

Urmila Ingale

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.953 OF 2017

Union of India,
Through the Secretary
Department of Personnel & Training
North Block,
New Delhi – 110 001.

2. The Secretary
Department of Atomic Energy,
Anushakti Bhavan,
CSM Marg,
Mumbai – 400 001.

3. The Chairman
Forward Markets Commission,
Everest 3rd Floor,
100 Marine Drive
Mumbai – 400 002.

4. G.N.Singh
Director,
Department of Consumer Affairs,
Ministry of Consumer Affairs,
Food and Public Distribution,
Krishi Bhawan, 3rd Floor,
Dr.Rajendra Prasad Marg,
New Delhi – 110 001.

.. Petitioners

Vs.

Vikas Chand Chaturvedi
Director/Deputy Secretary

Forward Markets Commission
Everest 3rd Floor
100 Marine Drive
Mumbai – 400 002
Residing at 67 Apartment House,
10th floor, Hyderabad Estate,
Napean Sea Road,
Mumbai – 400 036.

.. Respondents

Mr.Anil Singh ASG a/w Mrs.Neeta Masurkar, Ms.Geetika Gandhi
& Mr.D.P. Singh i/b Mr.Vinay S. Masurkar, for the Petitioners.
Mr.L.S.Shetty a/w Mr.M.M. Nair, Mr.Arn timer Misra i/b L.S. Shetty
& Associates, for Respondent.

**CORAM : SMT. V.K.TAHILRAMANI ACTING C.J.
AND M.S.KARNIK, J.**

**RESERVED ON : 19th DECEMBER, 2017
PRONOUNCED ON : 10th JANUARY, 2018**

JUDGMENT (PER M.S.KARNIK, J.) :

1. By this Petition filed under Articles 226 & 227 of the Constitution of India, petitioners challenge an order passed by the Central Administrative Tribunal, Mumbai Bench, Mumbai (hereinafter referred to as 'Tribunal' for short) dated 09/07/2015 allowing the OA filed by the respondent herein.

2 The respondent while working as a Director in the Forward Markets Commission, Mumbai filed OA before the Tribunal aggrieved by rejection of his representation against the below-benchmark gradings in his Annual Confidential Report (for short 'ACR') for the years 2001-02, 2002-03 & 2003-04 and by denial of promotion to him as a consequence thereof. The Competent Authority by the impugned order dated 11/02/2011 informed the respondent that the final grading of endorsement 'Average' in the ACRs are retained. Before the Tribunal, the respondent had also impugned the order dated 12/09/2011 by which the petitioners had informed him that his request for review of decision for promotion could not be agreed to. The case of the respondent before the Tribunal was that for the period of 3 years when he was working as an Under Secretary in the Departmental of Atomic Energy from 15/03/2001, though the Reporting Officer had rated him as 'Very Good' in the ACRs of the years 2001-02, 2002-03 & 2003-04, the Reviewing Officer downgraded his ACR to "Average". He was overlooked for promotion for the select list of 2006 in the DPC held on

22/01/2009 because of the below-benchmark grading. The respondent submitted several representations on 12/03/2009, 25/05/2009, 21/07/2009, 18/08/2009, 17/12/2009 and 07/01/2010. The respondent was promoted to the post of Deputy Secretary in the select list of 2009 by order dated 01/04/2010.

3. The DOPT on 13/04/2010 issued an Office Memorandum which required all departments to communicate grading below the benchmark in the ACRs for the period prior to 2008-09 and obtain representations from the affected officers and take appropriate decision on the representation in consultation with the Reporting and Reviewing Officer. Accordingly, by letter dated 22/06/2010, the respondent was communicated 3 ACRs for the period 2001-02, 2002-03 & 2003-04. The respondent submitted a representation on 28/07/2010 and in response to that the petitioners by order dated 11/02/2011 rejected the representation.

4. The case of the respondent is that he was overlooked for promotion to the selection grade (DS) in Select List 2006 for which the DPC was held on 22/01/2009 since he did not meet the benchmark for promotion which was four “Very Good” out of 5 ACRs. By communication dated 12/09/2011, the respondent was informed that there is no change in the gradings of the ACRs and therefore the review of his case for promotion cannot be agreed to.

5. Before the Tribunal, the respondent contended that Reviewing Officer has acted in a biased and subjective manner while writing the remarks in the ACR of the respondent for these 3 years. For the first 2 years viz. 2001-02 & 2002-03, the Reporting Officer was one Shri V.R. Vijayan, Deputy Secretary in the DAE who graded the respondent as “Very Good”. In the third year, the respondent's Reporting Officer Smt.Uma Mahadevan, IAS graded the respondent “Very Good”. The Reviewing Officer for all 3 years was the Joint Secretary (R&D) Smt.Sudha Bhave she downgraded the respondent's grading as

“Average” for all the 3 years. For the ACR of the year 2001-02 the Reviewing Officer gave her remarks as late as 14/09/2004 after 2 years and 2 months of writing of the ACR by the Reporting Officer on 23/07/2002. The ACR for the year 2002-03 was written by the Reporting Officer Shri Vijayan on 21/01/2003 but the Reviewing Officer downgraded the respondent to 'Average' in June 2004 after 15 months from the date on which the ACR was written by the Reporting Officer. In the 3rd year viz. 2003-04, the Reviewing Officer recorded her remarks downgrading him as an “Average” officer at a much later period of time when she had already left the Department of Atomic Energy and was working as Managing Director of the Maharashtra State Textile Corporation. The Tribunal was pleased to allow the OA filed by the respondent.

6. Learned Additional Solicitor General Shri Anil Singh appearing for the petitioners assailed the order passed by the Tribunal. Inviting our attention to the operative part of the order, learned ASG contends that no directions could have been

issued by the Tribunal to consider the case of the respondent for promotion based on the grades as given by the Reporting Officer alone. In his submission, in the light of the rules and regulations, it is the Reviewing Officer who assessed the work of the officer concerned. He submitted that the Reviewing Officer has given reasons for downgrading the remarks in the confidential rolls. In his submission, it is the Reporting Officer who has not given any reasons in support of his remarks. Delay, if any, is on the part of the respondent in submitting his self appraisal report. For the delay caused in writing remark by the Reviewing Officer, it is the respondent who is responsible. Learned ASG further points out that at the relevant time when the Reviewing Officer down graded the respondent to average, 'Average' was not considered as an adverse remark and therefore there was no question of communicating the same. It is only after 2010 when the decision was taken to communicate below benchmark entries that the remarks for the 3 years were communicated to the respondent. In the submission of learned ASG the Tribunal was not justified in holding that there was

delay in communicating adverse remarks. Learned ASG further submits that based on the performance of the respondent, the Reviewing Officer assessed his work and conduct and based on this has downgraded the ACRs. Learned ASG justified the remarks of the Reviewing Officer. In his submission, the Reviewing Officer is justified in observing that she does not agree with the assessment of the Reporting Officer and thus remarked that respondent did not show interest in his work. Learned ASG assailed the findings of the Tribunal by contending that these reasons by the Reviewing Officer are sufficient to downgrade the respondent and it cannot be said that no reasons have been given.

7. Learned Counsel for the respondent on the other hand supported the order passed by the Tribunal. He invited our attention to the findings recorded by the Tribunal to contend that the findings cannot be said to be illegal or contrary to law so as to warrant interference.

8. With the assistance of the learned ASG and learned Counsel for the respondent, we have gone through the confidential reports of the 3 years which have been written by the Reporting Officers as well as Reviewing Officer. It would be material to refer to some of the provisions of the Brochure on Preparations & Maintenance of Annual Performance Assessment Report for Central Civil Services to which our attention is invited by the learned Counsel.

“1.4. The system of APAR on the performance of Government servants is a means to an end and not an end in itself. The ultimate goal is to optimise the achievement of Government policies and programmes. This is possible only if the APAR lead to the optimization of the performance of the concerned Government servants. The main focus of the Reporting Officer should, therefore, be developmental rather than judgmental. The APAR should be a true indicator of the achievement of the Government servant; it should not be a mere tool to control or discipline him.

1.5. The system of APAR has two principal objectives and the Reporting Officer should have a very clear perception of these objectives. The first and foremost is to improve the performance of the subordinates in his present job. The second objective is to assess the potentialities of the subordinate and prepare him through appropriate feedback and guidance for future possible opportunities in service. To a great extent, the second objective is dependent on the achievement of the first.

2.3. The performance is then assessed by the Reporting Officer, who after completing his part of the Report submits it to his own superior, known as the Reviewing Officer for review. The assessment of the performance of

Government servant at two levels ensures a greater degree of objectivity and fairness. However, whether a Government servant has only one supervisory level above him as in the case of personal staff attached to officers, the assessment will be at the level of Reporting Officer only. The officers at both Reporting and Reviewing levels are required to have at least three months experience of supervising the work and conduct of the Government servant reported upon, before they can record their assessment on the performance of the Government servant.

2.6. Where a Reporting Officer/Reviewing officer retires, he may be allowed to give the report on his subordinates within one month of reference.

2.8. Assessment of the performance of a Government servant at more than one level has been prescribed as a general rule with a view to ensure maximum objectivity. While it might be difficult for an officer to have a detailed knowledge of the qualities of a Government servant two levels below him, his over-all assessment of the character, performance and ability of the Government servant reported upon is vitally necessary as a built-in corrective. The judgment of the immediate superior can sometimes be too narrow and subjective to do justice to the Government servant reported upon. The Reviewing Officer should, therefore, consider it his duty to personally know and form his judgment of the work and conduct of the Government servant reported upon. He should exercise positive and independent judgment on the numerical grading given by the Reporting Officer and remarks of the Reporting Officer under the various detailed headings in the form of Report as well as on the pen picture, and express clearly his agreement or disagreement with these remarks. The Reviewing Officer is also free to make his own remarks on points not mentioned by the Reporting Officer. Such additional remarks would, in fact, be necessary where the Report of the Reporting Officers is too brief, vague or cryptic. However, the remarks of the Reviewing Officer himself should not be vague or self-contradictory to another remark given by himself in the APAR.”

9. The procedure in the said Brochure prescribes that

while assessing the performance of the Government Servants the main focus of the Reporting Officer should be developmental rather than judgmental. It further indicates that APAR should be a true indicator of the achievement of the Government servant, it should not be a mere tool to control or discipline him. Clause 2.3 clearly mentions that assessment at 2 levels ensures a greater degree of objectivity and fairness. In case where a Government servant has only one supervisory level above him, the assessment will be at the level of Reporting Officer only. Clause 2.8 in fact is safeguard where the judgment of the immediate superior when becomes too narrow and subjective to do justice to the Government servant reported upon. It is the Reviewing Officer who should therefore consider it his duty to personally know and form his judgment of the work and conduct of the Government servant reported upon. The Reviewing Officer should exercise positive and independent judgment on the numerical grading given by the Reporting Officer and remarks of the Reporting Officer under the various detailed headings in the form of Report as well as on the pen

picture, and express clearly his agreement or disagreement with these remarks. The Reviewing Officer is also free to make his own remarks on points not mentioned by the Reporting Officer. Such additional remarks would in fact be necessary where the Report of the Reporting Officer is too brief, vague or cryptic. However, the remarks of the Reviewing Officer himself should not be vague or self contradictory to another remark given by himself in the APAR.

10. The Tribunal has found that in the years 2001-02, 2002-03, Reporting Officer Shri V.R. Vijayan had graded the respondent "Very Good". In the 3rd year, the respondent's Reporting Officer Smt.Uma Mahadevan,IAS, graded him as "Very Good". We find that in all these 3 years, the Reviewing Officer was the same and for all these 3 years she has downgraded ACRs of the respondent as "Average". In the overall assessment, the Reporting Officer has regarded the respondent as calm and quiet officer willing to shoulder additional responsibilities with a sound knowledge of rules and procedures practiced in the

Government”. The Tribunal found that the Reviewing Officer has only recorded “I do not agree with the assessment of the Reporting Officer. Shri Chaturvedi did not show great interest in his work” and thereby graded him as “Average”. The Tribunal found that the reasons recorded by the Reviewing Officer falls considerably short of a plausible justification for downgrading from “Very Good” to as low as “Average”. The Reviewing Officer has written her remarks two years two months after the Reporting Officer had written his remarks. In fact these remarks have been written three months after she wrote the remarks for the subsequent year. The Tribunal has further found that the remark for the year 2003-04 have been written by the Reviewing Officer after Smt. Bhave the Reviewing Officer left the Department of Atomic Energy and was working as Managing Director of the Maharashtra State Textile Corporation. There is no date mentioned when the remarks were written.

11. Thus, the Tribunal has recorded that the Reviewing Officer for the year 2001-02 has written her remarks 2 years and

2 months after Reporting Officer has written his remarks. For the year 2002-03, remark have been written by the Reviewing Officer after a gap of 1 year and 5 months and for the year 2003-04, remarks are written after Smt.Bhave left the department of Atomic Energy. The Tribunal has found that notwithstanding the ambiguity of date of writing of remarks by the Reviewing Officer the remarks still show that the Reviewing Officer has not taken pains to record detailed reasons for downgrading ACRs of the respondent from 'Very Good' to 'Average' (2 levels below). In fact the OM dated 23/09/1985 has prescribed the time schedule for preparation of the confidential report. The Reviewing Officer has far exceeded this time schedule. Having gone through the reasoning of the Tribunal, we do not find that the conclusion reached by the Tribunal about the adverse remarks and below-benchmark grading recorded by the Reviewing Officer after inordinate and unexplained delay is in any manner perverse or unwarranted. Reliance on these gradings of the Reviewing Officer by the petitioners for denial of promotion to the respondent is

therefore unjustified.

12. There is no dispute that entries for years 2001-2002, 2002-03, 2003-04 are communicated to the respondent after a gap of 6 to 8 years. The petitioners have relied upon the office note dated 22/06/2010 justifying the decision to communicate these adverse remarks after such inordinate delay. The Apex Court in the case of **Sukhdev Singh Vs. Union of India and ors. Reported in (2013) 9 Supreme Court Cases 566** relying on the case of **Dev Dutt Vs. Union of India (2008)8 SCC 725** has held that the view taken in **Dev Dutt (supra)** that every entry in ACR of a public servant must be communicated to him/her within a reasonable period is legally sound and helps in achieving threefold objectives. First, the communication of every entry in the ACR to a public servant helps him/her to work harder and achieve more that helps him in improving his work and give better results. Second and equally important on being made aware of the entry in the ACR, the public servant may feel dissatisfied with the same. Communication of the entry enables him/her to make representation for up-gradation of the remarks

entered in the ACR. Third, communication of every entry in the ACR brings transparency in recording the remarks relating to a public servant and the system functions more in conformity with the principles of natural justice. Accordingly, it must be held that every entry in ACR – poor, fair, average, good or very good must be communicated to him/her within a reasonable period.

13. Having regard to the law laid down by the Apex Court we find that the view of the Tribunal that in the present case non-communication of below-benchmark gradings to the respondent in time as per rules stands out to be a fatal error leading to denial of promotion to him in the DPC held on 22/09/2009 for the select list of 2006 is not at all unreasonable.

14. In this view of the matter, we do not find any reason to interfere with the view taken by the Tribunal. The order passed by the Tribunal is a well reasoned order which does not warrant any interference in exercise of our writ jurisdiction under Article 226 of the Constitution of India. Writ Petition is dismissed with no order as to costs.

(M.S.KARNIK, J.)

(ACTING CHIEF JUSTICE)

15. After pronouncement of the judgment, learned Counsel for the petitioners prays for stay of the operation of this order. Request for stay is rejected.

(M.S.KARNIK, J.)

(ACTING CHIEF JUSTICE)