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CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH
NEW DELHI

O.A./~~xxx~~ No. 1506/1989. /19

Decided on: 12.7.95.

Shri B.N.Singh.

..... APPLICANT(S)

(By Shri G.D.GUPTA

Advocate)

VERSUS

UD I & OTHERS.

..... RESPONDENTS

(By Shri S.R.AGARWAL,

Advocate)

CO RAM

THE HON'BLE SHRI S.R.ADIGE, MEMBER(A)

THE HON'BLE ~~SHRI~~ SMT./~~xxx~~ LAKSHMI SWAMINATHAN, MEMBER(J)

1. To be referred to the Reporter or not? Yes.
2. Whether to be circulated to other Benches of the Tribunal ?

S.R. Adige
(S.R.ADIGE)
MEMBER(A).

13

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CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH
NEW DELHI

O.A. No. 1506/89

New Delhi, dated the 12th July, 1995

HON'BLE MR. S.R. ADIGE, MEMBER (A)

HON'BLE MRS. LAKSHMI SWAMINATHAN, MEMBER (J)

Shri B.N. Singh,
S/o Shri Jang Bahadur Singh,
R/o Guest House, Income Tax Deptt.,
Dehradun (U.P.) ... APPLICANT
(By Advocate: Shri G.D. Gupta)

VERSUS

1. Union of India through
the Secretary to the Govt. of India,
Ministry of Finance, North Block
New Delhi.
 2. The Cabinet Secretary,
Govt. of India,
Cabinet Secretariat,
Rashtrapati Bhawan,
New Delhi.
 3. The Chairman,
Central Board of Direct Taxes,
North Block,
New Delhi.
 4. Union Public Service Commission,
through its Chairman,
Shahjahan Road,
New Delhi.
 5. Shri D.K. Sharma
 6. Shri G.P. Nanda
 7. Shri S.N. Mandal
 8. Shri S.C. Grover
 9. Shri W. Hassan
 10. Shri S. Kapoor
 11. Shri N.N. Mishra
 12. Shri H.C. Pant
 13. Shri E.J. Mawlong
 14. Shri Nathu Ram
 15. Capt. Jai Dev
 16. Shri D. Chakravarti
 17. Shri G.R. Reddy
 18. Shri R.N. Srivastava
 19. Smt. Hardeep Kaur
 20. Shri Panna Lal
 21. Shri J.L. Negi
 22. Shri V. Tochhawang
 23. Shri V.N.L.K. Rao
 24. Smt. Sushma Trivedi
 25. Shri M.V.R. Prasad
 26. Shri B.M. Choudhary
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27. Shri Daudoor Rehman
28. Shri N.C. Tewari
29. Shri P.P. Lekkar
30. Shri K.M. Thomas
31. Smt. Radha Balakrishnan
32. Shri A.R. Chattopadhyay
33. Shri B.P. Mishra
34. Shri S.K. Dass Gupta
35. Shri S.K. Sircar
36. Shri B.C. Mohanty
37. Kum. Anjani Dza
38. Shri S.N. Soni
39. Shri R. Venkataramaiah
40. Shri A.C. Chandra
41. Shri B.L. Rao
42. Shri K.K. Roy
43. Shri G. Parida
44. Shri S.N. Bhargava
45. Shri D.P. Majumdar
46. Kum. R.K. Chahal
47. Shri H.S. Subramanya
48. Shri J.G. Arora
49. Shri S.C. Yadav
50. Shri V.P. Srivastava

Address: Commissioner of Income Tax,
C/o The Chairman, Central Board of Direct Taxes,
North Block, New Delhi.
(By Advocate: Shri R.S. Aggarwal) RESPONDENTS

J U D G M E N T

BY HON'BLE MR. S.R. ADIGE, MEMBER (A)

In this application Shri B.N. Singh,
Commissioner of Income Tax has impugned the action of the
Respondents in not promoting him as Commissioner of
Income Tax in spite of his selection by the D.P.C.
of the UPSC held in Sept. 1987.

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2. The applicant joined the Indian Revenue Service (Income Tax) on 3.7.66 on the basis of the competitive examination for the Indian Administrative and Allied Services held by the UPSC in 1965. In Oct. 72 he was appointed as Asstt. Director of Investigation (Intelligence) and in May, '77 he was promoted as Assistant Commissioner (Income Tax) (Now known as Dy. Commissioner, Income Tax) on the basis of the selection by the DPC duly constituted by the UPSC. In May, 84 he was appointed as Director, Central Translation Bureau in the Deptt. of Official Language and continued to officiate in that post till May, 1988.

2. Meanwhile a meeting of the DPC of the UPSC was held on 8th/9th September, 1987 for making promotions to the post of Commissioner of Income Tax. As a result of the deliberations of that D.P.C. 63 Asstt. Commissioners of Income Tax were ordered to be promoted as Commissioner of Income Tax vide order dt. 4.1.88 (Annexure A-3). Subsequently another officer was also ordered to be promoted vide order dated 3.2.89 (Annexure A-4). According to the applicant's understanding, all the aforesaid 64 officers were graded as 'Very Good' and their promotions were made in order of seniority for the post of Commissioner of Income Tax, vide seniority list dated 1.3.87 (Annexure A-5). The applicant contends that according to his knowledge, he was also graded 'Very Good' by the said D.P.C. and in fact his name was borne

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- 4 -

at Serial No. 19 i.e. immediately above the name of Shri D.K. Sharma in the panel prepared by the D.P.C. of the U.P.S.C., and further, although the said panel was also approved by the Hon'ble Finance Minister, the Appointments Committee of the Cabinet did not approve his promotion. The applicant states that he was ^a at/loss to understand on what grounds his name was dropped by the ACC, when he had been recommended for promotion by the DPC of the UPSC and also by the Hon'ble Finance Minister, more so, when the DPC of the UPSC had selected him for promotion in spite of ^{the} adverse remarks in his C.Rs for the years ^{1982-83 and 1983-84} ~~1982-83~~ and ~~1983-84~~. The applicant further states that although adverse remarks for these two years had been communicated to him and he had represented ^{against} the same, he had not received any reply to his representation and therefore he was under the bona fide belief that the said representations had been accepted, which impression was fortified, when the applicant came to know ^{that} in spite of the above mentioned adverse remarks, he had been graded 'Very Good' by the D.P.C. of the UPSC held in Sept. 1987 and his name was duly borne on the select list/panel prepared by the said DPC of the UPSC. The applicant contends that when

he did not find his name in the order dated 4.1.88
he submitted a representation on 7.1.88 (Annexure A-7)
to which he did not receive any reply either, upon
which he submitted another representation dated
8.5.89 (Annexure A-8).

3. The applicant contends that meanwhile another
D.P.C. of the UPSC was held on 5th/6th April, 1988
for making further promotions to the post of
Commissioner of Income Tax. In that DPC also the
applicant's name was considered, and according to
applicant's understanding he was once again graded as
'Very Good' and his name was not only borne on the
select list, but this time his name was approved by the
consequence
ACC in / of which the applicant was promoted as
Commissioner of Income Tax vide order dated 15.12.88
(Annexure A-9). The applicant contends that in the
D.P.C. held in 5/6th April, 1988 also, the very same
C.Rs were considered as were considered in the D.P.C.
held in Sept. 1987 i.e. the Confidential Reports for
the years 1982-83; 1983-84; 1984-85; 1985-86 and
1986-87 were considered. The applicant has averred
that in the D.P.C. held in April 1988 the C.R for year
the
1987-88 were not considered firstly because / CR for
that year had not been written at that time, and
secondly because the vacancies for which the D.P.C was

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held in April, 1988 actually belonged to the year
the
1987 and April, 1988 D.P.C. only supplemented the
earlier D.P.C. held in September, 1987.

4. The applicant states that he mentioned all these
facts in his representations dated 8.5.89, on his non-
promotion as Commissioner of Income Tax on the basis
of the D.P.C. recommendations of September, 1987, but
that representation was rejected without assigning any
reason vide Respondents' letter dated 3.6.89 (Ann. A-10),
against which the applicant has now filed this O.A.

5. The Respondents in their reply have contested
the O.A. They admit that the D.P.C. of the UPSC which
met in Sept. 1987 recommended the applicant's name
for promotion, but contend that the DPC of the
UPSC is only an advisory body which advises on matters of
promotions of officers, and its recommendations are for
consideration of the "Appointing Authority" which is full
competent to take a final decision in the matter.

The Respondents contend that the "Appointing Authority"
competent
is not to differ with the advice given by an
advisory body and can take an independent decision on
proper examination of the records of the officer in the
matter of promotion by "selection method." In so far as
the reliance has been placed by the applicant on DPAR's
O.M. dated 30.12.76 (Ann. A-19) which prescribes the
procedure to be followed where the Appointing Authority
disagrees with the DPC's recommendation, the Respondents/
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19

reply state that reliance on these instructions was misplaced because ^{those} instructions contemplate a situation where the Minister concerned departs from the advice of the UPSC. It is stated that in such cases the UPSC ^{is} apprised of the reasons for the departure from its advice, and the case ^{is} finally decided by the Appointing Authority, but in the present case the departure from the ^{UPSC's} advice was at the level of the highest competent authority itself and accordingly those instructions do not apply in the present case. Further more, it has been urged that as per Art. 350(3) of the Constitution the President is answerable to the Legislature regarding non-acceptance of the UPSC recommendations that they are only advisory in nature and not mandatory.

6. The applicant in his rejoinder has reiterated that if the ACC has to differ with the recommendations of the DPC of the UPSC, it ^{could} do so only after following the procedure laid down in D.P. & A.R.'s O.M. dated 30.12.76, and further more the ACC erred in not accepting the DPC's recommendations of Sept. 87, particularly when it accepted without demur the DPC's recommendations of April, 1988 which was based on the very same materials.

7. We had directed the Respondents to place

before us for perusal the relevant records relating to promotions to the Commissioner of Income Tax, based upon the recommendations of the D.P.C. of the UPSC held in Sept. 87 and April 1988. On a perusal of the same, it does appear that the D.P.C. presided over by the Chairman, UPSC in its meeting held on 8th, 9th & 10th of September, 1987, after having examined the character rolls of the senior most eligible officers graded the applicant as "Very Good" and recommended the panel of 64 names for vacancies pertaining to the year 1987-88, in which the applicant's name stood at Sl. No. 19, immediately above Shri D.K. Sharma. The recommendations of the D.P.C. were approved by the Hon'ble Finance Minister on 18.9.87, but was eventually rejected by the ACC on the ground that although he had ^{been} given a very good grading by the D.P.C., his reports showed that in 1981-82 he had been graded as satisfactory and even as average under speed and soundness of decision making, which made the overall grading just satisfactory. Similarly in 1982-83 his work had been graded as satisfactory against relation with colleagues, and control and guidance of officers it had been noted that he indulged in party politics in the office and his work was not satisfactory due to that reason. In the report for the year 1983-84 again it had been noted that he had indulged in party politics in the office due to which office discipline had suffered.

He was also given a warning according to the directions of the Chairman, CSDT, and his request for expunction of the adverse remarks for 1982-83 and 1983-84 were rejected. It was noted that subsequently he had received effusive remarks ^{from} the Reporting Officer in the Central Translation Bureau where he worked, but over-all it was decided not to promote him.

9. There is no material on the record to indicate that the procedure prescribed in D.P. & A.R.'s D.M. dated 30-12-76 was followed, when this decision was taken not to agree with the recommendations of the D.P.C. of the U.P.S.C.

10. Subsequently, the D.P.C. of the U.P.S.C. met again on 5th to 7th April, 1988 to consider selecting officers for promotion to the grade of Commissioner of Income Tax. The Income Tax Department reported 66 vacancies which pertained to the financial year 1987-88, and this time again the D.P.C. graded the applicant as "Very Good". A panel consisting of 79 names was recommended by the DPC of the ^{UPSC} the/

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in which the applicant found place at Sl. No. 2.

There are no materials on record to indicate that the CRs for the period 1.4.87 to 31.3.88 were taken into account while making the assessment, firstly because it is most unlikely that the CRs for that year would have been written up and made available to the DPC before it met on 5th April, 1988 and secondly because this DPC of April, 1988 appears to have supplemented the earlier DPC of Sept. 87 and considered vacancies only for the year 1987-88. Hence the applicant's assertion appears to be correct that the same materials which were used to assess his performance in Sept. 87 were placed before the DPC when they assessed him in Sept. 87 but this time the ACC accepted the DPC recommendation without objection and the applicant accordingly was promoted as CIT w.e.f. 16.12.88.

11. We have heard Shri G.D. Gupta for the applicant and Shri R.S. Aggarwal for the Respondents at considerable length. Initially Shri Gupta prayed to inspect the relevant records produced by the Respondents before us on the ground that he would be better able to assist the Tribunal in adjudicating this case only, after he had perused the records, but when the Respondents counsel claimed privilege and we pointed out to Shri Gupta that we would have to rule ^{on} this claim for privilege first, before proceeding further in the matter, Shri Gupta did not press for inspection of the records any further.

12. Opening his arguments Shri Gupta has urged that the ACC's action in not accepting the recommendation of the DPC in Sept. 87 which graded the applicant as "Very Good" alongwith many others (None were graded as "outstanding") in spite of adverse remarks for 1981-82 and 1982-83 and had recommended him for promotion, which recommendation also had the approval of the Hon'ble Finance Minister, and their subsequent acceptance of the DPC's recommendation for promotion in April, 1988, which had again graded the applicant as "Very Good" and which were based on the same facts and materials was clearly arbitrary. He urged ^{that} arbitrariness was antithetical to the rule of law, natural justice, equality and fairness and ^{was} therefore violative of Art. 14 and 16 of the Constitution, as had been held by the Hon'ble Supreme Court in Maneka Gandhi Vs. UOI AIR 1978 SC 597 as well as Ajay Hagia Vs. Khalid Mujib AIR 1981 SC 487 wherein their Lordships of the Hon'ble Supreme Court had observed that

"Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and if it affects any matter relating to public employment, it is also violative of Art. 16. Art. 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment".

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24

13. Secondly Shri Gupta argued that if it were adverse remarks that weighed with the ACC in rejecting the DPC's recommendation on Sept. 87, the same could not be taken into account ^{when} the representation filed by the applicant against those adverse remarks were still pending. In this connection he relied upon Shri G.S. Fijl Vs. State of Punjab AIR 1979 SC 162 wherein it had been settled that adverse report in a CR could not be acted upon, denying the employee promotional opportunities, unless the same had been communicated to him, so that he had an opportunity to improve his work and conduct, or explain the circumstances leading to those adverse remarks. In this connection Shri Gupta stated that he was aware of UOI Vs. G. Nambudiri 1991 SC 1216 wherein it had been held that absence of reasons while rejecting the representation against adverse remarks was not illegal per se, provided those reasons were available and could be supplemented from the relevant record.

14. Thirdly Shri Gupta had argued that even if the appointing authority had the right to disagree with the recommendation of the DPC of the UPSC, that right had to be based on valid reasons. When the appointing authority's action in not accepting the recommendations of the DPC of the UPSC was challenged on the grounds of malafide, arbitrariness and illegality, the appointing authority had to satisfy the Tribunal as to reasons which weighed with it in not accepting the DPC's recommendations, and when it considered it

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28

necessary to depart or disagree with those recommendations, the prescribed procedure as contained in Home Ministry's D.M. dated 27.11.50 and reproduced in DP & AR's D.M. dated 30.12.76 had to be followed, but in the present case this was not done. In this connection Shri Gupta relied upon the ruling in B.N. Singh Vs. Secretary to the Govt. of India, Ministry of Labour AIR 1990 (1) CAT 1991. Furthermore he urged that as the recommendations were based on ^u certain order of merit and consequent to the rejection by the ACC of those recommendations, that order was disturbed, the principle set forth in Jatinder Kumar & Ors. Vs. State of Punjab & Ors. in 1985 (1) SCC 122 had been violated, wherein it had been held that if a vacancy was to be filled, the Govt. had to make the appointment strictly adhering to the order of merit as recommended by the Public Service Commission.

15. Lastly, Shri Gupta urged that the ACC's decision was itself *not* immune from challenge in a Court of Law, and in this connection referred to the ruling in H. Mukherjee 1994 (26) ATC 833 wherein it had held that the Govt. may for valid reasons recorded on the file disapprove of the advice or recommendations tendered by the Commission, that decision could be tested on the limited ground of it being arbitrary, malafide or capricious.

16. On the other hand respondents' counsel Shri R.S. Aggarwal argued that in declaring the applicant unfit for promotion in Sept. 87 it was not the respondents' intention to penalise him permanently. When in April, 1988, the applicant's case came up again for promotion he was found fit, and this action of the Resp. according to Shri Aggarwal could not be termed unreasonable. He also emphasised that the applicant's representations against his adverse remarks had been rejected and no reasons were required to be communicated to him for rejection. The Respondents were not aware that the orders communicating the rejections had not been received by the applicant, and as no reminder was received by them they naturally presumed that the rejection orders had been received by him, and hence no advantage could flow to him on this account.

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18. Before we discuss the merits of the arguments put forth by the respective counsel, we would advert to the judgment of the Hon'ble Supreme Court in UOI Vs. Shri N.P. Dhamania vide Civil Appeal No.1794 of 88 and other connected cases decided by the Hon'ble Supreme Court on 20.10.94, which has a direct bearing on the case before us.

19. Shri Dhamania was appointed in the P&T Deptt. in Sept. 1963 in the Indian Telcom. service and in due course he was given Selection Grade in the scale of pay of Rs.2000 - 3250 in the Junior Administrative Grade w.e.f. 1.12.82. On 9.12.82 a DPC meeting was convened to prepare a select list of officers for promotion to Level II of the Senior Administrative Grade of the ITS. The DPC recommended 5 officers for empanelment for 1984, 24 officers for 1985 and 30 officers for 1986. All the officers including Shri Dhamania were rated as 'Very Good' and none possessed outstanding merits. Shri Dhamania retained his original seniority at Sl.No.13 in Junior Administrative Grade in the panel. The panel was approved by the Communications Minister, but after perusing the records, the ACC directed that the panel should be returned to the UPSC for some vigorous review as it expected more selectivity. The UPSC informed that the panel was prepared strictly in accordance with the Deptt. of Personnel's instructions, and there was no scope for review and they had stated that they had no further advice to offer in the matter. The panel was again approved by the Communications Minister and was again submitted to the A.C.C.

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After some further correspondence in the matter the ACC approved a panel of 54 officers on 9.12.86. Five names were dropped including that of the applicant, who filed O.A. 1191/86 before the Tribunal, who by its judgment directed that as no reasons had been assigned or were forthcoming for the deletion of Shri Dhamania's name from the panel, he should be deemed to have been promoted with effect from the date his immediate junior was promoted to the Senior Administrative Grade Level II, vide Notification dated 8.1.87.

20. The Hon'ble Supreme Court in their judgment adverted to the instructions contained in the DPAR O.M. dated 30-12-76 regarding the procedure to be followed when the appointing authority did not agree with the recommendations of the DPC. After reproducing the relevant portion of the procedure contained in Home Ministry's O.M. dt. 27.11.50 on the subject, their Lordships agreed with the Tribunal that the recommendations of the UPSC were advisory in nature and were not binding on the appointing authority. It was open to the appointing authority to defer from the recommendation in the public interest but while doing so it had to give reasons for so deferring to ward off any attack of arbitrariness, although it was not necessary to communicate those reasons to the officer concerned. However, their Lordships were of the view that the Tribunal had exceeded its jurisdiction in directing Shri Dhamania's deemed promotion from the date his immediate junior was so promoted. They observed that they were unable to support the Tribunal's finding that merely because the ACC required the UPSC to adopt a more vigorous 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 account the deemed promotion could not be accorded. Instead, the appeal was disposed by the Hon'ble Supreme Court with a direction that the ACC should reconsider Shri Dhamania's case on merits with reference to the records and if found suitable grant him promotion w.e.f. the date his immediate junior was promoted with consequential benefits such as seniority, salary, etc. Similarly in connected Civil Appeal No. 1726 of 1989 the Appointing Authority was directed to consult the UPSC once again by making a 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 had reached the conclusions not to appoint the respondent 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 respondent's name was restored to its original position as recommended by the UPSC, the respondent's case for promotion to the post of Commissioner of Income Tax was to be considered on merits and orders were to be passed within three months.

21. In the light of all that has been stated above, Shri Gupta is entirely right in arguing that the ACC's decision is not immune from judicial review, and even if it did disagree with the UPSC's recommendations the disagreement had to be based upon valid reasons to ward off any challenge of arbitrariness which would violate Articles 14 and 16 of the Constitution. In the present case before us, unlike in Dhamania's case (supra), reasons for disagreement have been recorded. What appears to have weighed heavily in the ACC's mind in finding the applicant not fit for promotion in Sept. 87 were the remarks he had received for the years 1981-82 and 1982-83. The ACC has specifically noted that the applicant's representations for expunction of those remarks were rejected, and the mere fact that the orders communicating the rejections were not received

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25

allegedly by the applicant as contended by him owing to their being/ incorrectly addressed, does not help him. Furthermore it was not necessary for the respondents to give reasons why they rejected those representations.

22. That having been said, it must be noted that in April, 1988 on the basis of those very same C.Rs when the UPSC again recommended the applicant for promotion, the respondents accepted those recommendations without demur. Although Shri Aggarwal has argued that the respondents had no intention to hold back the applicant's promotion in Sept. 1987 permanently, there is no discussion in the concerned record to indicate that the applicant's work was to be watched, and in any case that question did not arise, because in April, 1988 the respondents on the basis of the very same C.Rs and the UPSC's recommendations found him this time fit for promotion.

23. Furthermore we note that while disagreeing with the UPSC's recommendations in Sept. 1987, the respondents did not follow the procedure laid down in DPAR's O.M. dated 30.12.76, relevant portion of which are reproduced below:

" 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

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 Gup 'B' to Group 'A' posts. However, a reference may be made to the Regulations, as and when necessary.

PROCEDURE TO BE FOLLOWED WHEN APPOINTING AUTHORITY DOES NOT AGREE WITH THE RECOMMENDATIONS OF DPC

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 occasion 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.

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."

The relevant portion of the procedure contained in Home Ministry's O.M. No. 18/42/50-Est.dt. 27.11.50 are also reproduced below.

" The Govt. of India have decided that where the Union 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 further justifying their recommendations. On the receipt of the observations of the Commission, their recommendations should be considered 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 Govt. of India who will place it before the Appointment Committee of the Cabinet consisting of the Hon'ble Prime Minister, the 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 Appointment Committee in all such cases should be communicated to the Commission by the Minister administratively concerned. Final orders in accordance with the decision will also be issued by that Ministry, copy being endorsed to the Commission."

24. The argument advanced by the respondents that this procedure was not required to be followed, because the departure from the UPSC's advice was at the level of the highest competent authority itself, does not appear to be tenable because the wording of Home Ministry's O.M. dated 27.11.50 is explicit and admits of no exception. As the appointing authority disagreed with the UPSC's

31

recommendations without following the procedure prescribed above, we hold that this infirmity should be cured even at this stage after which further consequent action should be taken in accordance with law. We are fortified in our view by the Hon'ble Supreme Court's direction in Civil Appeal No. 1726 of 1989 disposed of along with Dhamania's case (Supra).

25. Accordingly this D.A. is disposed of with the direction that the Appointing Authority shall consult the UPSC once again by making a reference back to them indicating the reasons for making a departure from the panel recommended by them in Sept. 1987 and also forward the material on which it decided not to promote the applicant ^{in view of} Sept. 1987 and obtain their views. In case after consultation with the UPSC in the matter indicated above, the applicant's name is restored to its original position as recommended by the UPSC, his case for promotion as Commissioner of Income Tax w.e.f. ^{as is the date from which his junior was promoted, in} Sept. 1987 shall be considered on merits and necessary orders passed within three months from the date of receipt of UPSC's recommendations.

26. Parties to bear their own costs.

Lakshmi Swaminathan
(LAKSHMI SWAMINATHAN)
Member (J)

S.R. Adige
(S.R. ADIGE)
Member (A)

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