

**CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH, MUMBAI**

**ORIGINAL APPLICATION No.482/2013
Date of Decision: 2nd May, 2018.**

**CORAM: HON'BLE SHRI ARVIND J. ROHEE, MEMBER (J)
HON'BLE SHRI R. VIJAYKUMAR, MEMBER (A)**

Harish Maganlal Baijal,
aged about 51 years,
Presently working as: Principal,
Detective Training Centre,
Government of Maharashtra,
Home Department, Nashik. and residing,
At: Sahyadri Bunglow, opp. Golf Club,
Gadkari Chowk, Nashik-422 001.

...Applicant.

(By Applicant Advocate: Shri.R.R. Shetty)

Versus.

1. The Union of India,
Through the Secretary,
Home Department, Govt. of India,
South Block, New Delhi 110 001.

2. The Secretary,
Union Public Service Commission
Dholpur House, Shahajahan Road,
New Delhi 110 011.

3. The Additional Chief Secretary,
Government of Maharashtra,
Ministry of Home Affairs,
Mantralaya, Mumbai- 400 032.

4. Shri Mahesh Ghurye, G.P.S,
Deputy Commissioner of Police, Zone-7,
Above Mulund Police Station,

New Kheraj Bhawan,
N.S.S. Road, 5th Road,
Mulund (W), Mumbai-400080.

... Respondents.

(Respondents by Advocate: Shri.V.B. Joshi for R-1, Shri. V. Narayan for R-2, Shri V.S. Masurkar for R-3).

Reserved on : 12.04.2018.

Pronounced on :

ORDER

Per:- R. Vijaykumar, MEMBER (A)

This OA has been filed on
04.06.2013 under Section 19 of Administrative
Tribunals Act, 1985 seeking the following
reliefs:-

"A. This Hon'ble Tribunal be pleased to call for record and proceedings of the present case and especially the Minutes of the Selection Committee Meeting held on 21st of January, 2013, and the gradings of the ACRs, and after examining the legality and propriety thereof, quash and set aside the same in so far as non-inclusion of the Applicant therein and direct the respondents:

(i). To hold a Review Selection Committee Meeting and

consider the Applicant's case for appointment by promotion to the Indian Police Service without taking into consideration the remarks in the Annual Confidential Reports of the Applicant which are uncommunicated and are adverse despite being good or Positively Good in the context of eligibility for promotion.

(ii). After holding such Review Selection Committee Meeting in the above manner, if the Applicant is found to be eligible, appoint the Applicant by promotion to the Indian Police Service from the due date on par with the Private Respondent along with all the consequential benefits including arrears of pay as well as appropriate consequential allotment year in the Indian Police Service.

Para.8(ii): That this Hon'ble Tribunal be pleased to hold that an order passed being order dated 25.11.2013 which is enclosed at Annexure AA-1 requires to be quashed and set aside with a direction to the Respondents to reconsider the representation of the applicant which is enclosed at Annexure A 23 and pass a specific speaking order on each and every issue in so far as the grading for the year 2005-06 and 2006-07 is concerned.

Para8 (iv): That this Hon'ble Tribunal be further pleased to hold that in any event since the Reporting Officer Shri Sanjay Barve has recommended upgradation of the ACR of the applicant for the year 2008-09 from "Positively Good" to "Very Good" if the Respondents requires be directed to hold a Review DPC for reconsidering the case of the applicant for promotion in the light of the upgraded ACR for the year 2008-09 in the minimum and if possible hold Review DPC after reconsidering the ACRs if upgraded for the year 2005-06 and 2006-07 as well."

B. Pass any such Order and/ or Orders as this Hon'ble Tribunal deems fit and proper in the facts and circumstances of the present case.

C. Costs of the Application be provided for."

3. The reliefs sought are based on the following grounds as mentioned in para 5 of the O.A. The same are reproduced here for ready reference:-

"a. That grading the Applicant as positively good for the years 2005-06 and 2008-9 is clearly indicative of his performance being much better than good and therefore could not

be graded as anything below very good as otherwise a State Police Service Officer from other states who are better than good get graded as very good whereas the Applicant in Maharashtra does not get so graded leading to a comparison of unequals thereby denying the Applicant his invaluable right of promotion to the IPS vis a vis counter parts in other states.

b). That considering an Officer with Good on par with the Applicant who is graded as positively Good results in treating unequal as equals & thereby prejudicing the grading of the Applicant to his disadvantage which is grossly arbitrary.

c). That in any case all gradings of good are a steep fall which is uncommunicated and hence liable to be ignored as per the State Government's guidelines dated 01-02-1996.

d) That in any case any grading which disentitles the Applicant from promotion although apparently not adverse needs to be ignored being uncommunicated and therefore clearly violative of principles of natural justice.

e). That the ACR for the year 2006-07, the Reporting Officer has strangely remarked that the Applicant is a young

Officer who is gradually picking up the work which is clearly having an adverse connotation since in 2006-07, the Applicant had already put in fifteen years of service and was 45 years old whereas the Reviewing Officer was only about 3 years older to the Applicant.

f). That in any case the ACRs have been written after 2010 as is clear from the DGs letter dated 14-9-2011, a copy whereof has already been enclosed as Annexure A-15 thereby clearly defeating the very purpose of writing an ACR as envisaged by the Government. These are sufficient reasons for ignoring the ACRs where the Applicant has been graded either Good or Positively Good.

g). That the grading in the ACRs which has resulted in its supersession has to be treated as adverse, since uncommunicated, liable to be ignored as per the Resolution 01-02-1996.

h). That in any case the ACRs are written belatedly, in a perfunctory manner and uncommunicated in violation of the GR of the State.

(i). That this Hon'ble Tribunal be pleased to hold that

the order passed a Annexure A dated 25.11.2013 is a non-speaking order and therefore deserves to be rejected.

(j). That in any case even after careful perusal of the remarks on the basis of the impugned order dated 25.11 2013 were passed have been enclosed as Annexure A- , it would be appreciated by this Hon'ble Tribunal that the order is clearly non-speaking and passed in a perfunctory manner without considering the aspirations of the applicant and specifically commenting on the various issues raised by him for reconsidering his gradings and upgradations thereof.;

k). That in any case since the DPC has been held post 13.5.2008, the Govt. of Maharashtra Resolution dated 13.3.2014 requires that the Review DPC be held to reconsider the grading after duly considering the representation of the applicant for the three years.

l). That the Govt. of Maharashtra has not rejected the recommendation of Shri Sanjay Barve in respect of the ACR of the applicant for the year 2008-09 wherein Shri Barve has come to an unequivocal conclusion that the ACR of the applicant requires

to be upgraded from "Positively Good" to 'Very Good" in turn would result in holding of a Review DPC to reconsider the case of the applicant."

4. The applicant in OA No. 482 of 2013 has contested the impugned Select List of 2010 notified by the respondent no.1 in Notification No. 24 dated 13. 05.2013 by which 26 State Police Service officers were appointed to the Indian Police Services (IPS) in the Select List of 2010 and two officers in the Select List of 2011. By these orders , 12 of his juniors in the State Police Service superseded him. The Selection Committee meeting chaired by Respondent No.2 which took the decision underlying the above Notification was held on 21.01.2013 by which 28 vacancies for the year 2010 and 2 vacancies for the year 2011 and the name of the applicant was considered by this Selection Committee for both the Select Lists. For the year 2010, the Committee considered 81 eligible officers including the

applicants against 28 vacancies and for the year 2011 the committee considered 6 officers including the applicant against two vacancies. For this meeting, the Committee considered the dossier of the applicant including his ACRs for the year 2005-2006, 2006-2007, 2007-2008, 2008-2009, and 2009-2010. The applicant did not find a place in either of the select lists. He, therefore, filed an Original Application No.209/2013 before this Bench but withdrew it by order dated 24.06.2013 with liberty to pursue the matter at a later stage. It appears that the applicant filed representations on 04.06.2013, 02.08.2013 and 03.08.2013 in relation to the ACRs of the year 2005-2006, 2006-2007 and 2008-2009 which bore some adverse comments and below benchmark grading. The ACR for the period 03.06.2005 to 31.03.2006 records a general Assessment as 'Capable' and held him to be 'Positively Good' in an illegibly signed and undated report of the Reporting Officer but which did

not bear the remarks of the Reviewing Officer. The ACR for the period 01.04.2006 to 31.03.2007 assessed him as 'Good' (B) with the remark that "a young officer who is gradually picking up the work" and which was duly signed and dated 21.09.2006 but which again did not bear the remarks of the Reviewing Officer as he had retired on 31.05.2010. The ACR for the period 29.07.2007 to 23.01.2008 assessed him as 'Very Good' (A) under the signature of Reporting Officer dated 14.10.2011 and with no remarks of the Reviewing Officers due to his retirement. For the period 02.06.2008 to 31.03.2009, he was he was assessed as 'Positively Good' (B+) with the remark 'Sincere and enthusiastic' and signed on 06.08.2009 which was agreed by the Reviewing Officer in signature dated 07.05.2009. For the year 2009-2010 from 01.06.2009 to 31.03.2010, he was graded 'Very Good' (A).

5. The ACRs of the applicant were not communicated to him at any point of

time and were finally sought by him under the Right to Information Act on 02.03.2013 subsequent to the Selection Committee meeting and after payment of requisite fees, he received his ACRs for the period 2001 to 2012. Meanwhile, the applicant received a letter Ref No. 126/11/114 dated 14. 9. 2011 from the Special Inspector General of Police (Establishment) advising him that his assessment record for 2005-2006, 2006-2007, and 2007-2008 were not available on record and he was directed to send a self-appraisal for the period so that his ACR could be written. In response, the applicant submitted his reply dated 04.10.2011 stating that these had been sent by Dak record dated 20.04.2006, 18.05.2006 and 05.05.2008 to the Reporting Officer and enclosed duplicate forms with self-assessment statements. This communication had been initiated at his request in his letter dated 15.12. 2010 because he had learnt that his ACRs for the period 2002-2003 to that date were not

available despite having been submitted to the department in response to their letter dated 20.04.2010. He also referred to the Government Resolution of the Government of Maharashtra (page 133) No.ACB/NSK RANGE/2010/5627 dated 15.12.2010 requiring communication of the ACRs but none of the ACRs from 2002-2003 had been communicated.

6. Following his representations on the three adverse ACRs, he did not receive any reply and based on RTI application dated 20.12.2013, he obtained notings of the Home Department considering his representations on the three ACRs. The notings reveal that the Reviewing Officer for the year 2005-2006 and 2006-2007 had reviewed the applicants' ACRs for the year 2009-2010 but did not get the opportunity to see or review the adverse remarks of 2005-2006 and 2006-2007. Prior to this, in the year 2004-2005, the applicant was on Central deputation in Kosovo under UN auspices and had received remarks of 'Outstanding' whereas lower remarks of

'Positively Good' in 2005-2006 had been recorded in his ACR. Each aspect of his representations has been noticed in the review as also for the year 2006-2007. The response of the then Reporting Officer were obtained and he expressed his view in his letter dated 07.09.2013 that the applicant had not raised any new issues and the report should be confirmed. For the year 2008-2009, the Reporting Officer has recorded upgrading of 'Very Good' (A) from 'Positively Good' (B+). The matter was examined against the rules subsisting in relation to the Government Resolution dated 01.02.1996 and not the later Government Resolution dated 01.11.2011 (page 237-U at Annexure-A-29) which was taken to be enforceable for 2011-2012. Since the earlier Government Resolution did not have such provisions, the representation of the applicant for upgradation was rejected.

7. Respondent no.2 traced the details of the selection process by which the entire

dossiers of the applicant were taken into consideration including his ACRs. The applicant had two ACR with 'Positively Good' but since the UPSC guidelines have only four gradings, Outstanding, Very Good, Good and unfit, these would automatically become 'Very Good'. That left the grading of 2006-2007 which was 'Good' and came in the way of promotion and supersession. The Respondent no.2 has submitted that the applicant was assessed on the basis of his service record as 'Good' for both the Select Lists for the years 2010 and 2011 and could not be selected because others including junior officers with higher gradings had to be selected within the vacancies available. They have referred to various citations including the case of **UPSC versus K. Raja** (page 249) wherein the Hon'ble Apex Court noticed that the power of classification of vacancies and unfit is vested with the Selection Committee and the gradings of the State Government in the ACR are not binding on the Committee. Further,

that the Selection Committee has its own classification and it may be at variance from the gradings given in the ACRs. Therefore, the contention of the applicant based on review gradings 'Positively Good' and 'Very Good' given to him in the relation of four gradings available to the selection committee are not tenable.

8. Respondent No.1 in his reply have placed the burden on the State Government which is the sole custodian of the selection process and which is required to furnish the proposals to the Selection Committee along with records and various certificates for consideration by the Selection Committee.

9. Respondent no.3, the State Government, have stated the process by which the Selection Committee meeting was held and that his first representation following request of documents under RTI were considered and rejected as informed to the applicant in Government letter dated 25.11.2013. His

further representation dated 17.07.2014 requesting upgrading of three adverse ACRs for the period 2005-2006, 2006-2007 and 2008-2009 were rejected after due consideration in letter dated 20.11.2013. Further, they also advised that in the later Selection Committee meeting, the applicant was promoted into the Indian Police Service Cadre with effect from 15.10.2014.

10. The applicant filed an MA.No.167/2014 on 12.03.2014 seeking to amend the OA bringing to notice the fact that subsequent to his representations in 2013 against the three adverse ACRs, he had not received a reply and had approached the Hon'ble Maharashtra State Tribunal (MAT) which passed orders on 27.08.2013 directing the Respondent No.3 to decide his representations based on which the Respondent No.3 passed a four line, non-speaking order rejecting the representation of the applicant. In his petition, he discusses the notings in the office of Respondents No.3 discussing each

ACR and the remarks obtained thereafter of the available Reporting/Reviewing Officers by which the ACRs of 2005-2006 and 2006-2007 had been reiterated by the then Reporting Officer. Although the ACR for the year 2008-2009 had been upgraded by the Reporting Officer even in this case the Government rejected the request. For all ACRs, the request for upgradation was rejected on the basis that the Government Resolution dated 01.02.1996 was applicable to his case and not the Government Resolution of 01.11.2011 which only applied from 2011-12 onwards.. The applicant has also enclosed a copy of the Government Orders (page-275) No.CFR-1210/Pra.Kra.47/2010/Tera, dated 01.11.2011 which was issued three years after the decision of the Hon'ble Apex Court in the case of **Dev Dutta vs. U.O.I. decided on 12.05.2008** and which is the settled law on the subject. This Resolution mentions at para 2, A, C as follows:

PARA 2, A & C TO BE TYPED

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Further, the GR adds in para 3 A & C as below:

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As earlier mentioned, these regulations were not followed in the case of the applicant by the Respondent No.3 and he had to obtain his ACRs under the RTI Act in 2013 and then file his representations. The applicant has also filed another MA.No.498/2015 challenging the orders of Respondent No.3 rejecting his representations for upgradation of his ACRs that contain adverse remarks and entries below the benchmark in the year 2005-2006, 2006-2007 and 2007-2008.

During the final hearing, arguments were heard from both learned counsels for parties. The learned counsel for the applicant has referred to the decision of the

Hon'ble Apex Court in **Mohinder Singh Gil & Another vs. The Chief Election Commissioner, New Delhi and Others** reported in (1978) 1 SCC-405 to support his contention that natural justice is essential in administrative and quasi-judicial functions. He also referred to the decision of the Hon'ble Apex Court in the case of **M.A. Murthy vs. State of Karnataka & Others** reported in 2003 (6) Supreme Today Part-137-2003 (6) page-424 on the prospective application of decisions of the Court and that only in cases where the law as declared is decided by the Court to apply prospectively, such application would be correct in law and in all other cases where such a mention is not made there is no restriction.

Learned counsel for the applicant also referred to the case of **Gurdial Singh Fijji vs. State of Punjab & Others** reported in (1979) 2 SCC-368 on the need to communicate the adverse entries to the affected officer and that they cannot be

used to his disadvantage.

The respondents referred to two decisions of this Bench passed in O.A.No.603/2014 dated 05.08.1993 in the case of **Subhash Raja Rajram Nilewad vs. U.O.I. & Others** decided by this Bench in OA No.603/2014 dated 05.08.2015 dismissing the OA on the basis that the applicant had only right for consideration to be promoted and not for promotion and that, therefore, the scope of judicial review cannot extend to alter the rules themselves.

The applicant has also urged in his amended OA and the written submissions given during arguments that the ACRs have not been written according to the instructions laid down by the Government of Maharashtra and have, therefore, to be ignored and gradings for the earlier years should be taken into consideration. For this purpose the learned counsel refers to the case of **Prabhu Dayal Khandelwal vs Chairman, UPSC & Others** reported in (2016) 1 SCC (L&S) 825 in which

the petitioner had sought promotion from the post of Commissioner, Income Tax to Chief Commissioner of Income Tax but the ACR with the below benchmark grading had not been communicated. The Hon'ble Apex Court directed, in its decision dated 23. 7. 2015, to consider the appellant's claim for promotion on the basis of communicated entries only. The applicant also cites the decision of Hon'ble Apex Court in the case of **S.T. Ramesh vs State of Karnataka** reported in (2007) 2 SCC (L&S) page-524 by which it was decided that if there is a grading of 'Average' intervening normally 'Adverse', 'Outstanding' and 'Very Good' gradings of different years, the intervening ACR should not be treated as 'Average'. The applicant also refers the decision of this Bench in OA No.587 of 2012 dated 9 7.2015 in the case of **Vikas Chand Chaturvedi vs Union of India and Others** in which three ACRs of the applicant that were graded 'Very Good' by the Reporting Officer had been downgraded as 'Average' by

the Reviewing Officer and he was consequently overlooked for promotion. The representations of the applicant had also been rejected and 'Average' grading was upheld. The downgrading was also brought to the notice of the applicant after a lapse of 6 to 8 years at which point of time, the Reviewing Officer had resigned from service and the Reporting Officer had retired from service. The Tribunal held that the rejection of his representation had been made in a casual manner without recording any reasons which are required for fair and just treatment even if there is no statute and rules requiring detailed reply. The Tribunal also noticed that the procedure of time limit for writing ACRs including communication had not been followed but which was governed by strict rules and therefore, directed that downgrading by the Reviewing Officer for the 3 years should be expunged and Review Selection Committee meeting should be held. When the matter was taken up by the Hon'ble

High Court, it was also noticed that the Reviewing Officer while differing from Reporting Officer had recorded remarks which did not provide possible justification for the downgrading from 'Very Good' to as far as 'Average' and that had been written after a lapse of 2 years 2 months after Reporting Officer had recorded his remarks and further date mentioned is three months after recording review in the later year's ACR. The Hon'ble High Court further referred to the decision in the case of **Sukhdev Singh Vs. UOI Civil Appeal No.5892/2006, decided on 24.04.2013 and Dev Dutt vs. UOI & Others (2008) 2 SCC (L&S) 771** and accordingly upheld the orders of the Tribunal. The applicant has also referred to the decision of Hon'ble Apex Court passed by the three judges Bench in the case of **Abhijit Ghosh Dastidar vs. Union of India (2010) 1 SCC (L&S) page-959** which categorically held that not communicating the ACRs is arbitrary and if there is a grading below the benchmark and it is not

communicated, it should be ignored. The applicant has also relied upon the doctrine applied in the case of **Nazir Ahmed vs. Emperor decided on 16.06.1936** by which it was noticed that where the power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden. The learned counsel argues that where the ACRs are not written in the manner and time frame prescribed it cannot be done in any other manner possible. The learned counsel also refers to a dispute he had with the then DGP and IGP in the period 2010 relevant to his assessment and this dispute that led to his uncereemonious transfer, was agitated by him before the Maharashtra State Administrative Tribunal (MAT) and thereafter, in the Hon'ble High Court of Mumbai in WP number 7960/ 2011 (at page 139) dated 21st October 2011 which decided the matter in his favour and directed that this incident should not, in any way, be recorded in any

unfavourable manner in his ACR. The applicant also further cites the decision of Hon'ble Apex Court in the case of **Manak Lal vs. Dr.Prem Chand Singhvi AIR 1957 page-425** to refer to the bias exhibited by the office of the DG where the applicant's then Reporting Officer was now serving as ADGP (Establishment) and who reconsidered the gradings for the three years where of adverse remarks had been made and argues that there was little chance that the representation of the applicant would received fair consideration at their hands. On the basis of this submission, the applicant submits that the gradings for 2005-2006, 2006-2007 should be expunged and that grading for 2008-2009 which have been recorded as 'Positively Good' should be treated should be treated as 'Very Good'.

We have gone through the O.A. alongwith Annexures A-1 to A-29. We have also gone through the Replies of the Respondent Nos.1, 2 and 3, and Rejoinder filed by the

applicant and have carefully examined original records submitted by the respondents and the official policy documents annexed in the case.

We have heard the learned counsel for the applicant and the learned counsel for the respondents and have carefully considered the facts, circumstances, law points and rival contentions in the case.

We have also examined the records of Respondent 3 by which the _____ applicant and his cohort were formulated as proposals and were considered by the Selection Committee which held its meeting on 21.11.2013 at Mumbai and prepared the Select List for the year 2010 of 28 persons and for the year 2011 for 2 persons in addition to the two officers whose promotions had been held back for want of integrity certificate in the Select List of 2010. The applicant was graded 'Good' in the assessment made by the Selection Committee and in view of the fact that there were many officers who received 'Very Good'

grades and despite his position at serial number 22, he was not selected for the Select List of 2010 and thereafter for the Select List of 2011 in which only 8 officers were considered including the two previously overlooked officers.

This Selection Committee meeting is held after the State Government (Respondent No.3) sends a proposal to Respondent No.2 based on elaborate documentation in accordance with the checklist that is stipulated by the Respondent No.2. This checklist mentions at Serial No.4 (d) "Whether as statement of communication of adverse remarks in the ACRs of eligible officers and consideration of representation against such remarks furnished in Annexure 6 ?". Against Item No.5 ACR dossiers, in Item No.5 (b), it is stated "whether complete ACRs dossiers of the eligible officers have been furnished". Further, under Item No.5 (g), "whether a certificate furnished to the effect that the ACRs forwarded to the

Commission are valid as per the State Government ACR Rules". The checklist also contains Item No.6 of Court directions under which the Respondent No.3 has to furnish "Statement of Court cases and Court orders (interim or final) bearing on the Select List including the brief facts of reliance on the Court cases be furnished as per Annexure 8". In respect of the certificate regarding communication of adverse remarks, the Respondent No.3 provided a tabular statement that certified "adverse remarks in the character rolls of the following eligible officers have not been communicated to the State Government by the officers concerned". Following this is a table which mentions 'Nil' for the period concerned against the name of the applicant at Serial No.22 and mention specific details for certain other officers. This certificate suggests that all the adverse remarks for this officer have either been communicated or that they do not exist. This is against the requirement of the

certificate provided in A-6 (i). Against A-6 (iii), which is a certificate regarding communication of adverse remarks in respect of eligible officers for Select List of 2010, the certificate reads "Representation against adverse entries in respect of following eligible officers have been received within the stipulated time but the decision of the State Government is yet to be taken". In respect of the applicant, the periods involved are stated as 'nil' which means that no representations have been received within the stipulated time or that the decision of the State Government has not yet been taken. These two requirements and the response of the Respondent No.3 are drawn directly from Government of India decision No.8 (i) , 8 (ii) under Rule -5 of the Indian Police Services (Appointment by Promotion) Regulations, 1955. The relevant para-8 (i) of the Rules are as follows:-

"8 (i). It has been brought to the notice of the Government of India by the Commission that the

State Governments do not bring out specifically to the notice of the Selection Committee/Commission cases where decisions on representations made against adverse entries are yet to be taken by the State Government. According to the Commission, this results in the officers who are not included in the Select List filing writ petitions against the selections made by the Selection Committees and in some cases the Courts passing orders accepting the writ petitions and directing the respondents to review the proceedings of the Selection Committee ignoring the adverse entries.

It is also to be considered that the Selection Committee chaired by the UPSC considered dossiers of the officers which contains all the details of the ACRs of the officers including relevant Court cases and by interpretation of the decision of Government of India as discussed above, the ACRs should be in final shape and the Selection Committee and the UPSC (Respondent No.2) should not be placed in a position where they are compelled to make a review of individual cases of officers who have not

been selected and who, thereafter, approached the Courts or Tribunals and obtain orders of review of the selection. This decision and instructions following from the UPSC essentially mean that the dossiers/ACRs should be in final shape for each and every officer whose case is brought before the Selection Committee.

We will need to examine if this was the case with the present applicant and whether all the instructions of the Government of India were properly and faithfully followed. At the outset, it would be appropriate to consider the domain of the scope of judicial review by this Tribunal in regard to State Government offices. The writing of the ACRs and specific contents thereof are activities that lie within the domain of the State Government and any grievances thereof will, in our opinion, have to be addressed before the appropriate forum. Therefore, it is not possible for this Tribunal to intervene to modify the ACRs in

terms of its remarks or to upgrade the final gradings obtained in the ACR. However, since the ACR is being placed as relevant material for the selection process to the All India Service, the validity of the ACR including its genuineness and if it has been written in accordance with the settled law, State's Rules, the Rules governing the Selection process under the Regulations and the requirement and purposes of writing ACR can be alone be considered by this Tribunal.

20. To assess the facts in question, we will first look at the nature of the ACRs for the years 2005-06, 2006-07 and 2008-09 and the manner in which they have been finalized by the State Government for consideration by the Selection Committee for preparing the Select List for the years 2010 and 2011. As explained by the applicant, these observations will restrict themselves to the domain of this Tribunal as discussed in the previous paragraphs. In respect of the years 2005-06 and 2006-07, the applicant has

asserted while sending duplicate forms in response to DGP's Office letter dt. 14.09.2011 that he had already submitted these forms previously on 20.04.2006 and 18.05.2006. These are the forms that did not receive the attention of the Reviewing Officer, Shri A N Roy, who had later reviewed his ACR for the year 2009-10 but did not recollect ever having been shown the forms for these two years. These two ACRs were evidently written up only in 2011 or 2012 by the then Reporting Officer who had now graduated as ADGP, Establishment, in the DGP's Office. The ACR of 2005-06 makes a general assessment that the Officer is capable and then awards an overall grading of Positively Good(B+) to which the Reporting Officer has appended his signature without any date obviously because this would reflect an ACR that has not been timely written, not timely reviewed and in opposition to the rules laid down by the State Government for the writing up of ACRs. In regard to ACR of

2006-07, the observations on individual remarks are mostly identical with the remarks in the previous years ACR except to reduce the administrative ability from Positively Good to Good and attitude towards backward class from helpful to sympathetic. The general assessment recorded is "a young officer who is gradually taking up the work", the overall grade given was Good(B) and to this the then Reporting Officer has appended his signature with a date, 21.09.2007. At first look, it is obvious that this ACR has been deliberately antedated by 4 to 5 years by the Reporting Officer who is now serving in the DGP's Office in the Establishment Department. Considering our domain, we do not wish to comment on the individual remarks although they appear to be somewhat peculiar. With regard to the overall remark, we wish to refer to the overall remark made in the previous years ACR which this Reporting Officer evidently wrote at the same time as this ACR. We also wish to refer to the

applicant submissions thereby he got an outstanding ACR in the year 2004-05 when he was on deputation through the Govt. of India, through the United Nations for operations in Kosovo. The assessment notes inter-alia that he is an excellent officer notes his coordination functions, handling of ethnic violence, his grasp of local laws in a very short time and his management of his fellow officers. The assessment also records that he was well-versed with the Police Organizations of various countries and their different techniques of investigations and had cordial relations with many international police officers. It is clear that from an outstanding performance with sensitivitiy to ethnic issues, capability to counter violence, understanding of investigation techniques and police organizations and ability to have cordial relations with other police officers, somewhat less complimentary observation was made in the year 2005-06 that he was only capable. In the next year ACR,

the Reporting Officer would suggest that he was a young officer, he was yet to learn the work. Plainly, these are not only contradictory, but imately absurd. The guiding principles and instructions for writing ACRs require the Reporting Officer to give narrative answers without obnoxious and nebulous or vague remarks before arriving at the overall grade. ***The Hon'ble Apex Court in S. Ramachandra Raju Vs. State of Orissa (1995 SCC (L&S) 74,*** held that "onerous responsibility of the Reporting Officer to exchew his subjectivity and personal prejudices or proclivity or predilections and to make an objective assessment. It is needless to emphasise that the career prospects of a Subordinate Officer/employee largely depends upon the work and character assessment by the Reporting Officer. The latter should adopt fair, objective, dispassionate and constructive commends/comments in estimating..."

The nature of the observation also

suggests a possibility of bias. ***The Hon'ble Apex Court observed in State of West Bengal & Ors. Vs. Shivananda Pathak & Ors. (1998(5) SCC 513)*** that bias may be defined as a pre-conceived opinion or a pre-disposition or pre-determination to decide a case or an issue in a particular manner, so much so that such pre-disposition does not leave the mind open to conviction. It is, in fact, a condition of mind, and, therefore, it may not always be possible to furnish actual proof of bias. But, there are many ways to discover bias; for example by evaluating the facts and circumstances of the case or applying the tests of "real likelihood of bias" or "reasonable suspicion of bias". Further, ***in Metropolitan Properties Co. Vs. Lannon [(198) W.L.R. 815]***, it was observed "whether there was a real likelihood of bias or not has to be ascertained with reference to right-minded persons; whether they would consider that there was a real likelihood of bias". This test was also applied in the case of ***Manak***

Lal Vs. Dr. Prem Chand Singhvi [(1957 AIR 425]. In Kumaon Mandal Vikas Nigam Ltd Vs. Girja Shankar Pant & Ors. [AIR 2001 SC 24], the Hon'ble Supreme Court held that "the test, therefore, is as to whether a mere apprehension of bias or there being a real danger of bias and it is on this score that the surrounding circumstances must and ought to be collated and necessary conclusion drawn therefrom. In the event however, the conclusion is inescapable that if there is existing a real danger of bias, the administrative action cannot be sustained."

In the case of Jiwan K. Lohia & Anr. Vs. Durgadutt Lohi & Ors. [AIR 1992 SC 188], [(1992) 1 SCC 56], the Hon'ble Apex Court observed the real test for likelihood of bias is whether a reasonable person in possession of relevant information, would have thought that bias was likely and whether the authority concerned was likely to be disposed to decide a matter in a particular manner.

In the case of these two ACRs, it is

noted from the observations furnished by the same Reporting Officer who was functioning as ADGP, Establishment at DGP's Officer that there was no case for reviewing the Report. However, the home department of respondent No.3 has noted that **"This is not an objective remark. Shri Baijal has completed fifteen years of service. His is 44 years old and in this age the remark that to the effect that young officer is learning the work slowly is irrelevant and redundant, hence said remark needs to be reviewed."**

The purpose of highlighting the State Government's comments is to show that no reasonable person would be able to appreciate the nature of this comment given the experience of the officer and his service both in the State and outside the country. It is this apprehension of bias that has been discussed in the judgment cited above whether which the administrative action involved in writing these ACRs cannot be sustained. This is quite apart from the fact that there is a

fundamental defect in these ACRs that they have been writing at the same time, five years after the period is over and by the same officer to undoubtedly bore a great deal of prejudice and bias towards officer reported upon. Further, the Reviewing Officer does not available to extend the necessary salve which is the secondary protection available for officers from immatured and biased officers who happened to become Reporting Officers. It is also noted that neither of these ACRs were communicated to the applicant even in the year 2011/2012 when they were written up and even then it was quite known at that point of time that the Reviewing Officer had already retired after reviewing the same applicant's ACR for the year 2009-10. As we have discussed in Paragraph 18 above, the ACR should be in final shape for review by the Selection Committee. In the case of these ACRs of 2005-06 and 2006-07, they were, clearly not worth the attention of the Selection

Committee and moreover, they were prepared in violation of rules and regulations and also not to meant to serve any purpose whatsoever by way of primary purpose for writing such ACRs which is to improve the performance of the officer reported upon. Therefore, if the Selection Committee had been advised of all these facts and its attention brought to the nature of these ACRs and the circumstances under which they have been written, they could not have arrived at any other conclusion but to ignore them completely. This would also be in conformance with the internal guidelines of the respondent 2, the UPSC, whereby under Para 5.2 ignores, the Selection Committee may ignore the adverse remarks in the Confidential Reports which had not at all been communicated to him. Where bias and improprieties are involved in the writing of the ACR, even this paragraph would not suffice and the ACRs could only be held to be non est. With regard to ACR for the period 2008-09, this ACR was also never

communicated. After the Selection Committee meeting was held, the applicant filed a request for obtaining the copy of the ACR under the RTI Act. It may be mentioned here that the Hon'ble Apex Court in the case of **Dev Dutt Vs. Union of India, [(2008) 8 SCC 725] dt. 12.05.2008**, held that all entries in the ACT should be communicated irrespective of any benchmark and further that not communicating the ACR is arbitrary as in the [Three Judges] Bench of the Hon'ble Apex Court in **Abhijit Ghosh Dastidar Vs. UOI & Ors. [(2009) 16 SCC 146] dt. 22.10.2008**.

The Applicant filed this representation after the conclusion of the Selection Committee meeting of 21.01.2013, after securing his ACRs in his letter dt. 04.06.2013, the respondent No. 3 also obtained the views of the Reporting Officer for the year 2008-09 and he had recommended that his overall grade should be upgraded from Positively Good to Very Good(A). Notably, he has mentioned while giving

remarks that it has been a long time since he wrote the reports but after verifying the details mentioned in the self assessment report of the officer and after cross checking the data, he had agreed to upgrade the remarks as above. Although recommended by the Office of the DGP, the Government appears to have taken a view it took in the case of the two previous ACRs of 2005-06 and 2006-07 that they had to depend on Government Resolutions of GAD dt. 01.02.1996 which are applicable for the years in question and that Resolution had no provision to upgrade the Confidential Reports. In accordance with this decision, a letter was sent to the applicant in the impugned orders dt. 28.01.2015 stating that his request for review and upgrading of his Annual Confidential Records for the years 2005-06, 2006-07 and 2008-09 vide his representations dt. 04.06.2013, 02.08.2013 and 03.08.2013 has been rejected by the Government.

The State Government had referred to

the provisions of this Government Resolution No. CFR 1295/Pra. Kra. 36/95/13, dt. 01.02.1996 by it was stated that after informing the adverse/critical/advisory remarks in the Confidential Reports to the Government Officers, in view of the representations made by concerned officers against it, upon receipt of said representation, within three months of the receipt thereof, either (1) representation be rejected (2) the gravity of the remark should be reduced (3) by accepting the representation, the adverse remarks should be expunged (4) partly allowing the representation by expunging some of the adverse remarks; one amongst said decisions is necessary to be taken. Therefore, the Government has apparently taken the stand that there is no provision to upgrade the ACR as such. Further, the Government has observed in its notings that in the later Government Resolution No. CFR/210/Pra. No. 47/2010/2013 dt. 01.11.2011, Schedule -I,

that there is provision to the effect that if the remarks are not satisfying the criteria of eligibility for promotion, then it should be brought to the level of satisfying criteria in respect of promotion. And this was enforced from the year 2011-12. This provision taken by respondent No. 3 is rather curious. In any selection of this kind, the **dorcile** of the applicant would include periods that straddle the period between such Resolutions of orders of the Government. That would put the State Government in a situation where the Rule of 1996 would apply to some of the ACRs and the Rule of 2011 would apply to some others which would be a contradictory provision from the stand point of logic and common sense. The purpose of making a representation would be lost if adequate understanding is not reached on the basis of the representation vis-a-vis the comments made and then to arrive at a reasonable conclusion. Having arrived at a reasonable conclusion in respect of the

various columns, there is no escape where to look at how these various columns come together to arrive at the overall general assessment from which will proceed the overall grading. If the overall assessment points to a superior performance, the grading cannot reflect a lower level and that might indicate only bias. But an ACR is intended to reflect various dimensions of the character and work of the officer and then to arrive at the general assessment. As mentioned in various directions given by Government to Reporting Officers on writing up the ACR, they are required narrative answers without **obnoxious** expressions like Outstanding, Very Good, Good, Average and Below Average but instead view the ACR as a development tool. Therefore, the general assessment which is to be written in the form of a few words and not in a single word or some expression is the critical part of the ACR that can convey an impression to the Selection Committee and should be in complete

accord with the overall grading. Therefore, to hold that the overall grading cannot be upgraded when the decision itself was taken in 2014/2015 much after the issue of the order of 2011, is a strange provision to take. However, this view point and the recommendation of the then Reporting Officer need to be considered by the Selection Committee which should be duly advised on these matters and was not so advised when it met even prior to the applicant learning about his ACRs in 2013. It should be mentioned that this position continued in Selection Committee meeting held in November 2013 for finalizing the Select List for the year 2012. We now come to the Selection Committee meeting held in 26.11.2013, the certificates furnished by respondent No.3 before this Selection Committee should have reflected the fact at this stage that ACR had not been communicated to the applicant for all the preceding years and further, this should have noted the fact that he had filed

a representation against the ACRs. Perusal of the records of respondent No. 3 that were placed before the Selection Committee shows that this was not the case whereas in the few other examples, the fact of non-report and non-receipt of representation has been noted. Clearly therefore, there has been an attempt to mislead the Selection Committee in regard to the consideration of the applicant for the purposes of selection.

There is also a provision in the UPSC Check List that all relevant Court orders should be brought to the notice of the Selection Committee. In this regard, the applicant had, during the relevant period for selection for the Select List of 2010, agitated the matter regarding his transfer on 01.06.2009 from Mumbai to the Anti Corruption Bureau, Nashik from where he was abruptly transferred in two years on 02.05.2011 before completion of tenure of three years as DCP, Thane. This matter was taken to the Maharashtra Administrative Tribunal in OA NO.

556/2011 and then challenged before the Hon'ble High Court in WP No. 7960/2011 decided on 21.10.2011 which set aside the order of the Tribunal and passed directions on some of the remarks and complaints **formiding** their inclusion in the petitioner service record unless they were enquire into by the SLPCA to be headed by the retired Judge of this Court and excluding the then DGP from participating in those proceedings. The non communication of any of his ACR to the applicant and the manner in which the fact of his pending representation was not brought to the notice of the Selection Committee because beyond the level of apprehension of bias by respondent No. 3 include raising questions of mala fide.

The Respondent No.2 has, in his reply, stated that their ACRs are not merely based on the overall gradings but go into the details of the individual columns of the ACR and then to also consider awards and recognitions secured by the candidate for

arriving at an overall assessment of the performance of the officer. While this may be true, we respectfully concur with the view of this Tribunal in its Principal Bench on this aspect, it observed that "The above Regulations clearly stipulate that the Selection Committee of the UPSC will make relative assessment of the Officers in the zone of consideration on the basis of their respective service records. Admittedly, the ACRs of the officers for a period of five years was the main basis, though ACR dossiers of the officers would provide the performance of officers throughout their career. ACRs form very important role in adjudging the grades of the contesting officers coming within the zone of consideration."

Although comparisons are rather difficult, we have also noted in the case of **Deepak Krishnaji Sakore in OA No. 722/2014 decided by this Tribunal** that in his ACR of 2011-12, the Reviewing Officer had downgraded the overall grading of Very Good(A) given to

the officer to Positively Good(B+) by simply noting the word 'Partly' on whether he agreed with the Reporting Officer. Both these remarks were expunged and the overall grading of the Reviewing Officer was raised to Very Good(A) along with another ACR in which the various remarks and overall grading has been assessed, the net result was that the officer transformed into 'Very Good' in the assessment of the Selection Committee. This comparison is made purely to suggest that despite of **awowals** of the the respondent 2 along with respondent 1 and 3, it appears that the overall assessment has a great deal to play in the final assessment of the Selection Committee. There is admitted by the respondents and which is rather unfortunate since the rules themselves suggests that the process should be a little more _____ and less of the mechanical exercise.

Returning to the respondents 1 & 2 have stated that the Select List for the

years 2010, 2011, 2012 are not in force after ____ of the year of the meeting of the Selection Committee. Although, this may be true, the point in question is whether the rules of natural justice have been violated in the present case and how this should be reflected in terms of the work of the Selection Committee. Therefore, consistent with common practice and understanding, if the decisions are clearly and with finality impacting the Applicant's interests, whereupon a duty of fairness is imposed on administrative proceedings as set out by the Canadian Supreme Court in Knight Vs. Indian Head School Division No. 19. This duty includes participatory rights including pre-hearing rights, rights related notice, disclosure, discovery and delay, hearing rights and to be given reasons for the decision which should reflect the compulsions of adopting a standard of reasonableness in such discretionary decision making. The Hon'ble Supreme Court has similarly held that

natural justice was synonymous with fairness and was the most accepted methodology of a government action(***Kumaon Mandal Vikas Nigam Ltd Vs. Girja Shankar Pant [AIR 2001 SC 24]***), holding further that the soul of the rule (natural justice) was fair play in action(***Swaadeshi Cotton Mills etc. Vs. UOI etc. [AIR (1981) SC 818]***).

We also refer to the decision of the Hon'ble Apex Court in ***Amar Kant Choudhary vs State Of Bihar & Ors. [1984 SCC (1) 694]*** decided on 3 January, 1984 where the adverse entries in his ACRs had been communicated to him well after the Selection Committee meeting and adverse entries had been removed by the State Government. He became entitled to the seniority and all other consequential benefits flowing therefrom for which he now decided that the Selection Committee would now have to reconsider the case of the appellant based on these changes and he shall be entitled to seniority and all other consequential

benefits flowing therefrom and accordingly directions were given to the respondents. The present case is a little more involved because two of this ACRs for the years 2005-06 and 2006-07 are clearly written as an abuse of the ACR process and flagrant violation of the instructions of the Government and are therefore non est. For the ACR of year 2008-09, we have already observed that the State Government had adopted a contradictory stand and that its non decision as communicated in the form of a rejection will need to be considered along with the relevant papers by the Selection Committee. We have also directed that the relevant orders of the Hon'ble High Court in the case filed by him will also to be considered by the Selection Committee while making an assessment of his performance and his service record. However, with two ACR dropped from his dossier, reference will need to be made with the previous ACR of the year 2004-05 when he was on foreign posting with

the United Nations. We are in a completely different category that cannot be compared with the post of Deputy Commissioner of Police/SP when he was holding in the State. Previous to that, the applicant was an Assistant Commissioner of Police. However, in the circumstances there appears to be no alternative for the Selection Committee but to depend on these two ACRs along with the other materials which shall be placed before the Selection Committee by respondent No.3. In faithful compliance with the findings of this Tribunal and its directions. In the circumstances, we direct the respondent No. 3 to formulate a proposal containing all the above materials for conducting a Review Selection Meeting for the inclusion of the applicant in the Select List of 2010 and such a proposal shall be prepared within a period of 1 month and send to respondent No. 2 who shall convene a review Selection Committee for inclusion of the applicant's name in the year 2010 in the Select List for the year

2010 and to make an assessment both in terms of his materials and by comparison with the others officers selected and placed in the Select List of 2010 and to decide on his selection. In the event that the applicant is not considered fit for inclusion in the Select List of the year 2010, he shall thereafter be considered for the Select List of the year 2011 by reference to the same materials as was done previously or by inclusion of the additional year for the year 2010-11. If, after the deliberations of the Selection Committee, the applicant fails to be included in the Select List for the year 2011, he should be considered for the Select List of 2012 and a decision taken with the relevant materials including by adding the ACR for the additional year, if the Selection Committee considers it appropriate. In the event that the applicant is placed in one of the Select List for the years 2010, 2011 and 2012, he should be granted the seniority for that year along with other officers as were

the rules set out in the IPS (Appointment by Promotions) Regulations, 1955 and shall be granted all consequential benefits flowing therefrom. After completion of these activities by respondent No. 2 within a period of two months from receipt of proposals from respondent No.3, the decision so taken shall be notified and also communicated to the applicant with a month therefrom.

We are particularly distressed by the fact that none of the ACRs of the applicant were communicated on time to the applicant by the concerned officers under the superintendence of respondent No.3. We are also particularly concerned that extreme bias and prejudice along with the flagrant disobedience of the rules and instructions of the Government have been made in writing up of the ACR for the years 2005-06 and 2006-07. We have already noted that in the case of these two ACRs, there has been a flagrant abuse of the requirements and purposes for

writing an ACR along with the antedating that is clearly evident from the correspondence that was initiated to prepare this ACR. In the circumstances, we feel it necessary to impose a nominal cost of Rs. 2000/- for each of the five ACRs from 2005-10 that were not communicated. Further, respondent No. 3 is directed to communicate displeasure of this Tribunal to the Reporting Officer to prepare the ACRs for the years 2005-06 and 2006-07 and if necessary, record this displeasure in the Office of the service record. Place this communication of displeasure in the office of the service record.

(R. Vijaykumar)
Member (A)

(Arvind J. Rohee)
Member (J)

AK/Ram.