

**Central Administrative Tribunal
Principal Bench, New Delhi.**

**OA-3342/2014
MA-2869/2014**

Reserved on : 30.09.2016.

Pronounced on : 07.10.2016.

**Hon'ble Mr. Shekhar Agarwal, Member (A)
Hon'ble Dr. Brahm Avtar Agrawal, Member (J)**

Sh. Om Prakash Verma,
S/o Sh. Ram Deen,
Aged about 56 years,
Present Post : Collector & District
Magistrate, Lalitpur,
R/o B-1/297, Sector-G,
Jankipuram, Lucknow-226021. Applicant

(through Sh. Mahesh Srivastava, Advocate)

Verus

1. Union of India through
Secretary,
Department of Personnel & Training,
Ministry of Personnel,
Public Grievances and Pensions,
Govt. of India, New Delhi.

2. State of U.P. through
Its Principal Secretary,
Department of Appointment and
Personnel, Govt. of U.P.
Lalbahadur Shastri Bhawan,
Lucknow-226001.

3. Union Public Service Commission
Through its Secretary,
Dholpur House, Shahjahan Road,
New Delhi-110069. Respondents

(through Sh. R.N. Singh for Sh. R.V. Sinha and Sh. Nikhil Majithia,
Advocates)

ORDER**Mr. Shekhar Agarwal, Member (A)**

Brief facts of the case are that the applicant belongs to State Civil Service of UP 1981 batch. He was considered for induction into the IAS by a Selection Committee constituted under Regulation-3 of IAS (Appointment by Promotion) Regulation, 1955 to review the Select lists of 2001-2004, 2004A and 2005 and also to prepare year wise Select Lists of 2006 to 2011 of such Members of the State Civil Service of UP, who were suitable for promotion to the IAS against vacancies of 2006 to 2011. He was so appointed vide order dated 27.11.2012. However, from information received through RTI on 13.02.2014, the applicant came to know that his ACR for the period 2005-2006 had been graded as 'average' i.e. below bench-mark of 'very good'. This ACR had, however, never been communicated to him and according to the applicant this was the main reason why he was not recommended for induction into the IAS for the select list of 2010. According to the applicant, he was eligible for induction into the IAS even for the select list of 2009. However, in that year no person junior to him had been inducted into the IAS. Hence, he was claiming induction into the IAS in the select list of 2010, rather than in 2011 in which he has actually been inducted. He has approached this Tribunal seeking the following relief:-

"(a) Issue appropriate direction to the respondent No.3 to hold the review DPC for considering the applicant for the appointment to IAS under promotion quota in respect of the Uttar Pradesh Cadre of IAS in State Civil Service Category determined by the Govt. of India under regulation 5(1) of IAS (Appointment by promotion) Regulation 1955 for the vacancies arise in the year 2010 in the interest of justice.

(b) Pass any other order/orders which this Hon'ble Court may deem fit and proper in the fact and circumstances of the present case."

2. The contention of the applicant is that Hon'ble Supreme Court in the case of **Dev Dutt Vs. UOI**, JT 2008(7) SC 463 has held that all APARs should be communicated to the concerned employee to enable him to make a representation against the same and seek upgradation of grading. The respondents, however, did not communicate the APAR for the year 2005-2006 to the applicant but took it into consideration while assessing him for induction into the IAS through the Select List of 2010. Thus, the respondents have acted against the law laid down by Hon'ble Supreme Court. Further, the applicant has relied on the judgment in the case of **Abhijit Ghosh Dastidar Vs. UOI**, 2009(16) SCC 146 wherein Hon'ble Supreme Court had laid down that an un-communicated below benchmark APAR be ignored and preceding APAR be seen to assess the suitability of the employee for promotion. The applicant has further relied on the judgment of Apex Court in the case of **Sukhdev Singh Vs. UOI**, 2013(9)SCC 566.

3. In their reply, respondent-UPSC have taken a preliminary objection that the OA was barred by limitation. They have further argued that this O.A. was not maintainable due to non-joinder of necessary parties inasmuch as the applicant has not arrayed as respondent any of his juniors, who would be ousted from the Select List of 2010 in case applicant's prayer was conceded.

3.1 On merits, UPSC have stated that as far as applicant's ACR for the year 2004-2005 was concerned, the State Government had informed UPSC that a representation against adverse entry in the same was pending. This had accordingly been taken note of by the Selection Committee. As far as his APAR for the period 21.07.2005 to 05.12.2005 (2005-06) was concerned, nothing had been intimated to them by the State Government. Thus, APAR below benchmark was taken into consideration by the Selection Committee. The Selection Committee on the basis of the record of the applicant had assessed him to be 'unfit' for induction into the IAS through the Select List of 2010. He was, however, found 'fit' for Select List of 2011 and was accordingly recommended for induction.

3.2 UPSC have further relied on several judgments of the Apex Court to say that it was not for the Courts to assess the relative merits of the candidates and that the Courts cannot sit in judgment over the assessment made by the DPC as an Appellate Authority. Thus,

the scope of judicial review in such matters was very limited. In this regard, the judgments relied upon by the UPSC were as follows:-

- (i) **Nutan Arvind Vs. UOI & Ors.**, (1996) 2 SCC 488.
- (ii) **UPSC Vs. H.L. Dev and Ors.**, AIR 1988 SC 1069.
- (iii) **Dalpat Abasaheb Solanke Vs. B.S. Mahajan**, AIR 1990 SC 434.
- (iv) **Smt. Anil Katiyar Vs. UOI & Ors.**, 1997(1) SLR 153.
- (v) **UPSC Vs. K. Rajaiah and Ors.**, (2005) 10 SCC 151.
- (vi) **M.V. Thimmaiah & Ors. Vs. UOI & Ors.**, (Civil Appeal No. 5883-5891 of 2007) decided on 13.12.2007.

3.3 As regards the preliminary objection taken by UPSC regarding O.A. being barred by limitation, the UPSC have relied on the following judgments of the Apex Court and the Tribunal:-

- (a) **Ms. Shakuntala Sharma Vs. Govt. of NCT of Delhi**, 2006(1) ATJ 239.
- (b) **S.S. Rathore Vs. State of Madhya Pradesh**, AIR 1990 SC 10.
- (c) **DCS Negi Vs. UOI & Ors.**, (CC No. 3709/2011) decided on 07.03.2011.
- (d) **Dinesh Kumar Vs. UPSC & Anr.**, (OA-1545/2009) decided on 08.10.2010.

It was argued that Section-21 of the Administrative Tribunals Act, 1986 bars the Tribunal from entertaining an application, which is beyond the period of limitation. Learned counsel for UPSC further argued that whenever such an objection was taken, it was incumbent upon this Tribunal to decide this issue before proceeding to decide the O.A. on merits.

3.4 On the issue of non-joinder of parties, the respondents have relied on the following two judgments:-

- (i) **Prabodh Verma & Ors. Vs. State of UP & Ors.**, 1984(4)SCC 251.
- (ii) **Amit Goel Vs. UPSC** (OA-458/2013 decided by Principal Bench of this Tribunal on 01.08.2016)

4. Government of U.P., who are respondent No.2 in this case, have also filed their reply opposing the O.A. According to them, prior to the judgment of Hon'ble Supreme Court in the case of **Dev Dutt** (supra), the Standing Instructions of the State Government were only to communicate the adverse entries to an employee. In the applicant's APAR for 2005-2006 there were no adverse remarks. Only the grading given by the Reporting Authority had been down graded. Such downgradations were not treated as adverse and were not required to be communicated to the applicant as per instructions in vogue at that time. However, pursuant to the judgment of Supreme Court in the case of **Dev Dutt** (supra), Government of UP issued G.O. No. 36/1/78-Ka-2/2013 dated 01.02.2013 wherein detailed guidelines were issued as to the manner in which the APARs were to be communicated to the employees and representation, if any, received against them were to be dealt with. Learned counsel for the State of U.P. argued that these Instructions took effect only prospectively. Since the APAR of the applicant for the year 2005-2006 was written prior to issue of these

Instructions, there was no requirement to communicate below benchmark APAR to him. Government of U.P. have relied on the judgments of Apex Court in the case of **K.M. Mishra Vs. Central Bank of India & Ors.**, (2008) 9 SCC 120 and **R.L. Butail Vs. UOI & Ors.**, 1970(2)SCC 876.

5. We have heard the parties and have perused the material placed on record. We first proceed to decide the preliminary objections taken by the respondent UPSC. The first objection was regarding limitation. According to respondents the applicant was inducted into IAS vide order dated 27.11.2012 through the select list of 2011. Thus, on that date, the applicant had become aware that he had been included in the Select List of 2011 and not in the Select List of 2010. Yet, he did not approach this Tribunal till 16.09.2014 when this O.A. was filed. Thus, there has been considerable unexplained delay in filing of this O.A., which was barred by limitation.

5.1 In response, learned counsel for the applicant submitted that the applicant has filed MA-2869/2014 along with the O.A. seeking condonation of delay in filing the present O.A. In this M.A. the applicant has stated that it was only through an RTI application, the response to which was received on 13.02.2014 that the applicant came to know of the reasons for not being included in the Select List of the year 2010. He has enclosed a copy of the reply received from

UPSC on 13.02.2014 (page-109 of the paper-book) which reveals that his APAR for the period 2005-2006 has been graded as 'average'. Thus, there is considerable merit in the submission of the applicant that he became aware of the reasons for his non induction in the select list of 2010 only when he received response to his RTI application on 13.02.2014. He then filed the O.A. on 16.09.2014 i.e. very much within the limitation period. Accordingly, we reject the objection of UPSC that this O.A. is barred by limitation.

5.2 The next preliminary objection taken by respondents was that O.A. was not maintainable due to non-joinder of necessary parties inasmuch as none of the juniors who could be ousted for the select list of 2010 in the event of applicant's prayer being allowed has been made a party in this case.

5.3 In response to the aforesaid objection, learned counsel for the applicant had argued that in the select list many of the retired persons had been included who had actually not been appointed to the IAS in view of the fact that they had retired prior to their induction into IAS. Learned counsel argued that thus even if applicant's prayer was allowed, it would not result in ouster of any of his juniors from the Select List.

5.4 Further, learned counsel relied on the Guidelines issued by UPSC vide their F.No. 4/3/2005-AIS dated 27.02.2012, in para-H of which the following is laid down:-

"INTERPOLATION OF NAMES IN THE SELECT LIST AFTER REVIEW"

10. Consequent on interpolation of additional names in the original Select Lists, the size of the original Select List is likely to exceed the statutory limit of the size of the Select List. This matter has been agitated in various courts. The matter relating to amendments in Promotion Regulations regarding increase in size of the Select List consequent on interpolation of additional officers in the original Select List after review is pending a final decision with the Govt. of India, DOPT. The Commission have, therefore, decided that till the Promotion Regulations are suitably amended, the following para may be indicated in the minutes of the Review Selection Committee Meeting.

"The Committee noted that as a consequence of this assessment and inclusion of Shri.....in the Select List of....., the size of the Select List would increase from the statutory size ofto..... The Committee were also informed that the policy issue of interpolation of officers in the Select Lists is pending a final decision by the Government of India, DOP&T. The recommendation would, therefore, be subject to the decision of the Govt. of India and Court orders, if any, on the matter of interpolation."

5.5. In view of the above clarification given by the applicant's counsel, we are of the view that the objection of OA being not maintainable due to non-joinder of necessary parties was not sustainable.

6. We now proceed to decide the issue on merits. In the case of **Dev Dutt** (supra) Hon'ble Supreme Court has held as follows:-

“36. In the present case, we are developing the principles of natural justice by holding that fairness and transparency in public administration requires that all entries (whether poor, fair, average, good or very good) in the Annual Confidential Report of a public servant, whether in civil, judicial, police or any other State service (except the military), must be communicated to him within a reasonable period so that he can make a representation for its upgradation. This in our opinion is the correct legal position even though there may be no Rule/G.O. requiring communication of the entry, or even if there is a Rule/G.O. prohibiting it, because the principle of non-arbitrariness in State action as envisaged by [Article 14](#) of the Constitution in our opinion requires such communication. [Article 14](#) will override all rules or government orders.

37. We further hold that when the entry is communicated to him the public servant should have a right to make a representation against the entry to the concerned authority, and the concerned authority must decide the representation in a fair manner and within a reasonable period. We also hold that the representation must be decided by an authority higher than the one who gave the entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar to Caesar. All this would be conducive to fairness and transparency in public administration, and would result in fairness to public servants. The State must be a model employer, and must act fairly towards its employees. Only then would good governance be possible.”

6.1 Thereafter, in the case of **Sukhdev Singh** (supra), Full Bench of Apex Court has held as follows:-

“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 others¹⁰ and K.M. Mishra vs. Central Bank of India and others¹¹ and the other decisions of this Court taking a contrary view are declared to be not laying down a good law."

Thus, Full Bench of the Apex Court while upholding the view taken in **Dev Dutt's** case (supra) that every ACR of the public servant must be communicated to him within a reasonable period has also held that the law laid down in the case of **K.M. Mishra** (supra) was not a good law. Thus, this judgment relied upon by the respondents has been held to be not laying down a good law by the Full Bench of the Apex Court. The implication of the aforesaid is that all ACRs were to be communicated to the employee and not necessarily only the adverse entry. Further, Apex Court has ruled in **Dev Dutt's** case (supra) that non communication of ACR would be violative of fundamental rights of an employee and this would over- rule all rules or Government orders to the contrary. Thus, the contention of Government of UP that the requirement to communicate the below benchmark ACR arose only after issue of their GO on 01.02.2013 lacks merit. This is because Apex Court has clearly ruled that existence of G.O. was not necessary for such communication. In

fact they have gone on to say that even if Government instructions were to the contrary, Article 14 would override all such instructions. Moreover, the Apex Court ruling cannot be said to apply only prospectively. In any case, it is not disputed that the meeting of the Selection Committee was held only in November, 2012 i.e. much after the judgment of Apex Court in **Dev Dutt's** case (supra). As such, there was no reason for not following the ratio laid down by the Apex Court in **Dev Dutt's** case (supra) in that meeting. The fact that the Government of UP delayed issuing detailed Instructions on the subject on 01.02.2013 cannot be allowed to act against the applicant.

6.2 Thus, in our opinion, the Government of U.P. was duty bound to communicate the APAR for the year 2005-2006 to the applicant and entertain any representation received against the same prior to taking this APAR into consideration in the Selection Committee. Since Government of U.P. failed to do so, the inevitable conclusion that can be drawn is that they have not acted in a fair manner insofar as the applicant was concerned and have deprived him of his Constitutional right to represent against below benchmark APAR.

6.3 The respondents had relied on the judgment of Apex Court in the case of **R.L. Butail** (supra) in which the following is laid down:-

"The rules do not provide for nor require an opportunity to be heard before any adverse entry is made. Making of an

adverse entry is not equivalent to imposition of a penalty which would necessitate an enquiry or the giving of a reasonable opportunity of being heard to the concerned Government servant."

6.4 However, we failed to see the relevance of this judgment to the instant case inasmuch as it has not been pleaded by the applicant that an opportunity of being heard should have been given to him prior to making below benchmark entry in his record. The issue herein was that after such entry had been recorded, the same should have been communicated to the applicant within a reasonable period to enable him to represent against the same and seeks its upgradation.

6.5 Learned counsel for the applicant had relied on the judgment of Apex Court in the case of **Abhijit Ghosh Dastidar** (supra) in which it has been held that if there was an uncommunicated ACR in the record of an employee then the same should be ignored and preceding APAR be taken into account while considering the case of the employee for promotion. On the basis of this ruling, learned counsel for the applicant had pleaded that respondents be directed to conduct a Review Selection Committee Meeting to reconsider the case of the applicant for induction into the IAS through the Select List of the year 2010 after ignoring the APAR for the year 2005-2006. However, we find that Hon'ble High Court of

Delhi in the case of **UOI & Ors. Vs. Swati S. Patil** (WP(C) No. 4018/2011) had held as follows:-

“10. Misreading the decision in Abhijit Ghosh Dastidar's case (supra) many Benches of the Central Administrative Tribunal at Delhi starting taking the view that wherever the Reviewing and/or Accepting Officers had superannuated, the ACR grading for the offending year has to be totally ignored and in its place the benchmark grading for such previous year where the appraisee meets the benchmark has to be considered.

11. Now, this would be patently absurd for the reason it would mean walking backwards till you reach the year where the appraisee meets the ACR grading, and if this would be so, it would be useless to convene a Departmental Promotion Committee. To appraise what! Nothing for the reason so read, only such ACR gradings would require to be placed before the DPC wherein the candidate achieves the benchmark.

12. Unfortunately, the said decisions of the Central Administrative Tribunal were upheld by various Division Benches of this Court, till when decision was pronounced on October 08, 2010 in Krishna Mohan Dixit's case (supra). The non-reasoned direction in the decision in Abhijit Ghosh Dastidar's case (supra) was held to be in exercise of the power vested in the Supreme Court under Article 142 of the Constitution of India for the reason ignoring the offending ACR, without even a re-appraisal before the Departmental Promotion Committee, and there being nothing to suggest that previous year ACR gradings were required to be considered, the Supreme Court noted that the person junior was promoted on August 28, 2000 and thus it was directed that Abhijit Ghosh Dastidar would also be so promoted but without back wages.....”

6.6 Thus, the applicant cannot get any benefit on the basis of the Apex Court judgment in the case of **Abhijit Ghosh Dastidar** (supra) as that has been held to be laid down under powers of Apex Court under Article 142 and was applicable only to the facts of that case and not laying down a law to be followed in other cases.

7. Thus, after consideration of all the judgments relied upon by the parties and the arguments advanced by them, we are of the opinion that this O.A. can be disposed of with the following directions:-

- (i) Respondent No.2 Govt. of U.P. shall communicate to the applicant his APAR for the year 2005-2006 within two weeks from the date of receipt of a certified copy of this order.
- (ii) The applicant can then make a representation for upgradation of the APAR within two weeks thereafter.
- (iii) In the event of such a representation being made, the Government of U.P. shall decide the same in accordance with Rules within six weeks thereafter.
- (iv) In case the applicant succeeds and there is a material change in his APAR, a review meeting of the Selection Committee shall be convened by the respondents to reconsider induction of the applicant in the IAS through the Selection List of 2010 within eight weeks thereafter.
- (v) If the applicant is found suitable then he shall be so appointed with all consequential benefits within six weeks thereafter.

8. Ordered accordingly. No costs.

(Dr. Brahm Avtar Agrawal)
Member (J)

/Vinita/

(Shekhar Agarwal)
Member (A)