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CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH, DELHI.

Regn. No. O.A. 1177/1989.

Date of Decision: July 13, 1990.

R.P. Sharma Applicant.
Ms. Sandhya Goswami Advocate for the Applicant.
V/s.
Union of India & Ors. Respondents.
Shri P.H. Ramchandani Advocate for the Respondents.

CORAM: Hon'ble Mr. P.C. Jain, Member (A).
Hon'ble Mr. J.P. Sharma, Member (J).

1. Whether Reporters of local papers may be allowed to see the judgement? Yes.
2. To be referred to the Reporter or not? Yes.
3. Whether their Lordships wish to see the fair copy of the judgement? No.
4. To be circulated to all Benches of the Tribunal? No.

Jain
(J.P. SHARMA)
Member (J)

Jain
(P.C. JAIN)
Member (A)

(17)

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| Shri P.H. Ramchandani | | Advocate for the Respondent |

CORAM: Hon'ble Mr. P.C. Jain, Member (A).
Hon'ble Mr. J.P. Sharma, Member (J).

(Judgement of the Bench delivered
by Hon'ble Mr. P.C. Jain, Member)

JUDGEMENT

In this application under Section 19 of the Administrative Tribunals Act, 1985, the applicant, who is Income Tax Officer (Group B), has assailed his non-promotion to the post of Assistant Commissioner of Income Tax (Junior Scale) and has prayed for an appropriate order or direction to the respondents to promote him as Assistant Commissioner Income Tax, Delhi Circle with effect from 23.2.1989, i.e., when promotions to the above post were made on regular basis.

2. The applicant started his service as an U.D.C. on 20.10.54. On 1.4.75, he was promoted as Income Tax Officer (Group B). The D.P.C. for promotion to the post of Assistant Commissioner of Income Tax (Junior Scale) met on 30.11.1988 and on subsequent dates. As a result of the recommendations of the D.P.C., promotion orders were issued on 23.2.1989 (Annexure XII) in which the name of the applicant was not included and hence this application.

3. The applicant's case, in brief, is that throughout his service, he has been a very enterprising and extremely hard-working officer and that he has been superseded on account of the mala-fides of Respondent No. 4, Shri V.P.Verma,

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Commissioner of Income Tax, Delhi-X and now Director, O&M. In regard to mala-fides, it is alleged that Respondent No.4 is an office bearer of the Association of Direct Recruits and the applicant is actively involved in the work of the Promotees Officers' Association and is currently the President of the Gazetted (Promotees) Officers Association. He has on various occasions very actively pressed for the rights of the promotees, which has resulted in rivalry between the two Associations and because of this, Respondent No.4 started bearing a grudge towards the applicant for his association activities and openly threatened him to desist from such activities or else he would not be promoted. It is further stated that on 12.6.87, Respondent No.4 "engineered" the transfer of the applicant from CII-10 to CII-6, Incharge of Salary Circle and got him posted in T.D.S. Section to demoralise him. On the representation of the applicant ~~xxxxxx~~, the transfer order was cancelled by the Chief Commissioner, Income Tax and in less than two months, he was retransferred to CII-10. It is also stated that on his transfer back to CII-10, Respondent No.4 did not give him any assessment charge, but kept him as Officer on Special Duty. He availed of earned leave in June 1988 while functioning as I.T.O. I(2) which is a senior charge, but after his return from leave, Respondent No.4 transferred him to I.T.O. I(5) Additional, which is the most junior charge, and that this was done solely with a view to demoralise him. On the Association's raising the matter before the Central Board of Direct Taxes, the applicant was given charge in the regular ward, vide Annexure X. It is on the basis of these contentions that the applicant has contended that Respondent No.4 is of a prejudiced disposition towards him and has acted out of malafides.

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4. The applicant has stated that for the years 1983-84, 1984-85 and 1985-86, his performance in the confidential reports was graded as 'Very Good'. However, for the year 1987-88, Respondent No.4 graded his performance as 'just good'. It is alleged that the gradation of 'just good' is a *prima facie* evidence of the malafides on the part of Respondent No.4 and that this gradation is not at all an objective assessment of his work. 'Just good' grading is not one of the prescribed gradings and it is not technically an adverse remark and thus not communicated to the applicant and, therefore, he could not represent against the same. Such a grading is stated to be wholly illegal. It is admitted that for the year 1988-89, he has been given "Very Good" grading. The applicant has contended that as per the directions of the Central Board of Direct Taxes, confidential reports for the preceding five years are to be seen by the D.P.C. and as he had three 'Very Good' entries in the past five years, he is entitled to promotion even on the basis of merit. The denial of such promotion is alleged to be arbitrary, discriminatory and violative of his Fundamental Rights guaranteed under Articles 14 and 16 of the Constitution of India. It is also alleged that Respondent No.5 gave his remarks on the instigation of Respondent No.4.

5. In their reply filed by Respondent No.3, the respondents have vehemently denied the allegation of malafides and bias and it is stated that during the relevant period, Respondent No.4 was not the office bearer of the Association of Direct Recruits. Respondent No.4 has also filed a separate counter in which he has specifically stated that the allegations of malafide, bias and prejudice are false and malicious and these have been denied by him. Similarly, Respondent No.5, in a

separate reply, has denied the allegations of malafide, prejudice etc. and has stated that these are false and malicious.

6. The respondents' case is that the performance of the applicant has been assessed by the reporting officer and reviewing officer in the ACRs and the records do not bear testimony to the claims made by the applicant. It is stated that 90 per cent of the officers working in the charge are promotees and there was no such complaint of having any grudge against ^{the} promotees by direct recruits to any of the officers. The applicant being an active member of the Promotee Officers' Association has no bearing on the assessment of merit of the officer. The allegation regarding transfer of the applicant to CII-6 and his posting in TDS Section having been engineered is stated to be false. The gradation of 'just good' is stated to mean 'Good' and, as such, it is stated that there is no illegality in such a gradation. Promotion to the grade of Assistant Commissioner of Income Tax is stated to be as per 'Selection' method and officers with better gradings are placed in the select panel for promotion. The applicant was duly considered by the D.P.C. along with other officers in the consideration zone and the D.P.C. was headed by a Member of the UPSC. The D.P.C. graded the applicant as "Good"; only officers graded as either 'Outstanding' or 'Very Good' were recommended for promotion. In case of promotion on 'selection' basis, no supersession is involved, as the concept of supersession is relevant in the context of promotion and not in the context of 'selection'. It is also stated that on the applicant's own admission, his report for the year 1988-89 was 'Very Good' and this contradicts his allegation of prejudice and malafide. His representation for promotion was rejected vide letter dated 30.5.1989. It is contended that the Tribunal cannot substitute its wisdom in place of the opinion of the D.P.C.

7. We have carefully perused the documents on record and have also heard the learned counsel for the parties.

8. It is not in dispute that the applicant was within the zone of consideration for promotion to the post of Assistant Commissioner of Income Tax (Junior Scale). It is also not in dispute that he was considered by the D.P.C. for such promotion. The applicant has stated in his application that recruitment to this post is to be made on the basis of seniority cum fitness. The respondents have, however, stated that it is made on 'selection' basis. The applicant has not placed before us anything to substantiate his contention that promotion to this post was to be done on the basis of seniority subject to rejection of the unfit. He, however, cited the Decision (1) - M.H.A. O.M. No.1/1/55-RPS, dated the 17th March, 1955 and F-1/4/55-RPS, dated the 16th May, 1957, on page 88 of Swamy's Compilation on Seniority and Promotion in Central Government Service (First Edition). Decision (1) ibid deals with classification of posts and the posts are required to be classified into two categories:

- (1) "Selection posts", i.e., posts, promotions to which are to be made by selection based on merit, with due regard to seniority, and
- (2) "Non-selection posts", i.e., posts, promotions to which are to be made by seniority subject to rejection of the unfit.

Thus, this decision does not have anything therein to substantiate the averment of the applicant that recruitment to the post of Assistant Commissioner of Income Tax (Junior Scale) is to be done on the basis of seniority subject to rejection of the unfit. However, in para 4(xxii) of his rejoinder-affidavit, the applicant has indirectly admitted that this is a case of promotion by selection. He has stated that "It is submitted that in the instant case

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which is purportedly a case of promotion by selection, the selection process in the case of the petitioner has been illegally interfered with at the instance of the respondents who have misled the Selection Committee by giving unwarranted gradation to the petitioner." It has, therefore, to be held that the promotion to the post of Assistant Commissioner of Income Tax (Junior Scale) was to be made on the basis of 'selection'. In such a selection, the D.P.C. assesses the record of the officers under consideration and grades them as Outstanding, Very Good, Good, Unfit etc., and in the panel of selection, officers graded as 'Outstanding' are placed higher than those who are graded as 'Very Good' and the officers graded as 'Very Good' are placed higher than those who are graded as 'Good'. This is exactly what has been done in this case.

9. As per the Government orders on the subject, where the number of vacancies is 10 or more, officers to the extent of three times of the number of vacancies are to be considered. The vacancies for which the D.P.C. met are shown to be 150. The D.P.C. considered in all the record of 468 officers, of which 13 were from the extended zone for Scheduled Tribe candidates. This leaves 455. The names of 5 officers under consideration before the D.P.C. were deleted / not considered, as they had already been recommended by Review D.P.C. for vacancies for the year 1988. Thus, there is no irregularity in the number of officers considered for promotion to the vacant posts for the year 1989-90. Of the 463 names, the D.P.C. assessed 5 as 'Outstanding', 287 as 'Very Good', 120 as 'Good' and 5 were assessed as 'Unfit'. Assessment of the D.P.C. in respect of 46 officers was placed in sealed covers. It is thus clear that the applicant, who was assessed as 'Good'

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could not have been recommended in preference to those who were assessed as 'Outstanding' and 'Very Good' and whose total number came to 292, while the number of vacancies was only 150. No malafide has been alleged against any member of the D.P.C., which comprised a Member of the U.P.S.C. as Chairman, and Chairman, C.B.D.T. and Member, C.B.D.T. as Members. Respondents 4 and 5 against whom malafides have been alleged, were not the members of the D.P.C. It is stated in the application that 5 years' confidential reports are to be seen by the D.P.C. The learned counsel for the applicant also stated at the bar that this is as per the directions issued by C.B.D.T. The learned counsel for the respondents, however, stated that there were no such directions of the C.B.D.T. The learned counsel for the applicant could not show us any such directions. The minutes of the D.P.C. state that:

"Having examined the Character Rolls of the senior-most eligible officers, the Committee assessed them as indicated against each in Annexure - I."

We are not aware of any instructions to the effect that in case of promotion by selection for a vacancy of a particular year, confidential reports in respect of the preceding five years only have to be seen by the D.P.C. We have not been shown any such instructions by the learned counsel for the applicant as well. Thus, no fault can be found with the selection procedure adopted by the D.P.C.

10. The main thrust of the case of the applicant is that his confidential report for the year 1987-88 is illegal, as the grading of "just good" given to him for that year is not one of the prescribed gradings and that the assessment for that year is based on prejudice and malafides. The respondents have contended that "just good" means 'Good'. The applicant's contention, on the other

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hand is that "just good" means less than 'Good'. We are unable to accept the contention of the applicant in this regard, since 'just good' cannot be taken to mean as less than "Good". Moreover, in the comments of the Reporting Officer in the confidential report for that year, it is stated that "He could have done better if the work had been properly planned" and that "No outstanding features were noticed in the assessment and other work of the Officer". Against specific aspects under columns 16, 17 and 18, the Reporting Officer has given 'Very Good' against five columns and 'Good' against nine columns. In his general observation, against column 21, he has mentioned that "He possesses average intelligence and ability." The Reviewing Officer, who is respondent No.4, generally agreed with the remarks of the Reporting Officer and graded his overall performance as "just good". It has ~~to be~~ ^{is} seen that there is no contradiction in the assessment of the Reporting Officer and that of the Reviewing Officer. It is also to be noted that the Reporting Officer in the case of confidential report for the year 1986-87 was different than the one who was the Reporting Officer for the confidential report for the year 1987-88. The Reporting Officer in the confidential report for the year 1986-87, assessed the applicant on all the specific points in columns 16, 17 and 18 as "Good" only, and the Reviewing Officer, who is Respondent No.4 had agreed with the assessment of the Reporting Officer. Admittedly, for 1988-89, the applicant's performance has been graded as "Very Good" and this has been done not only by the Reporting Officer but also by the Reviewing Officer, who is Respondent No.4 and against whom the applicant has alleged malafides. The assessment on the work and conduct of the Government servant during a particular period has to be based on his

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performance during that period; it is not required to be or should be influenced by the performance in any preceding period. In fact, there are clear orders that such assessment should be confined to the period to which the report relates. Thus, a contention to the effect that since an officer had been graded as "Very Good" in the previous year, he should be similarly graded as "Very Good" in the subsequent years also cannot be accepted either in law or in administration. The C.R. dossier of the applicant, which has been made available to us at our request, also shows that in the past also, the applicant's performance had been sometimes graded as 'Good' and not 'Very Good'. The D.P.C. is not bound under any orders to blindly accept the gradings given by the Reporting Officer or the Reviewing Officer; it is free to make its own assessment, which has, of course, to be based on the confidential reports as a whole, as it is not uncommon that the narrative part of a confidential report is in conflict with the overall grading. The grading by the D.P.C. against whom no malafides have been alleged and in whose selection process, we have not been able to find any fault, is the basis of empanelment for selection, on which promotion is based. The recommendations of the D.P.C. in such cases are also required to be approved by the U.P.S.C., which was also done in this case. They are further examined by the competent appointing authority before acceptance and further action thereon.

10. The applicant has not prayed for expunction of remarks given to him in the confidential report for the year 1987-88. The assessment for this year not being adverse, was not required, and in fact was not, communicated to the applicant. Therefore, the rulings cited by the learned counsel for the applicant on the point for

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consideration of adverse remarks which are not communicated are not relevant. In the circumstances discussed above, we are unable to accept the contention of the applicant that the grading by the Reviewing Officer in the confidential report for the year 1987-88 as "just good" is illegal simply because no such grading is prescribed and that it amounts to something less than 'Good'. No such interpretation is possible in the facts and circumstances of the case.

11. The learned counsel for the applicant cited the case of M. SASIDHARAN Vs. SHRI A.P. SUDIR, DEPUTY COLLECTOR OF CENTRAL EXCISE (AUDIT) COCHIN AND OTHERS, (1988) 6 A.T.C. 385, in which adverse entry recorded by the countersigning officer in the ACR of the applicant therein for the year 1984 was expunged. In that case, the countersigning officer had graded the applicant as "just adequate". The facts of that case were significantly different. Moreover, "just adequate" and "just good" are not comparable. The basis on which the remarks "just adequate" were entered were not established. That case is, therefore, not applicable to the facts and circumstances of the case before us.

12. As regards the allegation of malafide, we are of the considered view that the applicant has failed to establish the same. He could not show us anything in support of his assertion that Respondent No.4 "engineered" his transfer from CII-10 to CII-6. Respondent No.4 is not shown to have recommended the applicant's transfer or having any hand in the issue of the transfer order, which in any case had been issued by the competent authority. Similarly, there is nothing to show with any semblance of credibility that Respondent No.5 passed any ~~any remarks~~ on the instigation of Respondent No.4, as alleged by the applicant in ground No. III in his application. Merely because the Reporting Officer was junior to the

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Reviewing Officer, as it has to be in any case, cannot be taken to mean that the Reporting Officer's assessment was at the instigation of the Reviewing Officer. As already stated above by us, another Reporting Officer had assessed the applicant as "Good" in the confidential report for the year 1986-87, even though the Reviewing Officer was the same. The respondents have stated in their reply that Respondent No.4 was not the office bearer of the Association of Direct Recruits during the relevant period and thus the contention of the applicant that he being the office bearer of the Promotee Officers' Association and Respondent No.4 being the office bearer of the Association of Direct Recruits, led Respondent No.4 to harbour prejudice against the applicant, is not tenable. Even if Respondent No.4 were to be the President of the Association of Direct Recruits, it would not flow therefrom that he would thereby acquire prejudice against all promotee officers and would be prejudiced in his assessment of the work and conduct of the promotee officers. The fact that respondent No.4 himself graded the applicant as 'Very Good' in the confidential report for the year 1988-89 should dispel any such presumption. The contention that Respondent No.4 did not post the applicant to any assessment charge but gave him a most junior charge on his retransfer to CII-10 and, therefore, Respondent No.4 had malafides against him, cannot be given much weight. Assignment of charge within a circle is a normal routine administrative matter and no malafides can be attributed merely because an officer is transferred from one circle to another, particularly in this case when it is admitted that the applicant was on earned leave during that period and he had been retransferred to CII-10 in less than two months. In such a situation, reallocation of charge is not unusual. The applicant, on the other hand, might have used his influence as an office bearer of the Promotee Officers'

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Association in getting back his charge in CIT-10. Such an action on the part of the higher authorities cannot attract an inference against Respondent No.4.

13. It is well established proposition/law that a court cannot substitute itself in place of a Selection Committee. The applicant has prayed for a direction to the respondents for his promotion to the post of Assistant Commissioner of Income Tax, Delhi Circle. In the circumstances of the case, we cannot issue any such direction. It was held in UNION PUBLIC SERVICE COMMISSION V/s. HIRANYALAL DEV AND OTHERS - AIR 1988 S.C. 1069 - that

"the jurisdiction to make the selection vested in the Selection Committee and the Selection Committee had to make the selection by applying the same yardstick and norm as regards the rating to be given to the officials, who were in the field of choice by categorising the concerned officials as "outstanding", "very good", "good" etc. This function had also to be discharged by the Selection Committee by applying the same norm and tests and the selection was also to be made by the Selection Committee as per the relevant rules. The Tribunal could not have played the role which the Selection Committee had to play and it could not have substituted itself in place of the Selection Committee and made the selection as if the Tribunal itself was exercising the powers of the Selection Committee." It was also held that "when some one was selected in preference to the other, it could not be said that it amounted to supersession of a junior by a senior. The concept of supersession is relevant in the context of promotion and not in the context of selection." We cannot give any direction for expunction of the remarks given to the applicant in the confidential report for the year 1987-88. Firstly, the applicant had not prayed for expunction of these remarks. The Tribunal also cannot substitute itself in place of the Reporting / Reviewing Committee.

Officer; they alone are competent to assess the work and conduct of the officer for a particular period. It was held by the Madras High Court in K. KALYANARAMAN Vs. THE INSPECTING ASSISTANT COMMISSIONER OF INCOME TAX RANGE V, MADRAS AND OTHERS - 1980(2) SIR (Madras) 35 - that "Confidential reports are the subjective satisfaction of the officer concerned, though normally one is expected to come to that satisfaction on an objective assessment of the work of the subordinate. Even so, this Court exercising its power under Article 226 of the Constitution, cannot sit in judgment over the remarks of the Officer, as a subjective satisfaction is not open to objective tests by this Court. The officer, when he made the remarks, therefore, should have been satisfied about the need for making such entry by an observance of the conduct of the petitioner during the period he worked under him and it could not have been on the basis of a particular instance or a stray incident. It is also not necessary in all cases that there should be a warning before making any remarks in the confidential reports. Warning comes in by way of communication of the adverse remarks. Though an officer is expected to observe the conduct of the person for some time before he makes the remarks, since a responsible officer had made an entry and that depended on the subjective satisfaction of that officer, I cannot interfere on the ground that there was no earlier instance pointed out where this disputatious behaviour was noticed or warned." In the cited case, adverse remarks were involved, but in the case before us, there are no adverse remarks. Any suggestion, direct or indirect, from the applicant to the effect that the grading given to him for the year 1987-88 should be treated as "Very Good" for the purpose of his promotion, has no basis in law. We cannot grade his performance for that year different from what he has been given/it is neither in our purview to do

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so, nor are we in a position to assess the work and conduct of the officer during that period. The applicant has filed copies of his self-appraisal reports for the years 1982-83 to 1986-87. On the basis of what we have said above, these are not relevant.

14. Based on what we have said above, we find that the applicant had the right to be considered for selection and, in fact, he was considered. No fault can be found with the procedure adopted by the D.P.C. and the recommendations made by it. We cannot substitute ourselves in place of the D.P.C. and order either selection of the applicant for the post of Assistant Commissioner of Income Tax or his promotion to such a post. The plea of malafides against Respondents No.4 and 5 has not been established. The confidential report for the year 1987-88 is not adverse and cannot be treated as such. There is no prayer for expunction of any ~~unfair~~ remarks in the application. We cannot tamper with the confidential report, nor can we reassess the work and conduct of the officer for the year 1987-88. The report is available in the C.R. dossier of the applicant and had been duly considered by the D.P.C. Accordingly, the applicant cannot succeed and the application is hereby dismissed. Parties will bear their own costs.

Sharma
(J.P. SHARMA)

Member (J)

Jain
(P.C. JAIN)

Member (A)

13.7.1990.

pronounced by the undersigned in
open court.

C. Jain

13/7/1990