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BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL
NEW BOMBAY BENCH
CIRCUIT SITTING AT NAGPUR

O.A.966/89

Mr. Arun Bhatia,
Additional Commissioner,
Nagpur Division,
Nagpur. .. Applicant

vs.

1. The State of Maharashtra
through
The Secretary, GAD,
Mantralaya,
Bombay.
2. The Chief Secretary to the
Govt. of Maharashtra and
the Chairman Establishment Board,
Govt. of Maharashtra,
Mr. D. M. Sukthankar,
Mantralaya,
Bombay.
3. Shri K. G. Paranjape
Retd. Chief Secretary,
C/o. G. A. D.,
Mantralaya,
Bombay. .. Respondents

Coram: Hon'ble Shri P. S. Chaudhuri, Member (A)

Hon'ble Shri S. K. Jain, Member (J)

Appearances:

1. Mr. M. G. Bhangde
Advocate for the
Applicant.
2. Ms. P. D. Anklesaria,
Counsel for the
Respondents.

JUDGMENT:

(Per P. S. Chaudhuri, Member (A))

Date: 22-8-1991

This application under Section 19
of the Administrative Tribunals Act, 1985 was filed
on 29-12-1989. In it, the applicant who belongs to
the 1967 batch of the Maharashtra Cadre of the
Indian Administrative Service (for short, IAS) prays
for a direction to respondents No. 1 and 2 to
promote him to a post in the Supertime scale

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in the Maharashtra Cadre of the IAS with effect from either May-June, 1985 when his junior, one Shri A.W.Bhadkamkar, was promoted or such subsequent date as the Tribunal may deem fit.

2. We may start summarising the background to the applicant's grievance by quickly running over his postings prior to the filing of this original application. He was appointed in July, 1967 and after various other postings, was posted as Collector, Satara from January, 1977 to April, 1980; as Deputy Secretary Urban Development and Public Health Department, Govt. of Maharashtra from August, 1980 to April 1981; as Collector, Dhule from April, 1981 to June, 1982; and as Collector, Raigad from July, 1982 to May, 1983. In the meantime, by order dated 24-6-1983 the applicant had been promoted to the selection grade of the I.A.S. with effect from 17-6-1982. His next posting was as Collector, Bombay from July, 1983 to July, 1984. Thereafter, the applicant was on leave, which was not sanctioned initially but was regularised subsequently, from July, 1984 to January, 1985. By a letter dated 26-12-1984 the Chief Secretary, Government of Maharashtra (hereafter referred to as the Chief Secretary) informed the applicant that it had been decided to depute the applicant for appointment as Project Executive Adviser in Botswana with the F.A.O for a period of 24 months. The applicant was out of India on this assignment from January, 1985 to January, 1988, the period of the assignment having

been extended by one year. On his return to India, on 8-5-1988 he took over charge as Additional Commissioner, Nagpur and was continuing in that post when he filed this original application.

3. Coming now to the annual confidential reports of the applicant the respondents submit that the applicant's confidential report for 1979-80 contained certain adverse remarks which were communicated to him in the Chief Secretary's letter dated 24-11-1980 and that no representation from the applicant against these adverse remarks was received by the State Government. Further, the confidential record file of the applicant shows that the State Government's displeasure at the applicant's extremely indiscreet behaviour was communicated to him by the Chief then Secretary on 15-3-1980. The respondents submit that the applicant's confidential report for 1980-81 also contained some adverse remarks which were communicated to the applicant in the Chief Secretary's letter dated 24-2-1982. It is the respondent's submission that no representation from the applicant against these adverse remarks also was received by the State Government. No doubt the applicant denies this and submits that he had submitted a representation on 23-5-1982 on which a decision is still awaited, but we are unable to go along with the applicant in this submission because he has neither sought a redressal of this grievance in the appropriate forum with utmost

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expedition as enjoined in Tilokchand Motichand and Ors. v. H.B. Munshi, Commissioner of Sales Tax, Bombay and anr., AIR 1970 SC 898, nor, when making his subsequent representation in 1988, mentioned that his earlier representation of 1982 still remained to be decided. The respondents go on to add that during the same period, by the Chief Secretary's letter dated 20-11-1980, the applicant was warned by the Government of Maharashtra for having committed certain irregularities. The respondents further submit that the applicant's confidential report for the year 1981-82 also contained certain adverse remarks which were communicated to the applicant in the Chief Secretary's letter dated 18-6-1984. The applicant did not submit any representation against these adverse remarks because, according to him, he reasonably believed that these remarks were of no consequence inasmuch as he had been promoted to the Selection Grade of the I.A.S.. The respondents' last submission on this point is that the two confidential reports covering the year 1982-83 - one for the period 1-4-1982 to 30-6-1982 and the other for the period 6-7-1982 to 20-2-1983 - also contained adverse remarks which were communicated to the applicant in the Chief Secretary's letter dated 3-8-1984 when, as mentioned earlier, the applicant was on leave. This letter dated 3.8.1984 reads as follows:-

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"The confidential report on you for the year 1982-83 shows that you are a very intelligent officer capable of excellent results in the field and in the office, you are brilliant, very bold and dynamic officer with courage of convictions. It also shows that your performance in all spheres of Government work was outstanding. It however, shows that but for certain personal angularities and tendency to antagonise colleagues and subordinates, you would be an excellent officer and you were found lacking in balance at times and that you were not able to maintain smooth and cordial relations with your colleagues."

4. We may digress here to mention that the applicant's case for promotion to the Selection Grade was considered by the Establishment Board at its meeting held on 13-4-1981 along with the cases of 16 other IAS officers of the 1967 batch. The Confidential Record file of the applicant for the five years 1975-76 to 1979-80 was taken into account and it was found that the applicant was not fit for promotion as he had not attained 'Positively good', designated as 'B plus', grading. Thereafter, at its next meeting on 6-4-1983 the Establishment Board again considered the applicant's case for promotion to the Selection Grade and, on appraisal of his confidential record file for the five years 1977-78 to 1981-82, it found that the applicant is a dedicated and courageous officer, that he possess, zeal, initiative and drive, that he possess good comprehension and expression, ^{and so} he has, however, certain angularities which are perhaps due to his over enthusiasm; ^{and so} it decided to recommend that the applicant should now be given the Selection Grade. Accordingly, as mentioned earlier, the applicant was promoted to the Selection Grade with effect from

17-6-1982 by notification dated 24-6-1983.

5. On 3-5-1988, just before taking over charge as Additional Commissioner, Nagpur the applicant submitted a representation to the Government of Maharashtra against the adverse remarks in the confidential reports on him for the year 1982-83 which had been communicated to him in the Chief Secretary's letter dated 3-8-1984. Eventually, on 23-1-1989, the Chief Secretary informed him that:-

"The Government has considered your representation carefully and has decided to expunge the following remarks from your Confidential Report:

"But for certain personal angularities and tendency to antagonise colleagues and subordinates, he would be an excellent officer."

"He was found lacking in balance at times and that he was not able to maintain smooth and cordial relations with his colleagues.

....."

6. Simultaneously, on 13-5-1988 the applicant had also written to the Chief Secretary regarding his promotion stating that:

"....."

2. I was out of the country on deputation to the United Nations for three years(1985-1988). Now, on returning, I find that I have not been promoted. I learnt that the 1971 batch of IAS Officers are due for promotion which would mean that I have been superseded for 4 years. I would be very grateful, Sir, if you could please let me know the reason for not promoting me.

3. In this regard, I would like to make the following three submissions -

(a) Presumably, for promotion only those confidential reports would be relevant which pertain to the period after I received the Selection Grade. If so, then I would like to bring to your kind notice the excellant report given to me by Mr.R.L. Pradeep, Commissioner, Bombay Division, covering my tenure as Collector, Raigarh. The remarks were also communicated to me.

(b) The subsequent report of Mr.Sundaram, Commissioner, Bombay Division and the Secretary, Revenue Department, would not be impartial as I had serious disagreements with them which are documented. Though their comments have not been communicated to me I fear their reports might have had some bearing on the question of my promotion. I, therefore, request that if there are any adverse comments from Mr.Sundaram or the Revenue Secretary, during my tenure as Collector, Bombay the remarks should be communicated to me or else they should not be allowed to stand in the way of my promotion. I would also request that an opinion from the Ex-Chief Secretary Mr.R.D. Pradhan may also be obtained on the comments passed by Mr.Sundaram and the Revenue Secretary.

(c) I learnt that confidential reports written during deputation are not to be taken into account. However, I submit, Sir, that in my case the period is such that it interferes with my promotion and hence the reports from the United Nations may please be considered as a special case.

....."

He followed up the matter with the Chief Secretary by letters dated 20-7-1989 and 8-8-1989. Eventually on 21-8-1989, the Chief Secretary, sent him a reply in Marathi which on translation reads as :-

"Please refer your D.O.letter No. Additional Commissioner/PRO/ CS/1989 dtd. 8.8.1989 regarding promotion to Supertime scale.

You are recently held eligible for promotion to Supertime scale. Orders regarding promotion will be issued whenever there will be regular and permanent vacancy."

7. Then, on 13-12-1989, the applicant wrote to the Secretary, Department of Personnel, Home Ministry, New Delhi stating:

"I am enclosing a letter in Marathi received from my Chief Secretary in August, 1989 informing me that my case had been cleared for promotion and that posting orders would be issued as soon as there was a vacancy.

This means, Sir, that I should be the first person to be promoted whenever a vacancy arises. The 1973 batch of IAS officers who are six years junior to me are due for promotion and I have an apprehension that the Chief Secretary might try to bypass me again. My reasonable apprehension is based upon the fact that I have complained against the Chief Secretary for protecting corruption.

I, therefore, request you, Sir, to please direct the Chief Secretary not to violate the government decision communicated to me by the Chief Secretary himself. If it is found that my allegations against the Chief Secretary are false I am ready to accept the punishment but this is quite a separate issue and should not be allowed to interfere with my promotion.

I hope you will consider my request sympathetically and issue necessary directions to the Chief Secretary."

8. As he continued to be aggrieved, the applicant filed this application on 29-12-1989 praying for his promotion to a post in the Supertime scale in the Maharashtra Cadre of the IAS. The

respondents have opposed the application by filing their written statement. We have also heard Mr. Bhangde, learned advocate for the applicant and Ms. P.D. Anklesaria, learned Government Pleader for the respondents.

9. Before considering the rival contentions it would be useful to refer to the rule position in relation to promotion to the Supertime scale of the IAS. The relevant Rules are the Indian Administrative Service (Pay) Rules 1954, Rule 3(2-A) of which says:

"Appointment to the Selection Grade and to posts carrying pay above the time scale of pay in the Indian Administrative Service shall be made by selection on merit with due regard to seniority."

It is not disputed that the Supertime scale is one of the scales of pay above the Senior Time scale of pay and so is covered by this rule.

10. On 27-12-1975 the Government of India, Cabinet Secretariat, Department of Personnel and Administrative Reforms issued instructions to the State Governments laying down that Screening Committees should be set up and guidelines, detailed in the annexure to the instructions should be followed in regard to promotion/selection of IAS Officers to the various grade of the service. The guidelines pertaining to promotion to Supertime scale posts read as under:

"III. PROMOTION TO SUPERTIME SCALE POSTS.

(1) Composition of the Screening Committee.

The Screening Committee may consist of three officers - the Chief Secretary and two officers in the State at the level of Additional Secretary to the Government of India.

.....

(2) Zone of consideration.

The zone of consideration may consist of all the members of the Indian Administrative Service who have completed 16 years in the service.

(3) Method of selection.

(i) Selection should be based on merit with due regard to seniority as provided in sub-rule 2(A) of Rule 3 of the Indian Administrative Service (Pay) Rules, 1954.

(ii) Suitability of officers to hold supertime scale posts may be judged by evaluating their character roll record as a whole, and general assessment of their work..

(iii) An officer against whom a vigilance or departmental inquiry has been started should also be assessed and the assessment placed in ~~the~~ a sealed cover. The question of including him in the panel should be considered when the result of the inquiry is known.

(iv) The reasons for supersession may be indicated in the case of officers who are not included in the panel.

(v) An officer who has not been included in the panel in the first instance should be eligible for re-consideration after earning two more reports.

(vi) Special review may be done in cases where adverse remarks in the Officers' annual confidential reports

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are expunged subsequently as a result of their representations.

4. Period of validity of the panel:

(i) A fresh panel may be prepared as soon as all the officers on the previous panel have been provided.

(ii) If a vigilance or departmental enquiry has been started against an officer on the panel after a preliminary enquiry establishing charges *prima facie*, the said officer shall not be promoted to the supertime scale and will be deemed to have been excluded from the list, pending the result of the enquiry.

(iii) Subject to exigencies of service, the appointments to the supertime scale may be made in the order in which names appear in the panel."

11. However, by an earlier Resolution dated 13.6.1974 the Government of Maharashtra had set up an Establishment Board consisting of 5 Members headed by the Chief Secretary to, *inter alia*, make recommendations for appointments by promotion to posts above the Senior Time scale of the All India Services. This Resolution was amended by the Government of Maharashtra's Resolution dated 25.4.1989 in terms of which two separate Establishment Boards were set up. The constitution and functions of Establishment Board No. I, which is the Board with which we are concerned, were laid down as follows:

A) The Constitution of Establishment Board No. I :-

The Chief Secy will be the Chairman of the E.B.I and the two officers working as Addl. Chief Secy's will work as its members.

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2. The functions of the E.B.I

A) To select Officers for promotion to all posts the minimum of the time scale of which is Rs.5100/- and above.

B) To consider the representations against the notice of premature retirement served to those who hold the posts the minimum of time scale of which is Rs.3700/- and above as Representation Committee."

12. By another Resolution dated 28-1-1975 the Government of Maharashtra laid down principles to be observed in connection with promotion from a lower to a higher grade, service or post. Clauses 1(2), (3) and (6) of this Resolution read as under:-

"1(2)Promotions above the first promotion to Class I should be by strict selection i.e. only those persons who possess positive merit and achieve tangible good results should be considered suitable for promotion irrespective of their seniority provided they fulfill the criteria of length of service prescribed if any.

(3)Promotions to the posts of Heads of Departments should be by only very strict selection on the same criteria as under (2) above and irrespective of the class of service to which they belong. Selection should depend on the competence and ability of the officer to inspire a sense of dynamism in the department and effect a stricter control.

....
(6)In the case of promotions by selection, interse seniority of the officers who are considered fit for promotion should be maintained subject to grant of accelerated promotion to those who possess an outstanding record."

By a further Resolution dated 1-4-1976 the Government of Maharashtra amplified Clause 1(2) of the earlier Resolution dated 28-1-1975 as follows:

"3.(a)Promotions above the first promotion to Class I Service have to be on the basis of strict selection as described in clause (2) of the Government Resolution dated 28th January, 1975. With a view to enabling the Government servants possessing

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positive merit to be considered for promotion earlier, in amplification of clause(2) of the said Government Resolution, it has been decided that the field of selection should be widened so as to ensure that, whenever any posts are to be filled by promotion, the number of officers considered for promotion is four times the number of vacancies likely to occur during the next two years, or the number of the seniormost officers appointed to the lower grade, post or service during four consecutive years, whichever is greater.

(b) For being considered as a person possessing positive merit, a Government servant's record should be free from serious blemish, and should show that the person concerned is able, not only to discharge efficiently the duties of the post held by him for the time being, but to shoulder the duties and responsibilities of a higher post."

It is pertinent to note that clause 1(3) of the Resolution dated 28-1-1975 was not amplified or amended when clause 1(2) of that Resolution was amended by this Resolution dated 1-4-1976. Thereafter, by another Resolution dated 19-9-1977 the Govt. of Maharashtra amended this definition of 'positive merit' in the Resolution dtd. 1-4-1976 as follows:

"Government has since decided to modify this definition and is accordingly pleased to direct that for the existing para 3(b) of Government Resolution dated the 1st April, 1976, the following sub-para should be substituted viz:-

"3(b) for a Government Servant to be considered as possessing positive merit, the overall assessment of his record should show that he possess positive qualities like initiative, drive, integrity and efficiency to a noticeably higher degree than necessary for discharging efficiently the duties of the post held by him and also shoulder the responsibilities of a higher post. The person should be clearly fit for promotion to a higher post and should not be a border line case."

Of course, these Resolutions do not indicate that these are applicable to IAS officers but we have quoted these in detail because the Establishment

Board and the respondents took these Resolutions into account when considering the cases of the applicant, and other eligible officers, for promotion.

13. It would also be useful to refer to the gradings to be given by the Establishment Board when evaluating the merit of the officers and the minimum grading which an officer should secure to become eligible for promotion. Admittedly neither do the Indian Administrative Service (Pay) Rules, 1954 or the guidelines dated 27-12-1975 issued by the Govt. of India provide for gradings nor do they prescribe any minimum grading which an officer is required to secure for promotion. However, by Resolution dated 7-7-1987 the Government of Maharashtra had issued instructions prescribing gradings when selections were to be made for promotions. These gradings were to be given to officers considered on the basis of their Confidential rolls. The gradings so prescribed are A+(Outstanding), A(Very Good), A-(nearing very good), B+(Positively good), B(Good), B-(Average) and C(below average). The Resolution is mentioned as it, too, has been taken into consideration by the Establishment Board and the respondents when considering the cases of the applicant, and other eligible officers, for promotion. It is not disputed that the State Government has adopted 'Positively good' designated as 'Bplus' as being the minimum grading required for promotion to both the Selection Grade and the Supertime scale of the IAS.

14. Coming now to the rival contentions, it is the applicant's case that as the record stands

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now, i.e. after the earlier adverse remarks for the year 1982-83 have been expunged, there are no adverse confidential reports after 17-6-1982, the date of his promotion to the Selection Grade of the IAS, which dis-entitle him for promotion to the Supertime scale of the IAS and there is no other factor which could legitimately come in the way of such a promotion to him as the Chief Secretary's letter dated 21.8.1989 certifies the applicant as being fit for promotion to the Supertime scale of the IAS and assures him of such a promotion as and when a vacancy arises. The applicant contends that such a vacancy is available. It is the applicant's submission that he has been denied promotion to the Supertime scale of the IAS year after year right from May-June, 1985 every year when his junior in the 1967 batch, one Shri A.W.Bhadkamkar, was so promoted. It is the applicant's case that there was no valid reason for superseding him when making such promotions while his representation against the adverse remarks in his confidential reports was pending and that, in any case, these adverse remarks have since been expunged. It is his submission that such supersession is arbitrary, illegal and malafide and thus violative of Article 16 of the Constitution. He also alleges malafides against the second and third respondents on the ground that they are ill disposed towards him because he had been constrained to make complaints against them to the Chief Minister of Maharashtra.

15. In reply, the respondents submit that, the applicant's suitability and fitness for promotion to the Supertime scale of the IAS was considered, along with his batchmates belonging to the 1967 batch of the IAS, by the Establishment Board on 6-11-1984. The applicant was found as being not fit for such promotion on the basis of the confidential reports for the previous five years, i.e. from 1979-80 to 1983-84. However, during the oral arguments the respondents clarified that the five year period actually considered was 1978-79 to 1982-83 because the applicant's confidential report for 1983-84 was not available by that date. The respondents also submit that it is a long standing practice of the Government of Maharashtra that the confidential reports of the last five years are taken into consideration for the purposes of promotion to a higher scale. In a case where, on the basis of the last five years' confidential records, it is not possible to come to a conclusion with regard to the suitability and fitness of an officer for promotion to a superior grade, confidential reports of the past service of the officer are also taken into consideration. The respondents further submit that it is also their practice, which is confirmed by the Govt. of India's guidelines dated 27-12-1975, that where an officer is not found suitable for promotion and is superseded the Establishment Board considers his case only after a lapse of two years when the confidential reports for the next two years have been written and become available. The respondents contend that so, since the applicant was considered as being not fit for promotion to the Supertime scale of the I.A.S. in November, 1984, his case for promotion could be reconsidered only

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after the confidential reports for the next two years viz. 1984-85 and 1985-86 were written and became available to the State Government. However, no confidential reports in respect of the applicant were available for the four ^{year} period from 1984-85 to 1987-88 because, as we have stated earlier, the applicant was on leave from 5-7-1984 to 18-1-1985 and, thereafter, was on a foreign assignment till January, 1988.

16. The respondents further submit that although the applicant's representation of 1988 against the adverse entries in his confidential report pertaining to the year 1982-83 communicated by letter dated 3.8.1984 was received 3 years and 8 months late, nonetheless the respondents considered the representation favourably and expunged the adverse entries in January, 1989. The respondents contend that this consideration belies the applicant's allegation of malafides as the applicant's representation received favourable consideration even though it was hopelessly delayed and ^{fell outside the scope} ~~and so~~ of Rule 9 of the All India Services (Confidential Rolls) Rules, 1970 which reads as :

"A member of the Service may represent to the Government against the remark communicated to him under Rule 8 within 45 days of the date of its receipt by him:

Provided that the Government may entertain a representation within three months of the expiry of the said period if it is satisfied that the member of the service had sufficient cause for not submitting the representation in time."

17. The respondents further submit that immediately after the adverse entries had been so expunged the matter of the applicant's promotion to the Supertime scale of the IAS was considered by the Establishment Board on 7-2-1989 and once again the applicant was found as not fit for such promotion. However, having regard to the facts of the applicant's case, the Establishment Board suggested that a special report be called from the applicant's superior authority, viz. Commissioner, Nagpur Division, for judging the applicant's suitability for promotion to the Supertime scale of the IAS. This special report became available in the last week of March, 1989 and, after considering it at its meeting in April, 1989, the Establishment Board came to the conclusion that the applicant was fit for promotion to the Supertime scale of the IAS. Thereafter, the applicant was informed about this position by the letter dated 21.8.1989 to which we have referred earlier.

18. It is the respondents' contention that no regular and long term vacancy in the Supertime scale of the IAS was immediately available and that a reliable picture in this regard would emerge only in or after May, 1990 as it was anticipated that the vacancies may have to be filled up by first accommodating officers senior to the applicant who were being repatriated by the Govt. of India to Maharashtra State after having completed their tenure of Central deputation.

In the meantime, however, on 15-2-1990 the State Government decided to hold a departmental inquiry against the applicant under Rule 8 of the All India Services(Discipline and Appeal) Rules,1969 and not to promote him to the Supertime scale of the IAS till the outcome of this inquiry. A statement of articles of charges along with a statement of imputations of misconduct and misbehaviour, a list of documents and a list of witnesses on the basis of which the charges against him were proposed to be sustained dated 29-3-1990 was accordingly served on the applicant on 4-4-1990. It is contended that the action of the respondents in not promoting the applicant pending the results of the inquiry is in conformity with para 4(ii) of the annexure to the instructions of the Govt. of India dated 27-12-1975 which we have quoted earlier.

19. The applicant's case was put forward thus: First, promotion to posts in the Supertime scale of the IAS is by selection from amongst officers who come within the zone of consideration on the basis of the recommendations of the Establishment Board which are based on an evaluation of the last 5 years' annual confidential reports of the officers concerned. Secondly, in terms of the Indian Administrative Service(Pay)Rules,1954 there is no distinction whatsoever between the grading to be achieved by an IAS officer for promotion to the Selection Grade and that required to be achieved

by him for promotion to any of the higher grades in the IAS. Thirdly, as the applicant had been found fit for promotion to the Selection Grade and as his confidential reports thereafter as these now stood, after the adverse remarks pertaining to the year 1982-83 had been expunged as a result of the applicant's representation, were in no way whatsoever inferior to the confidential reports on the basis of which he had been promoted to the Selection Grade, the only possible recommendation that the Establishment Board could make at its special meeting on 7-2-1989, to review its earlier recommendation on 6-11-1984 pertaining to the applicant's suitability or otherwise for promotion to posts in the Supertime scale of the IAS, was that the applicant was fit for and so entitled to promotion to the Supertime scale of the IAS. Finally, as the applicant had now been found fit for promotion to the Supertime scale of the IAS, he should get this very benefit from 6.11.1984. The applicant also made alternative submissions pertaining to delayed communication of adverse remarks in confidential reports, failure to obtain confidential reports for the period that the applicant was on deputation to an international organisation, failure to hold specific review meetings of the Establishment Board in time and mala fide. We now proceed to examine each of these submissions.

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20. As regards the first submission, it is not disputed that posts in the Supertime scale of the IAS are to be filled by selection on merit with due regard to seniority from amongst officers who come within the zone of consideration. The practice in Maharashtra is that this selection is based on the recommendations of an Establishment Board and that for this Board to recommend an officer he should receive a grading of not less than 'Positively good' designated as 'B plus'. This practice has not been questioned by the applicant and so we are proceeding on the basis of the practices followed and the procedure adopted by the respondents even though some of the practices followed and procedures adopted are not specifically mentioned in the relevant rule and the Government of India's instructions dated 27-12-1975 as also the current Resolutions of the Government of Maharashtra which were shown to us.

21. Coming now to the second submission viz. that there is no distinction whatsoever between the grading required to be achieved for promotion to the Selection Grade and that required to be achieved for promotion to the Supertime scale of the IAS, it was the applicant's contention that no such distinction had been made in the Indian Administrative Service (Pay) Rules, 1954 or in any of the administrative instructions that have been issued and/or Resolutions that have been notified in this regard. It was his submission that as per the long standing practice in vogue the only requirement was that an officer be graded as

'Positively good' designated as 'B plus'. It was contended on behalf of the applicant that as the only criterion for selection for promotion for both the Selection grade and the Supertime scale of the IAS is merit with due regard to seniority, it means that what is adequate or good enough for considering an officer as fit for promotion to the Selection Grade must be adequate and good enough for considering him as fit for promotion to the Supertime scale of the IAS. The respondents sought to contend that stricter standards were adopted for grading an IAS officer as 'B plus' in the selection for promotion to the Supertime scale when compared with the standards adopted for grading him as 'B plus' in the selection for promotion to the Selection Grade. They cited clause 1(3) of the Resolution dated 28-1-1975 (supra) in support of this practice. But we find that no such distinction has been made in the Indian Administrative Service (Pay) Rules, 1954; also, no such distinction has been made in the Govt. of India's instructions dated 27-12-1985 (supra). Though clause 1(3) of the Resolution dated 28-1-1975 (supra) calls for "very strict selection" it also says that this very strict selection is to be done in terms of clause 1(2) thereof. In this clause 1(2) it has been laid down that only those persons who possess positive merit and achieve tangible good results should be considered suitable for promotion. What constitutes 'positive merit' has been defined in the Resolution dated 28-1-1975 as amended on 1-4-1976 (supra). But nowhere has

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it been laid down in any of these Resolutions that what is positive merit for selection for promotion to the Selection Grade is not positive merit for selection for promotion to the Supertime scale of the IAS. It has also not been laid down anywhere in any of these Resolutions that different standards are to be adopted for assessing 'positive merit' for posts in different grades. It has not been put forward anywhere that the applicant did not achieve tangible good results prior to his consideration for promotion to the Supertime scale of the IAS in November, 1984 although he had achieved such results prior to his consideration for promotion to the Selection Grade. It has also not been put forward that the applicant lacked dynamism or ability to effect a strict control. Against this background we must reject the respondents' submission to the effect that what is good enough for recommending an officer for selection for promotion to the Selection Grade need not necessarily be good enough for recommending his case for selection for promotion to the Supertime scale and uphold the applicant's submissions on this point.

22. Coming now to the third submission of the applicant, viz. that his confidential reports as these now stand are in no way whatsoever inferior to the confidential reports on the basis of which he had been selected for promotion to the Selection Grade and so he was fit for and entitled to promotion to the Supertime scale of the IAS and that the Establishment Board should have so recommended,

we may start from the respondents' statement that a conclusion in regard to the suitability and fitness of an officer for promotion to a superior grade is arrived at on the basis of a consideration of the last 5 years' confidential reports. From the record made available to us by the respondents it is clear that the last confidential report taken into consideration by the Establishment Board at its meeting on 6-4-1983 when it decided to recommend that the applicant should now be given the Selection Grade was the confidential report for the year 1981-82 and so the 5 years' confidential reports covered by it were those from 1977-78 to 1981-82. There is no mention in the minutes of this meeting of the Establishment Board that they had made any relaxation in the matter of the grading required to be achieved for selection for promotion to the Selection Grade and so their conclusion can only mean that the Establishment Board had graded him as a 'Positively good' designated as 'B plus'. No other interpretation is possible because, as submitted by the respondents, the prescribed grading for promotion to Selection Grade is 'B plus'. It was the applicant's case that from this we should go on to the fact that when the applicant was considered for promotion to the Supertime scale on 6.11.1984 the 5 years confidential reports that were taken into account were for the period ending 1982-83. We have dealt with this point earlier also. The record also shows that the applicant's confidential

report for the year 1983-84 was not available on 6-11-1984 when the Establishment Board met; this was obviously because this report was accepted only on 23-6-1986. It is the applicant's case that, so, the 5 years' confidential reports that were considered were the confidential reports for the years 1978-79 to 1982-83. The applicant went on to submit that it was thus clear that whereas he had been found suitable for promotion to the Selection Grade on the basis of the assessment of his confidential reports for the 5 year period 1977-78 to 1981-82, his suitability for promotion to the Supertime scale of the IAS had been assessed on the basis of his confidential reports for the 5 year period 1978-79 to 1982-83. It was his contention that 4 years' reports viz. those for the 4 years 1978-79 to 1981-82 were common to both the assessments and so the only difference between the two assessments was that whereas for selection for promotion to the Selection Grade the confidential report for 1977-78 was the fifth year's confidential report that had been taken into account, for consideration for promotion to the Supertime scale of the IAS the fifth year's confidential report that had been taken into account was the confidential report for 1982-83. It was his further contention that the Chief Secretary's letter dated 3.8.1984, which we have quoted earlier, conveying adverse remarks in his confidential reports for the year 1982-83 also conveyed the aspects of his performance which merited commendatory remarks. After the adverse remarks mentioned therein

are deleted, as has now been done, all that remains are the commendatory remarks. It is the applicant's contention that a perusal thereof in the letter dtd. 3.8.1984 establishes beyond any doubt whatsoever that there is no way in which his confidential reports for 1982-83 as these now stand after the adverse remarks have been expunged can be graded as anything less than outstanding. We would add that a perusal of the record shows that in both the confidential reports pertaining to the year 1982-83 as these initially stood with the adverse remarks intact, the applicant had still been reported on as being fit for promotion to higher grade.

Against this background, we see considerable merit in the submission of the applicant. From this the applicant went on to contend that thus there was no way in which his confidential reports for 1982-83 as these now stood after the adverse remarks had been expunged could be regarded as being inferior to his confidential report for 1977-78 and so it logically followed that his grading on the basis of his confidential reports for the 5 years period 1978-79 to 1981-82 plus 1982-83 could not be any lower than his grading on the basis of his confidential reports for the 5 year period 1977-78 plus the same 1978-79 to 1981-82. We see merit in this logical deduction also. As an alternative line of argument the applicant submitted that the fact that he had been found suitable for promotion to the selection grade at a meeting of the Establishment Board on 6-4-1983 on the basis of his confidential record file upto 1981-82 meant that

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his record and the general assessment of his work as a whole upto and including 1981-82 amounted to at least 'Positively good' designated as 'B plus'. He submitted that it was not open to the respondents to look behind this record. He cited Baidyanath Mahapatra v. State of Orissa and another, AIR 1989 SC 2218, in which the Supreme Court have held :

"When a government servant is promoted to a higher post on the basis of merit and selection, adverse entries if any contained in his service record lose their significance and those remain on record as part of past history."

in support of this submission. He went on to submit that as his confidential reports for the very next year, viz. 1982-83 as these now stood after the adverse remarks had been expunged were outstanding, there was no way in which his record and the general assessment of his work as a whole upto and including 1982-83 could be anything less than at least 'Positively good' designated as 'B plus'. It was his contention that, in fact, it should be higher because later reports carry heavier weight. He cited Brij Mohan Singh Chopra v. State of Punjab, AIR 1987 SC 948, in which the Supreme Court have held :

"This Court has consistently taken the view that old and stale entries should not be taken into account while considering the question of premature retirement; instead; the entries of recent past of five to ten years should be considered in forming the requisite opinion to retire a Government employee in public interest. It would be unreasonable and unjust to consider adverse entries of remote past and to ignore the good entries of recent past. We are therefore of the opinion that if entries for a period of more than 10 years past are taken into account it would be an act of digging out past to get some material to make an order against the employee."

in support of his submission. The applicant also cited Pranabandhu Sahoo v. State of Orissa and others, II(1990) ATLT (SAT) 132, in which the Orissa Administrative Tribunal have held

".....the petitioner was promoted to the cadre of Class II of OES on 1-9-81. Such a promotion is on the basis of merit-cum-seniority. Having promoted him in the year 1981 the prior entries in the CCR become stale and the same is to be treated as non-existent in the eyes of law."

We see considerable merit in this alternative line of argument also inasmuch as there is no way in which the applicant's character record roll as a whole as it stood on 31-3-1983, after the adverse remarks for the year 1982-83 had been expunged, can be deemed to be inferior to his character record roll as a whole starting on 31-3-1982 on the basis of which he was found suitable for promotion to the Selection Grade. The applicant concluded his submission on this point by contending that, therefore, in no view of the matter whatsoever could the respondents have failed to find the applicant suitable for promotion to the Supertime scale of the IAS on the basis of his reports upto and including 1982-83.

23. Regarding the third submission of the applicant the respondents' first submission was that the applicant had no legal right to selection. It was their case that all Supertime scale posts in the IAS are selection posts and appointment thereto need not follow order of seniority and that, on the facts of the applicant's case, it was held that the applicant did not qualify for promotion. They quoted Sant Ram Sharma v. State of Rajasthan and others, AIR 1967 SC 1910, in support of this proposition. But that case

does not help the respondents because in it there was no challenge to the decision of the selection board. The question for determination in that case was whether the petitioner was entitled, as of right, to be promoted merely on the ground that his name stood first in gradation list and what was contended in that case was that, in the absence of any statutory rules governing promotions to selection grade posts, the Government cannot issue administrative instructions and such administrative instructions cannot impose any restrictions not found in the rules already framed.

24. The respondents' second submission was that the rules provided for preparation of a select list in which primacy was to be given to merit. They cited R.S.Dass v. Union of India and others, etc. etc. AIR 1987 SC 593, in support of their contention. In that bunch of cases, the applicants, challenged the action of the respondents in superseding them in an arbitrary manner without recording any reasons. We do not see how this can be of help the respondents. It is nobody's case that the applicant was not placed in the panel for the Supertime scale of the IAS because persons junior to the applicant received a higher grading than the applicant and that there was no room to accommodate the applicant in the panel. The facts of the case we are deciding are that the applicant was initially found unsuitable for promotion. Subsequently, the case of the applicant was considered in isolation and the applicant was found suitable for promotion.

In this case that we are deciding there is no question of having to choose between two persons both of whom are qualified. We must therefore reject this submission of the respondents.

25. Before proceeding further with our examination of the applicant's third submission, we would refer to the record. As mentioned earlier, the Establishment Board in its meeting held on 6-11-1984 found the applicant as not suitable for promotion to the Supertime scale of the IAS. At its meeting on 15-6-1985 the applicant's case was not considered because the next two subsequent CRs were not available. It is pertinent to note that the Establishment Board was under the impression that the applicant's confidential report upto 1983-84 had been considered; that is obviously incorrect as this report was not available even on 15-6-1985, let alone 6-11-1984. There is no doubt whatsoever that the last confidential report on the applicant that was considered by the Establishment Board at its meeting on 6-11-1984 was the report for 1982-83. So, the only next two confidential reports for which the Establishment Board could have been waiting were the reports for the years 1983-84 and 1984-85. Nonetheless, the same erroneous position was repeated at the meeting of the Establishment Board on 2.9.1985 and 7-10-1986. Again, the case of the applicant was not considered at the meeting of the Establishment Board on 29-7-1987 on the ground that he was on deputation to the Govt. of Botswana and the reports on him for the last two years were not available. The erroneous position was

repeated at the meeting of the Establishment Board on 5-5-1988.

26. We pause here to examine the position in respect of the confidential reports for the years 1983-84 and 1984-85. There is no doubt that the confidential report for 1983-84 was finalised on 23-6-1986 and so was available thereafter. It is the respondent's case that the confidential report on the applicant for the period from 5-7-1984 to 18-1-1985 has not been written as he was on leave during that period. But there is no explanation whatsoever as to why no report was written on the applicant for the period 1-4-1984 to 4-7-1984 when he was very much on duty. This period is of more than three months duration. No plea has been put forward that neither the reporting authority nor the reviewing authority nor the accepting authority had seen the performance of the applicant during this period. Sub-rules (2) and (4) to (6) of Rule 5 of the All India Services (Confidential Rolls) Rules, 1970 make it clear beyond any doubt that this is the only contingency under which it would have been permissible for the report for 1984-85 not to be written. These sub-rules are reproduced below:-

"(2) A confidential report shall also be written when either the reporting authority or the member of the Service reported upon relinquishes charge of the post, and, in such a case, it shall be written at the time of the relinquishment of his charge of the post or ordinarily within one month thereafter.

(Provided that a confidential report may not be written in such cases as may be specified by the Central Government, by general or special order)

(3)

(4) Where the reporting authority has not seen, and the reviewing authority has seen, the performance of member of the Service for at least three months during the period for which the confidential report is to be written, the Confidential report of any such member for any such period shall be written by the reviewing authority, and where, both the reporting authority and the reviewing authority have not seen, and the accepting authority has seen, the performance as aforesaid of any such member during any such period, the confidential report shall be written by the accepting authority.

(5) Where the authority writing the Confidential Report under Sub-rule (2) or Sub-rule (4) is a Government Servant, such report shall be written before he retires from service.

(6) Where the reporting authority, the reviewing authority and the accepting authority have not seen the performance of a member of the Service for at least three months during the period for which the report is to be written, an entry to that effect shall be made in the confidential report for any such period by the Government."

Further, no general or special order of the Central Govt. dispensing with the need for a confidential report for such a limited period of just over three months was shown to us. So, as the applicant was on leave from 5-7-1984 to 18-1-1985 and was, thereafter, on a foreign assignment till 1988, the confidential report for the period 1-4-1985 to 4-7-1985 out of the year 1984-85 should, in terms of clause(2) of the sub-rule quoted above, normally have been written a month after 5-7-1984 and then sent on to the reviewing and accepting authorities. It would have been the only report for 1984-85 as the applicant did not thereafter in that year work for at least 3 months in a post. No explanation was forthcoming as to why this was not done. There is no doubt that the confidential report for 1983-84 should and could have been made available within a reasonable period after 31-3-1984 and certainly well before it actually became available on 23-6-1986. Against this background we have no difficulty

in holding that the next two subsequent confidential reports for which the Establishment Board could have waited, viz. the reports for 1983-84 and 1984-85, should have been available by 15-6-1985 which is the first time that the Establishment Board reconsidered the case of the applicant after its meeting on 6-11-1984 when it found that the applicant was not suitable for promotion to the Supertime scale of the IAS.

27. Even if it is contended that no confidential report could have been written for the year 1984-85, we have to see whether reports could have been written for the three years 1985-86 to 1987-88 i.e. for the period that the applicant was on deputation to an international organisation.

Rule 5(1) of the All India Service(Confidential Rolls) Rules,1970 lays down that:

"5. Confidential reports - (1) A Confidential report assessing the performances, character, conduct and qualities of every member of the Service shall be written for each financial year, or calendar year, as may be specified by the Government, (ordinarily within two months) of the close of the said years:

(Provided that where a member of the Service is on deputation to an international organisation, confidential reports in respect of such member may be written -

(i) for the entire period of his tenure with the said organization even in a case where the period of such tenure exceeds one year; or

(ii) for such shorter period as may be considered convenient or necessary by the reporting authority having regard to the circumstances of each case, ordinarily within three months of the close of the said period:

(Provided further that a confidential report may not be written in such cases as may be specified by the Central Government, by general or special order.)"

The learned counsel for the respondents informed us across the bar that the record in Marathi pertaining to the meeting of the Establishment Board held on 3.12.1988 showed that the Establishment Board at its meeting held on 5.5.88, while considering 1971 batch, found that Shri Arun Bhatia's CRs for the period 6.7.1984 to 31.3.1987 were not written as he was on leave for some period and for the remaining period he was at Botswana. The Review Committee took a decision that his CRs for the period while he was at Botswana should be got from the Government of India and on their receipt Shri Bhatia's case should be considered for promotion. However, in the meantime Shri Bhatia himself submitted to Government the reports given by the Botswana Govt. and the same were placed on his CR file. However, the Board felt that these reports should not be considered to be duly authenticated and took a decision as aforesaid. On making enquiries with the Govt. of India as to whether the reports given by the Botswana Govt. should be considered as CRs, the Government of India informed the State Govt. that these reports of Botswana Govt. should not be treated as CRs and should not be kept in the CR file. Instead a certificate "no report" should be kept in the CR file. Accordingly, "no report certificates" have been kept in the file. Therefore, it was suggested to the Board that Shri Bhatia's case be not considered. It is, therefore, quite clear that

the Establishment Board considered that reports on the applicant should be obtained for the period that he was on deputation. It is pertinent to note that this was particularly necessary in the applicant's case because he had been found unsuitable for promotion to the Supertime scale of the IAS at the Establishment Board meeting held on 6.11.1984 and, in accordance with the instructions in force, he was ineligible for consideration for such promotion until two more reports became available. The Establishment Board was under the impression that these subsequent reports would pertain to the years 1984-85 onwards. According to the respondents, there was no report available on the applicant for 1984-85 as he was on leave from 5-7-1984 to 18-1-1985. It was, therefore, particularly important that the respondents obtained his reports for 1985-86 and 1986-87 when he was on deputation to Botswana but they did not do so. The respondents have contended that the applicant obtained the foreign assignment as a non-sponsored officer. That may well be so but certainly it does not mean that the respondents cease to be the applicant's employer. In fact, the copy of the Government of India's letter dated 18.12.1984 endorsed to the Govt. of Maharashtra carries a specific request to issue the necessary sanction regarding the deputation of the applicant to FAO, which indisputably is an international organisation, for 24 months as per rules. It appears that no formal orders regarding the applicant's deputation have yet been issued but this failure cannot possibly mean that no effort was required to be made by the respondents to obtain a Confidential report on the applicant.

We must, therefore, reject the submissions of the respondents in this regard and accept the applicant's submission that he has been prejudiced because of the respondents' not obtaining a confidential report on him from the international organisation to which he was on deputation. Of course, this issue only assumes relevance if it is held that no confidential report could have been written on the applicant for the year 1984-85. We have, however, categorically held that such a report for 1984-85 could, and should, have been written.

28. Coming back to the meetings of the Establishment Board to reconsider the applicant's case for promotion to the Supertime scale of the IAS, at the meeting of the Establishment Board held on 3-12-1988 the Establishment Board considered that as the applicant's representation against adverse remarks of 1982-83 and 1983-84 (sic) were pending with Govt. for consideration and no new record beyond 83-84 was available, his case be put up to the Establishment Board later on when the representation is decided or when further records become available. It would be pertinent to mention here that the confidential report on the applicant for 83-84 had not yet been taken into consideration at any meeting of the Establishment Board and, besides, the final confidential report for 83-84 was not an adverse one and no communication of any adverse remarks in the report had been made to the applicant. We would also mention here that, earlier, we have already held that a confidential report on the applicant for 1984-85 could, and should, have been written. Thereafter, at its meeting on 7-2-1989 the

Establishment Board took note of the fact that the adverse remarks from his CR for 82-83 had been expunged. However, the Establishment Board did not function as a Board reviewing the decision of the earlier meeting held on 6.11.1984 consequent on the expunction of the adverse remarks in the confidential reports on the applicant for 1982-83. For it to do so, it should have considered only the material that was available to the Establishment Board on 6-11-1984 but with the adverse remarks expunged. They did not do this. They considered the entire record of the applicant up to the date of their sitting. Of course, only one additional report, viz. that for 1983-84 was available. But that does not alter the fact that what the Establishment Board did was to reconsider the case of the applicant as on the date of this reconsideration whereas what they were required to do was to review the case of the applicant as deemed to be on the date of their original consideration but with the adverse remarks expunged. Based on this reconsideration the Board found that he did not earn the minimum required grading of 'Positive good' but also decided that as not a single confidential report on the applicant after 1983-84 upto 1987-88 was available, the report on his work in the present post for the period from 9-5-1988 to 28-2-1989 may be called for and on the basis of that report it may be considered whether he was suitable for promotion to the Supertime scale of the IAS. Finally, at its meeting on 9-3-1989 the Establishment Board assessed only this special report and as the assessment came to 'Very good' he was cleared for promotion.

29. Against on this background, the facts that emerge are that based on the applicant's confidential roll record upto 1981-82 he was graded as 'Positively good' and cleared for promotion to the Selection Grade. His reports for the next two years, viz. 1982-83 and 1983-84 as these now/finally stand are indisputably better than his earlier report. A confidential report could, and should, have been written on the applicant for 1984-85 but no such report was written. The Establishment Board that met on 6.11.1984 did not have the complete record before them. At a whole series of subsequent meetings the Establishment Board erred in failing to realise that one more report was, in fact, available and that one more could and should have been written. In the alternative, the Establishment Board erred in not obtaining later reports on the applicant from the international organisation with whom he was on deputation. No special review was done by the Establishment Board which considered the applicant's case after adverse remarks for 82-83 had been expunged. Instead, the Establishment Board reconsidered the applicant's case and in this reconsideration nothing of the position brought out above was taken into consideration. Yet it found that the applicant was not suitable for promotion. Eventually, on such reconsideration the applicant was cleared for promotion on the basis of just one single report. It is this report for 9 months which has not merely tilted the balance but constitutes the entire foundation on the basis of which the Establishment Board has now found the applicant to be suitable for promotion.

to the Supertime scale of the IAS. Against this background we are unable to see any reason whatsoever as to why this should not have occurred on 7-2-1989 when the Establishment Board was required review their earlier recommendation dated 6.11.1984 regarding the applicant's suitability for promotion. Against this background we have to uphold the applicant's third submission that only possible recommendation that the Establishment Board could make on 7-2-1989, when it was required to review its earlier recommendation of 6.11.1984 after the adverse remarks in the applicant's confidential report for 1982-83 had been expunged, was that the applicant was fit for promotion to the Supertime scale of the IAS. The respondents sought to contend that the Establishment Board was bound to consider the record as it stood at the relevant time and cited Ganga Nand Sharma v. The State of Himachal Pradesh, (1973) 1 SLR 907, in support of their contention. But the two cases are quite different. That case dealt with a promotion governed by the Himachal Pradesh, Public Works Department, Subordinate Class III (Clerical and Stenographers Service) Recruitment and Promotion Rules, 1960. This case, on the other hand, is governed by the Government of India's instructions dated 27-12-1975 and a plain reading of these instructions makes it clear that what has to be done is a special review. So we must reject this submission straight away.

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30. The respondents sought to contend that it is clearly the appointing authority who is the judge of the merit and ability of any officer and it is not the function of the Tribunal to substitute its judgment for that of the appointing authority. They cited a plethora of judgments in support of this proposition viz.

Dr. Shanker Nath Ganju v. State of Jammu and Kashmir, AIR 1957 J&K 29, and two other judgments, one of the Jammu & Kashmir High Court and the other of the Manipur Judicial Commissioner's Court, which rely on this. They also cited B.C.Tiwari v. The State of Madhya Pradesh, AIR 1960 MP 216; Mazhar Hasnain v. State of Uttar Pradesh and Others, AIR 1961 Allahabad 316; and R.Sampath v. The State of Madras and another, AIR 1962 Madras 485, in support of this proposition. The respondents also cited V.M.K.Nenon v. Scientific Advisor, 1985(2)SLR(Karnataka) 810, in which it has been said that

"It is now well settled that there is no legal right to claim promotion. But every employee has a right to be considered for promotion."

Against this background it was the respondents contention that it was not open to the Tribunal to substitute its own judgment for the judgment of the Establishment Board. But we are not determining or giving a grading to the applicant. We are only confirming a grading that has been given to the applicant by the Establishment Board from an earlier date.

31. We are fortified in this view by the judgment of the New Bombay Bench in Vasant Waman Pradhan v. State of Maharashtra and another, O.A.926/89(unreported). The applicant in that case was a Senior IPS Officer of the Maharashtra Cadre in the rank of Deputy Inspector General of Police, Level I. He was aggrieved by the order of the State Government dtd. 3.12.1988 informing him that the Govt. had decided not to promote him to the post of Special Inspector. General of Police since the Establishment Board had found that the applicant did not achieve the minimum grading of "Positively good" required for promotion to this post. The Bench relied on Union of India v. M.L.Capor and others, etc. etc., AIR 1974 SC 87, in which it has been held that:

"In the context of the effect upon the rights of aggrieved persons as members of a public service who are entitled to just and reasonable treatment by reason of protections conferred upon them by Article 14 and 16 of the Constitution, which are available to them throughout their service, it was incumbent on the Selection Committee to have stated reasons in a manner which would disclose how the record of each officer superseded stood in relation to records of others who were to be preferred, particularly as this is practically the only remaining visible safeguard against possible injustice and arbitrariness in making selections. If that had been done, facts in service records of officers considered by the Selection Committee would have been correlated to the conclusions reached. Reasons are the links between the materials on which certain conclusions are based and the actual conclusions.

They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi judicial. They should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable. We think that it is not enough to say that preference should be given because a certain kind of process was gone through by the Selection Committee. This is all that the supposed statement of reasons amounts to."

The Bench held:

"We would, therefore, hold that the applicant is deemed to have obtained a grading of B+ (positively good) as on 1-11-1984. We are conscious that it is not within the province of this Tribunal to determine or give a grading to the applicant but we are not doing so. We are only confirming the grading already given to the applicant by a duly constituted selection committee as early as on 21-8-1985. We are compelled to do so instead of once again remanding the matter for further review in view of the chequered history of the case. The applicant was first considered on 6-11-84 for promotion both to the posts of D.I.G. Level-I and Special I.G. The Committee which then met, acted illegally in that it took into consideration uncommunicated adverse remarks of 1981-82 and adverse remarks of 1983-84 which were questioned in appeal by the applicant. When the Board/Committee met again on 21-5-1985 pursuant to the interim directions of the Bombay High Court dated 6-5-1985, it acted illegally in not making a comparative assessment and it further acted arbitrarily in holding that the applicant is fit for promotion as D.I.G. Level-I but not fit on the basis of the of the very same record of service for the post of Special I.G. Again when the Board/Committee met for a third time on 29-4-1986 pursuant to the orders of the Bombay High Court dated 4-4-1986 it made a comparative assessment but this

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Board/Committee did not give any reasons for having superseded the applicant nor did it give due weight for seniority though it was required to do so under the Pay Rules of 1984 and the guidelines issued by the Ministry of Home Affairs. Finally when the Board/Committee met on 28-10-1988, pursuant to the directions of the Tribunal dated 6-4-1988 in T.A. 397/87, it committed several irregularities. This Board/Committee did not give due weight to seniority nor did it give reasons for superseding the applicant in contravention of the Pay Rules and the guidelines of the Central Government. The Committee also ignored the directions of the Tribunal that it should make a comparative assessment and that it should consider whether the expunction of the adverse remarks for 1981-82 and 1983-84 would result in a substantial improvement in the applicant's previous grading of B(good). We think that no purpose would be served in once again remanding the matter for reconsideration by one more Board/Committee since repeatedly there has been non-application of statutory rules, guidelines and non-compliance with directions of courts/the Tribunal, smacking of bureaucratic obduracy, by the various Boards/Committees by which the case of the applicant was considered. In any event further review is unnecessary since for the reasons given by us supra the applicant has as early as on 21-5-1985 been graded as B+(positively good) as on 16.11.1984 and such a grading would ensure to his benefit for the purpose of selection as Special I.G. of Police."

In the result, the Bench directed the respondents to promote the applicant as Special IG of the Police from the date his immediate junior was promoted.

In the case which we are deciding, the Establishment Board have not given any reasons as to why though the

applicant's complete record upto and including 1981-82 was good enough to grade him as 'Positively good', that upto 1982-83 after the adverse remarks had been expunged and only the highly commendatory remarks remained was not good enough to grade him as 'Positively good'.

32. Coming to the applicant's fourth submission that he should get the benefit of promotion to the Supertime scale of the IAS from 6-11-1984, we need only to refer to the Government of India's instructions of December, 1975 that we have quoted earlier. These instructions state that a special review may be done in cases where adverse remarks in the officer's annual confidential reports are expunged subsequently as a result of their representations. This is precisely what has happened in the applicant's case. There were adverse remarks in his confidential reports for 1982-83. He made a representation. That representation was considered and the remarks were expunged. Thus he is entitled to a special review of his fitness for promotion. There is no doubt that as this was to be a review and not a reconsideration, the special review was required to be done on the deemed position that the Establishment Board was meeting on 6.11.1984 but with the change that the confidential reports for 1982-83 read as these stand now after the expunction of the adverse remarks originally contained therein. When we have decided the applicant's third submission in his favour, the fourth also has to go in his favour. The respondents

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contended that the inclusion of a person's name in a panel does not confer on him an indefeasible right to promotion and so promotion cannot be claimed as a matter of right. They cited N.M.Siddique v. Union of India, AIR 1978 SC 386, and L.Balakrishnan v. The Deputy Inspector General of Police, Southern Range, Madurai and another, AIR 1959 Madras 270, in support of their contention. But that is not the point at issue in this case. The question here is whether the decision taken on 15-2-1990 to initiate disciplinary proceedings against the applicant stands in the way of the promotion which we have held was due to him from 6-11-1984. The answer to this question lies in para 4(ii) of the Govt. of India's instructions dated 27-12-1975 that we have quoted earlier. It is not disputed that several persons junior to the applicant were promoted between 6-11-1984 and 15-2-1990 and so there is no way in which the applicant would not have been similarly promoted had he been found suitable on 6-11-1984. His case for promotion would, therefore, not have come within the ambit of the restriction imposed by the above mentioned para 4(ii) of the instructions dated 27-12-1975. In support of this view, the applicant cited Amar Kant Choudhary v. The State of Bihar and others, AIR 1984 SC 531. The respondents sought to contend that even assuming that the applicant was deemed to have been found suitable on 6-11-1984, what was now required to be done was to consider his case for promotion to a higher post only after the conclusion of the disciplinary proceedings initiated against him. They cited Jitendra Jayantilal Joshi v. State of Gujarat and others, 1978(2)SLR (Guj) 728, in support of their

contention. But that case can be readily distinguished. In it the petitioner was due for promotion but, since an enquiry had been pending against him, his case was not considered for promotion. This is not at all the position in the case we are deciding; in it, the disciplinary proceedings have been initiated long after the applicant's deemed date of promotion. Against ^{in holding} this background we have no hesitation/that the applicant is entitled to be promoted on the basis of his deemed selection on 6-11-1984. Having said this, we would make it clear that this does not stand in the way of the respondents initiating disciplinary proceedings against the applicant in his promotional post in accordance with law on the basis of events which occurred after this deemed date of promotion.

33. Coming now to the applicant's submission that the adverse remarks for 1981-82 were communicated to him only on 18-6-1984, the ^{contended} applicant/that such delayed communication vitiates the confidential report and so it could not have been taken into account in the selection process. We are unable to go along with this submission of the applicant. He sought to rely on State of Haryana v. Shri P.C. Wadhwa, IPS, Inspector General of Police and another, AIR 1987 SC 1201. But even in that case it is not as if the adverse remarks have been struck down. What the Supreme Court have held is :

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"We need not, however, dilate upon the question any more and consider whether on the ground of inordinate and unreasonable delay, the adverse remarks against the respondent should be struck down or not, and suffice it to say that we do not approve of the inordinate delay made in communicating the adverse remarks to the respondent."

He also sought to rely on Baidyanath Mahapatra's case(supra). But that case, too, does not help him inasmuch as what the Supreme Court have held is :

"Since the communication of the adverse entries was itself highly belated the representation against those adverse remarks should have been considered on merits and the same could not be rejected on the alleged ground of delay as the Government itself was guilty of inordinate delay in communicating the adverse remarks to the appellant."

Even though the communication of the remarks was delayed the applicant could, if he so desired, have made a statutory representation against the remarks. He did so in respect of the remarks for 1982-83. Had he done so in respect of the adverse remarks for 1981-82 he might well have succeeded as he did with his representation made in 1988 against the adverse remarks for the year 1982-83 even though this representation was badly delayed. But, on the applicant's own submission, he did not make a representation against the adverse remarks for 1981-82 because he reasonably believed that the said remarks were of no consequences inasmuch as he had been promoted to the Selection Grade w.e.f. 17-6-1982. This belief cannot absolve him of the consequences of his own action and so we have no hesitation in rejecting this submission. In view of this finding, we must also decline to accept the applicant's challenge to the merits of the report

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for 1981-82 because he himself decided not to avail of the statutory remedies available to him for the redressal of his grievance in the matter.

34. Coming now to the applicant's final contention regarding mala-fide, the applicant has tried to contend that various officials were prejudiced against him. Mere allegations of this nature do not constitute mala-fide. We are satisfied that the applicant has not made out any case to establish his allegation. We see considerable merit in respondents submission that had they been ill-disposed towards the applicant they would certainly not have favourably considered a long delayed representation against an adverse Confidential Report and, thereafter, gone out of their way to get a special report on the applicant so that he could be considered for promotion to the Supertime scale of the IAS. The respondents cited Smt. S.R. Venkataraman v. Union of India and another, AIR 1979 SC 49, in which it has been quoted:

"malice in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want of reasonable or probable cause."

in support of their contention. The applicant's allegation against the second and third respondents is that they acted in a mala fide manner by delaying the consideration of his representation dated 3-5-88 against the adverse remarks communicated to him on 3-8-1984 because they were ill-disposed

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towards him. The decision on this representation in the applicant's favour was communicated to him on 23-1-1989. Considering the facts and circumstances of the case and particularly the very long time that elapsed, for whatever be the reason, between the communication of the adverse remarks and the applicant's representation thereon, we do not find that there was any mala fide delay in deciding the applicant's representation. In any case, it is now well settled that a mere allegation of mala fide is not enough; there should be concrete material which is unimpeachable in character. We find no such material here. Against this background, we must reject this submission of the applicant.

35. In this view of the matter we are of the opinion that the applicant has made out a case for a direction to the respondents for his promotion to the Supertime scale of the IAS along with his juniors who were promoted to this scale on the basis of the recommendations of the Establishment Board at its meeting on 6-11-1984. We would make it clear that this does not stand in the way of the respondents initiating disciplinary proceedings against the applicant in his promotional post in accordance with law on the basis of events which occurred after this deemed date of promotion. As far as backwages for this delayed promotion are concerned, it is now well settled that such a person is not entitled to claim any financial benefits retrospectively but what he is entitled to is to get his pay fixed after giving

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him notional seniority so that the pay so fixed is not lower than that of the person who is immediately junior to him - see Paluru Ramkrishnaiah and others v. Union of India and another, etc. etc., AIR 1990 SC 166.

36. We accordingly direct the respondents to promote the applicant in the Supertime scale of the IAS with effect from the date his immediate junior who was found suitable at the meeting of the Establishment Board on 6.11.1984 was so promoted. His pay shall be fixed on the basis of this notional seniority so that his pay is not lower than that of the person who is immediately junior to him. The application is allowed with this direction. In the circumstances of the case there will be no order as to costs. Compliance with our directions be made by the respondents within 30 days of the receipt of the copy of this order.


(S.K.JAIN)
Member (J)


(P.S.CHAUDHURI)
Member (A)

22.8.1991