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**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH**

1. OA No.1648/2003
2. OA No.2955/2003

New Delhi this the 21st day of September, 2004.

HON'BLE MR. V.K. MAJOTRA, VICE-CHAIRMAN (A)
HON'BLE MR. SHANKER RAJU, MEMBER (J)

OA No.1648/2003

Shri Prasant Gupta,

-Applicant

(By Advocate Shri K.C. Mittal)

OA No.2955/2003

Shri Upendra Singh,

-Applicant

(By Advocate Shri K.C. Mittal)

-Versus-

Union of India & Others

-Respondents

(By Advocate Shri V.P. Uppal)

1. To be referred to the Reporters or ~~not~~? yes
2. To be circulated to other Benches of the Tribunal or yes
~~not~~?

(Shanker Raju)
Member (J)

(26)

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OA No.1648/2003

Shri Prasant Gupta,
Commissioner of Income Tax,
R/o D-60, East of Kailash,
New Delhi-110 065.

-Applicant

(By Advocate Shri K.C. Mittal)
1

OA No.2955/2003

Shri Upendra Singh,
Commissioner of Income Tax,
R/o H-126, Karampura,
New Delhi.

-Applicant

(By Advocate Shri K.C. Mittal)

-Versus-

Union of India through:

1. The Secretary,
Department of Revenue,
Government of India,
North Block,
New Delhi-110 001.
2. The Chairman,
Central Board of Direct Taxes,
Department of Revenue,
Government of India,
North Block,
New Delhi-110 001.

-Respondents

(By Advocate Shri V.P. Uppal)

ORDER

Mr. Shanker Raju, Member (J):

As these OAs are grounded on same set of facts and involving identical question of law, are being disposed of through this common order.

2. In OA-1648/2003, applicant who was working as Commissioner of Income Tax, has assailed his supersession in the matter of promotion to the rank of Chief Commissioner of Income Tax (CCIT) in the wake of DPC held on 6.4.2003. He has sought direction to respondents to grant him promotion to the post of CCIT with effect from the date his juniors have been given by holding a review DPC and also to ignore downgraded and uncommunicated ACRs in the last five years.

3. Likewise, in OA-2955/2003 denial of promotion to the post of Chief Commissioner of Income Tax in the DPC held on 6.4.2003 has been assailed. Direction for holding review DPC and to ignore uncommunicated and downgraded remarks in the ACRs for the year 1997-98 and 1998-99 has been sought with grant of promotion to the post of CCIT with all consequential benefits.

4. By an interim order dated 19.12.2003 in the OAs promotions made during the pendency of the OAs have been made subject to the final outcome of the OAs.

5. Shri K.C. Mittal, learned counsel for applicant in both the OAs with regard to OA-2955/2003 contended that ACRs for the period 1996-97 till 2002-2003 had been considered by the respondents in the DPC and as the benchmark was 'very good' the requirement of three ACRs was fulfilled by applicants but yet they had not been considered and

promoted keeping in view their seniority position, whereas their juniors have been empanelled.

6. Learned counsel states that as per DoPT OM dated 16.6.2000 with regard to consideration of ACRs, the ACRs which are available during the year immediately preceding the vacancy panel years are to be considered. Accordingly, for the panel year 2000-01 ACRs upto 1998-99 are required to be considered. Since the vacancy panel period is 2003-04 ACRs of applicants immediately preceding year of 2002-03 should have been evaluated. As this ACR was available non-consideration is not in accordance with law.

7. Shri K.C. Mittal further relying upon OM dated 13.7.89 contended that DPC should not be guided by the overall grading of the ACRs and as per letter dated 28.4.2004 of the Ministry of Finance it is stipulated that reviewing officer cannot alter or modify the remarks given by the reporting officer but he is competent to differ with recording reasons. In this conspectus it is stated that whereas in 2000-01 reporting officer has given him 'very good' remark but the same has been downgraded to 'Good'.

8. Learned counsel for applicant further states that as per DoPT OM dated 20.4.98 ACRs for the period 1997-98 and 1998-99 had been writted and signed by the authorities after 1-1/2 years, probably in December, 1999, as the time schedule has not been observed the same is not tenable. By relying upon the decision of the Apex Court in **U.P. Jal Nigam v. Prabhat Chandra Jain**, AIR 1996 SC 1368 it is stated that the ACRs for the year 1998-99 should be ignored

as applicants whose gradings were 'very good' have been toned down to 'good' in the subsequent year.

9. Learned counsel states that the DPC has acted in derogation of the rules and on the downgraded ACR has superseded applicants. Learned counsel relies upon a decision of the Full Bench of the High Court in **J.S. Garg v. Union of India**, 100 (2002) DLT 177 (FB) and decision dated 27.8.2002 in **Dr. Vinay Gupta v. Union of India**, High Court of Bombay, WP-6341/2002 to buttress his plea.

10. By relying upon a decision of the Apex Court in SLP No.2713/2002 in **Union of India v. S.M. Verma** dated 5.4.2002, it is contended that decision of the Delhi High Court has attained finality by rejection of the SLP.

11. Adverting to the Full Bench decision of this Tribunal in OA-555/2001 and others in **A.K. Dawar v. Union of India**, decided on 16.4.2004 it is contended that against the reference "whether the grading of 'Good' in the ACR given to a government employee when the grading prescribed in benchmark is 'very good' for the next higher promotional post should be treated necessarily as 'adverse' and so required to be communicated to him in accordance with law and rules, has been answered to the effect that if there is no downgrading of the concerned person in the ACR, in that event the grading of 'Good' given to a government employee irrespective of the benchmark for the next promotion 'very good' need not be communicated or to be treated as adverse.

12. Having regard to the aforesaid it is contended that what is discernible as a ratio from the Full Bench is that in the event the ACR is downgraded like in the present cases

before us this very good remarks reported upon in 1996-97 had been toned down to 'good' in the subsequent year which falls below the benchmark of 'very good' have been treated as adverse to supersede applicants in the matter of promotion would be downgrading and for non-communication the same has to be ignored with holding of a review DPC.

13. Sh. Mittal, as regards case of applicant in OA-1648/2003 – Prashant Gupta v. Union of India adopted the same arguments and contended that the entry of 'good' which falls below the benchmark of 'very good' being acted adversely should have been communicated.

13. On the other hand, respondents' counsel Sh. V.P. Uppal vehemently opposed the contentions. According to the learned counsel any grading below the benchmark need not be adverse or communicated. Learned counsel states that a very high level committee holds selection. Five year service record, more particularly ACRs for the preceding five years the year of panel vacancies are to be considered. For the panel year 2003-04 the ACR ending up to 31.3.2002 are required to be taken into consideration. It is stated that none of the officials with adverse remarks during the assessment year has been promoted as CCIT vide order dated 18.12.2003.

14. Learned counsel states that ACR is based on assessment of the performance during a particular year. This performance may vary, for example, deteriorate or improve from year to year. The DPC devises its own method to assess the record. It is stated that decision of the Mumbai High Court is applicable in the facts and circumstances and

the Full Bench has rightly decided the issue and as there is no downgrading in the ACR of applicants. Accordingly the OAs are liable to be dismissed.

15. It is also stated that in promotion matter this Court is precluded from assuming the role of the appellate authority to come to a different finding.

16. The learned counsel relied upon the decision of the Full Bench in **Manik Chand v. Union of India**, 2002 (3) ATJ 268. It is stated that decision in Vinay Gupta's case has been challenged in SLP. It is also stated that the recommendations of DPC were considered by the ACC.

17. We have carefully considered the rival contentions of the parties and perused the material on record.

18. Confidential report of a government servant is a mirror reflecting his performance and it is a general assessment of the work performed by the government servant and serves as a date of comparative merit when question of promotion arises. Government of India has consolidated guidelines for recording of confidential reports for consideration of promotion, although these guidelines are not mandatory but are directory and regulatory in nature. As regards communication of adverse entries the following decisions have been taken:

"20. Communication of adverse entries and how to be done.—All adverse entries in the confidential report of Government servant, both on performance as well as on basic qualities and potential should be communicated along with a mention of good points within one month of their being recorded. This communication should be in writing and a record to that effect should be kept in the CR dossier of the Government servant concerned.

Only such of the adverse entries as are accepted by the countersigning authority, if any, need be communicated. The countersigning authority should, therefore, normally indicate whether it agrees or disagrees with the remarks of the reporting officer. It should also record, additional remarks, wherever necessary, if the report is too brief, cryptic or vague. Along with the adverse entry the substance of the entire report including what may have been stated in praise of the officer should also be communicated. The improvements made in respect of the defects mentioned in the earlier report should also be communicated to the officer in a suitable form. A copy of the letter communicating the adverse remarks duly acknowledged by the official concerned should be kept in the report itself by the authority communicating them.

Great attention should be paid to the manner and method of communication of adverse remarks in order to ensure that the advice given and warning or censure administered, whether orally or in writing shall, having regard to the temperament of the officer concerned, be most beneficial to him. The memo forwarding the adverse remarks to the officer reported upon should be couched in such a language that it does not produce a sense of resentment in the officer reported upon and that it makes it clear to him that the intention of communicating these defects to him is that, he should try to improve himself in respect of those defects.

Remarks about the physical defects of the officers noted in the confidential reports need not be communicated. The grading of officers being done on the basis of the general remarks in the report should also be communicated, even if it is adverse."

19. A constitution Bench of the Apex Court in **R.L. Butail**

v. Union of India, 1970 (2) SCC 876 observed as under:

"These rules abundantly show that a confidential report is intended to be a general assessment of work performed by a Government servant subordinate to the reporting authority, that such reports are maintained for the purpose of serving as data of comparative merit when questions of promotion, confirmation, etc. arise. They also show that such reports are not ordinarily to contain specific incidents upon which assessments are made except in cases where as a result of any specific incident a

censure or a warning is issued and when such warning is by an order to be kept in the personal file of the Government servant. In such a case the officer making the order has to give a reasonable opportunity to the Government servant to present his case. The contention, therefore, that the adverse remarks did not contain specific instances and were, therefore, contrary to the rules, cannot be sustained. Equally unsustainable is the corollary that because of that omission the appellant could not make an adequate representation and therefore the confidential reports are vitiated."

20. If once has regard to the above, an adverse entry recorded in the ACR is to be necessarily communicated with an opportunity to the concerned to make a representation. On consideration by the higher authorities on a representation the same attains finality and decides future course. However, an adverse entry is not to be equated with imposition of penalty which precedes as a mandate an enquiry or reasonable opportunity of being heard.

21. The following observations have been made by the Apex Court in **Gurdial Singh Fijji v. state of Punjab and Others**, (1979) 2 SCC 368 had held:

"17. The principle is well-settled that in accordance with the rules of natural justice, an adverse report in a confidential roll cannot be acted upon to deny promotional opportunities unless it is communicated to the person concerned so that he has an opportunity to improve his work and conduct or to explain the circumstances leading to the report. Such an opportunity is not an empty formality, its object, partially, being to enable the superior authorities to decided on a consideration of the explanation offered by the person concerned, whether the adverse report is justified. Unfortunately, for one reason or another, not arising out of any fault on the part of the appellant, though the adverse report was communicated to him, the Government has not been able to consider his explanation and decide whether the report was justified. In these circumstances, it is difficult to support the non-issuance of the integrity certificate to the appellant. The chain of reaction began with the

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adverse report causation is that no one has yet decided whether that report was justified. We cannot speculate in the absence of a proper pleading, whether the appellant was not found suitable otherwise, that is to say, for reasons other than those connected with the non-issuance of an integrity certificate to him."

22. In **State of U.P. v. Yamuna Shanker Misra and Another**, 1997 SCC (L&S) 903, following has been observed by the Apex Court:

"7. It would, thus be clear that the object of writing the confidential reports and making entries in the character rolls is to give an opportunity to a public servant to improve excellence. Article 51-A (j) enjoins upon every citizen the primary duty to constantly endeavour to prove excellence, individually, and collectively, as a member of the group. Given an opportunity, the individual employee strives to improve excellence and thereby efficiency of administration would be augmented. The officer entrusted with the duty to write confidential reports has a public responsibility and trust to write the confidential reports objectively, fairly accurately as possible, the statement of facts on overall assessment of the performance of the subordinate officer. It should be founded upon facts or circumstances. Though sometimes it may not be part of the record, but the conduct, reputation and character acquire public knowledge or notoriety and may be within his knowledge. Before forming an opinion to be adverse, the reporting officers writing confidentials should share the information which is not a part of the record with the officer concerned, have the information confronted by the record. This amounts to an opportunity given to the erring/corrupt officer to correct the errors of the judgment, conduct, behaviour, integrity or conduct/corrupt proclivity. If, despite being given such an opportunity, the officer fails to perform the duty, correct his conduct or improve himself, the confidential reports and a copy thereof supplied to the affected officer know the remarks made against him. If he feels aggrieved, it would be open to him to have it corrected by appropriate representation to the higher authorities or any appropriate judicial forum for redressal. Thereby, honesty integrity, good conduct and efficiency get improved in the performance of public duties and standard of excellence in services constantly rises to higher levels and it becomes successful tool to manage the services with officers of integrity, honesty, efficiency and devotion."

23. What is discernible as a ratio from the cases is that adverse remarks are those remarks which reflect otherwise on the performance of an officer of the particular year and also have an impeding effect in consideration for promotion to the next higher post.

24. While writing confidential report objectivity is to be adhered to and the performance is to be watched and evaluated by the reporting officer. If it slackens down and has not achieved the desired level and has been below the level to which it cannot be treated positive on watching performance in a particular year, advisory memos, warnings, explanatory notes by way of efforts to apprise the concerned to improve efficiency are to be communicated and in the event the performance still not improved the adverse remarks are recorded. These remarks should be avoided on the facts and circumstances, conduct and various factors as to the performance and efficiency of the government servants. The remarks are communicated not only to accord an opportunity to the officer to improve his performance but also to know the details on which he has been reported adversely. This gives an opportunity to the officer to rebut the remarks and to persuade the authorities on production of relevant material to take a contrary view. In nut shell, only those remarks which are adverse are to be communicated.

25. In a confidential report of a particular year if an officer is given a higher grading by the reporting officer and is toned down to a lower grading which is not adverse then the same is to be communicated. This proposition is no more res

integra in the light of the decision of the Apex Court in **State of U.P. v. Narendra Nath Sinha**, JT 2001 (7) SC 182, where the following observations have been made:

“3. The gist of the case of the appellant is that the judgment of the High Court and the directions issued thereunder are against the Government orders issued from time to time regarding the manner of assessment of performance of the officers for the purpose of giving grading in the Annual Confidential Report (ACR), regarding disposal of representations against adverse grading in such Report and regarding consideration of eligible candidates for promotion from the grade of Superintendent Engineer to Chief Engineer Level-II. The respondent had approached the High Court with the grievance against non-consideration of his case for promotion to the post of Chief Engineer Level-II which according to him was based on the downgraded entries made by the Reviewing Officer which were accepted by the Accepting Officers in his ACR. He prayed for quashing such downgraded entries and for fresh consideration of his case for promotion.

4. The main ground on which he challenged the downgraded entries was that the Reviewing Officer and/or Accepting Officer had not stated any reason/justification for downgrading the entries given by the Reporting Officer which were either “very good” or “excellent” or “outstanding”. On perusal of the judgment of the High Court we find that the arguments advanced on behalf of the writ petitioner-respondent herein were on the line noticed above. The High Court felt persuaded to accept the contentions raised on behalf of the writ petitioner mainly on the ground on non-compliance of principle of natural justice inasmuch as no intimation was given to, no explanation called for from the writ petitioner before downgrading the “excellent” or “outstanding” entries to “satisfactory” or “good”. It was further contended by the writ petitioner that no reason/ justification was given in support of such downgrading.”

26. The controversy in the present case revolves around the issue as to whether a remark/grading given in a particular ACR which falls short of benchmark as treated as adverse and communicated or it is only when there is a

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downgrading in the ACR the obligation to communicate it as adverse is to be satisfied. The genesis of the above controversy has arisen from the decision of the Apex Court in U.P. Jal Nigam and Others Vs. Prabhat Chandra Jain and others (JT 1996 (1) SC 641 where the following observations have been made:-

"3. We need to explain these observations of the High Court. The Nigam has rules, whereunder an adverse entry is required to be communicated to the employee concerned, but not down grading of an entry. It has been urged on behalf of the Nigam that when the nature of the entry does not reflect any adverseness that is not required to be communicated. As we view it the extreme illustration given by the High Court may reflect an adverse element compulsorily communicable, but if the graded entry is of going a step down, like falling from 'very good' to 'good' that may not ordinarily be an adverse entry since both are a positive grading. All what is required by the Authority recording confidentials in the situation is to record reasons for such down grading on the personal file of the officer concerned, and inform him of the change in the form of an advice. If the variation warranted be not permissible, then the very purpose of writing annual confidential reports would not be frustrated. Having achieved an optimum level the employee on his part may slacken in his work, relaxing secure by his one time achievement. This would be an undesirable situation. All the same the sting of adverseness must, in all events, be not reflected in such variations, as otherwise they shall be communicated as such. It may be emphasized that even a positive confidential entry in a given case can perilously be adverse and to say that an adverse entry should always be qualitatively damaging may not be true. In the instant case we have seen the service record of the first respondent. No reason for the change is mentioned. The down grading is reflected by comparison. This cannot sustain. Having explained in this manner the case of the first respondent and the system that should prevail in the Jal Nigam, we do not find any difficulty in accepting the ultimate result arrived at by the High Court."

27. If one has regard to the above, respondents in SLP had approached the High Court complaining about down grading entries in C.R., the same was ruled to be communicated. As an illustration, the High Court observed that on an

outstanding report in a particular year, which in succeeding year without his knowledge is reduced to the level of satisfactory without communication would affect him adversely at one or other stage of the career. A particular rule of U.P. Jal Nigam (supra) obligated the authority to communicate adverse entries but not down grading of the entry on the ground that the nature of the entry is not adverse. It is only when the graded entry had a stiff fall and not a step down to 'very good' to 'good' would not be treated as an adverse entry as both the entries are positive. In this view of the matter, the Apex Court was of the view that the down grading should be recorded on the file and communicated in the form of an advice. An employee who has achieved the optimum has slackened down in his work but there must not be an adversity reflected in such variations. A 'good' entry which is of positive nature may be adverse as the down grading was reflected by comparison, the order of the High Court was upheld.

28. There are several decisions of the Division as well as Full Benches of the different High Courts where down grading was ordered to be ignored. High Court in CWP No.6741 of 2000 by an order dated 1.2.2001 upheld the Tribunal's order. Feeling aggrieved the State has gone in appeal before the Apex Court in CC No.388 of 2002 where on the ground that down grading by one stage from 'very good' to 'good' will not be treated as adverse and need not be communicated, notices were issued on 28.1.2002. After the notices by an order dated 5.4.2002 a Three Judge Bench dismissed the S.L.P. without recording any reasons.

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29. In the High Court of Judicature at Mumbai in W.P. No.3641 of 2002 was filed by Dr. Vinay Gupta against the order of the Tribunal in which the Tribunal after hearing the parties held that though the applicant had given 'outstanding' grading in 1994-95, next year he was given the grading of 'very good' which was reviewed to 'good' and thereafter he was assessed as 'good', the aforesaid has not been found to have contained any adversity but relying upon the decision in U.P. Jal Nigam's case (supra), finding of down grading, the same was ordered to be communicated. The High Court of Mumbai has upheld the observations of the Tribunal that ACR for 1994-95 was down graded from 'very good' to 'good'.

30. On the other hand, the Full Bench decision of this Tribunal at Mumbai in the case of Manik Chand Vs. Union of India and others, reported in AT Full Bench Judgments (2002-2003) 160, on a reference in the case of selection where a particular benchmark has been prescribed, whether any gradings in the ACR which fall short of bench mark need to be communicated to the reportee even though the grading/report per se may not be adverse, ruled that it is not necessary to communicate the remarks which are below the bench mark prescribed for promotion in respect of a selection post but there is no quarrel for communication of those gradings/remarks which had been down graded or there has been a stiff fall in the light of U.P. Jal Nigam's case (supra). The reasons to arrive at this finding are reproduced as under:

"15. The entire object of the ACR is to assess the performance of the subject employee

during the year. For purpose of promotion by selection, normally the ACRs of the five preceding years are taken into consideration. The DPC fixes its own norms and makes an independent assessment and arrives at a grading taking into account the totality of performance. Thus, if a Government servant has consistently good record, but does not have the bench mark, the DPC does hold him suitable. Further, whether a good positive entry is adverse or not, comes to light only when a meeting of the DPC takes place and independent assessment is made by the DPC. If such grading arrived at DPC, were to be communicated to the concerned Government servant perhaps, no purpose would be served except to bring it to the knowledge of the concerned person, because the entries in all the five ACRs which were considered by the DPC will have to be communicated, if they are treated as adverse, even though they may not be adverse in the strict sense. Therefore, the Government servant cannot be expected to improve his performance during the previous four years, if informed after a period of five years. The improvement can come about only for the year immediately preceding the year when the meeting is held. Therefore, conveying of the remarks for improving the performance for promotion may not serve the purpose because the assessment by the DPC is not to be communicated. Further, the ACRs form the basis for clearing the Government servant for Efficiency bar, Promotion, Regularisation and continuation in service also. In fact, the supreme Court has held in Baiku8nta Nath Das (supra) that even where a person is retired compulsorily under FR 56 (j), it is not liable to be quashed by a court, even if communicated adverse remarks in the ACRs were taken into consideration for compulsorily retiring the Government servant. Considering this position, in our considered view, there is no need to communicate the non-adverse remarks or grading to the concerned Government servant. Besides, the Government servant only has a right to be considered for promotion and not right for actual promotion or selection. Therefore, it cannot be said that only principles of natural justice will be violated if the grading/entry below the bench mark are not communicated to the Government servant.

16. Further it is also to be seen whether it would be practicable to communicate every remark/grading in all the ACRs continuously in respect of all the persons. There will be thousands of employees, in whose cases, such entries may need to be communicated. It would

require scrutiny of the ACR dossier to find out whether the person concerned would meet the bench mark or not. Also not every person would be eligible for promotion. Only those, who would be coming in the zone of consideration will need to be considered. Also, it will depend upon the number of vacancies. Thus, communication of remarks/grading, which are not adverse perse, but which fall short of bench mark could be gigantic exercise requiring lot of man power and consuming lot of time. The effort may not be commensurate with the result to be achieved."

31. If once has regard to the above decision of the Full Bench what has been the basis of the conclusion is that a government employee may have earned good record but failed to achieve the bench mark is declared unsuitable by the DPC. This adverse entry is known only at the time of meeting of the DPC. If this is to be treated as adverse all the remarks are to be communicated to the concerned before holding DPC treating it as adverse. Accordingly for yester years there would not be an opportunity to improve upon the performance, the improvement can be in the year immediately preceding when the meeting is held.

32. In view of conflicting decision the matter has been laid at rest by another Full Bench at Principal Bench in **A.K. Dawar v. Union of India**, OA-555/2001 decided on 16.4.2004. The following was the reference before the Full Bench:

"whether the grading of 'Good' in the Annual Confidential Report, given to a Government employee, when the grading prescribed in the Bench mark is 'Very Good' for the next higher promotion post, should be treated necessarily as 'adverse' and so required to be communicated to him in accordance with the law and rules."

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33. While considering the issue having regard to the diametric view taken by various High Courts as a doctrine of precedent the following observations have been made:

"12. We are conscious of the decision of the Supreme Court in the case of M/s East India Commercial Co. Ltd. Calcutta and another Vs. Collector of Customs, Calcutta, AIR 1962 Supreme Court 1893. In the cited case, the appellant - East India Commercial Co. Ltd. Had applied for grant of licence to import fluorescent tubes and fixtures from the United States of America. The licence had been issued subject to the condition not to sell the goods so imported. Subsequently, some breach in the condition was noticed and a notice had been issued to the licence holder in this regard. One of the questions that came up for consideration before the Supreme Court was as to whether the decision of the High Courts would be binding on the Tribunals or not. The Supreme Court held that it would be binding. The finds read:-

"....Under Art.227 it has jurisdiction over all courts and tribunals throughout the territories in relation which it exercises jurisdiction. It would be anomalous to suggest that a tribunal over which the High Court has superintendence can ignore the law declared by that court and start proceedings in direct violation of it. If a tribunal can do so, all the subordinate courts can equally do so, for there is no specific provision, just like in the case of Supreme Court, making the law declared by the High Court binding on subordinate courts. It is implicit in the power of supervision conferred on a superior tribunal that all the tribunals subject to its supervision should conform to the law laid down by it. Such obedience would also be conducive to their smooth working; otherwise, there would be confusion in the administration of law and respect for law would irretrievably suffer. We, therefore, hold that the law declared by the highest court in the State is binding on authorities or tribunals under its superintendence, and that they cannot ignore it either in initiating a proceeding or deciding on the rights involved in such a proceeding. If that be so the notice issued by the authority signifying the launching of proceedings contrary to the law laid down by the High Court would be invalid and the

proceedings themselves would be without jurisdiction".

34. The Full Bench has also discussed U.P. Jal Nigam's case and came to a definite conclusion without any pale of controversy that the Apex Court had dealt with a situation when there was a still fall in recording of confidential reports. The decision of the High Court in **J.S. Garg v. Union of India**, 2002 (65) DRJ 607 (FB) was also considered. A Full Bench of the High Court in the light of specific rule or communication of adverse remarks in CPWD having regard to U.P. Jal Nigam's case observed the Tribunal to have taken an erroneous view. In this case fall in standard as applicant was graded 'very good' and 'good' in 1995-96 was not communicated has been deprecated. The Punjab & Haryana High Court in CWP-13024-CAT/2000 decided on 22.11.2002 in **Union of India v. M.S. Preety** observed that overall entries which are not adverse need not be communicated. According to the High Court average would not be an adverse and downgrading but the issue would be the consideration of properly recorded ACRs.

35. A Division Bench of the Delhi High Court in **Rajender Kumar v. Union of India**, 91 (2001) DLT 170, observed as under:

"10. Coming to the other issue whether "Average" entry earned by petitioner for four years after the "Very Good" entry for one year could be treated drastic variation to assume adverse character, we feel that the ratio of Supreme Court judgment in Jal Nigam's case (supra) was being read out of context. The Apex Court in that case had found a drastic variation from "Excellent" entry for one year to "Poor" next year and had held that Competent Authority ought to have recorded reasons for such a steep downgrading and communicated it to enable the

employee to improve his performance. But all this was not attracted in the present case because petitioner was graded "Average" which was not an adverse entry under the relevant guidelines not only for one year but for four years non-stop. This, therefore, was not a case of any drastic variation from top to bottom for one year. Moreover, "Average" entry did not require any communication as it was not considered an adverse entry under the guidelines. Reliance on the Supreme Court judgment appears misplaced on the face of it".

36. In nut shell what has been held is that if there had been a ~~skip~~ downgrading and the grading is positive entry need not be communicated.

37. A Full Bench of this Tribunal while answering the reference observed as under:

"....Consequently, kif a person earned a 'Good' report in his Confidential Report, it cannot be taken to be an adverse remark when there is no downgrading. Adverse remarks can indicate the defects and deficiencies in the quality of work, performance and conduct of an officer. It may not include the words in the nature of counsel or advice. The adverse remarks have to be seen at the time when they are recorded. If the reporting and reviewing officers have recorded the performance of an officer to be 'Good', necessarily his total and overall performance have to be considered later on, it cannot, therefore, be held that merely because on subsequent date, he may not meet the benchmark, the remarks would automatically turn colour and become adverse.

14. Our attention was greatly drawn towards a decision of this Tribunal in the case of Udai Krishna v. Union of India (1996) 33 ATC 902. A Division Bench of this Tribunal at Allahabad was confronted with a similar situation. Their attention was drawn towards a decision of the Patna Bench of this Tribunal carrying a benchmark in the case of B.P. Singh v. Union of India, (1994) 28 ATC 601. The learned members of the Bench at Allahabad did not subscribe to the view in the case of B.P. Singh (supra) and proceeded on to hold to the contrary. This is indeed totally contrary to the judicial discipline. The decision, therefore, cannot be taken to be precedent pertaining to the nature of the arguments that were advanced before us. We, therefore, subscribe to the view taken by the

Punjab and Haryana High Court in the case of M.S. Preeti (supra) and of the Delhi High Court in the case of Rajender Kumar (supra). We answer the reference as under:

If there is no downgrading of the concerned person in the Annual Confidential Report, in that event, the grading of 'Good' given to the Government employee irrespective of the benchmark for the next promotion being 'Very Good' need not be communicated to be treated as adverse".

38. The decision of the Apex court in U.P. Jal Nigam's case (supra) has been observed to be not laying down a proposition of law but is a law in the peculiar facts and circumstances of the case. Citing an example that if a person earns good remarks in a particular year but after four years from earning promotion the good remark does not meet the bench mark of very good the same would not be adverse and necessarily to be communicated. A good report in the confidential report would not be adverse unless it does not indicate down grading. However, subscribing to the view taken by the Punjab & Haryana High Court in M.S. Preety's case and Delhi High Court in Rajender Kumar's case the answered reference was that in case there was down grading of the person concerned in the ACR it would not insist either communication or treating it as adverse. The decisions in Preety and Rajender Kumar cases (supra) which are basis of this Full Bench lays down a proposition of ^hstep fall in the performance and adversity is to be seen with reference to the remarks and if it is not per se adverse the same would not be a down grading. However, we must emphasize on down grading which is not explained, discussed or concluded in the order of the Tribunal. Before we do so we must

remember that the Tribunal has not applied its mind to consider case of down grading of confidential reports. In the wake of such a view the down gradation in the ACR cannot be treated mutatis mutandis or analogous to the down grading of ACR. It may look odd but has a nexus and relevance. Down grading in the ACR and down grading of ACRs are two different concepts. In the former where the reporting officer gives a higher grading but the reviewing authorities tones it down to a lower grading it would be a down grading in the ACR whereas in the latter grading given to an officer in a particular year of 'very good' and grading of 'good' in the preceding year would in common parlance down grading of confidential report. The issue regarding down grading of CR is not dealt with. As per Concise Oxford Dictionary down grading in its literal meaning is reduction to a lower grade, rank or level of importance.

39. From the cumulative reading of various decisions cited the ratio decidendi is to be derived by application of settled principle of law enumerated under Article 141 of the Constitution of India. In a constitution Bench decision of the Apex Court in **Islamic Academy of Education v. State of Karnataka**, 2003 (6) SCC 697, majority Coram has taken the following view:

"2. Most of the petitioners/applicants before us are unaided professional educational institutions (both minority and non-minority). On behalf of the petitioners/applicants it was submitted that the answers given to the questions, as set out at the end of the majority judgment, lay down the true ratio of the judgment. It was submitted that any observation made in the body of the judgment had to be read in the context of the answers given. We are unable to accept this submission. The answers to the questions, in the majority

judgment in *Pai* case are merely a brief summation of the ratio laid down in the judgment. The ratio decidendi of a judgment has to be found out only on reading the entire judgment. In fact, the ratio of the judgment is what is set out in the judgment itself. The answer to the question would necessarily have to be read in the context of what is set out in the judgment and not in isolation. In case of any doubt as regards any observations, reasons and principles, the other part of the judgment has to be looked into. By reading a line here and there from the judgment, one cannot find out the entire ratio decidendi of the judgment. We, therefore, while giving our clarifications, are disposed to look into other parts of the judgment other than those portions which may be relied upon".

40. In **Ashwani Kumar Singh v. U.P. Public Service Commission**, 2004 SCC (L&S) 95 as regards precedent the following observations have been made:

"10. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark upon lengthy discussions, but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In *London Graving Dock Co. Ltd. v. Horton* (AC at p. 761) Lord Macdermott observed: (All ER p.14 C.D).

"The matter cannot, of course, be settled merely by treating the ipsissima verba of Wiles, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge...."

11. In *Home Office v. Dorset Yacht Co.* Lord Reid said, "Lord Atkin's speech...is not to be treated as if it were a statutory definition. It will

require qualification in new circumstances" (All ER p.297g-h). Megarry, J. in *Shepherd Homes Ltd. V. Sandham (No.2)* observed: (All ER p. 1274d-e) "One must not, of course, construe even a reserved judgment of even Russel, I.J. as if it were an Act of Parliament," In *Herrington v. British Rlys. Board* Lord Morris said: (All ER p. 761c).

"There is always peril in treating the words of a speech or a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case.

12. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper."

41. If one has regard to the above ratio decidendi is to be derived from the entire judgment. The observations are to be read in this context. Picking out a line and reading it in isolation would not be in consonance with law.

42. In the light of the above, we may now advert to decision of the Apex Court in *U.P. Jal Nigam's case* (supra). It is trite that the ratio is arrived on the peculiar facts of a particular case and any observation or particular direction of the Apex Court cannot be taken as a precedent in the light of the decision of the Apex Court in **State of Orissa v. Balram Sahu**, 2003 (2) ATJ SC 1810. In *U.P. Jal Nigam's case* (supra) the rules provided communication of adverse remarks. The factual decision is not clear from the decision. What is transpired is that on down grading of ACR down grading of entries in the ACR which was still a positive entry, non-communication was deprecated and the entry was treated as adverse. While explaining the observations of the High Court in the illustration where an employee on earning

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outstanding report in succeeding year is reduced to the level of satisfactory without communication, discussed the rule which allowed communication of the adverse remarks but not down grading of entry, as it had not reflected any adverseness. But in a case where down graded entry is from one step down to very good to good that has not been treated as an adverse entry as both are positive grading. In *such* a situation the only obligation is to record reasons for such down grading on personal file and communication in the form of advise to the concerned. This is on the logic that in a particular year keeping in view of the performance of an officer he may reach to the optimum but he may not have carried the same pace in subsequent years and may slacken in work but the sting of adverseness should not be reflected in such variations. It is also observed that a positive entry may sometime be adverse. On perusal of the record of the service as no reasons have been recorded for the change the down grading was reflected by comparison. Accordingly, it was sustained. In our considered view the case was decided on the basis of the peculiar facts and circumstances without laying down any proposition of law to be universally followed. It was a disposal of directions on the basis of explanation tendered to the observations of the High Court keeping in view the relevant existing rules in U.P. Jal Nigam's case (supra).

43. As regards case of S.M. Verma in SLP it is trite that a non-speaking order of the Apex Court would not bind as a precedent under Article 141 of the Constitution of India. We do not have details of the decision of the Tribunal or the High

(P)

Court of Delhi in Writ Petition, yet we find that down grading by one step from 'very good' to 'good' was not treated as adverse and on that issue notices were issued in SLP but while dismissing SLP no reasons have been recorded would give finality to the decision in S.M. Verma's case (supra) would not have any binding effect.

44. It is also trite law that the Tribunal is bound by the doctrine of precedent. The decisions of the Apex Court are binding on High Courts as well as Tribunal. In the same hierarchy the decision of the High after the decision of the Apex Court in a Constitution Bench in **L. Chandra Kumar & Ors. v. Union of India & Ors.**, JT 1997 (3) SC 589 the Tribunal has been made a court of first instance subject to judicial review before the High Court. Accordingly, in the order of hierarchy the decision of the High Court of of a Division Bench and of Full Bench are binding upon Tribunal.

45. However, we find that conflicting decisions of various High Courts lead to following of a decision of larger Bench of High Court of which having territorial jurisdiction over the Principal Bench but once there are different conflicting decisions of the High Courts the Tribunal is free to take its own view to accept ruling of either of the High court. The Full Bench has decided to adopt the view taken in M.S. Preety's case of Punjab and Haryana High Court where the down grading was construed to be an adverse remark and in Rajender Kumar's case (supra) Apex Court in U.P. Jal Nigam's case has been re-iterated and has to be binding in a case where there is a ^hstep down grading.

46. In the above view of the matter the down grading of the concerned person in ACR is a sine qua non of its adversity and communication thereof.

47. A Full Bench of the High Court which would over-ride the decision of Division Bench, in J.S. Garg's case (supra) applicability of decision of U.P. Jal Nigam was res integra. Petitioner who was in CPWD was denied promotion. The bench mark for promotion was very good and zone of consideration was preceding five year record which included ACR. Rule 9 of the CPWD Service Manual Volume-I 1992 makes it obligatory to communicate purported fall in standard. In this view of the matter what has been found is that in remark column for the year 1995-96 and 1997-98 reporting as well as accepting authorities down graded applicant. Although good grading had never been communicated but he obtained very good in 1994, 1995 and 1996 and 1997. In this view of the matter the Tribunal held that for the grading good from 1991-94 the very good given in 1994-95 and subsequent entry of good in 1995-96 the good entry can be ignored but the same cannot be replaced by categorization or updating the ACR. To this the following observations have been made:

"13. The learned Tribunal, in our opinion, committed a serious misdirection in law in so far as it failed to pose unto itself a right question so as to enable it to arrive at a correct finding of fact with a view to give a correct answer. The question which was posed before the learned Tribunal was not that whether the petitioner had been correctly rated by the DPC? The question, as noticed hereinbefore, which arose for consideration before the learned Tribunal as also before us was as to whether having regard to the decision of the Apex Court in U.P. Jal Nigam and Ors. (supra), as also Rule 9 of the CPWD Manual the concerned respondents had acted illegally in

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not communicating his 'fall in standard'. It is now trite that the Court of the Tribunal cannot usurp the jurisdiction of the Statutory Authority but it is also a settled principle of law that the jurisdiction of this Court to exercise its power of judicial review would arise in the event it is found that the concerned authority has, in its decision making process, taken into consideration irrelevant fact not germane for the purpose of deciding the issue or has refused to take into consideration the relevant facts. The learned Tribunal, in our opinion, while holding that having regard to the decision of the Apex Court in U.P. Jal Nigam and Ors, the DPC could ignore categorization, committed a serious error in usurping its jurisdiction. Once such categorizations are ignored, the matter would have been remitted to the DPC for the purpose of consideration of the petitioner's case again ignoring the remarks 'Good' and on the basis of the other available remarks. This position stands settled by various judgments of the Supreme Court.

14. It is now trite that a bad record, if not communicated, the effect thereof would be that the same cannot be taken into consideration by the Appropriate Authority".

48. Accordingly this decision of the High Court is mainly based on an influence of Rule 9 where fall in standard are to be communicated. Accordingly, the aforesaid does not lay down a general proposition of law and from the reading of the entire order the ratio decidendi discernible cannot be that the down grading or fall in standard is to be communicated. With this we must emphasize on the concept of down grading as explained earlier down grading is reduction in rank or fall in standard. Whether this down grading is stiff or not to take the shape of an adverse remark is the bone of contention.

49. The High Court at Mumbai Bench in Vinay Gupta's case (supra) has dealt with a situation where in the year 1994-95 though the reporting officer has given him the

grading of 'very good' the reviewing officer changed it to 'good' and in the next two years applicant was assessed as 'good' but this entry was not communicated. In our considered view in *Bindy* Gupta's case the proposition laid down is on the basis that the reviewing officer in a particular year changed the grading from 'very good' to 'good'. This brings us to another controversy as if in the ACR of a particular year there is one step down grading would it not be mutatis mutandis applied on the same standard to down grading of ACR from year to year.

50. The aforesaid has to be answered with reference to adverseness in the remark.

51. From the above discussion we have no hesitation to hold, which is the true import of the latest Full Bench decision of the Tribunal in Dawar's case that if there is a down grading in the ACR, i.e., when the remarks given by the reporting officer are toned down by the reviewing officer irrespective of the *Steep* fall in the light of the decision in Narender Nath Sinha's case (supra) of the Apex Court. The same shall be adverse and communicated to the concerned or in the alternative same may be ignored and consideration be made by holding a review DPC.

52. As regards down grading in general of ACR, i.e., from year to year, for example from 'very good' to 'good' or from outstanding to 'average' unless the same is a *Steep* fall and the down graded remarks are adverse in nature and accordingly the same need not be communicated or treated as adverse.

53. Having regard to the aforesaid finding in OA-2953/2003 the consideration before the selection committee of the ACR of applicant was from 1996-97 to 2001-2002. The following remarks have been given to applicant:

Year	Reporting Officer	Reviewing Officer
1996-97	'Very Good'	'Very Good'
1997-98	'Good'	'Very Good'
1998-99	'Good'	'Good'
1999-2000	'Very Good'	'Very Good'
2000-2001	'Very Good'	'Good'
2001-2002	'Very Good'	'Very Good'

54. If one has regard to the above, applying the aforesaid ratio applicant in the year 2001-02 was graded 'very good' by the reporting officer but the reviewing officer has reported him 'good'. This is an adverse remark against applicant, which should have been communicated to him. We do not find any reason in support of such a down grading.

55. In OA-1648/2003 Prashant Gupta the following remarks have been given:

Year	Reporting Officer	Reviewing Officer
1996-97	'Very Good'	'Very Good'
1997-98	'Very Good'	'Very Good'
1998-99	'Very Good'	'no review'
1999-2000	'Very Good'	'no review'
2000-2001	'Very Good'	'Very Good'
2001-2002	'Very Good'	'Very Good'

56. In the above case we do not find any ^h ~~step~~ fall or down grading in the ACR.

57. In the above view of the matter, in OA-1648/2003 we find that applicant has earned for the last five years of report as 'very good'. The promotion was within Group 'A'.

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Accordingly, the office memorandum dated 8.2.2002 of DoPT in the promotion selection by merit prescribes bench mark as 'very good' promotion is to be on the basis of fit and unfit is to be further dealt with in accordance with seniority. Promoting his junior Sh. T.K. Chatterjee is not in consonance with the guidelines and to this effect DPC has not applied its mind. We do not find any other adverse material against applicant.

58. In this view of the matter, having regard to the discussion made above and perusal of record, we are of the considered view that in the case of Upendra Singh (OA-2955/2003) in the light of the decision in Narender Nath Sinha's case (supra) where on down grading a reasonable opportunity to show cause on representation was afforded and to consider the matter afresh, we direct respondents to offer applicant an opportunity to represent against down grading and in response to his reply further process holding of review DPC and consider claim of applicant for promotion at par with his juniors in accordance with rules and instructions subject to his fitness and in that event he shall be entitled to all consequential benefits.

59. In the case of Prashant Gupta (OA-1648/2003) as we find that the guidelines are not adhered to and the record of applicant meets the bench mark a review DPC be held to consider his case afresh in the light of his record and in the event he is declared fit as per rules and fitness he shall be considered for promotion from the date of his junior and in that event he shall be entitled to all consequential benefits.

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60. The aforesaid directions shall be complied with by the respondents within a period of three months from the date of receipt of a copy of this order. With these directions OAs are partly allowed. No costs.

61. Copy of the order be placed in each case.

(Shanker Raju)
Member (J)

(V. K. Majotra)
Vice-Chairman(A) 21.9.07

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