

CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH, MUMBAI.

ORIGINAL APPLICATION NO.: 468/99

14.1.2000
Date of Decision :

Shri R. M. Dayal Applicant.

Advocate for the
Applicant.

VERSUS

Union of India & Others, Respondents.

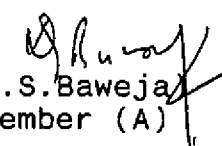
Shri V.S.Masurkar Advocate for the
Respondents.

CORAM . :

The Hon'ble Shri D.S. Baweja, Member (A)

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

- (i) To be referred to the Reporter or not ? ✓
- (ii) Whether it needs to be circulated to other Benches of the Tribunal ?
- (iii) Library ✓


(D.S. Baweja)
Member (A)

mrj*

BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL

MUMBAI BENCH, MUMBAI

OA.NO.468/99

Dated this the 14th day of January 2000.

CORAM : Hon'ble Shri D.S.Baweja, Member (A)

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

Ravendra Mohan Dayal,
101, Hill View,
85, Lulla Nagar,
Pune 411 040.

... Applicant

v/s.

1. State of Maharashtra
through Chief Secretary,
Government of Maharashtra,
Mantralaya, Mumbai.
2. Union of India
through Secretary,
Ministry of Environment and Forests,
C.G.O. Complex,
Lodhi Road, New Delhi.
3. Shri S.B.Kulkarni,
IFS (Retired),
14, Rambaug Colony,
Paud Road Opp.Tulja Bhawani Mandir,
Kothrud, Pune - 411 029.
4. Shri P.Subrahmanyam, IAS,
the then Chief Secretary,
Government of Maharashtra
and the then Chairman of
Establishment Board/Screening
Committee through Secretary,
General Administration Department,
Government of Maharashtra,
Mantralaya, Mumbai.

... Respondents

By Advocate Shri V.S.Masurkar

...2/-



ORDER

{Per: Shri D.S.Baweja, Member (A)}

The applicant is an officer of 1978 batch of Indian Forest Service (IFS) belonging to Maharashtra State Cadre. He was promoted to Junior Administrative Grade on due date on 1.4.1987. However, for the next promotion to Super Time Scale of pay, he was over looked for promotion by the Screening Committee meeting held on 19.1.1993 and his immediate junior Shri V.K.Mohan and other juniors were promoted. However, at that time only based on the confidential record of 1987-88 to 1991-92, he was selected for promotion to Super Time Scale of pay in IFS and was sent on deputation under Respondent No. 2, i.e. Ministry of Environment and Forests, New Delhi. Feeling aggrieved by his non selection for promotion to Super Time Scale of pay in the State, he filed OA.NO. 1276/93 challenging the adverse remarks conveyed to him for the Confidential rolls of 1986-87, 1989-90 and 1990-91 years and seeking the relief of expunging the same. This OA. was disposed of as per order dated 10.1.1997 quashing the adverse remarks conveyed for the reports of 1986-87, 1989-90 and 1990-91 and directing to reconsider the case of the applicant for promotion to Super Time Scale in the State from the date his junior has been promoted, i.e. 6.4.1993. In compliance with this order, as per three letters dated 21.5.1997 adverse remarks from all the three reports as stated earlier were expunged. However, there was delay in holding the review Screening Committee meeting and the applicant filed a Contempt Application No. 66/1997. In

reply to the Contempt application, the respondents submitted that review Screening Committee meeting was held on 22.6.1997 and even after expunging of the adverse remarks as directed in order dated 10.1.1997, the Committee did not find the applicant fit for promotion to Super Time Scale of pay. Contempt application was disposed of as per order dated 5.12.1997 stating that there is no case of contempt of court but if the applicant is aggrieved by non selection inspite of fresh Screening Committee meeting as per the orders of the Tribunal, then applicant has to approach the Tribunal or any other appropriate forum. The applicant thereafter submitted a detailed representation dated 23.7.1998 to Forest Minister of the State. This was followed by a reminder dated 10.2.1999. The applicant also personally met the Hon'ble Minister. The applicant submits that Hon'ble Minister informed him that the review Screening Committee had committed serious irregularities in implementing of Tribunal's order dated 10.1.1997 in OA.NO. 1276/93 and he has disposed of the file with his observations and sent to the Department for submission to Hon'ble Chief Minister. Since even after intervention in the matter at the Minister's level, there was no reply to his representation, he agitated the matter again for seeking legal remedy through OA.NO.1065/98. This OA. was disposed of as per the order dated 19.2.1999 directing the State Government to consider and dispose of the representations dated 23.7.1998 and 10.2.1999 by a speaking order. It was also provided that in case any adverse order is passed by the Administration, then the

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(f) To confirm the 'Very Good' grading for all administrative purpose for the year 1989-90 in view of the order in OA.NO.1276/93.

(g) To quash and set aside the communication of the non adverse remark for the year 1987-88 on 10.4.1992 and direct to expunge the same by pasting.

(h) To set aside the order dated 24.2.1993 rejecting the representation dated 20.5.1992 against the communication of the adverse remarks for the year 1987-88.

(i) To set aside the 'average' grading given by the reviewing authority (Respondent No. 3 in OA.NO.1276/93) for the year 1987-88 overlooking the 'Very Good' grading by the reporting officer without assigning any reasons.

(j) To confirm the 'Very Good' grading of the reporting officer as the final grading for the year 1987-88 for all administrative purposes.

(k) To set aside the order dated 5.5.1999 through which the representations have been rejected and advised that the applicant has not been found fit for promotion.

(l) To direct Respondent No. 1 to promote the applicant to Super Time Scale from 6.4.1993 when his juniors Shri V.K.Mohan was promoted with all consequential monetary benefits.

3. The Respondent No. 1, i.e. State of Maharashtra has filed brief written statement on behalf of the Respondents No. 1 to 4 to oppose the admission of the OA. and grant of interim stay order. The respondents contend that in pursuance of the order

dated 19.2.1999 in OA.NO. 1065/98 the representations of the applicant have been carefully considered by the Screening Committee which met again on 3.4.1999. However, the Committee did not find the applicant fit for promotion even after removal of the adverse remarks as ordered in the OA.NO.1276/93 as per order dated 10.1.1997. Accordingly, reply to the representations of the applicant as per the direction of the Tribunal as per order dated 19.2.1999 in OA.NO.1065 has been sent as per order dated 5.5.1999 which is a speaking order as the reasons for non selection have been conveyed to the applicant. With these facts, the respondents submit that the applicant has no case and the application deserves to be dismissed.

4. Though the Respondents No. 1 to 4 stated in the brief written statement that a detailed written statement giving parawise reply will be filed subsequently, but the same has not been filed.

5. Respondent No. 3, Shri S.B.Kulkarni, who is made party respondent by name has also filed a separate affidavit. The applicant has alleged malafides against him in paras 46 & 47 of the OA. for down grading the 'Very Good' grading given by the reporting officer to that as 'average' for the year 1987-88. Shri Kulkarni refutes the allegations made and submits that he has been unnecessarily made as party respondent and pleadings of the applicant do not deserve any consideration.

6. The applicant has not filed any rejoinder reply for the written statement of Respondents No. 1 to 4 as well as that of Respondent No. 3, i.e. Shri S.B.Kulkarni.

7. We have heard the arguments of the applicant in person and Shri V.S.Masurkar for the respondents. The Respondent No. 1 has made available the folder of Confidential Reports of the applicant and relevant files containing the minutes of the Screening Committee meetings. The applicant has also filed written arguments at the time of final hearing.

8. The applicant has made elaborate averments and some with repetition. The applicant has also sought a large number of reliefs which are also overlapping as brought out in para 2 above. However, the main grounds for challenging his non promotion as emerging from the averments and taken in the written arguments are as under :-

(a) The 'average' grading given in the report of 1989-90 by the review authority does not survive in view of the order dated 10.1.1997 in OA.NO.1276/93 and the same could not have been taken into account by the review committee.

(b) Down grading of the grading of 'Very Good' given by the reporting officer to that of 'average' by the review authority, i.e. Shri S.B.Kulkarni, Respondent No. 3 in the Confidential Report of 1987-88 is not legally maintainable as no reasons for down grading have been recorded and this adverse entry has not been conveyed to the applicant. .8/-

(c) The reviewing Screening Committee meeting held on 3.4.1999 has acted with perverse, prejudiced, biased and malafide intentions in evaluation of the gradings of the applicant and due to non compliance with the direction/observations in order dated 10.1.1997 in OA.NO.1276/93. These allegations are mainly made against Shri P.Subramanyam, Chief Secretary and the Chairman of the review Screening Committee.

9. The first ground of the challenge and related reliefs prayed for relates to the expunging of the adverse entries as ordered by the Tribunal in OA.NO.1276/93 as per order dated 10.1.1997. It is contended by the applicant that inspite of the clear direction from the Tribunal, adverse entries have not been pasted and taken note of by the Screening Committee meetings held on 22.6.1997 and 30.4.1999 and influenced by the same in declaring the applicant unfit for promotion. On going through the order dated 10.1.1997, we note that the applicant had challenged the conveying of the adverse remarks for the reports of the years 1986-87, 1989-90 and 1990-91. For consideration of the promotion of the applicant when due in 1993 and when his juniors were promoted, reports from 1987-88 onwards were considered by the Screening Committee. On going through the Confidential Rolls, we find that the adverse entries made by the reviewing authority in the reports of 1989-90 and 1990-91 with which we are concerned here have been expunged and pasted. This was also advised to the applicant as per the letter dated 23.5.1997. However, on going through the Confidential report of

1989-90, we find that in items 4 of Part V, the remarks of the reviewing authority have been expunged and pasted only partly. The remark "This grade ought to be average" has not been expunged and hence not pasted. Therefore this grading was before the review Committee meetings held on 22.6.1997, 30.4.1999. The applicant has strongly argued that in view of the observations made and direction given in the order dated 10.1.1997 in OA.NO.1276/93, all the adverse remarks by the reviewing officer stand expunged and any grading which stands on the basis of these adverse remarks does not survive. He further averred that the 'average' grading was also therefore required to be ignored and pasted. On going through the order dated 10.1.1997, we find considerable merit in the contention of the applicant. Directions in the order in para 13 as reproduced below are very clear :-

In the result, in the absence of any rebuttal from the Respondent No.3 and the evasive reply filed by the Respondent No. 1, we are left with no other alternative but to quash all the adverse remarks passed against the applicant for the years 1986-87, 1989-90 and 1990-91 and set aside the same...."

Once all the adverse remarks are set aside then whatever adverse is written by the review officer in the report stands expunged. The 'average' grading which is based on the adverse remarks against item 4 of Part V in particular also stand set aside. We fail to understand as to how the Respondent No. 1 has interpreted the order that only the remarks are to be expunged and not the down grading which is the result of adverse remarks. Entire

entry against item 4 should have been expunged and pasted before placing the matter before the review Screening Committee. In fact, the Respondent No. 1 in para 13 of the written statement is frank enough to concede the contention of the applicant that the 'average' grading also ought to have been ignored and the 'Very Good' grading by the reporting officer should have been taken into account. Para 13 is reproduced for ready reference :-

"13. I say that the grading made during the year 1989-90 the applicant rightly contended that when the whole portion of the adverse remarks recorded by the then Reviewing Officer Shri R.L.Choudhary was expunged by the Hon'ble Tribunal on the ground they have been proved to be written with malafide intention. Hence Average ought to have been ignored and the Very Good remark written by the Reporting Officer for major period should have been resorted and taken into account. In support of this contention, the applicant has relied upon the para 10 of the order of the Tribunal dt. 10th Jan 1997 which is at page 113 of the OA. The contention of the applicant has substance in view of the fact that the Tribunal has recorded the findings of malafide in writing of CRs by the then Reviewing Officer i.e. Shri R.L.Choudhary."

Once the correct action which ought to have been taken as per the order dated 10.1.1997 in OA.NO.1276/93 is accepted by the Respondent No. 1, it is understandable as to why the Respondent No. 1 has not come out as to how the entire entry including grading in item 4 was not pasted. On going through the file containing the minutes of the Screening Committee meeting held on 30.4.1999 and the consideration of the representations of the applicant, we find a note dated 25.2.1999 in which in para 6 what is stated in para 13 of the written statement has been recorded.

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After taking this view, the State Government could have pasted the entire entry of item 4 before placing the matter before review Screening Committee ordered as per the decision of the State Government on the representations of the applicant and which held its meeting on 23.4.1993. In the absence of proper action, this committee again took into account the unpasted 'average' grading in assessing the suitability of the applicant for promotion and graded the applicant as 'average' for 1989-90. It is all the more astonishing that the note dated 25.2.1999 had been seen by the Chief Secretary on 4.3.1999 who was the Chairman of the Screening Committee. It is not brought out whether this note at all was placed before the Committee. In the back ground of these observations, the unpasted remark "This grade ought to be average" against the item 4 of part V cannot be held to stand.

The same is required to be expunged and pasted. Since the review Committee held on 30.4.1999 has considered the promotion of the applicant by ^{taking into account} the unpasted 'average' grading,

the recommendations of the Screening Committee which is under challenge get vitiated on this account.

10. The second ground of challenge concerns the Confidential report of 1987-88 in which the down grading of the 'Very Good' grading of the reporting officer to that of 'average' grading has been done by the reviewing authority, i.e. Respondent No. 3, Shri S.B.Kulkarni. It is further contended that no reasons have been recorded to support this down grading. The applicant in paras 46

and 47 of the OA. has also alleged malafides against the Respondent No. 3 for down grading the grading. Respondent No. 3 has filed a separate written statement controverting the allegations in paras 46 and 47. We have gone through the averments in paras 46 and 47 and are of the considered view that the same do not lay down adequate and cogent foundation for inferring malafides. The applicant has not indicated any details of any official dealings as to why Shri Kulkarni was ill disposed towards him. Reference to letter dated 24.10.1988 issued to Mr. Kulkarni by the Chief Secretary cannot be foundation of the malafides against the applicant. We are therefore not impressed by the plea of malafides against the Respondent No. 3 and to hold that the down grading is vitiated on this account.

We, however, find merit in the second contention that the down grading by the reviewing authority without recording any reasons for differing with the reporting officer and communication of this adverse grading cannot be taken into account for assessment of the applicant for promotion. On going through the Confidential report for the year 1987-88, we note that against item 4 of Part V, the reviewing authority has recorded "Nil. An average officer". We further note that no reasons have been recorded for disagreeing. On one side the reviewing officer writes 'Nil' which means that he agrees with the general remarks of the reporting officer but at the same time he grades the officer as 'average' as against 'Very Good' by the reporting officer. We further note that some remarks have been

made against item Nos. 2 and 3. These have been also conveyed to the applicant. But the same are of advisory nature as confined to the applicant as per letter dated 24.2.1993 when the applicant represented against the same. These remarks cannot be therefore taken as reasons for down grading the grading to 'average'. We have therefore no hesitation to hold that the reduction in grading is not supported by any reasons.

The purpose and objective behind writing annual confidential reports (ACR) and the responsibility devolving on the various authorities involved in the process of writing of ACRs has been gone into by the Apex Court in the several judgements. Here as under we refer to a few of such judgements to illustrate the view point of the Apex Court :-

- (i) Swatantra Singh vs. State of Haryana & Ors.
1997 SCC (L&S) 909.
- (ii) Union of India & Ors. vs. E.G.Nambudiri
1991 SC SLJ 19.
- (iii) State of U.P. vs. Yamuna Shanker Misra
(1997) 4 SCC 7
- (iv) M.A.Raja Sekhar vs. State of Karnataka & Anr.
1998 SCC (L&S) 574.

We reproduce extracts from some of these judgements which sum up the view point of the Hon'ble Supreme Court.

M.A.RajaSekhar Para 4

" It is no settled law that the object of making adverse remarks is to assess the competence of an officer on merits and performance of an officer concerned so as to grade him in various categories as outstanding, very good, good, satisfactory and average etc. The competent authority and the reviewing authority have to act fairly or objectively in assessing the character, integrity and performance of the incumbent."

Swatantar Singh Para 5

" It is true that in view of the settled legal position, the object of writing the confidential reports or character roll of a government servant and communication of the adverse remarks is to afford an opportunity to the officer concerned to make amends to his remissness; to reform himself; to mend his conduct and to be disciplined, to do hard work, to bring home the lapse in his integrity and character so that he corrects himself and improves the efficiency in public service. The entries, therefore, require an objective assessment of the work and conduct of a government servant reflecting as accurately as possible his sagging inefficiency and incompetency. The defects and deficiencies brought home to the officer, are means to the end of correcting himself and to show improvement towards excellence."

As held by the Hon'ble Supreme Court in the cited judgements above, the officers writing the ACR are expected to show objectivity, impartiality and make fair assessment without any prejudice whatsoever with highest sense of responsibility. In the process of report writing, it is the reporting officer who has intimate contact with the official being reported upon and he is the best judge for his performance appraisal and to present truest possible picture of the appraisee. Next in the process is

the reviewing authority who may not be in direct contact with the official but is expected to have fair knowledge about the performance of any officer being the Head of Office/Department. He is in a position to ensure that the reporting authority has made the assessment of the performance with due care and attention. The Accepting authority is not normally expected to have a direct or personal knowledge of the performance of the official being reported upon and is expected to accept/endorse the appraisal of the reviewing authority. It is no doubt conceded that the reviewing authority and the accepting authority have a right to differ with the performance appraisal of the reporting officer. They may upgrade or down grade the same. But considerable restraint and sense of responsibility is called for in exercising this right as brought out earlier. If the reviewing/accepting authority does not agree with the assessment of the grading of reporting/reviewing authority and is of the opinion that the grading is over rated and requires in his opinion to be down graded, then for such an action detailed reasons are required to be recorded. These reasons should reflect his personal knowledge about the performance of the concerned officer and should be cogent enough to justify the downward grading of the performance. A caution is all the more required if the down grading is such that the same will be adverse and come in the way of promotion of the officer being reported upon. firstly if such a report is challenged for seeking legal remedy, the mind of the authority concerned is known for down grading the

entry and secondly the Screening Committee can properly assess the report. Thus any down grading of the assessment without recording reasons is not sustainable. In view of what is discussed earlier, the down grading by the reviewing authority to 'average' in the report of 1987-88 cannot be allowed to stand as this has come in the way of the applicant in assessing his fitness for promotion. Such an entry is an adverse entry and should have been communicated to the applicant.

The applicant has cited the following orders/judgements

:-

(a) Mohan Gupta vs. State of M.P. & Ors.

1994 (1) ATJ 95.

This is the case of an IAS officer. The reviewing authority had down graded 'Very Good' grading given by the reporting officer without recording any reasons. Bench held that such down grading had to be ignored and directed to hold review DPC to consider the case of the applicant for promotion.

(b) Rama Chandra Misra vs. State of Orissa

(1990) 13 ATC 633.

In this order while dealing with the issue of down grading in the confidential report, it is held that the accepting authority while differing with high ranking reporting and countersigning officers should indicate the reasons for the same.

We also note that similar view as in the case of Mohan Gupta has been taken in the following orders of the Tribunal :-

- (a) Arvind Balkrishna Bhangre vs. Union of India
1996 (2) SLJ 431
- (b) Thankwala vs. Union of India
(1998) 37 ATC 601.
- (c) Udai Krishna vs. Union of India
(1996) 33 ATC 802.

We are in respectful agreement with what is held in the above cited orders in view of our deliberations earlier.

11. The above deliberations bring out that non promotion of the applicant is vitiated on the following two grounds :-

(a) the down grading of the grading by the reviewing officer from 'Very Good' to 'average' in the report of 1987-88 without recording of reasons is not legally sustainable. This is an adverse entry which cannot be considered for assessing fitness for promotion without communicating the same to the applicant.

(b) entire entry against item 4 of part V of the 1989-90 report including 'average' grading was required to be expunged and pasted. The Hon'ble Supreme Court in the case of Dalpat Abasaheb Solunke vs. Dr.B.S.Mahajan, 1990 SCC (L&S) 80 has held in para 12 as under :-

" The decision of the Selection Committee can be interfered with only on limited grounds such as illegality or patent material irregularity in the constitution of the committee or its procedure vitiating the selection or proved malafides affecting the selection....."

In the present case, in view of the infirmities found in the consideration of the applicant for promotion, the recommendations of the Screening Committee meeting held on 30.4.1999 are not sustainable and judicial interference is called for in view of the law laid down by the Hon'ble Supreme Court.

12. We have recorded our findings above that the down grading by the reviewing authority in case of the Confidential report of 1987-88 from 'Very Good' to 'Average' was an adverse entry. Adverse entry normally is required to be conveyed to an employee to give him an opportunity to represent against the same. Based on the consideration of representation, adverse entry may be expunged, modified by the competent authority. In the present case, on the facts and circumstances, we are not inclined to give such a direction to convey the adverse grading and then take final decision after consideration of the representation which the applicant could make against the same. This is on three considerations, namely :- (a) conveying of the adverse grading after several years will be unfair and unjust to the applicant as he will not be able to put up effective representation at this late date. (b) The concerned reviewing authority has since retired. (c) any delay in conveying adverse entry loses its purpose. In this connection, we are fortified by the view held by the Hon'ble Supreme Court in the following judgements :-

(a) Brij Mohan Chopra vs. State of Punjab
1987 AIR SC 948.

(b) State of Haryana vs. P.C.Wadhwa & Ors.

1987 (2) SLJ 162.

(c) Union of India vs. E.G.Nambudri

1991 SC SLJ 1953

(d) Baidyanath Mohapatra vs. State of Orissa

1989 SC SLJ 13

It will be relevant here to reproduce an extract below from para 6 of the judgement in the case of Baidyanatha Mohapatra:-

"..... Belated communication of the entries resulted into denial of reasonable opportunity to the appellant to improve his performance"

In view of the law laid down by the Hon'ble Supreme Court, we come to the conclusion that instead of conveying the adverse grading given by the reviewing authority without recording the reasons in the report of 1987-88, the same should be treated as ignored and the case of the applicant for promotion should be accordingly reviewed.

13. The applicant has alleged perverse, biased, prejudiced and malafide intentions against Shri P.Subramaniam, Chief Secretary and the Chairman of the Screening Committee held on 30.4.1999. Shri Subramanyam has been made party respondent by name but he has not filed any written statement. Brief written statement said to be filed on behalf of Respondents 1 to 4, but the allegations of malafides and bias have not been specifically controverted.

Hon'ble Supreme Court in the case of Express News Papers Pvt.Ltd. vs. Union of India, 1986(1) SCC 133 has held that the court is constrained to accept the unrebutted allegations on the test of probability. In the present case, in the absence of any rebuttal by Shri P.Subramaniyam, these allegation should be taken as proved, however subject to the test of probability. Hon'ble Supreme Court in the case of K.Nagraj & Ors. vs. State of Andhra Pradesh, AIR 1985 SC 551 in para 36 has held as under :-

" The burden to establish malafides is a heavy burden to discharge. Vague and casual allegations suggesting that a certain act was done with an ulterior motive cannot be accepted without proper pleadings and adequate proof."

Keeping this in view, we have gone through the averments made to support allegations against Mr.P.Subramaniyam. We note that just for mentioning that Shri P.Subramaniyam has acted with biased prejudiced and malafide intention, no foundation has been laid to support the same. He has not brought out as to why Shri P.Subramaniyam was illdisposed towards the applicant. On a mere statement, we are afraid, the merits of the allegations cannot be gone into even if there is no affidavit to rebut the same by the party concerned. Therefore, the plea of malafides and bias is without any substance and deserves to be rejected.

14. Lastly, we come to the issue as to what direction should be given to the Respondents No. 1. The applicant appearing in person made a strong plea that in case the infirmities pointed out by the applicant in consideration of his case for promotion

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by the Screening Committee are upheld, then the Respondent No. 1 should be directed to give promotion to the applicant from the due date instead of remanding the matter for reconsideration by the review Screening Committee. Though the applicant conceded that normally the case is to be remanded to the review Screening Committee with the observations of court but in the present case in view of the facts and circumstances, the applicant argued, direction to the Respondent No. 1 to promote the applicant directly is warranted. The applicant argued that his case has been considered by the review Screening Committee twice but both the Committees have failed to make a proper assessment of Confidential reports and implement the directions in the order dated 10.1.1997 in OA.NO.1276/93.

The applicant has relied upon the following judgements to support his prayer :-

(a) The Distt. Registrar Palghat & Ors. vs. M.B.Koyakutty & Ors., 1979 SCC (L&S) 126. In this case, the Hon'ble Supreme Court in para 30 has observed as under :-

" The last point for consideration is whether it was proper for the High Court to issue a positive direction requiring the appellant to promote the respondent to the Upper Division and thereafter to determine his rank in the cadre of Upper Division Clerks. Ordinarily, the court does not issue a direction in such positive terms, but the peculiar feature of this case.-----

----- Since the existence of both the criteria viz. seniority and fitness for promotion to the Upper Division prescribed by the Statutory Rule 28 (b) (ii) in the case of Koyakutty was not disputed, the High Court was justified in issuing direction it did."

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(b) State of Gujrat vs. S.Tripathy & Ors.

AIR 1987 SC 479.

In this case also the direction for promotion to selection grade and supertime scale was straightaway given in view of the finding recorded by the High Court and on the facts and circumstances of the case.

In the present case, the facts and circumstances are distinct. Here for the report of 1987-88 the applicant has raised the issue for the first time in this OA. and we have recorded our findings for the same. In respect of 1989-90, 'average' grading was also required to be expunged. With these findings, it is necessary for the Screening Committee to reassess the fitness of the applicant for promotion.

We have ^{also} on the other hand a catena of judgements by the Apex Court wherein it is held that it is not for the Court/Tribunal to substitute itself in the role of the Screening Committee and give directions for promotion. Some of the cited judgements are as under :-

- (a) Gurdiyal Singh Fijji vs. State of PUNjab
1999 SCC (L&S) 197.
- (b) State of Bihar & Ors. vs. Bateshwar Sharma,
1997 SCC (L&S) 975.
- (c) State Bank of India vs. Moh. Mynuddin,
1987 SCC (L&S) 464.
- (d) Union Public Service Commission vs. Hiranyalal Dev &
Ors., 1986 SCC (L&S) 484.

Here we reproduce para 4 from one of the judgements in case of State of Bihar vs. Bateshwar Sharma as under :-

" 4. In view of the above finding of fact by the competent committee, the question arises whether the high Court could record finding that the respondent could be deemed to have been promoted from 17.1.1989 with all consequential benefits. The view taken by the High Court is palpably illegal for the reason that once the DPC had found that the respondent was unfit for promotion up to that date, the only course that requires to be adopted by the High Court was to remit the matter to the Government for constitution of the DPC to consider his fitness (sic fitness) for promotion in later period. In that event, the DPC would go into the merits afresh and find out whether the respondent would be fit for promotion. If he would be found fit and recommendation is made in that behalf, the Government would appoint him on regular basis and he would get seniority only from the date of his promotion and not from the earlier date when he was working on ad hoc basis. We are not inclined to express any opinion on merits either way. The DPC is the only competent authority to decide on merits."

In view of the law laid down by the Apex Court in the above referred judgements and in the facts and circumstances of the present case, we are of the considered view that the matter should be remanded back for reconsideration by the review Screening Committee after ignoring the adverse entries as per our findings recorded earlier.

15. In conclusion, we allow the OA. with the following directions :-

- (a) The 'average' grading given by the reviewing authority in the Confidential report of 1987 -88 shall be ignored.

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- (b) The 'average' grading in item 4 of part V of 1989-90 report shall be treated as expunged and pasted.
- (c) The case of applicant for promotion to Super Time Scale of pay will be reconsidered by the review Screening Committee ignoring the adverse entries at (a) & (b) above.
- (d) If the applicant is found fit for promotion, then the applicant shall be promoted from the date his junior has been promoted. The applicant will be entitled for all consequential benefits including arrears of pay and seniority etc.
- (e) Compliance of the order to be done within a period of three months from the receipt of the order.
- (f) No order as to costs.

S.L.Jain
(S.L.JAIN)
MEMBER (J)

D.S.Baweja
(D.S.BAWEJA)
MEMBER (A)

mrj.