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UNION OF INDIA ETC. ETC.

v.

N.P. DHAMANIA, ETC. ETC.

OCTOBER 20, 1994

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[M.N. VENKATACHALIAH, CJ, J.S. VERMA AND S. MOHAN, JJ.]

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*Service Law—Promotion—Recommendations of Departmental promotion Committee—Advisory in nature, not binding on appointing authority—Appointing authority can differ from recommendations of Departmental Promotion Committee in public interest—Reasons must be given for so differing—Reasons to be recorded—Reasons recorded not required to be communicated to officer concerned.*

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The respondent joined the Post and Telegraphs Department in India Telecommunication Service on the basis of All India Selection held by Union Public Service Commission. He was initially appointed as Assistant Divisional Engineer, Telegraph. He was promoted to Junior Administrative Grade. In 1985 the Departmental Promotion Committee prepared year wise select panels of 59 officers for officiating promotion to the Senior Administrative Grade Level II of the ITS Group 'A'. The respondent retained his original seniority at serial no. 13 in the Junior Administrative Grade for empanelment of the Senior Administrative Grade. The Panel was approved by the concerned Minister in toto. It was forwarded to the Department of Personnel for obtaining the approval of the Appointments Committee of the Cabinet. The Committee on a perusal of the records directed that the panel should be returned to the UPSC for more "rigorous review". The UPSC informed that the panel had been prepared strictly in accordance with the instructions issued by the Department of Personnel and there was no scope for the review. The panel was again approved by the concerned Minister and the same was resubmitted to the Appointments Committee. The Committee approved a panel of 54 officers for Appointment to the Senior Administrative Grade 'A' Level Post of the ITS. The remaining five out of the select panel of 59 officers including the respondent were dropped. It was this exclusion which was challenged before the Central Administrative Tribunal.

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The Tribunal Held that the consultation with UPSC under Article

320(3) of the Constitution of India was directory and not mandatory. It was held that it was incumbent on the Government to give reasons for excluding the respondents in the select panels prepared by the UPSC. On the basis, the contention of Union of India that the appointing authority was competent to ignore the recommendations of the UPSC without assigning any reason whatsoever and without showing that it was doing so in public interest was negatived. It was declared that the petitioners shall be deemed to have been promoted w.e.f. the date the officer immediately junior to him was promoted.

This appeal has been filed against the order of the Tribunal, and the questions that arose for consideration were:

(i) whether it is open to the Appointments Committee of the Cabinet to differ from the recommendations of the Departmental Promotion Committee; and

(ii) Whether reasons must be given for so differing.

Disposing of the matter, this Court

**HELD :** 1.1. The recommendations of the DPC are advisory in nature. Such recommendations of the DPC are not binding on the Appointing Authority. It is open to the appointing authority to differ from the recommendations in public interest. [636-F]

1.2. Notwithstanding the fact that it is open to Appointments Committee which alone is the Appointing Authority and not the Minister concerned, to differ from the recommendations of the DPC, it must give reasons for so differing to ward off any attack of arbitrariness. Those reasons will have to be recorded in the file. In the instant case no reasons have been recorded for differing from the recommendations of the DPC. [636-G]

1.3. There is no need to communicate the reasons recorded to the officer concerned. When challenged it is always open to the authority concerned to produce the necessary records before the court. [637-B]

1.4. The Tribunal had exceeded in its jurisdiction in the grant of 'deemed promotion' to the respondent. this court is unable to support the finding merely because the Appointments Committee required the UPSC to adopt a more rigorous review of the select list, it would be an exercise

- A** in futility to make a reference back and seek further consultation with the UPSC in the matter. On this score 'deemed promotion' cannot be accorded. Still the appointments committee will have to consider the case of the respondent on merits with reference to the records. Therefore, this part of the order declaring the respondent shall be deemed to have been promoted to Senior Administrative Grade, shall be set aside. [637-C-D]
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- 1.5. In the instant case the Appointing Authority shall make a reference back to the UPSC indicating the reasons for making a departure from the panel recommended by the Commission. In case after consultation with the UPSC, the name of the respondent is restored to its original position as recommended by the UPSC, the case of the respondent for promotion shall be considered on merit. [638-D]
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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1794 of 1988 etc. etc.

- D** From the Judgment and Order dated 4.12.87 of the Central Administrative Tribunal, New Delhi in Regn. No. C.A. No. 1191 of 1986.

- Altaf Ahmad, Additional Solicitor General, N.N. Goswami, T.C. Sharma, Krishan Mahajan, Mrs. Anil Katiyar, Y.P. Mahajan, S.D. Sharma, S.N. Tardol, Mrs. Indra Sawhney, P.N. Misra and A.K. Sinha for the Appellants.
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In-person for the Appellant.

In-person for the Respondent.

- F** C.N. Sreekumar, Avijit Bhattacharjee, Ms. Nisha Bagchi, Ms. S. Jain, Mrs. Indu Malhotra and C.V. Subba Rao for the Respondents.

The Judgment of the Court was delivered by :

- G** MOHAN, J. Leave granted.

- In these cases the questions that arise for our consideration are, (1) whether it is open to the Appointments Committee of the Cabinet (hereinafter referred to as the 'ACC') to differ from the recommendations of the Departmental Promotion Committee (hereinafter referred to as the 'DFC') and (2) if so whether reasons must be given for so differing.
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We shall advert to the facts in C.A. No. 1794/88 which will be enough to answer the above questions. A

The respondent joined the Post and Telegraphs Department in September, 1963 in Indian Telecommunication Service (hereinafter referred to as 'ITS') on the basis of All-India Selection held by the Union Public Service Commission (hereinafter referred to as the 'UPSC'). He was initially appointed as Assistant Divisional Engineer Telegraph. Thereafter he was promoted to the rank of Divisional Engineer Telegraph in September, 1966. In August, 1974 he was promoted to Junior Administrative Grade of the ITS pursuant to the selections made on All-India basis by a duly constituted DPC under the Chairmanship of a Member of UPSC. Lastly, he was given selection grade of Rs. 2000-2250 in the Junior Administrative Grade with effect from 1.12.1982. B C

On 9.12.85, a meeting of DPC was convened to prepare a select list of officers for promotion to the Level II of Senior Administrative Grade of the ITS. The Senior Grade group 'A' carried pay scale of Rs. 2250-2500. The meeting was convened pursuant to the requisition sent by the Ministry of Communication to the UPSC for preparing a year-wise panel for 1984, 1985 and 1986, the vacancies being 5, 24 and 25 respectively, in all, 54 vacancies. D E

The Annual Confidential Report dossiers of 104 officers of Junior Administrative Grade Service were forwarded along with the requisition on an assessment made by the DPC. The Committee prepared year-wise select panels as also consolidated panel for officiating Promotion to the Senior Administrative Grade Level II of the ITS Group 'A'. The Committee recommended 5 officers for empanelment for the year 1984, 24 officers for the year 1985 and 30 officers for the year 1986. It requires to be stated, at this stage, that the records show the performance of all officers including that of the respondent was rated "very good". None of the officers possessed "outstanding" merit. The respondent retained his original seniority at Serial No. 13 in the Junior Administrative Grade for empanelment of the Senior Administrative Grade. The panel was approved by the concerned Minister in toto. It was forwarded to the Department of Personnel for obtaining the approval of the ACC. The ACC on a perusal of the records directed by its communication dated 14.1.86 that the panel should be returned to the UPSC for a more 'rigorous review'. Accordingly, the F G H

A Minister for Communication returned the select panel along with the ACR dossiers of all the 59 officers. The ACC made it clear that it was not happy with the grading of "very good" given to all officers and that the Committee expected more selectivity.

B The UPSC by its letter dated 7.2.86 informed that the panel had been prepared strictly in accordance with the instructions issued by the Department of Personnel and there was no scope for the review. Accordingly the UPSC had no further advice to offer in the matter. The Panel was again approved by the concerned Minister and the same was re-submitted to the ACC. There was some correspondence concerning the adoption of  
C 'rigorous review.' On 9.12.86 the ACC approved a panel of 54 officers for appointment to the Senior Administrative Grade 'A' Level Post of the ITS. The remaining 5 out of the select panel of 59 officers including the respondent was dropped.

D It appears the respondent having gained knowledge about his not being included filing O.A. No. 1191 of 1986 before the Central Administrative Tribunal. An interim injunction restraining from excluding him from the panel was also sought. The Tribunal, by its order dated 30th of December, 1986, directed that any appointment or regularisation of person who was placed below the respondent by the UPSC shall be subject to the  
E final outcome of the main application. In view of this Order, by a Notification dated 8.1.87 the President was pleased to appoint 40 more officers of Junior Administrative Grade of ITS to officiate in Level II of Senior Administrative Grade of ITS Group 'A'. The name of the respondent did not figure in that list. The result is though the name of the respondent was included by DPC in the first select panel prepared by it, ultimately, he was  
F not appointed since the ACC excluded 5 of the recommended names. It was this exclusion which was challenged before the Tribunal.

G The Tribunal under the impugned judgment held that the consultation with UPSC under Article 320(3) of the Constitution of India was directory and not mandatory. The Tribunal placed reliance on the following observations in the decision in *Jatinder Kumar and others v. State of Punjab and Others*, [1985] 1 SCC 122:

H "This, however does not clothe the appellants with any such right. They cannot claim as of right that the Government must accept the recommendation of the Commission. If, however the

vacancy is to be filled up, the Government has to make appointment strictly adhering to the order of merit as recommended by the Public Service Commission. *It cannot disturb the order of merit according to its own sweet will except for other good reasons viz., bad conduct or character.* The Government also cannot appoint a person whose name does not appear in the list. But it is open to the Government to decide how many appointments will be made. The process for selection and selection for the purpose of recruitment against the anticipated vacancies does not create a right to be appointed to the post which can be enforced by a mandamus." (emphasis ours)

On this basis, it was held that it was incumbent on the Government to give reasons for excluding the respondents and 4 others in the select panel prepared by the UPSC. Further, on this basis, the contention of Union of India that the appointing authority is competent to ignore the recommendations of the UPSC without assigning any reason whatsoever and without showing that it was doing so in public interest was negatived. Ultimately, it gave the following direction :

"No reason has been assigned or is forthcoming for deletion of the names of the petitioner from the panel, although as many as 46 appointments to the Senior Administrative Grade Level-II have already been made. Under the circumstances, the only course to ensure justice and fairplay to the petitioner would be to declare that the petitioner shall be deemed to have been promoted w.e.f. the date the officer immediately junior to him was promoted to the Senior Administrative Grade Level-II of ITS vide notification dated 8.1.1987. The petitioner shall also be entitled to all consequential reliefs by way of seniority, increased salary and allowances from the said date."

Mr. Altaf Ahmad, learned Additional Solicitor General, appearing for the Union of India, the appellant herein, would urge the following :

1. It is open to an Appointments Committee to differ from the recommendations of the DPC since such recommendations do not have binding force. No reasons need be recorded for so differing.

2. Even if the reasons need to be recorded it is enough if the file

A contains the same. Those reasons need not be communicated to the concerned officer.

3. In any event, it is not open to the Tribunal to accord 'a deemed promotion'. It is essentially a matter falling within the jurisdiction of the Appointments Committee.

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Thus, the order of the Tribunal is liable to be set aside.

C The respondent appearing in-person would urge that the words "appointing authority" would show that it has to be one authority. ACC consists of three Ministers. Its constitution can be changed any time. Naturally, such a Committee cannot be the appointing authority. Hence, the Minister concerned alone is the appointing authority. Even assuming ACC is the appointing authority, the grievance of the respondent is, without giving good and sufficient reasons, promotion cannot be denied to him, once he had been approved for promotion by the DPC in consultation with the UPSC which approval has been given by the Minister for Communication.

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E In the instant case, ACC chose to differ without assigning any reason. In fact, the counsel for Union of India was unable to produce any material to show that the reasons had been assigned for differing from DPC. Therefore, the name of the respondent cannot be arbitrarily dropped. It was this arbitrariness which weighed with the Tribunal. On that basis, it rightly concluded that it would be a futile exercise to direct the respondent to make a reference back and have further consultation with the UPSC in the matter. It was under those circumstances deemed promotion was ordered. To this, no exception could be taken.

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We have given our careful consideration to the above arguments. The Recruitment Rules dated 6.1.1975, at para 29, lay down that :

G "Appointment on Promotion to SAG Level II shall be made by selection on merit from amongst officers ordinarily with not less than 3 years' approved continuous service in the Jr. Administrative Grade on the recommendations of duly constituted DPC."

H We may now advert to the instructions contained in O.M. dated 30th December, 1976 issued by the Cabinet Secretariat (Department of Person-

nel and Administrative Reforms). The relevant portion is reproduced below : A

*"VIII CONSULTATION WITH THE UPSC.*

The recommendations of the Departmental Promotion Committee, whether it included a Member of the UPSC or not should be referred to the Commission for approval, if B

(1) Consultation with the Commission is compulsory under Article 320(3) of the Constitution of India, read with UPSC (Exemption from Consultation) Regulation, 1958 as amended from time to time. Broadly speaking subject to certain exceptions mentioned in the Regulations in so far as promotions are concerned, consultation with the Commission is compulsory, in respect of promotions from Group 'B' to Group 'A' posts. However, a reference may be made to the Regulations, as and when necessary. C

*IX. PROCEDURE TO BE FOLLOWED WHEN APPOINTING AUTHORITY DOES NOT AGREE WITH THE RECOMMENDATIONS OF DPC.* D

1. The DPC is a recommendatory body and the recommendations made by it are subject to approval by the appointing authority. There may be certain occasions when, for valid reasons, the appointing authority may find it necessary to disagree with the recommendations of the duly constituted DPC. The procedure to be followed in such cases will be as given below. E

(2) Where UPSC is associated with the DPC, the recommendations of the DPC should be treated as recommendations of the UPSC. If it is considered necessary by the appointing authority to vary or disagree with the recommendations made by the DPC, the procedure prescribed for overruling the recommendations of UPSC should be followed." F

The relevant portion of the procedure contained in the Ministry of Home Affairs O.M. No. 18/42/50-Estts. dated 27.11.1950 is reproduced below : G

"The Government of India have decided that where the Union H



- A Public Service Commission have been consulted in regard to any appointments the recommendations made by the Commission should not be departed from unless, in the opinion of the Hon'ble Minister concerned, exceptional circumstances exist which in the public interest require such departure. In such a case the reasons for holding this opinion should be communicated to the Commission and the Commission given an opportunity of the further justifying their recommendations. On the receipt of the observations of the Commission, their recommendations should consider further by the Ministry concerned, if, after further consideration, the Ministry still considers that the recommendations made by the Commission should not be accepted, the case should be referred with a self contained summary to the establishment Officer of the Government of India who will place it before the Appointments Committee of the Cabinet consisting of the Hon'ble the Prime Minister, Hon'ble Minister for Home Affairs and the Hon'ble Minister administratively concerned with the appointment(s). In cases in which the Hon'ble Home Minister or the Hon'ble Prime Minister happens to be the Minister concerned with the appointment, the Hon'ble Finance Minister will be added to the Committee. The decision reached by the Appointments Committee in all such cases should be communicated to the Commission by the Ministry administratively concerned. Final orders in accordance with the decision will also be issued by that Ministry, copy being endorsed to the Commission".
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- F It will be clear from the above that the recommendations of the DPC are advisory in nature. Such recommendations are not binding on the appointing authority. It is open to the appointing authority to differ from the recommendations in public interest. That is beyond doubt.

- G Notwithstanding the fact that it is open to AAC which alone is the appointing authority and not the Minister concerned, as urged by the respondent to differ from the recommendations of the DPC, it must give reasons for so differing to ward off any attack of arbitrariness. Those reasons will have to be recorded in the file. It requires to be stated at this stage that we have perused the file in the instant case. We find no reasons have been recorded for differing from the recommendations of the DPC. That is why the tribunal also *inter alia* observes in the impugned judgment
- H as under :

"However, the counsel for the respondent felt helpless in the matter and he failed to provide us any inkling of what prevailed with the ACC in dropping the petitioner and four others out of the select panel of 59 officers."

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If the file had contained reasons something could be said in favour of the appellant. But, that is not the case here. Then the question would be whether the reasons recorded are required to be communicated to the officer concerned. Our answer is in the negative. There is no need to communicate those reasons. When challenged it is always open to the authority concerned to produce the necessary records before the Court.

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Turning to the grant of 'deemed promotion' we are clearly of the view that the Tribunal had exceeded in its jurisdiction. We are unable to support the finding merely because the ACC required the UPSC to adopt a more rigorous review of the select list, it would be an exercise in futility to make a reference back and seek further consultation with the UPSC in the matter. On this score, 'deemed promotion' cannot be accorded. Still the ACC will have to consider the case of the respondent on merits with reference to the records. Therefore, we set aside this part of the order declaring the respondent shall be deemed to have been promoted to Senior Administrative Grade, Level-II of the ITS with effect from the date his immediate junior was promoted to the said grade.

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Civil Appeal Nos. 1794 of 1988, 3332 of 1988, 2367 of 1989 are allowed.

In Civil Appeal Nos. 1726 of 1989, 784 of 1988, 2176 of 1988 and C.A. No. 6894 of 1994 (arising out of SLP(C) No. 7356 of 1988 C.A. No. 4669/89 no interference is warranted except to the extent of following modifications :

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"ACC may reconsider these cases within 3 months in the light of the observations at page 7, 10 and above and if found suitable, may give promotion with effect from the date, their immediate junior officer was promoted with consequential benefits of seniority and salary etc."

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*Civil Appeal No. 1726 of 1989*

The Appointing Authority shall consult the UPSC once again by

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- A making reference back to them indicating the reasons for making a departure from the panel recommended by the Commission and also forward the material on which it has reached the conclusion not to appoint the respondent and obtain their views before taking final decision in the matter. In case after consultation with the UPSC, in the manner indicated above, the name of the respondent is restored to its original position as recommended by the UPSC, the case of the respondent for promotion to the post of Commissioner of Income Tax, shall be considered on merit and necessary orders be passed within 3 months from the date of the receipt of the file from UPSC.
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- C *C.A. No. 784, 2176 of 1988 and C.A. 6894 of 1994  
(arising out of SLP(C) No. 7356 of 1988)*

- The Appointing Authority shall make a reference back to the UPSC indicating the reasons for making a departure from the panel recommended by the Commission and obtain their views before taking a final decision in the matter. In case after consultation with the UPSC in the manner indicated above, the name of the respondent is restored to its original position as recommended by the UPSC the case of the respondent for promotion to the post of Commissioner of Income Tax (Level II), shall be considered on merit and necessary orders be passed within 3 months from the date of the receipt of the file from UPSC.
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All the I.As. and CMPs. are disposed of accordingly. However, there shall be no order as to costs.

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Petitions disposed of.