not for an individual officer to claim that his case is outstanding or otherwise as has been claimed by Shri Goel in his representation. It is for the DPC to make assessment on the officer after going through his service records. The mere grant of presidential Award cannot entitle an Officer to claim that he should be awarded outstanding grading by the DPC."

Respondent No.1 filed OA No. 141 of 2000 before the Central Administrative Tribunal, Principal Bench, New Delhi with the following prayers:-

"i) To direct that, in the grade of Commissioner, the seniority of the applicant over respondents 3 to 6 be maintained, and, therefore, to declare the impugned Office order No.11 of 1999 illegal to the extent it places respondents 2 to 5 above the applicant, and to give correct placement of the applicant at Sl. No.1 of the list contained in the said order,

ii) In the alternative, to set/quash the promotions of respondents 3 to 6 insofar as they have been promoted and given seniority above the applicant,

iii) To quash and set aside the undated Office Memorandum (Annexure-A2) issued by the respondent No.2,

iv) To grant costs of this application to the applicant herein, and

v) To pass such other order or orders as may be deemed fit and proper in the interests of justice."

The appellants filed their counter affidavits rebutting the claim of respondent No.1. It was submitted that the DPC had followed duly approved norms and procedure as prescribed vide para 6.2.1 of M.M. (DOP & T) No. 22011/556-Estt.(D) dated 10.4.1989.

The Tribunal dismissed the said petition by following the Full Bench decision in the case of Manik Chand vs. U.O.I. & Ors. 2002(3) ATJ 268 to hold that it is not necessary to communicate the remarks/grading which are not adverse or not below the bench mark prescribed for promotion to a particular post in respect of a selection post. In other words, if the applicant was meeting the bench mark, the question of communication of the entry, which in no event can be termed as adverse, would have arisen.

The Tribunal also considered and distinguished the facts and ratio of the case of U.P. Jal Nigam vs. Prabhat Chandra Jain AIR 1996 SC 1616 by observing that it was not shown that the confidential reports had been down graded and once they were not down graded, the question of communicating such grading did not arise.

Respondent No.1 filed Writ Petition No. 5404 of 2003 before the High Court of Delhi. The High Court allowed the writ petition and quashed the orders of the Tribunal and ACRs for the years 1992-1993, 1993-1994 and 1994-1995 and remanded the matter to the appellant for fresh consideration of the seniority of respondent No.1 in terms of the observations made by the High Court. The High Court in the concluding portion of its order observed as under:

"Similar is the view expressed in Full Bench Judgment of this Court in J.S.Garg vs. Union of India reported in 100 (2002) DLT 177. From the catena of cases cited above it emerges that when an entry reflects an adverse element it may not amount to adverse entry in the strict sense of the promotion since both may be positive grading but as observed in U.P. Jal Nigam's case, the authority recording the confidential report in such situation must record reasons for such down grading in the personal file of the officer concerned and inform him of the change in the form of an advice. The rate must be given appropriate guidance and opportunity as and when his weakness is noticed. If taking that entry into consideration seniority is not granted to the rate, it has an element of adverseness as far as his service profile is concerned. Therefore, it is well settled that although the Court cannot moderate the appraisal and grading given by an officer while exercising the power of judicial review but as the entries for the period indicated above had an element of adverse reflection and for that purpose his seniority has been downgraded, the ACRs ought to have been communicated to the petitioner, which has not been done in the instant case, therefore, reliance placed by the Tribunal on the decision of Punjab and Haryana High Court in Union of India & Ors vs. M.S. Preet and Anr. In Civil Writ Petition No. 13024/CAT/2002 rendered on 22.11.2002 would not come into play. We set aside and quash the order of the Tribunal and the ACRs for the year 1992-1993, 1993-1994 and 1994-1995 and remand the case back to the respondent to reconsider afresh within a period of three months the seniority of the petitioner in terms of the above observations qua the respondents."

Aggrieved by the said order, appellant Nos. 1 & 2 preferred the above appeal by way of special leave petition before this Court.

We have heard Mr. R. Mohan, learned Additional Solicitor General and Mr. T.S. Doabia, learned senior counsel appearing for the appellants and Mr. Rajiv Dutta, learned senior counsel appearing for respondent No.1. Mr. R. Mohan, learned Additional solicitor General took us through the impugned order passed by the High Court and other relevant records and submitted that the High Court erred in its failure/omission to take into consideration the Government instructions for regulating recording of Annual Confidential Reports which provide for only communication of adverse remarks in the ACRs. Since respondent No.1 had received no adverse remarks and has rather been graded at the level of the prescribed bench mark of 'above average', therefore, there was neither any onus nor requirement upon the appellant to have communicated the ACR entry to respondent No.1. Learned Additional Solicitor General further submitted that the DPC followed the prescribed norms as also applied its discretion vested in it to determine the comparative merit of the eligible officers and thereafter made recommendations in order of merit. There was thus no justification for interference in the order passed by the appellants as upheld by the Central Administrative Tribunal.

Learned Additional Solicitor General has also invited our attention to the judgment passed by the Tribunal as well as by the High Court. He also cited the following rulings:

1. Union of India & Anr. vs. Major Bahadur Singh , (2006) 1 SCC 368
2. R.L. Butail vs. Union of India & Ors. 1970(2) SCC 876
3. Anil Katiyar(Mrs.) vs. Union of India & Ors., (1997) 1 SCC 280

Mr. Rajiv Dutta, learned senior counsel appearing for the contesting respondent No.1 submitted that respondent No.1 along with respondent Nos. 2-5 joined the Indian Custom and Central Excise Services on probation in Group A after selection by the UPSC and that at the initial entry stage, respondent No.1 was fixed over and above respondent Nos. 2-5 vide notification in the Customs and Central Excise establishment S.No. 148 dated 19th December, 1975. In the said seniority list Shri Y.G. Parande was shown at S.No.2, Shri Hari Om Tiwari, respondent No.3 was shown at S.No.3, Shri C. Sathpathy, respondent No.4 was shown at S.No.12 and Shri Iype Mathew, respondent No.5 was shown at S.No.14 and respondent No.1 was promoted as Deputy Collector of Central Excise on ad hoc basis vide Order No.149/83 dated 12.8.1983 and was appointed on regular basis as Deputy Collector of Customs and Central Excise vide notification dated 16.7.1985. Thereupon, the Department of Revenue, Ministry of Finance, Government of India issued a civil list of Indian Revenue Services and in that list also respondent No.1 was shown as senior to respondent Nos.2-5 and that in the year 1991, respondent No.1 was decorated with President's award for specially distinguished services after considering his achievements for the past 15 years.

Mr. Rajiv Dutta further submitted that right from the day of initial entry stage to the date of ad hoc

promotion to the post of Commissioner, respondent No.1 was shown senior to respondent Nos. 2-5. He further submitted that respondent No.1 has been an upright, hardworking and honest officer and has been rated as outstanding from 1989-1990 to 1996-1997 by the reporting officers. However, subsequently respondent No.1 came to know that for the years 1992-1993, 1993-1994 and 1994-1995, the reviewing officer had down graded his ACR by one step i.e. from 'outstanding' to 'very good'. It is significant that for the years 1995-1996 and 1996-1997 the reporting officer rated respondent No.1 as 'outstanding' and on his ACR being forwarded to the Central Vigilance Commissioner also respondent No.1 was rated as 'outstanding'.

According to Mr. Rajiv Dutta, the reviewing officer did not give any reason for downgrading respondent No.1 from 'outstanding' to 'very good'. Moreover, there was no material before him for downgrading the rank of respondent No.1. The Reviewing did not indicate any material on the basis of which the said reviewing officer purported to reduce the grading of respondent No.1 from 'outstanding' to 'very good'. It was also contended that respondent No.1 was never communicated this downgrading by the reviewing officer in the form of advice or otherwise and respondent No.1 was never given an opportunity to show that the downgrading was totally unjustified and uncalled for.

It was further submitted that in February, 1998, DPC was held for promotion to the post of Commissioner of Customs and Central Excise. The said DPC considered the case of respondent No. 1 along with the case of respondent Nos. 2-5. No interviews were held by the DPC. For considering the merits and demerits of the candidates, the DPC took into consideration only the ACRs for the years 1988-90 to 1996-1997. In the case of respondent No.1, the defective and incomplete ACRs for the years 1992-1993, 1993-1994 and 1994-1995 were considered by the DPC and the panel was prepared for promotion to the post of Commissioner, Customs and Central Excise by the DPC and respondent No.1 was placed below respondent Nos. 2-5 thereby disturbing his seniority. The DPC apart from taking the defective and incomplete ACRs of respondent No.1 for the years 1992-1993 to 1994-1995 did not take into considering the recommendations of the 5th Pay Commission to the effect that the inter se seniority of the candidates should be maintained. Mr. Rajiv Dutta also relied on the decision in State Bank of India vs. Kashinath Kher (1996) 8 SCC 762 at 771 para 15 wherein this Court pointed out that the object of writing the confidential report is two fold i.e.

- (i) to give an opportunity to the officer to remove inefficiency and to inculcate discipline;
- (ii) It seeks to serve improvement of quality and excellence and efficiency of public service. The officers while writing confidential reports should show objectivity, impartiality and fair assessment without any prejudice whatever with the highest sense of responsibility to inculcate in the officer devotion to duty, honesty and integrity so as to improve excellence of the individual officers.

Mr. Rajiv Dutta also cited the judgment of this Court in State of U.P. vs. Yamuna Shankar Mishra AIR 1997 SC 3671 wherein this Court held that the object of writing the confidential reports and making entries in the

character rolls is to give an opportunity to a public servant to improve excellence. Article 51 A(j) of the Constitution of India enjoins upon every citizen the primary duty to constantly endeavour of prove excellence, individually and collectively, as a member of the group. Given an opportunity, the individual employee strives to improve excellence and thereby efficiency of administration would be augmented. The officer entrusted with the duty to write confidential reports, has a public responsibility and trust to write the confidential reports objectively, fairly and dispassionately while giving, as accurately as possible, the statement of facts on an overall assessment of the performance of the subordinate officer. It should be founded upon the facts or circumstances. Though sometimes, it may not be part of record, but the conduct, reputation and character acquire public knowledge or notoriety and may be within his knowledge. Before forming an opinion to be adverse, the reporting officers writing confidential reports should share the information which is not a part of the record with the officer concerned have the information confronted by the officer and then make it part of the record. This amounts to an opportunity given to the erring/corrupt officer to correct the errors of the judgment, conduct, behaviour, integrity or conduct/corrupt proclivity. If despite giving such an opportunity, the officer fails to perform the duty, correct his conduct or improve himself, the same may be recorded in the confidential reports and a copy thereof supplied to the affected officer so that he will have an opportunity to know the remarks made against him. If he feels aggrieved, it would be open to him to have it corrected by appropriate representation to the higher authorities or any appropriate judicial forum for redressal. Thereby, honesty, integrity, good conduct and efficiency get improved in the performance of public duties and standards of excellence in services constantly rises to higher levels and it becomes successful tool to manage the services with officers of integrity, honesty, efficiency and devotion.

It was also submitted that in the case of U.P. Jal Nigam & Ors. vs. Prabhat Chandra Jain & Ors., (supra), this Court reiterated these very principles in the matter of recording the ACRs and that of bringing the downgrading/adverse remarks to the notice of the officer with the sole aim of giving opportunity to the officer to improve his conduct. In the case of respondent No.1, he was downgraded from 'outstanding' to 'very good' and no reason for the same was given and that there was no material on the basis of which the reviewing officer could downgrade respondent No.1. No reasons for such downgrading were given nor was respondent No.1 appraised of the downgrading, thereby rendering the ACRs defective which could not be considered by the DPC.

Arguing further, learned senior counsel, submitted that if the downgraded entry is considered to be positive still it may adversely affect the rating as it happened in the case of respondent No.1 and that the DPC considered only ACRs from 1989-1990 to 1996-1997 in respect of promotions to the post of Commissioner to Central Excise. Apart from ACRs, the DPC had no other material with them.

It was submitted further that the DPC had also fallen into grave error in ignoring the recommendations of

the 5th Pay Commission followed by the Government of India to the effect that in the matter of promotion inter se seniority fixed at the time of initial entry stage should not be disturbed. In the facts and circumstances of the case, learned senior counsel submitted that the impugned judgment of the High Court which is clearly based upon the law as laid down by this Court in a number of cases is unassailable and, therefore, the civil appeal has no merits.

We have carefully considered the rival submissions with reference to the records placed and material placed before us and the judgment of the Tribunal and that of the High Court. We heard extensive arguments from both sides. The only question that arises for consideration in the instant case is as to whether the High Court has erred in its failure/omission to take into consideration the government instructions for regulating recording of ACR which provide for only communication of adverse remarks in the ACRs.

In the instant case, respondent No.1 had received no adverse remarks and had rather been graded at the level of the prescribed bench mark of 'above average', therefore, as rightly pointed out by learned Additional Solicitor General, there was neither any onus nor requirement upon the appellant to have communicated the ACR entry to respondent No.1.

At the time of hearing, the original record was placed before us. We have carefully perused the same. The DPC, in our view, followed the prescribed norms as also applied its discretion vested in it to determine the comparative merit of the eligible officers and thereafter made recommendations in order of merit. There was thus no occasion or justification for interference in the order passed by the appellants, as upheld by the Tribunal.

Learned senior counsel appearing for respondent No.1 placed strong reliance on the judgment of this Court in U.P. Jal Nigam (supra). In our opinion, the said decision is entirely distinguishable on facts and circumstances from the case on hand and is wrongly been relied upon by the High Court. In the U.P. Jal Nigam's case, the officer concerned Shri P.C. Jain had been downgraded at certain point of time. Before the High Court, it had been alleged that downgrading of entry could not be termed as adverse and that the same should be communicated. The U.P. Jal Nigam Service Rules provided for communication of adverse entries. In this case, downgrading had been done by comparison and there appears to be no reason recorded for such downgrading. However, in the instant case, the downgrading still meets the bench mark and therefore, merely because certain persons have been assessed by the DPC to be better than the respondent, did not imply that he should have been communicated his grading. In our opinion, the judgment of the Tribunal does not call for any interference inasmuch as it followed the well settled dictum of service jurisprudence that there will ordinarily be no interference by the courts of law in the proceedings and recommendations of the DPC unless such DPC meetings are held illegally or in gross violation of the rules or there is mis-grading of confidential reports. In the present case, the DPC had made an overall assessment of all the relevant confidential reports of the eligible officers who were being considered. The DPC considered the remarks of the reviewing officers.

There was clear application of mind. Respondent No.1 did fulfill the bench mark. Hence, the impugned direction of the High Court ought not to have been issued as the same will have the impact of causing utter confusion and chaos in the cadre of the Indian Revenue Service, Customs and Central Excise Service. It was also argued by the learned senior counsel appearing for respondent No.1 that the entries for the period had an element of adverse reflection and for that purpose the seniority of respondent No.1 was downgraded and, therefore, the ACR ought to have been communicated to respondent No.1. In our opinion, the observations of the High Court are wholly unjustified inasmuch as the post of Commissioner of Customs and Central Excise is a post required to be filled up on selection made strictly on the basis of merit. No judicial review of DPC proceedings, which are ordinarily conducted in accordance with the standing government instructions and Rules is warranted. The norms and procedure for DPC are prescribed in O.M. dated 10.4.1989. It is thus seen that the decision taken by the appellants has been as per the instructions issued on the subject that only adverse entries and remarks are to be communicated and there is no provision to communicate the downgrading of ACR to a government employee. The decision of the Central Government is in strict accordance with the prevailing rules and government instructions. In the absence of any violation, the impugned order of the High Court while undertaking a judicial review under Art. 226 of the Constitution of India, is wholly unjustified. Since the matter of seniority has been well settled and this Court in a plethora of cases has held that the seniority/promotion granted on the strength of DPC selection should not be unsettled after a lapse of time. Therefore, in the facts and circumstances of the present case, where there is no adverse remarks whatsoever against respondent No.1, the High Court ought not to have interfered with and passed the impugned direction. This apart, as per the instructions contained in para 6.21 of DOPT Order No. 22011/5/86/Estt. D dated 19.4.1981, as amended, the DPC is not required to be guided merely by the overall grading, if any, that may be recorded in the CRs but to make its own assessment on the basis of the entries in the CRs. The DPC enjoyed full discretion to devise its method and procedure for objective assessment of suitability and merit of the candidate being considered by it. Hence, the impugned order of the High Court, in our opinion, is liable to be set aside.

Case law on the subject

1. Anil Katiyar(Mrs.) vs. Union of India & Ors., (1997) 1 SCC 280 : The appellant and respondent No.4 in this case had joined the Central Agency Section in the Ministry of Law of the Government of India as Assistant Government Advocates. The appellant was junior to respondent No.4. While considering them for promotion to the post of Deputy Government Advocate, which is a selection post, the DPC graded both of them as "very good" and on the ground of seniority selected respondent No.4 for the said post. The appellant unsuccessfully challenged the selection of respondent No.4 before the CAT on the ground that the DPC was not justified in grading her merely as "very good" as in the ACRs for two of the relevant three years the departmental authorities had graded her as "outstanding" and for the third year as

"very good" while they had graded respondent No.4 as "very good" in all the three ACRs. The CAT while refusing relief to the appellant on the ground of want of jurisdiction to scrutinize the recommendations of the DPC, this Court perused the confidential procedure followed by the DPCs in the Union Public Service Commission for giving overall grading, including that of "outstanding" to an officer. Thereafter, refusing to interfere with the selection of respondent No.4 by the DPC but setting aside the said observation of the CAT, this Court held as under:

"Having regard to the confidential procedure which is followed by the Union Public Service Commission, it is not possible to hold that the decision of the DPC in grading the appellant as "very good" instead of "outstanding" was arbitrary. No ground is, therefore, made out for interference with the selection of respondent 4 by the DPC on the basis of which he has been appointed as Deputy Government Advocate. But, at the same time, it has to be held that the Tribunal was in error in going into the question whether the appellant had been rightly graded as "outstanding" in the ACRs for the years 1990-1991 and 1991-1992. The observations of the Tribunal that out of the two "outstanding" gradings given to the appellant one "outstanding" grading does not flow from various parameters given and the reports entered therein, cannot, therefore, be upheld and are accordingly set aside."

2. Union Public Service Commission vs. L.P. Tiwari & Ors. 2006(12) SCALE 278: This case relates to grading in selection list for promotion to Indian Forest Service. The jurisdiction of Courts to interfere with evaluation made by the expert committee was under consideration. The respondents were serving as State Service Forest Officers in the post of Assistant Conservator of Forests. Both the officers became eligible to be promoted to the Indian Forest Service. On an overall service records, Selection Committee assessed respondent as being "very good" and included his name at S.No.10 in the Select List of 2001. Respondents 4-8 were assessed as "outstanding" by the Selection Committee and were included at S.Nos. 3-7 in the selection list. Respondent No.1 claimed that he ought to have been assessed as "outstanding" and should have been assigned seniority in the Indian Forest Service Cadre over respondents 4-8. The Tribunal came to the conclusion that patent material irregularities had been committed by the Selection Committee for the year 2001. This Court allowed the appeal filed by the UPSC and held that the evaluation made by an expert committee should not be easily interfered with by the Courts which do not have the necessary expertise to undertake the exercise that is necessary for such purpose. Speaking for the Bench, Altamas Kabir, J. in paragraphs 12, 13 & 14 of the judgment held as under:

"12. It is now more or less well-settled that the evaluation made by an expert committee should not be easily interfered with by the Courts which do not have the necessary expertise to undertake the exercise that is necessary for such purpose. Such view was reiterated as late as in 2005 in the case of U.P.S.C. v. K. Rajaiah and Ors. reported in (2005) 10 SCC 15, wherein the aforesaid Rules for the purpose of

promotion to the I.P.S. Cadre was under consideration. Apart from the above, at no stage of the proceedings, either before the Tribunal or the High Court or even before this Court, has any allegation of mala fides been raised against the Selection Committee and the only grievance is that the Selection Committee erred while making assessment of the comparative merits of the respective candidates. While concluding his submissions, Mr. Rao had pointed out that the direction given by the High Court to the appellant to hold a Review Departmental Promotion Committee was also erroneous since the Regulations provided for selection to be made not by a Departmental Promotion Committee but by a Selection Committee constituted as per the Regulations.

13. Although, on behalf of the respondents it has been urged that there was no bar which precluded the Tribunal from looking into the original ACRs of the respective candidates, what we are required to consider is whether it was at all prudent on the part of the Tribunal to have adopted such a procedure which would amount to questioning the subjective satisfaction of the Selection Committee in preparing the Select List.

14. From the submissions made and the materials on record, we are satisfied that the methodology which has been evolved and included in the Regulations for grading the eligible officers have been religiously followed by the Selection Committee which did not call for any interference by the Tribunal. The High Court has merely followed the decision of the Tribunal without independently applying its mind to the facts involved."

For the foregoing reasons, we hold that the DPC enjoyed full discretion to devise its method and procedure for objective assessment of suitability and merit of the candidate being considered by it. Hence, the interference by the High Court is not called for.

Accordingly, the Civil Appeal stands allowed and the judgment of the High Court is set aside. However, there shall be no order as to costs.