

Central Administrative Tribunal Principal Bench, New Delhi

O.A. No.1489/2013
with
O.A.No.1764/2013

Order reserved on 17th September 2015

Order pronounced on 12th October 2015

**Hon'ble Mr. A.K. Bhardwaj, Member (J)
Hon'ble Dr. B. K. Sinha, Member (A)**

O.A.No.1489/2013

Bharat Lal Banjare
Secretary, Revenue Board
Bilaspur (CG)

(Mrs. June Chaudhari, Senior Advocate and Mr. Prabhat Kumar Rai,
Advocate along with her) ..Applicant

Versus

1. Union of India through the Secretary
Ministry of Personnel, PGA & Pensions
Department of DOP & T
Government of India
New Delhi
2. Union Public Service Commission
Through the Secretary
Dholpur House, Shahjan Road
New Delhi-69
3. State of Chhattisgarh
Through the Secretary
Govt. of Chhattisgarh
General Administration Department
Mahanadi Bhawan, Mantralaya
Naya Raipur (Chhattisgarh)
4. Mr. Trilok Chand Mahavar
Collector Mungeli
District Mungeli (CG)
5. A Kulbhushan Toppo (IAS)
Registrar, State Cooperative Society
Raipur

6. Anil Kumar Tuteja (IAS)
Commissioner Municipal Corporation
Bhilai, District – Durg (CG)
7. Narender Kumar Shukla (IAS)
CEO, Zila Panchyat, Raipur
District – Raipur (CG)
8. Niranjan Das (IAS)
Deputy Secretary
Raajbhawan Sachivalaya
Raipur (CG)
9. Emil Lakra (IAS)
Mission Director
National Rural Health Mission
Chhattisgarh, Raipur
10. Govindram Churendra (IAS)
Deputy Secretary, General Administration
Government of Chhattisgarh
Mahanadi Bhawan, Mantralaya
Naya Raipur (CG)
11. Umesh Kumar Agrawal (IAS)
Director, Treasury
Government of Chhattisgarh
Shankar Nagar, Raipur
12. Dhanjay Devagan (IAS)
Deputy Secretary
Department of Panchayat & Rural Development, Behind
Rajbhawan, Civil Line, Raipur
13. Dr. S K Alang (IAS)
Secretary
Chhattisgarh, Lok Ayog, Raipur (CG)
14. Chhattar Singh Dehre (IAS)
Secretary, Public Service Commission
Shankar Nagar, Raipur (CG)
15. Taaman Singh Sonwani (IAS)
Chief Executive Officer
Zilla Panchayat, Janjgir – Champa
Chhattisgarh

..Respondents
(Mr. Rajinder Nischal, Mr. Sameer Shrivastava, Mr. A P Majee, Mr. A.C. Bexipatro for Mr. A P Kurup, Mr. Sameer, Mr. Rohit Rathi and Vijeta Ohri, Advocate for respective respondents)

O.A.No.1764/2013

Sudhakar Khalkho
Upper Collector
District Balrampur, Sarguja (CG)

..Applicant

(Mrs. June Chaudhari, Senior Advocate and Mr. Prabhat Kumar Rai,
Advocate along with her)

Versus

1. Union of India through the Secretary
Ministry of Personnel, PGA & Pensions
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O R D E R

Mr. A.K. Bhardwaj:

O.A.No.1489/2013

The applicant herein joined State Civil Service of Madhya Pradesh in 1989. The Selection Committee met for promotion of members of State Civil Service, Chhattisgarh on 24.2.2012 considered the applicant for inclusion of his name in the suitability list for the select year 2010 and graded him as 'Good'. When there were 14 vacancies, the name of applicant was included at Sl. No.10 of the proposal forwarded by the State

Government. However, being graded as 'Good' he was not included in the suitability list (select list) and the members of the State Civil Service, who were placed at Sl. Nos. 12, 13, 15, 16, 17 and 18 of the proposal, were included in the list, as they were graded by the Committee as 'Very Good'. The inclusion of the name of Mr. Anand Kumar Masih was made provisional. Subsequently, in its comments on the suitability list, the State Government brought to the fore a report dated 31.5.2012 of Chhattisgarh Lok Aayog, Raipur regarding the complaint against Mr. Niranjan Das and Dhananjay Devangan, who were included in the select list. Nevertheless, in terms of letter dated 17.7.2012, the Government of Chhattisgarh brought out that the complaints registered against aforementioned two officers were filed and the charges could not be proved on facts. Thereafter the Commission approved the select list. The list was acted upon by the Government of India, Department of Personnel & Training (DoPT) vide its Notification dated 28.9.2012, thus the applicant filed the present Original Application praying therein:-

- "a) Quash the Order/Notification No.14015/5/2011-AIS (1)-B, Government of India, Ministry of Personal, Public Grievances & Pensions (Department of Personnel & Training) New Delhi, Dated 28-09-2012. In the alternate the applicants case be considered for inclusion in the Select List, by a Review D.P.C.;
- b) Quash the order dated 23-03-2013 by the Additional Secretary. A true translated copy of the Order No.476/2080/2012/One/4, dated 22.03.2013, passed by Respondent No.3;
- c) Expunge the "Good" Entry, for the periods 31-08-2007 to 08-07-2009;
- d) To direct the Respondent to hold a review D.P.C. for consideration of the applicant name in the Select List against the vacancies of 2010 & if found fit let, to promote the applicant from SAS to IAS cadre from the date of the impugned Select List with all consequential benefits including seniority & arrears of pay;

c) direct the respondents to produce the records of selection proceeding;

d) Pass such other and further orders as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case, & in the interest of justice”

2. Mrs. June Chaudhary, learned senior counsel for applicant espoused:

- i) Annual Confidential Reports (ACRs) of the applicant, except for the period from 1.4.2007 to 31.3.2008, were better than those of private respondent Nos. 5 to 15.
- ii) His ACR for the period from 1.4.2007 to 31.3.2008 was graded as ‘Good’ even when there was no warning or complaints against him during the period.
- iii) In terms of the law declared by the Hon'ble Supreme Court in **Dev Dutt v. Union of India & others**, (2008) 8 SCC 725, the grading ‘Good’ has to be treated as an adverse entry and need to be communicated to the concerned employee to enable him to make a representation against the same.
- iv) In terms of the view taken by a Larger Bench of this Tribunal in **Ashok Kumar Aneja v. Union of India & others**, 2009 (1) SLJ (CAT) 262, the down gradation of the ACR from ‘Very Good’ to ‘Good’ may not be considered as an adverse entry but need to be communicated to the person, who stands affected thereby.
- v) Since several of his juniors were included in the suitability list as well as select list for the year 2010, the applicant had fair chance for inclusion in the list.

- vi) The Selection Committee did not take into account the orders/ certificates regarding appreciation of meritorious work of the applicant.
- vii) While grading him 'Good' for the period from 1.4.2007 to 31.3.2008 and 'Average' for the period from 1.4.2008 to 30.9.2008, the concerned authorities flouted the instructions dated 6.8.2004 and 12.6.2008, in terms of which all Heads of Department were required to make efforts to improve the manner of working of officers belonging to SC, ST and OBC categories and only when there is no improvement, to record adverse entries in their ACRs. When no advice or warning was ever given to the applicant by respondent No.4, the ACRs for the period (ibid) should not have been graded 'Good' or 'Average'.
- viii) At the time of their consideration for promotion to the IAS, the inquiry was pending against respondent Nos. 8 and 12 before the Lok Aayog, thus their integrity could not have been certified.
- ix) Possibly the upgradation of the ACR of the applicant for the period 1.4.2008 to 30.9.2008 had escaped the attention of the Selection Committee.

3. In the counter reply filed on behalf of respondent No.2, it has been espoused that based on overall assessment of his service record, the Selection Committee assessed the applicant as 'Good' and in the backdrop of his grading and statutory limit regarding size of the select list, his name could not be included in the select list for the year 2010. Even certain other

persons, who were included at Sl. Nos. 11 and 14 of the proposal, namely, Mr. Sudhakar Khalkho and Mr. H. Kujur, could not be included in the select list for the reason that the DPC graded them 'Good' and sufficient number of individuals, who had been graded 'Very Good', were above them for being included in the select list. Since Mr. Umesh Kumar Agrawal (Sl. No.12), Mr. Dhananjay Devangan (Sl. No.13) and Dr. S K Alang (Sl. No.15) were graded by the Selection Committee as 'Very Good', they were included in the select list.

3. According to the Commission, the assessment made by the Selection Committee was based on the service record of the applicant made available to it. Regarding plea of oblivion of the Selection Committee about the upgradation of the ACR of the applicant for the period 1.4.2008 to 30.9.2008, the Commission has taken a stand that the plea is baseless. Regarding the allegation of inquiry pending against Mr. Niranjan Das and Mr. Dhananjay Devangan before the Lok Aayog, Chhattisgarh, the explanation brought to the fore by the UPSC is that the State Government was informed about the inquiry in terms of the letter dated 31.5.2012 when the Selection Committee had already met on 24.2.2012 and finally the State Government could convey that the complaints had been filed and the charges against the officers could not be proved. The UPSC conveyed its approval to the select list only after the State Government forwarded its observation on 15.6.2012 and the receipt of the letter dated 11.7.2012 from the Central Government. The select list was forwarded to the DoPT vide letter of the Commission dated 16.8.2012 and was notified by the Government of India on 28.9.2012.

4. In the reply dated 28.10.2013 filed on behalf of respondent No.3, i.e., Government of Chhattisgarh, it is espoused that the ACR in dispute being pertaining to the period 2007-08 was not required to be communicated, as the judgment of Hon'ble Supreme Court (supra) whereby the law regarding communication of positive grading was declared had not yet come. The said respondent has also placed reliance upon the judgment of Hon'ble Supreme Court in **Union of India & another v. S.K. Goel & others**, (2007) 14 SCC 641 regarding pendency of complaints against Mr. Niranjan Das and Mr. Dhananjay Devangan before the Lok Aayog, Chhattisgarh.

5. Pursuant to the Order passed by this Tribunal on 23.9.2014, the Government of Chhattisgarh filed the additional affidavit dated 13.10.2014 stating therein that issuance of notice under Chhattisgarh Lok Aayog Adhiniyam, 2002 does not amount to *prima facie* charge against the officials concerned.

There is no counter reply filed on behalf of the Department of Personnel & Training. Respondent No.12 filed his written submissions. The Government of Chhattisgarh also filed detailed written arguments.

6. We heard the learned counsels for the parties and perused the record.

7. As far as the plea regarding deficiency in initiation and writing of the ACR for the period 1.4.2007 to 31.3.2008 is concerned, we are of the considered view that in terms of certain administrative guidelines on the subject, the concerned employee should be advised from time to time to

improve his work and performance, if so required and the advice should be kept in memo of service. The memo should invariably be consulted at the time of writing the annual report. In the absence of adherence to the procedure, the adverse remarks in an ACR may be found vitiated, but such is the procedure regarding adverse entries in the confidential report of a government servant. Though in view of the law declared by the Apex Court in **Dev Dutt's** case (supra) the positive grading below benchmark has been declared as adverse but only for the limited purpose of communication. In other words, normally a positive grading cannot be considered as adverse grading when recorded but is so considered when it is noticed that it would have adverse ramification on promotional prospects of the employee. The procedure laid down for making adverse entries in the ACR cannot be applied to positive gradation in the ACR. In the year 2007-08 when the ACR of the applicant was initiated and written, the official respondents could not have foreseen that in view of a subsequent judgment of Apex Court, a positive grading would be declared as adverse to the extent that the same would be required to be communicated to the concerned employee to enable him to make a representation against the same. Even after the law declared by the Apex Court, no such guidelines, as had been issued regarding adverse entries in the ACR, have been issued for recording the positive below benchmark grading in ACR, i.e., maintenance of memo of service or issuance of advisory memo. As can be seen from the contents of paragraph 5 (F) of the Original Application, the instructions dated 6.8.2004 and 12.6.2008 are also applicable only in recording the adverse remarks in the ACR. The said paragraph reads thus:-

“(F) Because the vindictive & malafide attitude of Respondent No.4 is seen from the fact that during the 1 ½ years of service at Dhamtari, as Deputy Collector, his reporting officer was Respondent No.4, who was Collector Dhamtari. The Respondent No.4, has graded him ‘good’ for the period 01-04-2007 to 31-03-2008, and ‘Average’ for the period 01-04-2008 to 30-09-2008. This has been done without adhering to the instructions in C.O. dated 06-08-2004 and 12-06-2008, where specific directions were given to all heads of department in relation to officers belonging to the SC, ST & O.B.C. category – wherein it was directed that efforts should be made to improve their manner of working, & if there was no improvement, adverse remarks should be given after due consideration. No such advice or warning was ever given by Respondent No.4 to the applicant. On the other hand, the Respondent No.4 deliberately awarded these entries to the applicant who belongs to the Scheduled Caste, thereby spoiling his chances for being promoted to the I.A.S. Cadre. In fact, before he was posted to Dhamtari, and thereafter when R.P.S. Tyagi took over as Collector, he has been graded as Very Good, and Excellent, & has been issued various commendation letters in appreciation of his excellent work.”

8. Above all, the promotion from State Civil Service to IAS is based on merits and there is no benchmark prescribed for such promotion. For a moment, for the sake of argument, we could have interpreted the lowest grading given by the Selection Committee, i.e., ‘Good’ as benchmark and could have taken a view that any grading below ‘Good’ may be required to be communicated to the concerned employee but in the present case the ACR of the applicant for the period 1.4.2007 to 31.3.2008 is ‘Good’, i.e., lowest of the classification of the suitable candidates. As far as the ACR for the period 1.4.2008 to 30.9.2008 is concerned, the same had already been upgraded to ‘Very Good’ and the candidates with ‘Very Good’ grading were included in the select list for promotion to IAS against the vacancies of selection year in question.

9. As has been noticed hereinabove, one of the salient arguments put forth on behalf of the applicant was that in view of law declared by the Apex Court in **Dev Dutt’s** case (supra), the grading below benchmark ought to

have been communicated to the applicant and in the absence of such communication, the ACR could not have been taken into account. There can be no two opinions that in terms of the said judgment of Apex Court even a positive grading below benchmark need to be considered as adverse and had to be communicated to the concerned employee to enable him to make a representation against the same. Nevertheless, in implementation of the judgment in **Dev Dutt's** case (supra), the Department of Personnel & Training could issue an O.M. in the year 2009, i.e., O.M. No. 21011/1/2005-Estt. (A) (Pt.II) dated 14.5.2009 wherein it was provided that only the ACRs for the period 2008-09 onwards were required to be communicated in terms of the law declared by the Apex Court. The O.M. read thus:-

“1. The existing provisions in regard to preparation and maintenance of Annual Confidential Reports inter alia provide that only adverse remarks should be communicated to the officer reported upon for representation, if any. The Supreme Court has held in their judgment, dated 12.05.2008 in the case of Dev Dutt v. Union of India (Civil Appeal No.7631 of 2002) that the object of writing the confidential report and making entries is to give an opportunity to the public servant to improve the performance. The 2nd Administrative Reforms Commission in their 10th Report has also recommended that the performance appraisal system for all services be made more consultative and transparent on the lines of the PAR of the All India Services.

2. Keeping in view the above position, the matter regarding communication of entries in the ACRs in the case of civil services under the Government of India has been further reviewed and the undersigned is directed to convey the following decisions of the Government-

- (i) The existing nomenclature of the Annual Confidential Report will be modified as Annual Performance Assessment Report (APAR).
- (ii) The full APAR including the overall grade and assessment of integrity shall be communicated to the concerned officer after the Report is complete with the remarks of the Reviewing Officer and the Accepting Authority wherever such system is in vogue. Where Government servant has

only one supervisory level above him as in the case of personal staff attached to officers, such communication shall be made after the reporting officer has completed the performance assessment,

- (iii) The Section entrusted with the maintenance of APARs after its receipt shall disclose the same to the officer reported upon.
- (iv) The concerned officer shall be given the opportunity to make any representation against the entries and the final grading given in the Report within a period of fifteen days from the date of receipt of the entries in the APAR. The representation shall be restricted to the specific factual observation contained in the report leading to assessment of the officer in terms of attributes work output, etc. While communicating the entries, it shall be made clear that in case no representation is received within the fifteen days, it shall be deemed that he/she has no representation to make. If the concerned APAR Section does not receive any information from the concerned officer on or before fifteen days from the date of disclosure, the APAR will be treated as final.
- (v) The new system of communicating the entries in the APAR shall be made applicable prospectively only with effect from the Reporting Period 2008-09 which is to be initiated after 1st April, 2009.
- (vi) The Competent Authority for considering adverse remarks under the existing instructions may consider the representation, if necessary, in consultation with the reporting and/or reviewing officer and shall decide the matter objectively based on the material placed before him within a period of thirty days from the date of receipt of the representation.
- (vii) The Competent Authority after due consideration may reject the representation or may accept and modify the APAR accordingly. The decision of the Competent Authority and the final grading shall be communicated to the officer reported upon within fifteen days of receipt of the decision of the competent authority by the concerned APAR Section.

3. All Ministries/Departments are requested to bring to the notice of all the offices under them for strict implementation of the above instructions.”

10. In view of the aforementioned O.M., the grading below benchmark for the year 2008-09 onwards were required to be communicated. Nevertheless, subsequently, the Department of Personnel & Training issued another O.M. No.21011/1/2010-Estt. A dated 13.4.2010 in terms of which if an employee was to be considered for promotion after the said date, his all the ACRs graded below benchmark were required to be communicated to him to enable him to make a representation against the same, within fifteen days. The O.M. reads thus:

“Below bench-mark gradings in ACRs prior to the reporting period 2008-2009 and objective consideration of representation by the Competent Authority against remarks in the APAR or for upgradation of the final grading.- Prior to the reporting period 2008-09, only the adverse remarks in the ACRs had to be communicated to the concerned officer for representation, if any, to be considered by the Competent Authority. The question of treating the grading in the ACR which is below the bench-mark for next promotion has been considered in this Department and it has been decided that if an employee is to be considered for promotion in a future DPC and his ACRs prior to the period 2008-09 which would be reckonable for assessment of his fitness in such future DPCs contain final grading which are the below the bench-mark for his next promotion, before such ACRs are placed before the DPC, the concerned employee will be given a copy of the relevant ACR for his representation, if any, within 15 days of such communication. It may be noted that only below bench-mark ACR below bench-mark ACRs of other year.

2. As per existing instructions, representations against the remarks or for upgradation of the final grading given in the APAR (previously known as ACR) should be examined by the Competent Authority in consultation, if necessary, with the Reporting and the Reviewing Officer, if any. While considering the representation, the Competent Authority decides the matter objectively in a quasi-judicial manner on the basis of material placed before it. This would imply that the Competent Authority shall take into account the contentions of the officer who has represented against the particular remarks/grading in the APAR and the views of the Reporting and Reviewing Officer if they are still in service on the points raised in the representation vis-à-vis the remarks/gradings given by the in the APAR. The UPSC has informed this Department that the Commission

has observed that while deciding such representations, the competent authorities sometimes do not take into account the views of Reporting/Reviewing Officers if they are still in service. The Commission has further observed that in a majority of such cases, the Competent Authority does not give specific reasons for upgrading the below bench-mark ACR/APAR grading at par with the bench-mark for next promotion.”

11. However, as has been noticed hereinabove, the promotion to IAS from State Civil Service is not based on benchmark (suitability) but is based on selection by merit. In promotions based on selection-cum-seniority, the benchmark is prescribed and only those, who reach the benchmark, are promoted. In such process, the Selection Committee / DPC assessed the candidates fit or unfit. Still even when the minimum qualifying grading, fixed for selection on merit, is considered as ‘Good’ in the present case, the ACR of the applicant for the period in question was already ‘Good’, i.e., at par with the lowest grading treated as basis for suitability and cannot be considered as adverse. The concept of benchmark was propounded and enunciated in O.M. F.No.35034/7/97-Estt(D) dated 8.2.2002. The relevant excerpt of O.M. reads thus:-

“3.2 ‘Bench-mark’ for promotion

The DPC shall determine the merit of those being assessed for promotion with reference to the prescribed bench-mark and accordingly grade the officers as ‘fit’ or ‘unfit’ only. Only those who are graded ‘fit’ (i.e. who meet the prescribed bench-mark) by the DPC shall be included and arranged in the select panel in order to their inter-se seniority in the feeder grade. Those officers who are graded ‘unfit’ (in terms of the prescribed bench-mark) by the DPC shall not be included in the select panel. Thus, there shall be no supersession in promotion among those who are graded ‘fit’ (in terms of the prescribed bench-mark) by the DPC.”

12. In terms of the Regulation 5 (5) of the IAS (Appointment by Promotion) Regulations, 1955, the select list for promotion to IAS is

prepared by including the required number of names first from amongst the officers finally classified as 'Outstanding' then from amongst those similarly classified as 'Very Good' and thereafter from amongst those similarly classified as 'Good' and the order of names inter-se within each category shall be in the order of their seniority in the State Civil Service.

The Regulation 5 (5) reads thus:-

"5 (5) The List shall be prepared by including the required number of names first from amongst the officers finally classified as 'Outstanding' then from amongst those similarly classified as 'Very Good' and thereafter from amongst those similarly classified as 'Good' and the order of names inter-se within each category shall be in the order of their seniority in the State Civil Service.

Provided that the name of an officer so included in the list shall be treated as provisional if the State Government withholds the integrity certificate in respect of such an officer or any proceedings, departmental or criminal are pending against him or anything adverse against him which renders him unsuitable for appointment to the service has come to the notice of the State Government.

Provided further that while preparing year-wise select lists for more than one year pursuant to the 2nd proviso to sub-regulation (1), the officer included provisionally in any of the Select List so prepared, shall be considered for inclusion in the Select List of subsequent year in addition to the normal consideration zone and in case he is found fit for inclusion in the suitability list for that year on a provisional basis, such inclusion shall be in addition to the normal size of the Select List determined by the Central Government for such year.

EXPLANATION I: The proceedings shall be treated as pending only if a charge-sheet has actually been issued to the officer or filed in a Court as the case may be.

EXPLANATION II: The adverse thing which came to the notice of the State Government rendering him unsuitable for appointment to the service shall be treated as having come to the notice of the State Government only if the details of the same have been communicated to the Central Government and the Central Government is satisfied that the details furnished by the State Government have a bearing on the suitability of the officer and investigation thereof is essential."

13. In the present case, it was not so that the applicant was not graded 'Good'. He was graded 'Good', which is classified suitable for next promotion, thus it cannot be viewed that the grading 'Good' given to the applicant in his ACR for the period in question was adverse. Nevertheless, we do not accept the submission made on behalf of respondent No.3 that in terms of the judgment of the Apex Court in **Union of India & another v. S.K. Goel & others** (supra), the grading below benchmark is not required to be communicated. In the case of **Sukhdev Singh v. Union of India & others** (Civil Appeal No.5892/2006) decided on 23.4.2013 the judgment wherein similar view was taken had been declared as not good law. Relevant excerpt of said judgment reads thus:

"7. A three Judge Bench of this Court in Abhijit Ghosh Dastidar vs. Union of India and others followed Dev Dutt. In paragraph 8 of the Report, this Court with reference to the case under consideration held as under:

"Coming to the second aspect, that though the benchmark "very good" is required for being considered for promotion admittedly the entry of "good" was not communicated to the appellant. The entry of 'good' should have been communicated to him as he was having "very good" in the previous year. In those circumstances, in our opinion, non-communication of entries in the ACR of a public servant whether he is in civil, judicial, police or any other service (other than the armed forces), it has civil consequences because it may affect his chances for promotion or get other benefits. Hence, such non-communication would be arbitrary and as such violative of Article 14 of the Constitution. The same view has been reiterated in the above referred decision relied on by the appellant. Therefore, the entries "good" if at all granted to the appellant, the same should not have been taken into consideration for being considered for promotion to the higher grade. The respondent has no case that the appellant had ever been informed of the nature of the grading given to him."

8. In our opinion, the view taken in Dev Dutt that every entry in ACR of a public servant must be communicated to him/her within a reasonable period is legally sound and helps in achieving threefold objectives. First, the communication of every entry in the ACR to a public servant helps him/her to work harder and achieve more that

helps him in improving his work and give better results. Second and equally important, on being made aware of the entry in the ACR, the public servant may feel dissatisfied with the same. Communication of the entry enables him/her to make representation for upgradation of the remarks entered in the ACR. Third, communication of every entry in the ACR brings transparency in recording the remarks relating to a public servant and the system becomes more conforming to the principles of natural justice. We, accordingly, hold that every entry in ACR - poor, fair, average, good or very good - must be communicated to him/her within a reasonable period.

9. The decisions of this Court in *Satya Narain Shukla vs. Union of India and others* and *K.M. Mishra vs. Central Bank of India and others*¹¹ and the other decisions of this Court taking a contrary view are declared to be not laying down a good law.

11. Insofar as the present case is concerned, we are informed that the appellant has already been promoted. In view thereof, nothing more is required to be done. Civil Appeal is disposed of with no order as to costs. However, it will be open to the appellant to make a representation to the concerned authorities for retrospective promotion in view of the legal position stated by us. If such a representation is made by the appellant, the same shall be considered by the concerned authorities appropriately in accordance with law.

¹¹ I.A. No. 3 of 2011 for intervention is rejected. It will be open to the applicant to pursue his legal remedy in accordance with law."

14. Though in **Ashok Kumar Aneja v. Union of India & others** (supra) the downgraded ACRs, as compared to previous year, are required to be communicated to the concerned official, nevertheless the ratio *decidendi* of the judgment is only that a grading, which is acted upon by the Departmental Promotion Committee (DPC) to find a person suitable, is required to be communicated. Paragraph 19 of the judgment reads thus:-

"19. In the considered view, the grading given to an officer in the ACR cannot be isolated and is an important and integral part of consideration by the Union Public Service Commission acting as DPC, the officer for promotion. It can be best demonstrated by an example i.e. in case where all the attributes and parameters in the per forma of the ACR shows the applicant as 'very good', yet a grading given, which is accepted up to the level of accepting authority as 'Good' is acted upon by the DPC to find a person falling below the benchmark. Moreover, the performance of an officer in the past when goes above the benchmark with the suitable grading in the ACR, yet in the

subsequent year when given grading falling short of benchmark is certainly an impediment for consideration of promotion. At this stage this downgraded ACR has an impact of adversity when weighed by the concerned authority on consideration is required to be communicated.”

15. In other words, the ramification of the judgment of Larger Bench of this Tribunal is same as that of the Apex Court in **Dev Dutt’s** case (supra). The applicant might be senior enough to be included in the promotion to IAS but since there was sufficient number of candidates, who were graded ‘Very Good’ in terms of Regulation 5 (5) of the Regulations (ibid) above him, he could not have been included in the select list.

16. As far as the plea regarding non-consideration of certificates regarding appreciation of the meritorious work of the applicant is concerned, in the reply filed by the UPSC, it has been categorically stated that the entire material sent to the Selection Committee was taken into account. There is no material before us to presume that the certificates regarding appreciation of meritorious work of the applicant were not taken into account by the Selection Committee. As has been ruled by the Hon’ble Supreme Court in **U.P.S.C v. K. Rajaiah & others**, (2005) 10 SCC 15, the Selection Committee is not required to record reasons for the grading given or recommendation made by it. Relevant excerpt of said judgment reads thus:-

“7. What remains is whether the case of the 1st respondent was duly considered vis-a-vis the other eligible officers including Respondents 5 to 7. The question is whether the non-selection of the 1st respondent to IPS against the vacancies pertaining to A.P. State for the year 1999 is on account of non-adherence to relevant rules or arbitrariness in the process of selection.

8. The actual procedure adopted and the factors taken into account by the UPSC / Selection Committee has been narrated in the

additional affidavit dated 15.2.2005 filed on behalf of UPSC sworn to by the Deputy Director (AIS), UPSC. The relevant extracts are given hereunder:

"It is also submitted that the Regulations do not provide for the detailed method to be followed in the matter of assessment of officers. The Commission has, therefore, evolved certain guidelines to be followed by the Selection Committee in the matter of the procedure for assessing the records. It is submitted that the confidential procedure of the Union Public Service Commission has been circulated to this Hon'ble Court. The procedure contained therein is followed by the Selection Committee in respect of all the States/Cadres for induction to the All India Services under the Promotion Regulations.

It is submitted that the Selection Committee is required to go through the service records of each of the eligible officers, with special reference to the performance of the officer during the last five years (preceding, the years for which the Select List is being prepared), deliberating on the quality of the officer as indicated in the various columns recorded by the Reporting/Reviewing Officer/ Accepting Authority in the ACRs for different years and then finally arrive at the classification to be assigned to each officer. The Selection Committee also takes into account orders regarding appreciation for the meritorious work done by the concerned officers. Similarly, it is also required to keep in view orders awarding penalties or any adverse remarks communicated to the officer, which even after due consideration of his representation, have not been completely expunged.

That as per the uniform procedure followed by the Selection Committee for preparing the IPS Select List for 1999, the ACRs for the years 1993-94, 1994-95, 1995-96, 1996-97 and 1997-98 were taken into consideration by the Selection Committee for categorizing all the eligible SPS officers as 'outstanding', 'very good', 'good', or 'unfit' as the case may be.

That, for the year 1999 against 03 (three) vacancies, 09 (nine) officers were considered by the Selection Committee. The respondent No. 1 was considered at S.No. 08 in the eligibility list of 1999. For preparation of the Select List of 1999, the ACRs for the years 1993-94, 1994-95, 1995-96, 1996-97 & 1997-98 were taken into consideration because the crucial date for reckoning the eligibility is 01.01.1999. The Selection Committee on an overall relative assessment of his service record assessed Respondent No. 1 as 'very Good' as he secured 'Outstanding' only in respect of three years. On the basis of overall grading as 'very Good', the name of Respondent No. 1 could not be included in the Select List of 1999 due to the statutory limit on the size of the Select List. That, sufficient number of officers senior to the respondent No. 1 with overall grading as 'very

'Good' were available and in accordance with the provisions of Regulation 5(5) of the Promotion Regulations, their names were included in the Select List of 1999. Two officers senior to the Respondent No. 1 who were graded as 'very Good' also could not find a place in the Select List of 1999 due to the statutory limit on the size of the Select List."

9. We have also gone through the records of assessment placed before us by the learned counsel for the UPSC. The arguments in the additional affidavit coupled with the contents of the record make it clear that the 1st respondent could not be selected for the reason that he did not get the gradation of 'outstanding' for four years in a block of five years that was taken into account for the purpose of evaluating the merits of the candidates. The learned counsel for the 1st respondent points out that for the year 1993-94 which falls within the five year range, the first respondent ought to have been graded as 'outstanding' in conformity with the grading in the ACR. However, the selection Committee graded him as 'very good' in view of the difference of opinion expressed by the reporting officer and the reviewing officer. We do not find any unfairness or arbitrariness in grading the 1st respondent as 'very good' for the year 1993-94. If so, as he gets 'outstanding' grading only for three years, his overall grading cannot be 'outstanding' in view of the existing guidelines adopted by the Commission. Normally, the Court will not interfere with the evaluation done by the Commission on a consideration of relevant material. However, we have some doubts on the validity of guidelines evolved in this behalf. The procedure of assigning the overall grading as 'outstanding', only if an officer was classified as such in the ACRs of four out of five years, seems to dilute the procedure of selection by merit and give primacy to seniority to some extent. For instance, if a junior officer gets three 'outstanding' grades and two 'very good' grading, the officers senior to him, though they might not have got 'outstanding' even for one year, will be selected by virtue of their seniority. Whether this result that follows from the application of the criterion that is being adopted by the Commission is contrary to the statutory Regulations or whether such criteria would be violative of Articles 14 & 16, is a matter which might deserve serious consideration. But, in the absence of specific challenge to the rule or the procedural guidelines spelt out in the additional affidavit filed by the UPSC and the arguments not having been advanced on this aspect, we are not inclined to express a definite opinion on this aspect.

10. Taking an overall view and having due regard to the limitations inherent in judicial review of selection process by an expert body, we are not inclined to nullify the decision taken by the UPSC.

11. In the light of the foregoing discussion, we set aside the judgment of the High Court and hold that the Tribunal has rightly dismissed the application filed by the 1st respondent. The appeals are thus allowed."

17. As far as the plea regarding non-consideration of the upgradation of the ACR for the period 1.4.2007 to 31.3.2008 by the Selection Committee is concerned, as has been noticed hereinabove, in the counter reply filed by the Commission, it has been specifically stated that the plea is baseless and we have no reason to nix the stand taken by the Commission in this regard.

18. Regarding the pendency of the proceedings against two of the candidates (ibid) before the Chhattisgarh Lok Aayog, both the Government of Chhattisgarh and UPSC had no information from Lok Aayog regarding the pendency of the complaint against any of the two officials and when the State Government forwarded a copy of the list referred to in Regulation to Central Government and the Central Government was to send its observations, both the Central as well as State Governments conveyed their approval to the select list. As can be seen from the Regulations and the Government of India's decisions thereunder, while furnishing the material information to the UPSC for holding the meeting of the Selection Committee, the State Government should invariably furnish the following certificates:

“a) Adverse remarks in the character rolls of the following eligible officers have not been communicated by the State Government to the officers concerned.

b) Adverse entries in respect of the following eligible officers have been communicated but no representations have been so far received from the officers concerned but the time limit to represent is not yet over.

c) Representations against adverse entries in respect of the following officers have been received within the stipulated time but the decision on the State Government, is yet to be taken.”

19. In terms of the relevant Regulations, i.e., Regulations 5 to 7 of the Regulations 1955 (ibid), the State Government need to comment upon the

suitability of an officer at two stages, i.e., at the time of sending the proposal and commenting upon the select list. The Government can withhold the integrity certificate on account of pendency of a criminal case or departmental proceedings against the government servant or there being anything adverse against him.

20. As far as the pendency of departmental proceedings or criminal charge is concerned, the State Government has no discretion but regarding adversity against a government servant, the State Government need to assess whether the adverse material against the members of the Service is sufficient to withhold the integrity certificate. The adverse thing within the notice of the State, which can be made the grounds to withhold the integrity certificate, should be such, which have been communicated to the Central Government, which, in turn, is satisfied that the details having been furnished by the Central Government have bearing on suitability of the officer and investigation thereof is essential.

21. In the present case, when despite pendency of complaint against two of the members of Service (ibid) the State Government did not withhold the integrity certificate, it is not for this Tribunal to assume the role of the State Government to form its own opinion in the matter. The procedure regarding selection of the members of the Service to IAS has been enumerated in Regulations 5 to 9 of the Regulations 1955 (ibid). For easy reference, the Regulations are reproduced hereinbelow:-

“5 Preparation of a list of suitable officers:-

5(1) Each Committee shall ordinarily meet every year and prepare a list of such members of the State Civil Service as are held by them to be suitable for promotion to the Service. The number of members of the State Civil Service to be included in the list shall be determined by the Central

Government in consultation with the State Government concerned and shall not exceed the number of substantive vacancies as on the first day of January of the year in which the meeting is held, in the posts available for them under rule 9 of the recruitment rules. The date and venue of the meeting of the Committee to make the selection shall be determined by the Commission:

Provided that no meeting of the Committee shall be held, and no list for the year in question shall be prepared when,

(a) there are no substantive vacancies as on the first day of January of the year in the posts available for the members of the State Civil Service under rule 9 of the recruitment rules; or

(b) the Central Government in consultation with the State Government decides that no recruitment shall be made during the year to the substantive vacancies as on the first day of January of the year in the posts available for the members of the State Civil Service under rule 9 of the recruitment rules:

Provided further that where no meeting of the Committee could be held during a year for any reason other than that provided for in the first proviso, as and when the Committee meets again, the select list shall be prepared separately for each year during which the Committee could not meet, as on the 31st December of each year;

(c)

Explanation - In the case of joint cadres, a separate select list shall be prepared in respect of each State Civil Service;

5(2) The Committee shall consider for inclusion to the said list, the cases of members of the State Civil Services in the order of a seniority in that service of a number which is equal to three times the number referred in sub-regulation (1):

Provided that such restriction shall not apply in respect of a State where the total number of eligible officers is less than three times the maximum permissible size of the Select List and in such a case the Committee shall consider all the eligible officers:

Provided further that in computing the number for inclusion in the field of consideration, the number of officers referred to in sub-regulation (3) shall be excluded:

Provided also that the Committee shall not consider the case of a member of the State Civil Service unless, on the first day of January of the year for which the Select List is prepared he is substantive in the State Civil Service and has completed not less than eight years of continuous service (whether officiating or substantive) in the post of Deputy Collector or in any other post or posts declared equivalent thereto by the State Government.

Provided also that in respect of any released Emergency Commissioned or Short Service Commissioned Officers appointed to the State Civil Service, eight years of continuous service as required under the preceding proviso shall be counted from the deemed date of their appointment to that service, subject to the condition that such officers shall be eligible for consideration if they have completed not less than four years of actual continuous service, on the first day of the January of the year for which the select list is prepared, in the post of Deputy Collector or in any other post or posts declared equivalent thereto by the State Government.

Explanation:- The powers of the State Government under the third proviso to this sub-regulation shall be exercised in relation to the members of the State Civil Service of a constituent State, by the Government of that State.

5(2A) [omitted]

5(3) The Committee shall not consider the cases of the members of the State Civil Service who have attained the age of 54 years on the first day of January of the year for which the Select List is prepared:

Provided that a member of the State Civil Service whose name appears in the Select List [prepared for the earlier year] before the date of the meeting of the Committee and who has not been appointed to the Service only because he was included [provisionally in that Select List] shall be considered for inclusion in the fresh list to be prepared by the Committee, even if he has in the meanwhile attained the age of fifty four years:

Provided further that a member of the State Civil Service who has attained the age of fifty-four years on the first day of January of the year for which the select list is prepared shall be considered by the Committee, if he was eligible for consideration on the first day of January of the year or of any of the years immediately preceding the year in which such meeting is held but could not be considered as no meeting of the Committee was held during such preceding year or years under item (b) of the proviso to sub-regulation (1).

5(3A) The Committee shall not consider the case of such member of the State Civil Service who had been included in an earlier Select List and –

(a) had expressed his unwillingness for appointment to the Service under regulation 9:

Provided that he shall be considered for inclusion in the Select List, if before the commencement of the year, he applies in writing, to the State Government expressing his willingness to be considered for appointment to the service;

(b) was not appointed to the Service by the Central Government under regulation

5(4) The Selection Committee shall classify the eligible officers as 'Outstanding', 'Very Good', 'Good' or 'Unfit', as the case may be, on an overall relative assessment of their Service records.

5(5) The list shall be prepared by including the required number of names, first from amongst the officers finally classified as 'Outstanding' then from amongst those similarly classified as 'Very Good' and thereafter from amongst those similarly classified as 'Good' and the order of names inter-se within each category shall be in the order of their seniority in the State Civil Service

Provided that the name of any officer so included in the list, shall be treated as provisional, if the State Government, withholds the integrity certificate in respect of such an officer or any proceedings, departmental or criminal, are pending against him or anything adverse against him which renders him unsuitable for appointment to the service has come to the notice of the State Government.

Provided further that while preparing year-wise select lists for more than one year pursuant to the second proviso to sub-regulation (1), the officer included provisionally in any of the select list so prepared, shall be considered for inclusion in the select list of subsequent year in addition to the normal consideration zone and in case he is found fit for inclusion in the suitability list for that year on a provisional basis, such inclusion shall be in addition to the normal size of the select list determined by the Central Government for such year.

Explanation I: The proceedings shall be treated as pending only if a charge-sheet has actually been issued to the officer or filed in a Court, as the case may be.

Explanation II: The adverse thing which came to the notice of the State Government rendering him unsuitable for appointment to the Service shall be treated as having come to the notice of the State only if the same have been communicated to the Central Government and the Central Government is satisfied that the details furnished by the State Government have a bearing on the suitability of the officer and investigation thereof is essential.

5(6) Omitted.

5(7) [Deleted]

6. Consultation with the Commission:-

This list prepared in accordance with regulation 5 shall then be forwarded to the Commission by the State Government along with-

- (i) the records of all members of the State Civil Service included in the list;
- (ii) the records of all members of the State Civil Service who are proposed to be superseded by the recommendations made in the list;
- (iii) [deleted].
- (iv) the observations of the State Government on the recommendations of the Committee.

6A The State Government shall also forward a copy of the list referred to in regulation 6 to the Central Government and the Central Government shall send their observations on the recommendations of the Committee to the Commission.

7. Select List:-

(1) The Commission shall consider the list prepared by the Committee along with-

- (a) the documents received from the State Government under regulation 6;
- (b) the observations of the Central Government and, unless it considers any change necessary, approve the list.

7(2) If the Commission considers it necessary to make any changes in the list received from the State Government, the Commission shall inform the State Government [and the Central Government] of the changes proposed and after taking into account the comments, if any, of the State Government [and the Central Government], may approve the list finally with such modification, if any, as may, in its opinion, be just and proper.

7(3) The list as finally approved by the Commission shall form the Select List of the members of the State Civil Service.

Provided that if an officer whose name is included in the Select List is, after such inclusion, issued with a charge-sheet or a charge-sheet is filed against him in a Court of Law, his name in the Select List shall be deemed to be provisional.

7(4) The Select List shall remain in force till the 31st day of December of the year in which the meeting of the selection committee was held with a view to prepare the list under sub-regulation (1) of regulation 5 or upto sixty days from the date of

approval of the select list by the Commission under sub-regulation (1) or, as the case may be, finally approved under sub-regulation (2), whichever is later:

Provided that where the State Government has forwarded the proposal to declare a provisionally included officer in the select list as "unconditional", to the Commission during the period when the select list was in force, the Commission shall decide the matter within a period of forty-five days or before the date of meeting of the next selection committee, whichever is earlier and if the Commission declares the inclusion of the provisionally included officer in the select list as unconditional and final, the appointment of the concerned officer shall be considered by the Central Government under regulation 9 and such appointment shall not be invalid merely for the reason that it was made after the select list ceased to be in force.

Provided further that in the event of any new Service or Services being formed by enlarging the existing State Civil Service or otherwise being approved by the Central Government as the State Civil Service under Clause (j) of sub-regulation (1) of regulation 2, the Select List in force at the time of such approval shall continue to be in force until a new select list prepared under regulation 5 in respect of the members of the new State Civil Service, is approved under sub-regulation (1) or, as the case may be, finally approved under sub-regulation (2).

Provided also that where the select list is prepared for more than one year pursuant to the second proviso to sub-regulation (1) of regulation 5, the select lists shall remain in force till the 31st day of December of the year in which the meeting was held to prepare such lists or upto sixty days from the date of approval of the select lists by the Commission under this regulation, whichever is later.

7(5) [Omitted]

8. [Omitted]
9. Appointments to the Service from the Select List.-

9 (1) Appointment of a member of the State Civil Service, who has expressed his willingness to be appointed to the Service shall be made by the Central Government in the order in which the names of the members of the State Civil Service appear in the Select List for the time being in force during the period when the select list remains in force:

Provided that the appointment of members of the State Civil Service shall be made in accordance with the agreement arrived at under clause (b) of sub-rule (3) of rule 8 of the Recruitment Rules in the order in which the names of the members of the State Civil Service occur in the relevant parts of the Select List for the time being in force.

Provided further that the appointment of an officer, whose name has been included or deemed to be included in the select list provisionally under the proviso to sub-regulation (5) of regulation 5 or under the proviso to sub-regulation (3) of regulation 7, as the case may be, shall be made within sixty days after the name is made unconditional by the Commission in terms of the first proviso to sub-regulation (4) of regulation 7:

Provided also that in case a select list officer has expressed his unwillingness for appointment to the service, he shall have no claim for appointment to the service from that select list unless he informs the Central Government through the State Government before the expiry of the validity period of the select list, revoking his earlier expression of unwillingness for appointment to the service."

22. Maybe in such cases where the disciplinary proceedings or criminal case is found to be pending, in terms of provisions (ibid), the recommendations of the DPC regarding promotion from State Civil Service to IAS need to be treated as deemed provisional. Nevertheless, in terms of Chhattisgarh Adhiniyam, 2002 (No.30 of 2002), the proceedings before Lok Aayog cannot be considered as criminal or disciplinary proceedings. The only authority with which the Lok Aayog is vested is to make an inquiry and submits its report to the competent authority. The Lok Aayog need to report the matter in writing to the competent authority only when it is satisfied that the complaint is established. Section 11 of the Adhiniyam reads thus:-

“11. Reports of Lok Aayog:- (1) If after inquiry of any action in respect of which a complaint has been received the Lok Aayog is of the opinion that the complaint is established, it shall by a report in writing, communicate its findings and recommendations along with the relevant documents and other evidence to the competent authority.

Explanation: Opinion of Lok Aayog in relation to any complaint, including a decision, report, finding or conclusion thereon, means the opinion of the majority of its members.

(2) The competent authority shall examine the report forwarded to it under sub-section (1) and intimate to the Lok Aayog within three months of the date of receipt of the report, the action taken or proposed to be taken thereon.

(3) If the Lok Aayog is satisfied with the action taken or proposed to be taken on its recommendations, it shall close the case under information to the complainant, the public servant and the competent authority, and if in any case the Lok Aayog is of the opinion that the case so deserves, it may make a special report upon the case to the Governor and also inform the complainant.

(4) The Lok Aayog shall present to the Governor, annually, a consolidated report on the performance of its functions under this Adhiniyam.

(5) If in any special report under sub-section (3) or the annual report under sub-section (4), any adverse comment is made against any public servant, such report shall also contain the substance of the defence adduced by such public servant and the comment made thereon by or on behalf of the State Government or the relevant competent authority, as the case may be.

(6) On receipt of a special report under sub-section (3) or the annual report under sub-section (4), the Governor shall cause a copy thereof together with an explanatory memorandum to be laid before the State Legislative Assembly.

(7) Subject to the provisions of Section 9 of this Adhiniyam, the Lok Aayog may at its discretion make available from time to time and in such manner and to such persons as it may deem appropriate, the substance of bases closed or otherwise disposed of by it which may in its opinion be of general public, academic or professional interest.”

In the present case, the Lok Aayog did not find the complaint established. In the circumstances, we find nothing wrong at the end of the State Government in commenting upon the integrity of two officials (*ibid*), who are juniors to the applicant and included in the select list.

23. In view of the aforementioned, the Original Application No. 1489/2013 is dismissed. No costs.

O.A.No.1764/2013

24. Learned counsels for the parties are *ad idem* that the controversy involved in the present Original Application is identical to the one involved in O.A. No.1489/2013. The only additional plea put forth by the learned counsel for applicant is that in respect of the applicant herein the State Government had withheld the integrity certificate. Once the applicant was not included in the select list on the ground of being graded ‘Good’ and there being sufficient number of candidates, who were graded ‘Very Good’, the plea of non-issuance of integrity certificates would only be academic. It

is not so that the applicant is not promoted to IAS on account of non-issuance of integrity certificates alone. The non-inclusion of his name in the select list is ramification of his grading by the Selection Committee, i.e., 'Good'. The issue has already been examined hereinabove.

25. Following the aforementioned view taken in Original Application No.1489/2013, we dismiss this Original Application No.1764/2013 also. No costs.

(Dr. B.K. Sinha)
Member (A)

(A.K. Bhardwaj)
Member (J)

/sunil/