

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

....

Date of decision : 21-7-92

P R E S E N T

HON'BLE SHRI N.V. KRISHNAN, VICE CHAIRMAN
HON'BLE SHRI N.DHARMADAN, JUDICIAL MEMBER

I. D.A. No. 603/90

R.Rajagopalan ... Applicant
Mr. G.Sivarajan ... Counsel for the applicant
Vs.
u/o) through
The Secretary, Ministry
of Finance, New Delhi & 3 others .. Respondents
Mr. N.N.Sugunapalan ... Counsel for the respondents /+2
P. Radhakrishnan ... for R-3

II. DA 726/90

C.Karthikeyan Nair ... Applicant
Mr. K.L.Narasimhan ... Counsel for the applicant

Vs.

u/o) through the
Secretary, Ministry of
Finance, New Delhi & 5 others. .. Respondents

Mr. AA.Abul Hassan Counsel for R-1, R-2 & R-6.
Mr. P.Radhakrishnan Counsel for R-3
Mr. G.Sivarajan Counsel for R-5

O R D E R

N.V.Krishnan, VC

D.A. No.603/90 filed by R.Rajagopalan and DA No.726/90

filed by C.Karthikeyan Nair were heard together with the
consent of the parties as, in both applications, the order
dated 2nd March, 1990 of the Chief Commissioner of Income
Tax, Cochin, the 2nd respondent, promoting K.Kittu, the

3rd respondent, over the heads of the applicants is impugned.

Therefore, they are being disposed of by this common judgement. Reference to exhibits are to those in OA 726/90, unless otherwise mentioned.

2. These applications are an off-shoot of an earlier application No. TAK 54/87 by C.Karthikeyan Nair, which was disposed of by the Annexure A2 order dated 31.8.89. Hence, it is necessary to briefly trace the background leading to the filing of these applications.

2.1 For considering promotions from Inspector of Income Tax (I.I.T) to the post of Income Tax Officers Group B (ITO), a Departmental Promotion Committee (DPC) met on 31.12.81. It prepared a panel of 8 names to fill up 8 vacancies, including 2 vacancies for SC. Of these vacancies, 3 had arisen in 1981, on or before 31st December, 1981, 4 were to arise in 1982, and one to arise on 31.3.83. The last two names in that panel were those of R.Rajagopalan and T.N.Thankamma, a Scheduled Caste. These two persons were promoted as ITO on 3.2.83 and 2.5.83 respectively.

2.2 Another DPC meeting was held on 13.6.83 to prepare a panel of 3 names, including one Scheduled Tribe. This was chaired by Sh.i M.S.Unni Nair, Member of the Central Board of Direct Taxes (CBDT), who was earlier the Commissioner of Income Tax, Cochin. The DPC prepared a panel of 3 persons as follows:

- i) K.Kittu
- ii) M.Ramachandran
- iii) V.A.Narayanan (ST)

The first place in the panel was given to K.Kittu, the juniormost I.I.T, as he was graded 'outstanding'. He thus superseded M. Ramachandran--the seniormost I.I.T who was given only the second place in the panel. As there were only 2 vacancies for other communities, C.Karthikeyan Nair, the second seniormost I.I.T, could not be included in the panel. K.Kittu was promoted as ITO on 29.10.83.

2.3 Aggrieved by his supersession, C.Karthikeyan Nair filed OP 8496/83 in the High Court of Kerala, which was received on transfer in this Tribunal under section 29 of the Administrative Tribunals Act, 1985 and registered as TAK 54/87. It was contended that the DPC proceedings of 31.12.81 are vitiated as that DPC should not have taken into account any vacancy that was to arise after 31.12.82. Had this been done the chances of the applicant for selection would have been greater. Therefore, R. Rajagopalan and T.N.Thankamma, who were promoted on 3.2.83 and 2.5.83 respectively, were impleaded as Respondents 5 and 4 respectively. The selection of K.Kittu and his placement at S.No. (1) of the panel by the DPC proceedings of 13.6.83 was also challenged and K.Kittu was therefore impleaded as Respondent 3. The challenge to K.Kittu's selection was made on the important grounds that he was junior to the applicant, the applicant was more qualified and had a better record than K.Kittu, the DPC

was chaired by Shri M.S.Unni Nair who had a soft corner for K.Kittu and he was also the Commissioner of Income Tax, Cochin in which capacity he had reviewed the character rolls (CRs) of K.Kittu and upgraded them. On these grounds, it is alleged the selection is biased.

2.4 The Tribunal found considerable force in the argument by the applicant that the DPC which met on 31.12.81 should have considered only 7 vacancies, falling upto 31.12.82, and left out of consideration the vacancy which was to fall on 31.12.83. Therefore, the Tribunal did not enter into the merits of the application on other grounds. An observation was, however, made in the context of the CR of K.Kittu, that the officer who chaired the DPC on 13.6.83 (ie. Shri M.S.Unni Nair) was the same officer, who had not only given 'outstanding' grading to K.Kittu but had also reviewed the gradings given by the reporting officer. The Tribunal concluded by stating "we need not comment on these facts". The application was disposed of by the order dated 31.8.89 (Ann. A2) with the following observation/direction:

"In the facts and circumstances we direct that the meetings of the review DPCs should be convened as on 31.12.81 and 13.6.83 to draw up panels for seven vacancies upto 31.12.82 and for four vacancies upto 13.6.84, including two vacancies of Scheduled Castes and one vacancy of Scheduled Tribe respectively for two panels. [These panels should be prepared without changing the grading of the officers earlier considered except for valid reasons which should be recorded.] The petitioner, if included in any of the panels should be given notional promotion as ITO with retrospective effect on the basis of his

position in the panel and with all consequential benefits of arrears of pay, seniority etc. The respondents 1 and 2 will be at liberty to protect the promotions already made by creating super-numerary posts if necessary to accommodate the petitioner for the notional promotion. Such protection to others, however, would not give any benefit of seniority in the grade or ITO, which will be determined by the respective places awarded to the petitioner and others in the panels prepared by the review DPC. We allow the petition on the above lines with the direction that this order should be implemented within a period of six months from the date of communication of this order. There will be no order as to costs."

*(Portion deleted by order dated 30.11.89 in review)

2.5 In respect of this order, both C.Karthikeyan Nair, the original applicant and R.Rajagopalan, the 5th respondent therein--the applicants now before us in OA 726/90 and 603/90--filed review applications which were registered as R.A. 49/89 and 69/89.

2.6 The review applicants contended that the Review DPC should not be compelled, while preparing a fresh panel, to adopt the grading of the officers done by the previous DPC, in view of the allegations made about the manner in which entries were made in the character roll of K.Kittu. Finding merit in this contention, these review applications were allowed by the Ann.A3 order dated 30.11.89 and the second sentence of paragraph 8 of the original order extracted above (shown in square brackets) was deleted. It is also necessary to add here that R.Rajagopalan, the applicant in OA 603/90, had filed a Special Leave Petition in the Supreme Court against the original order in TAK-54/87, but it was dismissed.

2.7 In pursuance of these orders, a Review DPC was convened which met on 19.2.90. It reviewed the selection as on 31.12.1981 and prepared a fresh panel to fill up 7 vacancies upto 31.12.82 including two vacancies reserved for SC. That panel is as follows:

1. K. Raghavan (SC)
2. M. Gopalakurup
3. K.S.Vijayan
4. P.M.Varghese
5. K.K.Mathai
6. A.M. Ali
7. T.N.Thankamma (SC)

The only change as compared to the panel prepared by the original DPC is that the name of R.Rajagopalan has been dropped because this panel had only 5 non reserved vacancies and R.Rajagopalan was junior to others and was not graded as outstanding so as to supersede them.

2.8 The Review DPC also reviewed selection as on 13.6.83 and prepared a panel to fill 4 vacancies, including one vacancy reserved for Scheduled Tribe. That panel is as follows:

1. K.Kittu
2. R.Rajagopalan
3. M. Ramachandran
4. V.A.Narayanan (S.T.)

K.Kittu, a junior I.T.I. has been graded as 'outstanding' by the Review DPC and hence he has been placed at the top of the panel, because others were given only 'very good' grading. He has therefore superseded R.Rajagopalan (applicant in OA 603/90) and M.Ramachandran, both of whom are senior to him. C.Karthikeyan Nair (applicant in OA 726/90) who is also senior to K.Kittu, does not find a place in the panel as there are only 3 unreserved vacancies to fill up.

2.9 Acting upon the recommendations of this Review

DPC, the 2nd respondent passed the impugned order(Ann.A1) dated 2nd March 1990 (Ann. C in OA 603/90) which is impugned in these applications. Extracts of the relevant paras from this impugned order are reproduced below:

"As directed by the Tribunal, DPCs to review the earlier DPC decisions i.e. in order to consider only 7 vacancies for the period from 31.12.81 to 31.12.82 and 4 vacancies for the period 1.1.83 to 13.6.84 were held. While conducting the review DPCs, the directions contained in the Tribunal's orders dated 31.3.89 and 30.11.89 were borne in mind. Accordingly two panels of 7 officers and 4 officers respectively for the period from 31.1.81 to 31.12.82 and 1.1.83 to 13.6.84 were drawn up. It is found that the applicant viz. Shri C.Karthikeyan Nair did not find a place in any of the two panels. In the light of this, no consequential benefits, either in seniority or by way of arrears of pay etc., are found due to Shri C.Karthikeyan Nair and orders were passed accordingly.

3. Consequent on the review DPCs, held as aforesaid inter-se seniority of some of the officers involved in the DPCs get changed. Their seniority will be as under:

1. K.Raghavan
2. M.Gopaiakurup
3. K.S.Vijayan
4. P.M.Varghese
5. K.K.Mathai
6. A.M.Ali
7. T.N.Thankamma
8. K.Kittu
9. R.Rajagopalan
10. M.Ramachandran
11. V.A. Narayanan, and so on.

The deemed date of promotion of Smt. T.N.Thankamma will be 3.2.1983 (instead of 2.5.1983) and that of Shri K.Kittu will be 2.5.1983 (instead of 29.10.83). The date of promotion of Shri R.Rajagopalan will be 29.10.83 (instead of 3.2.83). The heads of offices concerned shall rectify the pay of the above officers and regulate increments and disburse the arrears or pay/recover the excess payments, if any, as the case may be. However, the monetary benefits in respect of the officers, Smt. T.N.Thankamma and Shri K.Kittu will be admissible only from the date on which they actually started working as Income-tax Officer, viz. 2.5.83 and 29.10.83 respectively."

- Both the applicants are aggrieved by this order.

3. In OA 603/90 filed by R.Rajagopalan, the following reliefs have been sought:-

- "(i) To call for the records leading to Ann.C and quash/set aside the same.
- (ii) To declare that the action of the DPC headed by the 2nd respondent in placing the 3rd respondent above the applicant in the rank list for ITOs is illegal, arbitrary and unjustified.
- (iii) To pass all consequential reliefs including cancellation of the order for recovery of the excess pay drawn and award cost of this petition."

4. The grievance of this applicant is mainly two-fold.

i) The applicant states that C.Karthikeyan Nair who filed the earlier application, TAK-54/87, did not have any grievance against him, because, between them, the applicant was senior. C. Karthikayen Nair was aggrieved by his supersession by his junior, K.Kittu, who was promoted out of turn on the basis of DPC's recommendations. Therefore, the final order in TAK-54/87 should have been implemented keeping this important point in view. It is contended that, if the Review DPC found that C.Karthikeyan Nair was not entitled to any relief, the position of the applicant vis-a-vis K.Kittu ought not to have been disturbed and he should have been allowed to retain the seniority he enjoyed over K.Kittu as a result of the earlier DPC's recommendation and the orders thereon. Therefore, there was no need, whatsoever to quash the proceedings of the earlier DPC which was held on 31.12.81 on the promotion given to him from 3.4.83.

ii) His second grievance is that there is no justification whatsoever for the Review DPC meeting to

supersede him in the matter of ranking by placing K.Kittu, the 3rd respondent above him, as a result of which, in the impugned order, the applicant has been posted as ITO from 29.10.83, while K.Kittu has been promoted from 2.5.83. In this connection, he has alleged that the Review DPC has blindly adopted the gradings given by the earlier DPC without making an independent assessment of the calibre of K.Kittu and the applicant.

5. OA 726/90 is filed by C.Karthikayen Nair, the applicant in the earlier application TAK-54/87. He has impleaded K.Kittu, T.N. Thankamma and R.Rajagopalan, the applicant in OA 603/90 as contesting private respondents 3, 4 and 5. He has sought the following reliefs:

- "(a) To call for the records leading to the selection of panel on the basis of the Departmental Promotion Committee held on 31.12.81 and 13.6.83 and the Review DPC of 1990, scrutinise and examine its legality, propriety and quash Ann.1 order dated 2.5.90 of the 2nd respondent.
- (b) To hold that the promotion of 4th and 5th respondents are bad, as the promotions are made on the basis of the expired select list.
- (c) To direct the first and second respondents to assess the relative merit/performance of the applicant and the 3rd respondent on the basis of the past track records and objectively.
- (d) To direct the first/second respondents to convene the DPC complying with the norms prescribed for its contribution to assess the suitability of eligible candidate for promotion to the post of ITO (Group B) in 1977 itself.
- (e) To declare the promotion of 3rd respondent ignoring the seniority and claims of the applicant ultravires of the rule bad and assign to the applicant due rank above all his juniors."

7. The respondents 1 and 2 in both the applications, the Union of India and Chief Commissioner of Income Tax, Cochin (Department, for short) have opposed the applications. It is contended that in the first place, the order dated 31.8.89 in TAK 54/87, as modified by the order dated 30.11.89 has become final and the issues decided therein cannot now be reopened and secondly, the impugned order dated 2nd March 1990 has been passed in pursuance of the directions given by the Tribunal in TAK 54/87. The applications are, therefore, without merit and have to be rejected. It is also denied that there has been any irregularity in the proceedings of the Review DPC held on 19.2.90.

8. K.Kittu, the 3rd respondent in both the cases, has also filed a separate reply contesting the claims of the applicants. He submits that it was because of his sheer merit and better performance that he got an 'outstanding' grading and hence, in accordance with the instructions on the subject, he was placed at the top of the panel. He denied that he was the recipient of any undue favour from Shri M.S.Unni Nair.

9. R.Rajagopalan, the 5th respondent in OA 726/90, has also filed a reply stating that the applicant can have no grievance against him and to the extent that the application seeks any relief against his promotion, it may be rejected.

10. We have carefully perused the pleadings in these applications and heard the parties at great length. On our directions, the relevant original records were also produced for our perusal. Before we proceed further, we find it necessary to state that the applicant in OA 726/90 and his learned counsel have tried to raise some issues which are clearly barred by constructive res judicata. For, these matters should have been taken up for a final decision in TAK 54/87 initiated by the same applicant. It is no doubt true that in the Annexure A2 order disposing of TAK 54/87 it was observed that the Bench did not feel it necessary "to go into other questions raised by the petitioner about his superior educational qualifications and performance and the handicap that he suffered by the fact that the Reviewing Officer who had given 'outstanding' entries to respondent 3 also happened to be the Chairman of the DPC". The Bench, however, did not preserve the right of the applicant to raise these issues again in any subsequent proceedings. The applicant also did not seek to get this order changed or modified to preserve such right. He, no doubt, filed a review application RA 49/89 but he did not raise these grounds in that application. As seen from the Annexure A3 order of the Bench, the only prayer made in the review application was for deletion of the second sentence of para 8 of the original order and this prayer was accepted and that sentence was deleted. Therefore, we cannot allow this applicant to raise issues which have been or ought to have been raised in TAK 54/87 and which have not been preserved

in the final order therin for being agitated later on.

In particular, we cannot permit this applicant to question the propriety of holding the second DPC as on 13th June 1983 instead of as on 31.12.82.

11. In this background, after having considered the arguments advanced by the parties, we propose to consider the following issues only.

i) The first issue is the grievance of the applicant in OA 603/90 referred to in para 4(i), i.e. his contention that, not having found any merit in the claims of C.Karthikeyan Nair, the Review DPC ought not to have disturbed the earlier promotion granted to him.

ii) Was the second DPC meeting deliberately fixed on 13.6.83 to favour K.Kittu and to enable him to get an outstanding grading?

iii) Is the allegation justified that Shri M.S.Unni Nair, the then Commissioner of Income Tax, Cochin showed undue interest in K.Kittu and favoured him by upgrading the C.R.grading from 'very good' to 'outstanding'?

iv) Did the Review DPC which met on 19.2.90 strictly comply with the direction given in the Annexure A2 and A3 orders?

12. Issue No.(i)

This arises from the ground 'G' set out by the applicant in OA 603/90 which reads as follows:

"The Tribunal's direction was only to reconvene the DPC, to draw up fresh panels and to promote the petitioner therein, Sri Karthikeyan Nair, if

included in any of the panels. There was no direction to disturb the promotions already made, if the petitioner (Sri Kartikeyan Nair) was not benefitted thereby. Therefore, the present change of inter se seniority of the officers ordered is beyond the scope of the order of the CAT and hence illegal."

This argument cannot be sustained. The Annexure A2 order directed a review DPC as on 31.12.81 on the only ground that 7 vacancies alone should have been considered, of which 2 are reserved vacancies. That is a final direction and it adversely affected the applicant, who was Resp. 5 therein because, in the normal course, his name was found to be deleted by the Review DPC because he was the junior most among the candidates from other communities. Yet he did not agitate this matter in review. Hence he is precluded from raising it now. The 5 candidates included in the panel by the Review DPC held on 31.12.81 at S.Nos. 2 to 6, against the 5 unreserved vacancies, are all seniors to the applicant. The applicant, therefore, can have no grievance against them and in fact, he has not impleaded any of them. The seventh person in the panel is the fourth respondent T.N.Thankamma, a Scheduled Caste, included to fill up the second reserved vacancy and she has been impleaded in the OA. Obviously, the applicant can have no grievance against her as she has been given a place in the panel against a Scheduled Caste vacancy. Therefore, this applicant could not have found a place in the panel as on 31.12.81 and he had to be considered only by the Review DPC as on 13.6.83. He can, therefore, have only a grievance against the 3rd respondent who was

placed first in the panel superseding him and his plea that since C.Karthikeyan Nair was not given any relief, there was no need to disturb him, has no force.

13. Issue No. (ii)

The learned counsel, Sri K.L.Narasimhan, alleged that Sri M.S.Unni Nair, Member, Central Board of Direct Taxes, was instrumental in getting the second DPC meeting fixed on 13.6.83 to protect the interest of K.Kittu. He submitted that, in the first instance, the Annexure A4 letter dated 10.1.83 was sent from the CBDT to the 2nd respondent directing that no fresh DPC be held till the existing panel prepared by the DPC on 31.12.81 was exhausted. The last promotion on the basis of that panel was that of T.N.Thankamma (SC) from 2.5.83. Hence, the second DPC was held on 13.6.83. He further contended that this was designed to help K.Kittu to get an 'outstanding' grading at the hands of the DPC so that he could supersede his seniors in the selection. It is stated that if a DPC had been held on 31.12.82--as it should allegedly have been done according to the instructions--the record of K.Kittu could have been assessed as only 'very good' and therefore, he could not have superseded either R.Rajagopalan or C.Karthikeyan Nair, the applicants in these cases.

14. This is not part of the pleadings. We notice that while referring to Annexure A4 in his application in OA 726/90, the applicant did not make the above allegations, which was subsequently made in the course of the arguments. He had stated only as follows:

"Further, the second respondent failed to convene

the annual DPE apparently relying on the communication F.No. A 32012/1/82-Ad.VI dated 10.1.83 from the First respondent. This order is produced herewith and marked as Annexure-IV."

15. Nevertheless, to find the truth about this allegation we have perused the original records (File No.C.90/Estd/Con/81) relating to DPC of 1981 and it discloses the following facts.

i) On 12.11.81, Shri M.S.Unni Nair, the Commissioner of Income Tax Cochin (against whom these allegations are made) requested the CBDT to arrange for a DPC to consider promotion to ITO Group B against vacancies likely to arise only upto 31.12.82 and not beyond.

ii) However, on 7th December 1981, the CBDT informed all Commissioners of Income Tax that a DPC was proposed to be held during the months of December 1981/January 1982 to consider promotion as ITO Grade B and it was in this letter that it was directed that the anticipated vacancies upto February 1983 should be taken into account. The CBDT was informed by letter dated 14.12.81 of the second respondent that there were 8 vacancies, the last of which was to arise on 31.1.83.

iii) It is on this basis that the DPC met on 31.12.81 and prepared a panel of 8 names.

iv) Vacancies were being filled up from time to time from this panel on the specific directions of the CBDT.

v) While the panel prepared was being operated in this manner, Shri G.R.Patwardhan, who succeeded Shri M.S.Unni Nair, sent a letter dated 22.12.82 to the CBDT stating that the panel was to expire on 31.12.82 and he made the following proposal:

"The Board may therefore immediately approve the promotion of the SC candidate (last in the panel) against the vacancy arising on 31.12.82. The Board may also extend the validity of the panel to 28.2.83 allowing the next person (general candidate) to be promoted on 31.1.83.

Another DPC will be held in April 1983."

It is to be noted that the request for extending the validity of the panel upto 28.2.83 was made in this letter.

vi) It is to this letter that the Annexure A4 reply was sent ~~xxxxxxxxxxxxxx~~, the relevant portion of which reads as follows:

"Promotion from Inspector to the grade of Income Tax Officer (Group B) will be made on the basis of select panel drawn up by the DPC. Of the select panel of 8 Inspectors, first five Inspectors have so far been promoted as Income Tax Officer (Group B) and 6th Inspector in the panel will be promoted against the retirement of Shri K.Abdul Khader, Income Tax Officer (Group A) and not the last SC Inspector in the panel as stated in para 4 of your letter under reference. Further, no fresh DPC will be held till the existing panel is exhausted."

It is this letter which clarified that a new DPC will be held only after the panel was exhausted. Subsequently, by the letter dated 2.2.83 of the CBDT, the last Inspector from the panel was authorized to be promoted and accordingly, T.N.Thankamma (SC) was promoted.

In fact, Ann.A4 was not sent from the CBDT as stated in the exhibit filed by the applicant, but it was issued by the Department of Revenue in the Ministry of Finance, i.e. the Government. Therefore, the allegation of it being the handwork of Shri M.S.Unni Nair is only a wild surmise.

16. The other allegation made in this connection is that this was done to secure for K.Kittu an 'outstanding' grading of his CR. This is not alleged in the original application in OA 726/90. This argument is advanced on the basis of the following extract from para 8 of the additional reply dated 2.9.91 filed by the Department in OA 603/90:

"D.P.C. can give only one grading either 'outstanding' or 'good' to each candidate having regard to the grading given consecutively for all the 5 years in the A.C.Rs. If all the 5 ACRs contained 'outstanding' grading, normally the DPC would rate the candidate as 'outstanding' but the DPC would be cautious if the 'outstanding' grading for all the 5 years is given by the very same set of Reporting/Reviewing Officers. If the rating for one or more of the said 5 years is 'very good' and for remaining years 'outstanding', DPC can rate the candidate only as 'very good' for all the 5 years. If the rating for any one or more years happened to be 'good' and for other years 'very good', the rating of DPC can only be 'good'.

In the case of respondent No.3, Shri Kittu, he did not get the rating as 'outstanding' as on 31.12.81 because out of 5 years from 1976-77 to 1980-81, he could get such rating in the ACRs only for $4\frac{1}{2}$ years while the rating was only 'very good' in his ACR for the period from 1.10.77 to 31.3.78. However, the position happened to be different as on 13.6.83 in which his ratings in all 5 ACRs for 1978-79 to 1982-83 given by different set of officers happened to be 'outstanding'. As such, he had to be rated 'outstanding' by the Review DPC bearing in mind the relevant instructions/ directions contained in the Government of India's O.Ms prevailing as on 13.6.83, and happened to be No.1 in the panel as on 13.6.83 prepared by the Review DPC and the applicant happened to be No.2 in the said panel."

This allegation has, therefore, come only as an after-thought, after seeing this reply. Neither applicant has

either made this allegation in his original application, nor in any rejoinder to this reply. The most effective reply to this allegation is provided by the Character Roll of K.Kittu. In the DPC of 13.6.83, CRs from 1978-79 to 1982-83 were considered, as stated in the aforesaid extract. The CR of K.Kittu for 1982-83 was recorded by both the Reporting Officer (Shri T.V.Varghese, ADI) and the Reviewing Officer (Shri G.R.Patwardhan, Commissioner of Income-tax) on 28.5.83. The Annexure-A4 letter was written by the Ministry as early as on 10.1.83. None could have anticipated then what the grading of K.Kittu's C.R for 1982-83 would be. Even so, the learned counsel for the applicant in OA 726/90 would like to persuade us to believe that Shri M.S.Unni Nair, who was the then Member CBDT exercised undue influence over the Reporting and Reviewing Officer to ensure that they gave K.Kittu an outstanding rating. We refuse to countenance this argument which is not borne out by any record.

Therefore this issue is answered against the applicant.

17. Issue No. (iii)

The other important issue that remains for consideration relates to the upgradation by Shri M.S.Unni Nair, the then Commissioner of Income-tax, Cochin, of the CRs of K.Kittu from 'very good' to 'outstanding'. In the

earlier judgment in TAK 54/87 (Annexure A2) the following observations have been made:

"We have seen the CRs of both the petitioner as well as respondent No.3 and find that the Reviewing Officer of respondent No.3 who was the Chairman of the DPC had not only given 'outstanding' entries to respondent No.3, but upgraded the entries made by the Reporting Officer of respondent No.3. We need not comment on these facts."

In the context in which they have been made this, perhaps, points to the undue interest shown by Shri M.S.Unni Nair in K.Kittu, though there is no such explicit inference. The question is whether the upgrading of the rating of the CR was justified.

18. We have perused the character rolls of K.Kittu as an ITI from 1.4.76 upto 31.3.83, which is the period for which his record was considered by the DPC and the Review DPC. The assessment or grading given by the reporting and reviewing officers is given below. Where, in the general comments made, a one word final assessment is not given, the general comment given is extracted fully:

Period	Reporting Officer	Assessment	Reviewing Officer	Assessment
				Officer
1.4.76 to 31.3.77	T.R.Subramanian I.T.O. Special Circle.	Outstanding	B.J.Chacko IAC, Trichur	Agreed
1.4.77 to 30.9.77	-do-	-do-	V.Mohan Lal IAC, Trichur	Agreed
1.4.77 to 31.3.78 (should be 1.10.77 to 31.3.78)	N.Seetharaman I.T.O, Kerala	A very good and a very willing worker	M.A.Subramanian Commr. of Income-tax.	Shaping well
1.4.78 to 31.3.79	-do-	Outstanding	M.S.Unni Nair	Out-standing

Period	Reporting Officer	Assessment	Reviewing Officer	Assessment
1.4.79 to 31.3.80	P.Vijayan (J) I.T.O. Hqrs.	Outstanding	M.S.Unni Nair, Commr. Income-tax	Outstanding
3.4.80 to 31.3.81	KV.A.Menon Astt. Director of Inspection	Efficient hard working and willing worker	-do-	Outstanding
1.4.81 to 31.3.82	-do-	A very hard working and efficient hand.	-do-	-do-
1.4.82 to 31.3.83	T.V.Verghese ADI	Outstanding	G.R.Patwar- dhan, Commr. of Income-tax.	-do-

19. It is thus seen that prior to 1978-79, when Shri Unni Nair came on the scene, K.Kittu had already been rated as outstanding for $1\frac{1}{2}$ years from 1.4.76 to 30.9.77. For the following half year i.e. 1.10.77 to 31.3.78, he was assessed by totally new officers. The Reporting Authority, nevertheless, found him to be very good and in the immediate next year 1978-79 he rated him as 'outstanding'. Shri M.A.Subramanian, Commissioner of Income-tax, Cochin, was more cautious and found him to be 'shaping well' in the latter half of 1977-78. He did not remain, thereafter, to make a proper assessment. Shri M.S.Unni Nair became the Reviewing Officer from 78-79. He found, even in the first year, that the record of K.Kittu was 'outstanding'. This is not unusual. For, before and after 1978-79, others who had seen K.Kittu's performance for the first time, like Shri M.S.Unni Nair, had also found him to be 'outstanding' as can be seen from the details given above. Thus, Shri B.J.Chacko, IAC, Trichur and

and Shri V.Mohan Lal, IAC, Trichur, the reviewing authorities, found him 'outstanding' in 1976-77 and first half of 77-78; Shri P.V.Vijayan, ITO (J) Hqrs. and Shri T.V.Verghese, Assistant Director of Inspection, both reporting officers, found him 'outstanding' in 79-80 and 82-83; and, finally, Shri G.R.Patwardhan, Commissioner of Income-tax Cochin, the reviewing officer, found him 'outstanding' and also 'fit for promotion out of turn' in 82-83. It should not, therefore, be surprising if, in two consecutive years 78-79 and 79-80, Shri M.S.Unni Nair also found K.Kittu to be 'outstanding', an assessment already made by the Reporting officers.

20. That takes us to 80-81 and 81-82. In these two years, the reporting officer did not give any overall grading of K.Kittu's work, though he had given his assessment. Shri M.S.Unni Nair felt that the reporting officer had underestimated K.Kittu and gave the following overall assessment and grading. For 81-82, the CR form requires the reviewing officer to mention the reasons for disagreement, if any, with the reporting officer and, these have been given as will be seen from the relevant extracts:

80-81

"He is an Inspector of outstanding abilities. His enquiries have been highly result oriented and have led to very successful searches. The Reporting Officer has underestimated his attributes. I am very familiar with the official's work!"

81-82

"The reporting officer has under rated the attributes of the official. Suitable modifications have been made. The official's thorough knowledge of accounts and procedures led to unearthing of large concealment."

during the course of a search in a nursing home. His notings indicate excellent knowledge of law and procedure.

Fit out of turn.

An exceptionally competent Inspector whose work is characterised by thoroughness, depth and remarkable initiative. He has a remarkably keen insight into accounts. He is absolutely dependable and will be an asset in any department."

21. What has drawn adverse attention is the fact that, in addition, Shri M.S.Unni Nair has upgraded the grading of 'very good' given by the Reporting Officer Shri K.V.A. Menon, Assistant Director of Inspection in respect of certain particulars prescribed in the proforma for writing character rolls in these 2 years. These particulars are as follows:-

(1) Year 1980-82

- 4(a) Knowledge of Direct Tax Laws, Rules, Procedure and Circulars.
- (b) Willingness to work.
- (c) (ii) Enquiry Work
- (d) Output during the year

4(c)(ii) was modified to 'exceptionally good' and others modified from 'very good' to 'outstanding'.

(2) Year 1981-82

- 13(1) Knowledge of Direct Tax Laws
- (2) Knowledge of Accounts
- (3) Knowledge of Rules, Procedure and Circulars.

(all modified from 'very good' to 'outstanding')

17. Relations with

- (i) Superiors
- (ii) Colleagues
- (iii) Public

(all modified from 'very good' to 'excellent').

22. The reason for making these modification has briefly been given in the concluding remarks of Shri Unni Nair which have been reproduced above. There is no dispute that in the procedure prescribed for the writing of character rolls, the reviewing officer has a right to modify the assessment made by the reporting officer, either in favour of or to the detriment of the reported official. Para 8 of Part A Confidential Reports - General Instructions' in Chapter 2 "Records for consideration of Promotion" in Swamy's Compilation on 'Seniority and Promotion in Central Government Service' First Edition (Swamy's compilation, for short) contains, at page 33, the following instructions.

"The counter-signing authority should, therefore, normally indicate whether it agrees or disagrees with the remarks of the reporting officer. It should also record additional remarks, wherever necessary, if the report is too brief, cryptic or vague."

Considering the facts disclosed by a perusal of the CRs of K.Kittu, we are satisfied that this is not a case where the record of a totally undeserved person has been upgraded to 'outstanding' or that such a benefit has been given by one who is entirely unacquainted with the work of the reported official. Hence, the allegation that this has been done to confer an undeserved favour on K.Kittu is baseless.

23. The learned counsel for the applicant in OA 726/90 brought to our notice a judgment of the Madras Bench of the ^{(1989) 9 ATC 396} ~~therein~~ Tribunal ^{therein} wherein there was a complaint by the applicant that Shri M.S. Unni Nair has spoiled his character roll. Our attention was drawn to the fact that the Tribunal found this complaint to be true and has spoken of him in uncomplimentary terms. It is, therefore, contended that

Shri M.S.Unni Nair cannot be depended upon to give any disinterested and unbiased assessment.

24. We have perused that judgment. We are satisfied that this cannot be pressed into service to persuade us that Shri M.S.Unni Nair's assessment of K.Kittu must be ignored. The main basis for the criticism of Shri M.S.Unni Nair in that judgment is that while writing the CR of the applicant therein as the Reporting Officer, he had ignored and failed to take into account the comments given by the Commissioner of Income Tax, Trivandrum and other senior officers of the same rank as himself, under whom the applicant had simultaneously worked during that period. This was taken as evidence of bias. There is also a reference to a criticism of Shri M.S.Unni Nair by a colleague of his for following such a procedure for writing the CR. Thus, that criticism was made on the special facts of that case. It cannot be universally applicable to the assessments made by Shri M.S.Unni Nair in all cases. We have specifically found above that there is no basis for the charge levelled against him that he had deliberately upgraded the CR rating of K.Kittu.

25. We would, however, like to make it clear that our finding does not necessarily mean that the record of K.Kittu has to be graded as 'outstanding'. For, this is a matter which has to be decided by the DPC itself. It is stated in para 6.2.1 of Chapter 44, Promotions - A.Departmental Promotion Committees - in Swamy's Complete Manual on

Establishment and Administration, 3rd Edition that the evaluation of CRs should be fair, just and non-discriminatory. To ensure this, the following directions are given:

- " e) The DPC should not be guided merely by the overall grading, if any, that may be recorded in the CRs but should make its own assessment on the basis of the entries in the CRs, because it has been noticed that, sometimes, the overall grading in a CR may be inconsistent with the grading under various parameters or attributes.
- f) If the reviewing authority or the Accepting authority, as the case may be, has overruled the Reporting Officer or the Reviewing authority, as the case may be, the remarks of the latter authority should be taken as the final remarks for the purpose of assessment, provided it is apparent from the relevant entries that the higher authority has come to a different assessment consciously after due application of mind. If the remarks of the Reporting Officer, Reviewing Authority and Accepting authority are complementary to each other and one does not have the effect of overruling the other, then the remarks should be read together and the final assessment made by the DPC."

26. Therefore, such an evaluation has to be made only by the review DPC keeping in mind the aforesaid instructions. We have only come to the conclusion that the allegation that the changes made by Shri M.S.Unni Nair are motivated have no basis and that his bonafide in this matter is being questioned without any evidence by the applicant.

27. Issue No. (iv)

That brings us to the last question whether the review DPC has strictly complied with the directions of the Tribunal in TAK 54/87 as to how the assessment has to be made by the review DPC. We would first examine what these

directions are. The original order in TAK 54/87 (Ann. A2) contained the following direction:

"In the facts and circumstances we direct that the meetings of the review DPCs should be convened as on 31.12.81 and 13.6.83 to draw up panels for seven vacancies upto 13.6.84 including two vacancies of Scheduled Castes and one vacancy of Scheduled Tribe respectively for the two panels. These panels should be prepared without changing the grading of officers earlier considered except for valid reasons which should be recorded."

It may be added that this is also the standing instruction in the DP&AR Memo dated 26.3.80. The relevant extract from para 3 on page 103 of Swamy's compilation is reproduced below:

"Another question that has been raised is whether the review DPC could change the grading of the officers already considered by them and graded or whether they can change the zone of consideration or take into account any increase in the number of vacancies. As mentioned in the preceding paragraph, a Review DPC can only reconsider the case with regard to the revised set of facts for rectifying unintentional mistakes which might have taken place earlier. It is, therefore, clarified that the Review DPC is required to consider the case again only with reference to the technical or factual mistakes that took place earlier and, therefore, it should neither change the grading of an officer earlier considered without any valid reasons which should be recorded nor change the zone of consideration nor take into account any increase in the number of vacancies which might have occurred subsequently!"

However, the direction given by the Tribunal in its Ann. A2 order was subsequently modified in review (Ann. A3) made at the request of the applicant. The ~~xxxxxxxx~~ last sentence in the extract reproduced above was deleted for the following reasons:

"If, in accordance with our judgment, the grading given by the DPCs of 1981 and 1983 has to be maintained, it will be inconsequential and tantamount to mere reshuffling of the candidates already selected between these two select lists. Further, the last candidate in the select list of 1981 assessed by the DPC of 1981 may also suffer by being clubbed with select list of 1983 if the 1983 assessment, as alleged by the Original Petitioner had been prejudiced in favour of respondent 3 in the Original Petition."

28. It is clear that though there is no positive direction that the earlier gradings made by the DPC have to be ignored and not looked into at all, that was the import of the order passed in view, deleting the last sentence in the original order extracted in para 27 above. A de novo assessment was, therefore, required to be made by the Review DPC. In fact, the Department has averred as follows at page 3 of the additional reply filed in OA 603/90 which is in reply to para 2 of the applicant's rejoinder:

"The Review DPCs held in February 1990 independently examined the records of the officials concerned and gave its own grading to each one of them, uninfluenced by the decision taken by the original DPC."

We have now to examine whether this is correct.

29. We will restrict this enquiry to the extent needed. The applicants have not come out with any grievance against the review DPC held on 31.12.81. They have not impleaded the first six persons in the panel (including one SC) who are placed against the first 6 vacancies. The seventh, T.N.Thankamma, has been impleaded as a respondent by C.Karthikeyan Nair in OA 726/90. However, we can have no grievance against her because there is a direction in the earlier order in TAK 54/87 that the panel as on 31.12.81 should contain 7 names, of which 2 should be SC. T.N.Thankamma is the second SC and she had a right to be included in the panel prepared by the review DPC held as on 31.12.81. Hence there is no need to disturb the panel as on 31.12.81 prepared by the

Review DPC.

30. Therefore, we have to take into account only the proceedings of the Review DPC held on 13.6.83. A perusal of the record--11/Estt/1/Con/CCCHN/90-91-- shows that, contrary to the final direction in TAK 54/87, the Review DPC was guided by the assessment made by the earlier DPC which met on 13.6.83. We notice from the records of the meeting held on 19.4.90 by the Review DPC to review the panel as on 13.6.83, that a tabular statement of 13 columns was filled, of which column 11 was 'Finding of the last DPC' under which these findings had been entered for the information of the Review DPC. The Review DPC gave its finding in column 12. There was no change in the finding. Column 13 is for 'Remarks' and there are no remarks in the column. If the final direction given in TAK 54/87 was to be implemented, the Review DPC ought not to have looked into the grading given by the original DPC. Despite denial by the Department, we are satisfied that the Review DPC not only looked into it, but followed it. For this reason alone, these proceedings are liable to be quashed.

31. There is another major flaw in these Review DPC proceedings. No record has been kept by the Review DPC about its assessment of the character roll for each year in respect of each official. Before coming to a conclusion that the record of K.Kittu was 'outstanding' and the records of the applicants were 'very good' after perusing

the CRs for five years, the Review DPC should have first made an assessment of the CR of each of the five years and then alone made an overall assessment. No such yearly independent assessment was made. Such an independent yearly assessment is absolutely necessary as the reporting and reviewing officers are not the ~~same~~ for all officials. They also have their own styles of writing the CR. Some reporting officers have not given any overall grading. Some reviewing officers have recorded 'nil' comments. It is for this reason that the Review DPC is expected to standardize all the assessments, irrespective of the gradings given in the character rolls, giving due weightage to the remarks given against various items in respect of which an officer has been reported upon. Further, in regard to R.Rajagopalan, CR of 1982-83 is not available.

Instructions

in the light of the departmental
One does not know how this was made good. All these go to show that the review DPC has failed in discharging its duty properly.

32. In the circumstance, we are of the view that it is necessary to quash the proceedings of the Review DPC relatable to the review on 13.6.83 and remand the case again to a Review DPC for a fresh reassessment in the light of our earlier observations.

33. The question arises as to what specific directions may be given in this behalf. We notice that 13 names, in their order of seniority, were considered by the Review DPC for its review of the selection as on 13.6.83

This included V.A.Narayanan, a ST, who was at Sl.No.11. As one vacancy was earmarked for a Scheduled Tribe, V.A. Narayanan was selected. For the remaining three unreserved vacancies, the Review DPC considered the names of the other 12 persons. The four seniormost persons and the rating given to them by the Review DPC were as follows:

- 1) R.Rajagopalan - Very Good
(applicant in OA 603/90)
- 2) M. Ramachandran - Very Good
- 3) C.Karthikeyan Nair - Very Good
(applicant in OA 726/90)
- 4) K.Kittu - Outstanding
(respondent in both OAs)

The others, who were all juniors, were not found to be outstanding. Hence the panel was prepared as follows placing K.Kittu at the top so as to supersede the aforesaid seniors:

- 1) K.Kittu - Outstanding
- 2) K.Rajagopalan - Very Good
- 3) M.Ramachandran - Very Good
- 4) V.A.Narayanan (ST)- Very Good.

C.Karthikeyan Nair was excluded from the list.

34. The applicants who do not belong to SC/ST are concerned only with the first three names in the panel to fill up the three unreserved vacancies. M.Ramachandran who is senior to C.Karthikeyan Nair has not been impleaded as a party. Hence no orders can be passed which may be adverse to him and therefore his name shall remain in the panel at S.No.3. Therefore, if per chance, Karthikeyan Nair gets included in the panel, he will be ranked below M.Ramachandran/ whatever be his grading. Therefore, the question to be considered on review

is who are the two other fittest persons to be placed in the panel and for this purpose, the names of the two applicants and the third respondent K.Kittu only have to be considered. At present K.Kittu has displaced C.Karthikeyan Nair. If *de novo* assessment shows that K.Kittu's record is no better than that of R.Rajagopalan or C.Karthikeyan Nair (whatever the grading assigned may be) the two places have to be given to R.Rajagopalan and C.Karthikeyan Nair, the latter being placed below M.Ramachandran. If the *de novo* assessment reveals that out of the three, only K.Kittu has an outstanding record he will occupy the first place in the panel. The second place will be filled by determining whether R.Rajagopalan or C.Karthikeyan Nair is the fittest to occupy it. If it is found that R.Rajagopalan and K.Kittu both have outstanding records, they will be selected for the 2 places in that order and placed above M.Ramachandran.

35. Therefore, while disposing of these applications we quash the proceedings of the Review DPC held on 19.2.90 to review the panel for promotion as on 13.6.83, in so far as they concern the positions assigned in that panel to K.Kittu (Res. 3) and R.Rajagopalan (applicant in OA 663/90) and the non-inclusion in that panel of C.Karthikeyan Nair, (applicant in OA 726/90) and we also quash the consequential orders passed by the second respondent (Ann.A2)

in so far as it concerns the promotion as Income Tax Officer of K.Kittu and R.Rajagopalan and the order directing recovery from the latter and we also issue the following directions to Respondent 1 and 2:-

i) A fresh Review DFC shall be constituted to consider the claims for inclusion in the panel for promotion as ITOs as on 13.6.83, of the applicants in OA 603/90 and OA 726/90 and K.Kittu, for two vacancies, keeping intact and undisturbed the earlier selection of M.Ramachandran and V.A. Narayanan in their respective positions and fresh orders of promotion shall be passed by the secund respondent in the light of the recommendations of the Review DPC.

ii) In conducting the review, the relative merits of the records of the two applicants and of K.Kittu shall, notwithstanding any departmental instructions to the contrary, be assessed independently, keeping in view the observations made in the preceding paras of this judgment and without in any way being influenced by any earlier assessment of such records by any DPC.

iii) The persons promoted as a result of this Review DPC shall be given notional promotion as ITO with retrospective effect on the basis of his position in the panel and with all benefits of arrears of pay, seniority etc.

iv) These directions shall be complied with, within two months from the date of receipt of this judgment and till then, the status quo shall continue on an adhoc basis, and the promotions shall abide by the final order that may be passed by the second respondent in pursuance of these directions.

v) There shall be no recovery from the parties to this application if it is found that they are entitled to promotion only from a date later than the date on which they were promoted.

vi) There will be no order as to costs.

N. Diarmadan
(N. Diarmadan) 21.7.92
Judicial Member

V. Krishnan
(N. V. Krishnan)
Vice Chairman (A)