

**UNION PUBLIC SERVICE
COMMISSION**

**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH
O.A.NO.555 OF 2001 & CONNECTED CASES
D.D. 16.4.2004**

Shri Justice V.S.Aggarwal, Chairman

Shri S.K.Naik, Member (A)

Shri Kuldip Singh, Member (J)

Dr.A.K.Dawan & Ors. ... Applicants

Vs.

The Secy. Ministry of Labour New Delhi & Ors. ... Respondents

Confidential Report:

The question for consideration is if for a promotional post the bench mark prescribed is “Very Good” and the concerned Officer is graded as “Good” whether the said grading should be communicated or not.

Held:

The Central Administrative Tribunal after examining the entire case law on the point has held that if there is no downgrading of the concerned Government employee in the Annual Confidential Report, the grading of “Good” given to him irrespective of the bench mark for the next promotion being “Very Good” need not be communicated or to be treated as adverse.

Cases Referred:

1. AIR 1962 Supreme Court 1893 - M/s. East India Commercial Co. Ltd. Calcutta and another Vs. Collector of Customs, Calcutta
2. (1995) 1 Supreme Court Cases 399 - State of Orissa and Others vs. Bhagaban Sarangi and Others
3. 1996 (33) ATC 217 - U.P. Jal Nigam and Ors. v. Prabhat Chandra Jain and Ors.
4. JT 1997 (3) S.C. 589 - L.Chandra Kumar Vs. The Union of India & Others
5. 1998 CTJ 129 (MRTPC) - Director General (I and R) vs. Holy Angels School
6. 2001 (2) ATJ 467 - Donatus Engzanang v. State of Mizoram
7. (2001) 7 Supreme Court Cases 469 - Indian Petrochemicals Corpn. Ltd. and another vs. Shramik Sena
8. 2002 (65) Delhi Reported Judgments 607 (FB) - J.S.Garg v. Union of India & Others
9. 2002 (3) ATJ 7 - Dr. Binoy Gupta v. The Union of India and Ors.
10. 2003 (2) ATJ 392 - Dr. J.P.Srivastava v. Union of India & Ors.

ORDER

On 17.3.2003, a Bench of this Tribunal referred the following question for consideration of this 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.”

2. This controversy arises as a result of the plea that is being urged that if for a promotional post, the benchmark prescribed is “Very Good” and the concerned officer is graded as “Good” whether the said grading should be communicated or not?

3. The matter had been argued earlier before us on 6.1.2004 and it was noted that though the controversy was before the Supreme Court but as the promotion of many of the officers was involved, they thought it appropriate to urge the matter to avoid any delay in affecting their promotion. Furthermore, during the course of submissions, it transpired that pertaining to this controversy, different High Courts have pronounced different orders and whether all of them would be binding on the Central Administrative Tribunal or the judgments of the High Court within whose jurisdiction the Tribunal is functioning would be binding. On 6.1.2004, the attention of the parties was, therefore, specifically drawn to the said controversy which was precipitating. The said order reads:-

“Irrespective of what we have recorded above, since this question also came up for consideration during the course of deliberations, we would request the parties counsel to address us on the controversy because it has been pointed that while judicially reviewing certain orders of different Benches of this Tribunal in India different High Courts have expressed different views. It should also therefore be addressed to this Full Bench as to what is the affect of different judgments of the High Courts which are stated to have become final between those parties.”

4. We have heard the parties counsel with respect to the above said question as well as pertaining to the question posed by the Division Bench which was referred to this Full Bench. The Statement of Objects & Reasons of the Administrative Tribunals Act, 1985 (for short, the Act) specifically provides that establishment of the Administrative Tribunals had become necessary since a large number of cases relating to service matters were pending before various Courts. It was to deal exclusively with the service matters which would go a long way in reducing the burden of the

various Courts and for providing expeditious justice. The preamble of the said Act reads:-

“By section 46 of the Constitution (Forty-second Amendment) Act, 1976, after Part XIV of the Constitution Part XIV A was inserted which relates to Tribunals. In the said inserted Part XIV A article 323A stipulates that Parliament may, by law, provide for the adjudication of trial by Administrative Tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any Corporation owned or controlled by the Government. In order to give effect to the aforesaid constitutional stipulation by providing for the establishment of an Administrative Tribunal for the Union and a separate Administrative Tribunal for a State or a Joint Administrative Tribunal for two or more States the Administrative Tribunals Bill was introduced in the Parliament.”

5. The provisions of the Act further show that Section 3(f) defines the Central Administrative Tribunal to mean the Administrative Tribunal established under sub-section (1) of Section 4 of the Act. Sub-section (1) to Section 4 gives the power to the Central Government to establish an Administrative Tribunal to be known as Central Administrative Tribunal. It reads:-

“4. Establishment of Administrative Tribunals:- (1) The Central Government shall, by notification, establish an Administrative Tribunal, to be known as the Central Administrative Tribunal, to exercise the jurisdiction, powers and authority conferred on the Central Administrative Tribunal by or under this Act.”

The Act further provides for setting up of different Benches of this Tribunal. Sub-section (1) to Section 18 of the Act permits the appropriate Government to make provisions as to distribution of the business of the Tribunal amongst the Benches. In exercise of this power, the Central Government by a notification that was being issued from time to time the latest being of 23.11.2000 distributed the business of the Tribunal. Suffice to mention, as would be relevant hereinafter, the Chandigarh Bench of this Tribunal falls within the jurisdiction of three different High Courts, namely, Jammu & Kashmir High Court, Punjab & Haryana High Court and the High Court of Himachal Pradesh. Similar position exists in the case of Allahabad Bench of this Tribunal which, besides falling within the jurisdiction of Allahabad High Court, also falls within the jurisdiction of Uttaranchal Pradesh High Court at Nainital. The position is identical in the case of Guwahati Bench, Calcutta Bench as well as the Patna Bench of this Tribunal.

6. In exercise of the powers under the Act, the Central Administrative Tribunal Rules of Practice, 1993 have even been framed. To overcome the situation when there is a difference of opinion between different Benches of the Tribunal, a provision has been made to constitute a Larger Bench. Rule 50 provides for preparation and filing of paper books on reference to the Full Bench. Under Rule 51 of the above said Rules, the Registrar of the referring Bench has to send a copy of the order of reference to all the other Benches and under Rule 52, the Registrar of the referring Bench has to forward a copy of the order of reference to the Registrar of the Principal Bench for securing orders of the Chairman pertaining to constitution of the Full Bench.

7. Under Section 28 of the Act, from the date this Tribunal came into being, with respect to service matters, the jurisdiction of all Courts was excluded except that of the Supreme Court or Industrial Tribunal/Labour Court constituted under the Industrial Disputes Act.

8. Under Section 26 of the Act, if a Member of the Bench differs in opinion on any point, the point can be decided according to the opinion of the majority. A decision has to be taken by the Chairman who can either hear it himself or assign it to any other Member.

9. In the landmark judgment in the case of *L.Chandra Kumar Vs. The Union of India & Others*, JT 1997 (3) S.C. 589, the Supreme Court upheld the principle of judicial review to be one of the basic structure of the Constitution of India. Resultantly, the powers of the High Courts to judicially review the orders of this Tribunal could not be withdrawn. The Supreme Court held that though the Tribunals were competent to hear the matters where the vires of statutory provisions even has been questioned but they could not act as substitutes for the High Courts and the Supreme Court. The Supreme Court held:-

“95. Before moving on to other aspects, we may summarise our conclusions on the jurisdictional powers of these Tribunals. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set-up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals

shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very act to be unconstitutional. In such cases alone, the concerned High Court may be approached directly. All other decisions of these Tribunals rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts, we may add that the Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal.”

The Supreme Court thereupon held that the orders passed by the Tribunal would be subject to judicial review before the High Court where the Tribunal is functioning. The findings of the Supreme Court in this regard are:-

“92. To hold that the Tribunals have no power to handle matters involving constitutional issues would not serve the purpose for which they were constituted. On the other hand, to hold that all such decisions will be subject to the jurisdiction of the High Courts under Articles 226/227 of the Constitution before a Division Bench of the High Courts within whose territorial jurisdiction the Tribunal concerned falls will serve two purposes. While saving the power of judicial review of legislative action vested in the High Courts under Article 226/227 of the Constitution, it will ensure that frivolous claims are filtered out through the process of adjudication in the Tribunal. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter.”

After the decision of *L. Chandra Kumar (supra)*, the orders of this Tribunal became the subject matter of judicial review before different High Courts. As would be noticed hereinafter, sometimes views expressed and laws interpreted by different High Courts were not reconciling and at times were diametrically opposite. According to the learned counsel who were appearing on behalf of the applicants in particular the Principal Bench, since the Principal Bench is situated at Delhi, the decision of the Principal Bench are subject to judicial review before the Delhi High Court and the said decisions should bind all the Benches of this Tribunal. We do not dispute this proposition. We may mention that in the present bunch of applications, one matter has been

transferred from Chandigarh Bench of this Tribunal and as noticed in the preceding paragraphs, many a times when Larger Benches are constituted or common questions are involved, applications from different Benches may be transferred at one place. At times, exercising powers under Section 25 of the Act, the applications are otherwise also transferred from one Bench of the Tribunal to another.

10. If the matter had ended here, there would have been no difficulty but when different applications are clubbed together which may fall within the jurisdiction of the different High Courts for judicial review as we have already referred to above. Certain Benches of this Tribunal could even fall within the jurisdiction of two or three different High Courts. When this question was posed to the learned counsel, we could not get any satisfactory answer as to what would be the position of that Bench if it has to follow different precedents within the same Bench of three different High Courts.

11. However, one fact that cannot be disputed is that this Tribunal is created under sub Section (1) to Section 4 of the Act. It is one Tribunal. The other Benches have been established for the sake of convenience to the litigants and for expeditious disposal of the matters. The scheme of the Act and the Rules clearly indicate that ordinarily this should have one law which should be applicable to all the Benches of the Tribunal.

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, 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 findings read:-

“..... Under Art.227 it has jurisdiction over all courts and tribunals throughout the territories in relation to 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.”

13. In another decision rendered by the Supreme Court pertaining to Orissa State Administrative Tribunal reported as *State of Orissa and Others vs. Bhagaban Sarangi and Others* (1995) 1 Supreme Court Cases 399, the Supreme Court in unambiguous terms held that the Tribunal is a Tribunal and is bound by the decision of the High Court of the State. The short judgment of the Supreme Court reads:-

“1. In our opinion, it is not correct for the Tribunal to have stated that they are not prepared to accept the judgment of the Orissa High Court in *Kunja Behari Rath v. State of Orissa*, O.J.C. No.668 of 1969. We make it clear that the Tribunal in this case is nonetheless a Tribunal and it is bound by the decision of the High Court of the State. It is incorrect to sidetrack or by-pass the decision of the High Court.

2. However, on the merits of the matter, we do not think that there is any case for interference. The order of the Tribunal appears to be just. We accordingly dismiss the special leave petition.”

However, the question that stares glaringly at us which we have referred to above had not been the subject matter of controversy before the Supreme Court. In fact while dealing with contradictory decisions, if any, of the Supreme Court itself, the Supreme Court in the case of *Indian Petrochemicals Corpn. Ltd. and another vs. Shramik Sena* (2001) 7 Supreme Court Cases 469 concluded that even when the decision of the Apex Court are diametrically opposite, the High Courts should decide the matters on merits according to their own interpretation. The findings read:-

“8. We have perused the impugned order of the High Court. We are unable to appreciate the approach of the High Court. Even when it was faced with diametrically apposite (sic opposite) interpretation of the judgment of this Court, it was expected of the High Court to decide the case (writ petition) on merit according to its own interpretation of the said judgment. Instead the High Court after referring to rival contentions of the parties...”

14. The above said controversy seemingly had only arisen before the Monopolies and Restrictive Trade Practices Commission in the case of Director General (I and R) vs. Holy Angels School 1998 CTJ 129 (MRTPC) decided on 15.5.1998. At the outset, we may mention that as far as the Monopolies and Restrictive trade Practices Commission, New Delhi are concerned, it has its seat at Delhi. It has jurisdiction through out the country. It does not have different benches like this Tribunal. However, if the order of the Commission affects a party residing anywhere in India, such party can invoke the jurisdiction of the High court exercising the jurisdiction over that area with respect to the orders of the Commission. Thus, like this Tribunal the orders of the commission are subject to judicial review in different High Courts except that it does not have different Benches like one we have already referred to above. However, somewhat similar situation had arisen and the Commission after broadly considering the same held:-

“(1) If the order of this Commission affects or is likely to affect a party in say State A, and if there is a ruling of that High Court on the point involved in the matter. This Commission will be bound by that ruling of the said High Court.

(2) If the order of this Commission affects or is likely to affect a party in State A and there is no ruling of the High Court of that State on the point involved in the matter but there is a ruling of the High Court of State B on that point, this Commission will be bind by the ruling of the High Court of State B on that point.

(3) If the order of this Commission affects or is likely to affect a party in State A and there is a ruling of the High Court of State A on the point involved in the matter and that ruling of the High Court of State A is in conflict with the ruling of any other High Court whether of a single Bench an equal Bench or a larger Bench, the ruling of the High Court of State A will be binding to this Commission.

(4) If the order of this Commission affects or is likely to affect in State A and there is no ruling of the High Court of State A on the point involved in the matter and there are conflicting rulings of two or more different High Courts on that point, the

commission will be free to accept the ruling of either or any High Court for the purpose of deciding the case.

(5) If the order of this Commission affecting a party in State A is based on the ruling of the High Court in any other State on the point involved in the matter in absence of any ruling on that point by the High Court of State A and subsequently the High Court of State A gives a ruling on that point which might be in conflict with the decision of the High Court which was earlier followed by the Commission in a subsequent case of a party who might be affected in State A, the subsequent ruling of the High Court of State A will be binding to this Commission.

(6) If the order of this Commission is likely to affect two different parties in two different States A and B and the High Court of either State has decided the point involved therein, the decision of that High Court will be binding to this Commission. If the High Court of States A and B have decided the point separately and their rulings are in conflict with each other, the Commission will be free to follow the ruling of either High Court.

(7) If any ruling of a High Court is in conflict with any ruling of the Supreme Court, the ruling of the Supreme Court is always binding to this Commission.

(8) In the case of conflict of rulings of the same High Courts on a point of law which is involved in a case before this Commission, the one which is given by a larger Bench will be binding to this Commission. If the conflicting rulings of the same High Courts are by coordinate Benches, ordinarily the ruling which is later in the point of time will be binding to this Commission.”

15. We do not dispute the proposition enunciated by the above said Commission that if there is a judgment of the High Court, it would bind this Tribunal. However, if on that point, there is no judgement of the High Court having jurisdiction, this Tribunal would be bound by any other judgement of the other High Courts because we have already referred to above that this Tribunal is one and its orders are subject to judicial review.

16. Keeping in view, the peculiar situation of this controversy which we have already referred to above particularly when one Bench of this Tribunal is at times under the territorial jurisdiction of more than one High Courts, it is with respect difficult to subscribe to the view that in case there is conflict between the judgements of two High Courts, the judgement of the High Court having

territorial jurisdiction would be binding. In the peculiar situation in which we are placed that may result in an enigmatic situation because it was brought to the notice of this Tribunal that many a times different persons posted in different Benches belonging to the very same civil service or cadre file applications to different Benches and if the Bench considers that the decision of that particular High Court which is diametrically opposite to the decisions in the other High Courts is to be followed, this would even bring difficulties in the same cadre or service.

17. Consequently, we hold:-

1. that if there is a judgement of the High Court on the point having territorial jurisdiction over this Tribunal, it would be binding:
2. that if there is no decision of the High Court having territorial jurisdiction on the point involved but there is a decision of the High Court anywhere in India, this Tribunal would be bound by the decision of that High Court:
3. that if there are conflicting decisions of the High Courts including the High Court having the territorial jurisdiction, the decision of the Larger Bench would be binding: and
4. that if there are conflicting decisions of the High Courts including the one having territorial jurisdiction then following the ratio of the judgement in the case of Indian Petrochemicals corporation Limited (supra), this Tribunal would be free to take its own view to accept the ruling of either of the High Courts rather than expressing third point of view.

18. Having considered this question, we revert back to the main controversy regarding which the reference was made.

19. During the course of the submissions, it was urged that downgrading without communicating

“3. We need to explain these observations of the High Court. The Nigam has rules, hereunder an adverse entry is required to be communicated to the employee concerned. But not downgrading 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 confidential 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 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 emphasised 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 downgrading 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 Jail Nigam, we do not find any difficulty in accepting the ultimate result arrived at by the High Court.”

It is abundantly clear without any pale of controversy that the Supreme Court was basically dealing with a matter where there was a steep fall in recording of the confidential reports and otherwise also not only the Supreme Court was concerned with the relevant rules of the U.P. Jal Nigam but the said Court held that if there is a downgrading, in that event, a person who has reached the optimum level must be convened the same.

21. This decision of the Supreme Court was followed by a Bench of the Guwahati High Court in the case of *Donatus Engzanang v. State of Mizoram* 2001 (2) ATJ 467. The Full Bench of the Delhi High Court in the case of *J.S.Garg v. Union of India & Others*, 2002 (65) Delhi Reported Judgments 607 (FB) also took up the matter wherein the Annual Confidential Reports after being Very Good had been downgraded. The Judgement of the U.P.Jal Nigam (supra) was

referred to by the Full Bench and it was held that the uncommunicated downgraded remarks could not have been considered. The Full Bench held:

“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 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 categorisation, committed a serious error in usurping its jurisdiction. Once such categorisations 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.”

To the same effect is the Single Bench decision of the Delhi High Court in the case of Madhu Bala Dham v. Delhi Development Authority in Civil Writ Petition No.5761/2003 decided in January, 2004.

22. The Bombay High Court in the case of Dr. Binoy Gupta v. The Union of India and Ors. 2002 (3) ATJ 7 was also concerned with the same question where there was downgrading of the Annual Confidential Reports. Perusal of the judgment reveals that after earning outstanding report Dr. Binoy Gupta was down graded to Good in the next year and the remarks had not been communicated. The Bombay High Court relying on the decision in the case of U.P. Jal Nigam (supra) held:-

“In the light of the decision of the Supreme Court we find that non selection of the petitioner for promotion to the post of Chief Commissioner on the basis of the ACR where communication of down grading has not been made vitiate the proceedings. Therefore, we direct the respondents to convene a review DPC and reconsider the case of the petitioner ignoring the ACRs of the Reviewing Officer for 1995-96 and also ACRs of 1996-97 and 1998-99 and if he is found suitable, give him promotion from the date from which other officers who were promoted on the recommendations of the DPC.”

Rule is made absolute accordingly.”

23. It is not only the view of different High Court but the consistent view of this Tribunal has also been identical. In Original Application No.456/2000 in the case of Sh. B.L.Srivastava v. Union of India, decided on 16.8.2000, same view following the decision of U.P. Jal Nigam (supra) had been adopted. The Punjab and Haryana High Court as would be noticed hereinafter had not approved the same. Similar view had been expressed by the Principal Bench in the case of A.K.Gupta v. Union of India & Others in OA No.1016/2001 decided on 2.4.2002 and also in the case of V.S.Arora v. Union of India & Others in OA No.1570/2001 decided on 7.5.2002. The Lucknow Bench of this Tribunal in the case of Dr. J.P.Srivastava v. Union of India & Ors. 2003 (2) ATJ 392 also held on similar lines. There are numerous judgments but it becomes unnecessary to multiply the same because as is apparent from the land mark judgment of the Supreme Court in the case of U.P. Jal Nigam (supra) that when there is downgrading of the Annual Confidential Reports, the same should be communicated in accordance with law before it can be considered.

24. Reverting back to the main question that was referred to above that when there are views expressed which re diametrically opposite of each other, this Tribunal has to take up one of those views. In the case of Union of India & Others v. M.S.Preeti and Others in Civil Writ Petition No.13024-CAT of 2002 decided on 22.11.2002, the Punjab and Haryana High Court did not approve the decision in the case of the B.L.Srivastava (supra) but concluded that when it is not a case of downgrading, the decision in the case of U.P.Jal Nigam (supra) will have no role to play. The findings of the said Court read:

“In our opinion, the reason assigned by the Tribunal for entertaining the plea of respondent No.1 is per se erroneous and legally unsustainable and the direction given by it for re-consideration of his case for promotion under BCR Scheme is liable to be set aside. It seems to us that the Tribunal laboured under a mistaken

impression that the rules/instructions which regulate recording of ACRs provide for communication of even those entries which are not adverse. During the course of hearing, Shri I.S.Sidhu placed before us the instructions issued by the Government of India for recording the ACRs to show that only adverse remarks are required to be communicated to the officer/employee. This position was not contested by Shri R.K.Sharma. Unfortunately, the Tribunal completely over looked this important aspect of the matter and interfered with the recommendations of the Departmental Promotion Committee by erroneously assuming that average entries were required to be communicated to respondent No.1.

The judgment of the Supreme Court in U.P.Jal Nigam's case (supra) relied upon by the Tribunal has no bearing on the case of respondent No.1. In that case, the Supreme Court considered the question whether the entries recorded in the ACR can be down graded without giving notice and opportunity of hearing to the affected employee. Their Lordships of the Supreme Court answered the question in favour of the employee and observed as under:

All what is required by the Authority recording confidential 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 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 emphasised 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 downgrading is reflected by comparison. This cannot sustain.”

As already mentioned above, the present one is not a case of down grading the ACRs but consideration of properly recorded ACRs for the purpose of adjudging the suitability of the employee. Therefore, the Tribunal was clearly wrong in placing reliance on the judgment of the Supreme Court.”

The same High Court in the case of Union of India & Another v. Col. Tilak Raj and Others, Civil Writ Petition No.18833-CAT of 2002 decided on 13.5.2003 was again concerned with the matter where there was no downgrading of the Annual Confidential Reports. While setting aside the decision of the Chandigarh Bench, the Punjab and Haryana High Court again held that in such an event, it is not required that the remarks should be communicated. It held:

“The judgment of the Supreme Court in U.P. Jal Nigam’s case (supra) on which reliance has been placed by the Principal Bench of the Tribunal for granting relief to B.L.Srivastava, A.K.Anand and A.K.Gupta and which has also been relied upon in the impugned order has no bearing on the case of respondent no.1. The question which fell for consideration before the Supreme Court in U.P.Jal Nigam’s case (supra) was whether the entries recorded in the Annual Confidential Reports can be downgraded without giving notice and opportunity of hearing to the affected employee.”

25. Same view was taken by the Principal Bench in OA No.2967/2002 in the case of Tarun Kumar v. Union of India & Others, decided on 25.4.2003. Herein also there was no downgrading of the Confidential Reports. It was held:

“9. To resolve the said controversy as to whether the applicant has been downgraded to take advantage of the decision in the case of the U.P.Jal Nigam (supra), we had called for the Confidential Reports of the applicant. A perusal of the same reveals that for the years in question, to begin with, the applicant had “Average”/“Good” reports. In the later years, he had improved his performance and his work was assessed as “Very Good”. The Departmental Promotion Committee taking note of the overall assignment had assessed the work of the applicant for the years in question as “Good”. Therefore, it is not a question of down grading or steep fall that the applicant can press into service the decision of the Supreme Court in the case of U.P. Jal Nigam (supra). Therefore, the decision of the Punjab and Haryana High Court in peculiar facts would certainly apply.”

The Division Bench of the Delhi High Court in the case of Rajinder Kumar v. Union of India and Others, 91 (2001) DLT 170 also considered the same controversy wherein certain persons junior to Rajinder Kumar had been promoted. He felt aggrieved and made series of representations and filed OA No.2488/1997 before the Principal Bench of this Tribunal. He had been found unfit for promotion because he had earned only one “Very Good” annual Confidential Report for one year and the “Average” entry for remaining four years. His argument was that the “Average”

entry had not been communicated. The Delhi High Court held that “Average” entry was not an average entry and did not require communication. The decision in the case of U.P.Jal Nigam (supra) was distinguished. The Division Bench held:-

“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 judgement 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 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 also 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 judgement appears misplaced on the face of it.”

Another Division Bench of the Delhi High Court by a speaking order in Civil Writ Petition No.1386/2002 in the case of Union of India v. R.K. Anand had held:

“The only question which arise for consideration in this writ petition is as to whether the office memorandum dated 30th December 1983 – 6th January 1984 in terms whereof the Departmental Promotion Committee had been authorised to classify the officers as “Outstanding” “Very Good” and “Good” on the basis of their merit upon examination of their respective records of service of the candidate, is valid.

It is not in dispute that the Departmental Promotion Committee had fixed “Very Good” as the Bench Mark.

The respondent herein had received “good” for one year. Tribunal following the decision of the Apex Court in U.P. Jal Nigam Vs. Prabhat Chandra Jain, AIR 1996 SC 1661 had held that, in the event, a Bench mark “Very Good” is fixed, the ACRs should have been communicated to the respondent herein. We do not find any infirmity in the judgement of the Tribunal. Be it recorded that the same view has been taken by a Division Bench of this Court in Union of India and another vs.

B.L.Srivastava and Others (Civil Writ Petition No.715/2001) disposed of on 2nd February 2001.

For the reasons as aforementioned, we do not find any merit in this writ petition, which is accordingly dismissed.”

In other words, it was concluded by the Delhi High Court that even when there is a Good entry, it has to be communicated if it is below the benchmark.

26. Keeping in view these diametrical views that have been expressed, necessarily we have to adopt one of those views for the reasons we have recorded above.

27. Concept of fairness in administrative action has been the subject matter of considerable judicial debate, but there is totally unanimity on the basic element of the concept to the effect that the same is dependent upon the facts and circumstances of each matter. No straight jacket formula can be evolved. As a matter of fact, fairness is synonymous with reasonableness and on the issue of ascertainment of meaning of reasonableness, common English parlance referred to as what is in contemplation of an ordinary man of prudence similarly placed. (From *State of Punjab v. V.K. Khanna and Others*, 2001 SCC (L&S) 1010).

28. It is settled principle that adverse entries cannot be acted upon till a representation against the same has been afforded. The Supreme Court in the case of *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 decide 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 adverse

report and the infirmity in the link of 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.”

With these basic principles which are not in controversy, we refer to the contentions that were advanced before us. According to the learned counsel for the applicants and some of the applicants who had appeared in person that once the confidential report is recorded which is below the benchmark, necessarily it must be communicated because it had adverse affect on the service prospects of the individual. On the contrary, the view expressed was that the “Good” entry which is per se not adverse entry need not be communicated and this is a matter to be looked into by the Departmental Promotion Committee as to whether a person has to be promoted or not.

29. We know from the decision rendered in the case of *State Bank of India v. Kashinath Kher*, 1996 SCC (L&S) 1107 that the object of writing confidential reports is to give an opportunity to the officer to remove deficiency and to inculcate discipline. Similarly, in the case of *State of U.P. v. Yamuna Shankar Misra and Another*, 1997 SCC (L&S) 903, the same view was re-expressed holding that before forming an opinion or making adverse remarks, it is better to confront the concerned officer. In paragraph 7, the Supreme Court held that the purpose is to enable an employee to improve his performance in public service. The findings read:-

“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 or 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 and dispassionately while giving, as accurately as possible, the statement of facts on an 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 confidential should share the information which is not a part of the record with the officer concerned, have the information confronted by the officer and then

make it part of 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, necessarily the same may be recorded in the confidential reports and a copy thereof supplied to the affected officer so that he will have an opportunity to 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 a successful tool to manage the services with officers of integrity, honesty, efficiency and devotion.”

30. Necessarily from the aforesaid, it follows that if the purpose of communicating of the confidential reports is to let the officer improve his performance and if the concerned person has already earned a good report which is a positive entry unless the reporting or the reviewing officer believes that it should be so communicated and there are deficiencies, the same need not be communicated.

31. During the course of submissions, the instructions issued by the Government of India that only adverse entries have to be communicated were not challenged. Therefore, we deem it unnecessary to reproduce the same.

32. The settled principle is that no person has a fundamental right to be promoted. He has only a right to be considered for promotion. In the case of *U.P. Jal Nigam (supra)*, the Supreme Court held that a “Good” report is a positive entry.

33. Strong reliance is being placed on the following lines recorded by the Apex Court in the case of *U.P.Jal Nigam (supra)*:-

“It may be emphasised 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.”

These findings necessarily drawn their colour and strength from the earlier findings of the Supreme Court which we have reproduced above in extenso. The Supreme Court was dealing with specific

rules of the U.P. Jal Nigam. There was a steep downfall in the performance of the concerned person in the Annual Confidential Reports. The findings basically reproduced above do not lay down any principle of law as to when it would be taken as adverse. The decision of the Supreme Court referred to above, therefore, necessarily has to be considered keeping in view the facts that were before the Apex Court. The findings, therefore, will not be help the applicants in this regard. The expression adverse cannot be taken to be an expression of art. There is no statutory definition of the said expression adverse entry. In the normal balance it would be taken as opposed to one's interests, unfavourable, harmful or detrimental to his interests. Necessarily, an adverse entry has to be seen at the time when the question of promotion arises. One cannot ignore that in a given case when Good remarks are recorded in a particular year and on basis of that, the person concerned may earn his promotion but after four years for the next promotion the same Good remarks may not meet the benchmark of "Very Good". Can it be said in that case that it was an adverse entry recorded five years back? Under the relevant instructions, remarks have to be communicated within a stipulated period. In our view, the answer would be in the negative. One cannot earn promotion and after years repeat that it was an adverse remarks recorded five years earlier. We reproduce the extract of the findings of the Full Bench of this Tribunal in the case of *Manik Chand v. Union of India & Others*, 2002 (3) ATJ 268. The Full Bench noted:

"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."

The said Full Bench had relied upon another decision of the Full Bench of Hyderabad in the case of *V.Pallam Raju v. Union of India & Others* in OA No.777/1993, rendered on 10.2.1995.

Consequently, if 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.

34. Our attention was greatly drawn towards a decision of this Tribunal in the case of *Udal Krishna v. Union of India* (1996) 33 ATC 802. 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 501. 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 or to be treated as adverse.”

35. Place the Original applications before the appropriate bench for further action.

**CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH
ORIGINAL APPLICATION NO.683/2004
D.D. 15.7.2005**

**Hon'ble Shri Anand Kumar Bhatt, Member (A)
Hon'ble Shri S.G.Deshmukh, Member (J)**

Shri Dr. A.T.Kumbhar ... **Applicants**
Vs.
M/O Personal, Public Grievances & Pensions ... **Respondents**

Confidential Report:

Furnishing of various documents considered by UPSC for selection to All India Service – UPSC has claimed privilege in respect of certain documents in its custody – Tribunal has upheld the privilege claimed by UPSC but directed for production of other documents for the perusal of the Tribunal.

ORDER

1. Applicant by Shri Dinesh Tiwari, Respondents by Shri V.S.Masurkar.
2. M.P. 295/2005 has been filed by the applicant for making available records in the custody of the State Government and UPSC for his inspection. Reply has been filed by the State Government. An affidavit has been filed by Chairman, UPSC claiming privilege with regard to the files which are in their custody. We have considered the various documents which have been requested for by the applicant for inspection. As far as sub-para (a) and (b) in para 7 of the M.P. is concerned, these letters have not been referred to by Respodnent No.2 (State Government) in the reply. We do not think that under the circumstances inspection can be allowed. As far as item (c) regarding zone of consideration of DPC 2003 is concerned it has been attached with the reply filed by respodnent No.3 (UPSC). As far as (d) is concerned the applicant is apparently referring to the files in the custody of UPSC for which they have claiming privilege under Section 123 of Indian Evidence Act 1872. We do not have precedent in the Tribunal in which file relating to correspondence of DPC proceedings and selection to All India Service has been shown to the applicant and in addition the UPSC has claimed privilege in their affidavit. I do not think that it

is essential for hearing the present case and we do not consider it necessary to further hear the counsel for the applicant in this regard.

3. As far as (e) nature of the charges against Mr. Sanap and Mr. M.S.Sawant and under what circumstances they were exonerated, they have also been impleaded by the applicant in the array of the respondents. However we cannot allow any fishing exercise on the part of the applicant in the case of other colleagues of his, who were also in the zone of consideration. The applicant's case has to be considered on its own merits. Regarding the articles published in the News Papers, it is clarified by the State Government that UPSC has asked for State Government's comments. We do not think that any inspection is required. There is no order and simply a request of the UPSC asking the comments from the State Government as intimated by the Respondents and this is obviously known to the applicant.

4. As far as letter mentioned in para 13 is concerned the State Government wrote to DOPT to accord sanction to fill up 10 clear vacancies in promotion quota which will be available on 1.1.2004. Accordingly Central Administration Department invited detailed proposal from Revenue & Forest Department for Promotion. UPSC wrote to State Government on 10.3.2004 for forwarding the proposal. As far as the documents mentioned in para 13 of State Government reply is concerned, the respondents may produce them for the perusal of the Court. However no such inspection can be allowed to the applicant. There is no letter mentioned in para 15 of the State Government. As far as (h) regarding correspondence with Chief Minister of Maharashtra and UPSC, there is no such correspondence between Chief Minister of Maharashtra and UPSC as mentioned in para 8 of the reply to MP of the State Government. So far as ACR's of all the candidates in the zone of consideration in 2002 and 2003 as well as their service records are concerned, this is again a fishing exploration on the part of the applicant. In any case, the Tribunal cannot sit on judgement of the assessment made in regard to other candidates in comparison to that of the applicant and this cannot be allowed. ACR of the applicant and DPC proceedings cannot be made available to the applicant for the reason that the Tribunal cannot allow fishing exercise on the part of the applicant, and there is absolutely no precedent for this in the Tribunal. Proceedings of DPC and service record and ACRs of the applicant be made available for perusal of the Tribunal.

5. M.P. is allowed partly as has been discussed. Some of the documents will be seen by the Court as mentioned above. So far as privilege claimed by the UPSC for documents in their custody is concerned we do not have any reason not to allow such request. Disclosure of such

documents to the applicant would in effect mean impeding the process of independent noting by the officials for a sensitive matter like promotion to All India Service. We also do not consider it necessary to further hear the counsel for the applicant as prayed by him.

6. Shri. Tiwari states that in Writ Petition No.3109/2004 the Hon'ble High Court by order dated 22.2.2005 in para 10 have stated that if the applicant wants the Tribunal to record evidence of some persons it can be decided under the provisions of Administrative Tribunals Act 1985. We do not find any such application by the applicant in this regard.

On application we can consider the matter. It has been pointed out that similar matters which impugn the same DPC are fixed for hearing on 2.8.2005. Accordingly the present case is also fixed on 2.8.2005. We have already clubbed all similar matters in our order dated 13.6.2005.
