

IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM, NAGALAND, MEGHALAYA, MANIPUR,
TRIPURA, MIZORAM AND ARUNACHAL PRADESH)

ITANAGAR BENCH

WRIT PETITION (C) NO.78 (AP) OF 2010

Shri Taye Jerum,
S/o Late Taru Jerum,
Permanent resident of
Pissa Village,
P.O. Daporijo,
Dist. Upper Subansiri,
Arunachal Pradesh,

Presently residing at
'E' Sector, Naharlagun,
P.O. Naharlagun,
Dist. Papum Pare,
Arunachal Pradesh.

PETITIONER

-Vs-

1) The State of Arunachal Pradesh

(Represented through the Chief
Secretary-cum-Chairman, DPC),
Govt. of Arunachal Pradesh,
Itanagar.

2) The Commissioner,

(Legal Metrology & Consumer Affairs),
Govt. of Arunachal Pradesh,
Itanagar.

3) The Controller, Department of Legal

Metrology & Consumer Affairs,
Govt. of Arunachal Pradesh,
Naharlagun.

4) **The (DPC) Departmental Promotion Committee**, Represented through the Chairman, Govt. of Arunachal Pradesh, P.O. Itanagar.

5) **Shri Gorik Dirchi**, Deputy Controller of Legal Metrology & Consumer Affairs, Govt. of Arunachal Pradesh, Itanagar.

RESPONDENTS

P R E S E N T

HON'BLE MR. JUSTICE A.C. UPADHYAY

For the petitioner- Mr. T. Son,
Mr. A. Kebe,
Mr. D. Maiden, Advocates

For the respondents - Mr. R.P. Sarmah, Sr. Adv.
Mr. Kento Jini,
Mr. N. Nyorak,
Mr. D. Kamdak,
Mr. Tamar Gadi, Advocates

Date of hearing - 14.11.2011

Date of delivery of
Judgment and order- 25.01.2012

JUDGMENT AND ORDER (CAV)

Heard Mr. T. Son, learned counsel appearing for the petitioner and Ms G. Deka, learned counsel representing the State respondents, and Mr. R.P. Sarmah, learned senior counsel assisted by

Mr. K. Jini, learned counsel appearing on behalf of the private Respondent No.5.

2. By filing this writ petition, the petitioner has challenged the legality and validity of the order passed by the review Departmental Promotion Committee, in terms of the direction of the Division Bench of this Court in Writ Appeal No.35(AP)/2008.

3. It would be apposite to detail here-in-below the sequence of events leading to filing of this writ petition.

The writ petitioner filed WP(C) No.350(AP)/2007, challenging the promotion order dated 3.9.2007, issued by the State respondent, by which the private respondent No.5 i.e. Shri Gorik Dirchi, Deputy Controller of Legal Metrology & Consumer Affairs, was promoted to the post of Controller of the said department. The petitioner's grievance in the writ petition was that, despite he being senior to the private respondent no.5 in service, was illegally and unjustifiably deprived of promotion to the post of Controller of Legal Metrology and Consumer Affairs . The petitioner challenged the procedure adopted in recording the remarks in Annual Confidential Reports (ACR) of the officers, in his department of Civil Supplies & Consumer Affairs.

4. It was pointed out by the learned counsel for petitioner that in terms of the procedure adopted for recording the Annual Confidential Reports of the officers in the Department of Civil Supplies and Consumer Affairs, notified by the State Government on

4.8.2000, the reporting authority is the Controller of the said department and the reviewing authority is the Commissioner & Secretary of the department, whereas the accepting authority is the Chief Secretary to the Government of Arunachal Pradesh. The petitioner alleged that in case of the private respondent No.5, the Minister of the concerned department acted as the accepting authority, which was in violation of the procedure prescribed. Therefore, the petitioner prayed for quashing the promotion order of the private respondent to the post of Controller in the department of Legal Metrology and Consumer Affairs, made on the basis of the said illegal and irregular reporting of the ACR of Respondent No.5.

5. On conclusion of the hearing of the writ petition, WP(C) No.350(AP)/2007, the learned Single Judge considered the matter in detail and after due discussion held that the writ petition is devoid of merit and accordingly, dismissed the writ petition. The writ petitioner carried the order passed by the learned Single Judge on appeal by filing Writ Appeal No.35(AP)/2008.

6. On conclusion of the hearing, the Division Bench of this High Court directed the State respondents to get the remarks recorded in the Annual Confidential Reports of the relevant years, for petitioner and private respondent No.5 from the competent authority, in terms of the guidelines, within a period of two months, from the date of judgment and thereafter, to re-consider the entire matter by holding a review Departmental Promotion Committee (DPC).

7. Pursuant to the direction of Hon'ble Division Bench dated 28.8.2009 in Writ Appeal No.35(AP) of 2008 a review DPC meeting was held in the office chamber of Chief Secretary, Govt. of Arunachal Pradesh, Itanagar to reconsider the promotion case of Officers of Deputy Controller grade to the post of Controller (L.M& CA) . The review DPC noticed that both petitioner and respondent No.5 joined as Deputy Controller, LM & CA on the same date i.e.28.01.2002 and respondent No. 5 has got four outstanding ACRs and one very good ACR, whereas the petitioner has got four very good ACR and one good ACR pertaining to year 2004-07.

8. It would be pertinent to depict herein below the resolution adopted in the review DPC held on 21.12.2009 in terms of the direction issued in WA No.35(AP)/2008, which reads as follows:

"MINUTES OF THE DPC MEETING HELD ON 21.12.2009 AT 3.30 PM IN THE OFFICE CHAMBER OF THE CHIEF SECRETARY TO CONSIDER PROMOTION TO THE POST OF CONTROLLER OF LEGAL METROLOGY & CONSUMER AFFAIRS.

Pursuant to the direction of Hon'ble Division Bench dated 28.8.2009 in Writ Appeal No.35(AP) of 2008 Shri Tayi Jeram versus the State of Arunachal Pradesh & Others, a DPC meeting was held in the office chamber of Chief Secretary, Govt. of Arunachal Pradesh, Itanagar to reconsider the promotion case of Officers of Deputy Controller grade to the post of Controller

(L.M& CA), attended by the following DPC members.

- 1. Shri Tabom Bam, IAS Chairman/
Chief Secretary**
- 2. Shri Y.D. Thongchi, IAS Member
Commissioner (LM&CA)**
- 3. Shri A.B. Shukia, IAS Member
Secretary (Personnel).**

The DPC was informed that it was a review DPC as per orders of Hon'ble High Court. The earlier DPC held on 04.07.2007.

The Administrative Department informed that on the recommendation of the DPC meeting held on 4th July, 2007 Shri Gorik Dirchi, Dy. Controller was promoted to the post of Controller (L.M& C.A) vide Order No.SCA.12/2001 dated 3rd September, 2007. Shri Tayi Jeram, Dy. Controller challenged the afore said promotion order of Shri Gorik Dirchi through WP(C) No.350(AP)2007 : Tayi Jeram vs. State of Arunachal Pradesh & Others. The Hon'ble Judge vide Judgment dated 22.7.2008 dismissed the said Writ Petition. Aggrieved by dismissal of his Writ Petition, the Writ Petitioner, Shri Tayi Jeram preferred appeal before the Hon'ble Division Bench through Writ Appeal No.35(AP) of 2008. The Hon'ble Division Bench vide its judgment dated 28.8.2009 has directed the State respondents to get the ACRs of the Officers concerned including the appellant Shri Tayi Jeram and respondent No.4, Shri Gorik Dirchi completed by obtaining afresh remarks from the competent Accepting Authority and thereafter, place the cases of the Officers concerned for re-consideration of the DPC.

As per directions of the Hon'ble High Court the ACRs of concerned officers were got completed by obtaining afresh remarks from the competent Accepting Authority.

The DPC considered the vigilance clearance, ACR s ands other relevant documents regarding promotion to the post

of the Controller LM & CA. It has been noticed that both Shri Jeram and Shri Dirchi joined as Deputy Controller, LM & CA on the same date i.e.28.01.2002 and Shri Dirchi has got four outstanding ACRs and one very good ACR whereas Shri Jeram has got four very good ACR and one good ACR pertaining to year 2004-07.

The DPC has also noted that as per the DPC guidelines for considering the promotion cases the officers are to be graded as outstanding, very good, good and average. Thus officers graded as outstanding are to be placed ahead of officer s graded as very good.

Therefore, the DPC recommends promotion of Shri Gorik Dirchi to the post of Controller (LM & CA) in the pay scale of Rs.12,000-16,500/- (pre-revised) w.e.f. 03.09.2007."

9. By filing this writ petition, the petitioner has challenged the resolution aforesaid of the 'review Departmental Promotion Committee', which was held on 21.12.2009. It has been stated by the writ petitioner that the impugned resolution was taken without obtaining fresh remarks on the Annual Confidential Report from the competent authority. Such as, reporting authority, reviewing authority and accepting authority and their complementary views were not obtained, for recommending the name of the private respondent, for promotion to the post of Controller, Legal Metrology & Consumer Affairs and thereby the petitioner was superseded by appointing the private respondent in the said post.

10. The petitioner also contended that the Departmental Promotion Committee adopted same and similar techniques, applied in the last Departmental Promotion Committee. It has been pointed

out on behalf of the petitioner that the respondent authority graded the private respondent as 'Outstanding' for the years 2003-2004, 2004-2005, 2005-2006, 2006-2007, in his Annual Confidential Reports, but there is complete break in case of the private respondent and the Departmental Promotion Committee, did not consider the missing entry of one year, in respect of the private respondent, while considering his promotion to the post of Controller, Legal Metrology and Consumer Affairs. It has been stated on behalf of the petitioner that there having been complete shortfall of one year in the Annual Confidential Reports for 5 years of the private respondent w.e.f. 2002-2003, 2003-2004, 2004-2005, 2005-2006 and 2006-2007 respectively, the recommendation for his promotion by the review DPC, is illegal.

11. Learned counsel for the petitioner submitted that the comparative assessment of the Annual Confidential Reports of the petitioner and the private respondent between the entire period of 2002-2003, 2003-2004, 2004-2005, 2005-2006 and 2006-2007, clearly reveal that the benchmark of grading given by the reviewing authority in the case of the private Respondent No.5 has been marked as 'Nil' on 3 occasions and 'Fit' in one occasion, and the accepting authority did not overrule the remarks of the reviewing authority as 'Nil' on 3 occasions and 'Fit' on one occasion. Therefore, in the absence of complimentary, bench mark of the grading from the two authorities in respect of 'Outstanding'/'Excellent' grading given by the reporting authority is not tenable in the eye of law.

12. In reply to the above, the State respondents stated in their affidavit that during the period 2002-2003, ACRs of both the private respondent and the petitioner were not recorded since the Controller, Mr. D. Chattacharjee retired on 31st of March, 2003. It is stated on behalf of the respondent that the petitioner, however, managed to obtain his ACR for the year 2002-2003 from some unauthorized person. However, the authority concerned considered the ACRs for the petitioner as well as the respondent from March 31st, 2003 onwards up to 2007, for 5 years from March 31st, 2003 up to 2007.

13. It is not disputed that with regard to the benchmark for promotion, the State of Arunachal Pradesh has adopted the guidelines issued by the Central Government, wherein the procedure to be adopted by the Departmental Promotion Committee in selection for promotion of each officer to higher grade has been provided. As pointed out by the learned counsel for the petitioner, the Central Government issued the office memorandum vide F.No.35034/7/97-Estt(D) dated 8th February, 2002. The relevant extract of the guidelines, reads as follows:-

...“3.2 ‘Benchmark’ for promotion

The DPC shall determine the merit of those being assessed for promotion with reference to the prescribed bench-mark and accordingly, grade the officers as ‘fit’ Or ‘unfit’ only. Only those who are graded ‘fit’ (i.e. who meet the prescribed bench-mark) by the DPC shall be included and arranged in the select panel in order to their inter-se-seniority in the feeder grade. Those officers who are graded unfit’ (in terms of the prescribed bench-mark) by the DPC shall not be included in

the select panel. Thus, there shall be no supercession in promotion among those who are graded 'fit' (in terms of the prescribed benchmark) by the DPC.

3.2.1. Although among those who meet the prescribed bench-mark, inter-se-seniority of the feeder grade shall remain intact, eligibility for promotion will no doubt be subject to fulfillment of all the conditions laid down in the relevant Recruitment/Service Rules, including the conditions that one should be the holder of the relevant feeder post on regular basis and that he should have rendered the prescribed eligibility service in the feeder post.

3.3 Promotion to the revised pay-scale (grade) of Rs.12,000 – 16,500 and above.

(i) The mode of promotion, as indicated in paragraph 3.1 above, shall be 'selection'.

(ii) The bench-mark for promotion, as it is now, shall continue to be 'very good'. This will ensure element of higher selectivity in comparison to selection promotions to the grades lower than the aforesaid level where the bench-mark, as included in the following paragraphs, shall be 'good' only.

(iii) The DPC shall for promotions to said pay-scale (grade) and above, grade officers as 'fit' or 'unfit' only with reference to the bench-mark of 'very good'. Only those who are graded as 'fit' shall be included in the select panel prepared by the DPC in order of their inter-se-seniority in the feeder grade. Thus, as already explained in paragraph 3.2 above, there shall be no supercession in promotion among those who are found 'fit' by the DPC in terms of the aforesaid prescribed bench-mark of 'very good'."

14. It is not disputed that the Government of India vide Office Memorandum F. No.35034/7/97-Estt(D) dated 8th February,

2002, issued by the Ministry of Personnel, Public Grievance & Pensions, Department of Personnel and Training, specified and indicated the procedure to be observed by the Departmental Promotion Committee (DPC). The said Guidelines have been adopted by the Government of Arunachal Pradesh .

15. In terms of the existing procedure, apparently, the benchmark prescribed is 'Very Good' for promotion to the scale range of Rs.12,000- Rs.16500/- (pre-revised) to which the petitioner and the private respondent belonged. The DPC, apparently, followed the applicable procedure in terms of the above guidelines, since pay scale of the promotional post of the Controller, Legal Metrology, is Rs.12000/- to Rs.16500/-.

16. Learned counsel for the petitioner submitted that the DPC has totally failed to consider the Confidential Reports, of the candidates, for equal number of years, in respect of all affairs, while considering promotion and suitability of the candidates, on the basis of their service records, with particular reference to the Confidential Reports for 5 (five) preceding years.

17. It has been further contended on behalf of the petitioner that that the grading awarded by the Reporting Authority in favour of the Private Respondent No.5 are highly exaggerated, completely detached from the performance and the comparative assessment made by the DPC held on 4.7.2007 and the Minutes of the DPC

meeting held on 21.12.2009 makes no difference and taken the same views and stand by the Members of the DPC.

18. The basic contention of the petitioner is the Departmental Promotion Committee, while evaluating and assessing the merit of the respective candidates entered in the ACRs, did not properly examine and verify about the grading , reported by the Reporting Authority. Learned counsel for the petitioner pointed out that the Reporting Authority should have informed the petitioner in black and white, to improve his performances in future, but there is no such notice from the Respondent authorities, for improvement of the quality of works. Further, it is submitted that the private Respondent No.5 was given promotion to the post of Deputy Controller of Legal Metrology and Consumer Affairs only after relaxation of the minimum length of qualifying service by 11 (eleven) months from the post of Assistant Controller of Legal Metrology and Consumer Affairs by the Governor of Arunachal Pradesh, vide Order No.SCA.5/01, dated Itanagar, the 10th August, 2001, issued by the Commissioner (CS & CA), Govt. of Arunachal Pradesh, Itanagar. On this count, the private Respondent No.5 was not eligible to hold the post of Controller of Legal Metrology and Consumer Affairs being the junior-most officer in comparison to the petitioner, who happened to be the senior most officer of the department. It is submitted that the petitioner deserves to be given due weightage as per the laid down Recruitment Rules, 2001, to the post of Controller of Legal Metrology and Consumer Affairs.

19. It has been stated that the petitioner maintained an unblemished service career and at no point of time the petitioner was

ever communicated any adverse remarks. Therefore, the petitioner ought to have been selected to the post of Controller of Legal Metrology and Consumer Affairs, in terms of the Recruitment Rules, 2001. Learned counsel for the petitioner submitted that in terms of Revised Guidelines issued by the Government of India and adopted by the State of Arunachal Pradesh, the selection-cum-seniority cannot be deprived merely on 'outstanding' performances reported by the Reporting Authority in favour of the private Respondent No.5, which had been highly exaggerated, without having any tangible performances, and in view of that matter, the petitioner ought to have been selected/recommended by the review DPC to the post of Controller (LM & CA), in place of the private Respondent No.5.

20. From the entire sequences of events as well as documents available on records as narrated above and annexed in this writ petition, it is apparent that the private Respondent No.5 has been given grading of 'very good' and 'outstanding' remarks in the ACR of the relevant period, whereas the petitioner did not even secure the required grading in the ACR for consideration of his case for promotion to the post Controller, Legal Metrology and Consumer Affairs..

21. Mr. RP Sarma, learned senior counsel appearing on behalf of the Respondent No.5 vehemently submitted that there is no scope to re-agitate all those issues which have been already decided by this Court in earlier round of litigations. Learned senior counsel pointed out that review DPC, which was held in terms of the direction in W.A. No. 35(AP)/2008, cannot be interpreted to expand the area of litigation for the petitioner and more so the petitioner is not

expected to add a few grounds, which were left out during earlier round of litigation. According to the learned counsel for the respondents it would not be justified to re-examine every issue discussed and decided earlier, once again except what has been directed by the Division Bench in its order dated 28.8.2009, passed in WA No. 35(AP)/2008.

Learned senior counsel further pointed out that the petitioner was not qualified to be considered for promotion, since he did not possess necessary grading in ACR and requisite qualification for consideration of his case for promotion. Learned counsel for the petitioner submitted that the Writ Court cannot exceed its jurisdiction and act like an appellate court, while considering the assessment made by the DPC. Learned counsel for the respondent submitted that the petitioner challenged the accepting remarks recorded by the Minister of the department, in the ACR of the respondent no .5, instead by the Chief Secretary. The Division Bench in **W.A. No.38(AP)/2008** directed to rectify the error by obtaining fresh remarks from the competent accepting authority. The petitioner had not challenged adverse entry made in his ACR, neither did he submit any representation against the adverse entry in the ACR, in the earlier round of litigation rather he challenged the promotion order of the respondent. Therefore, it has been submitted on behalf of the private respondent that in the 2nd round of litigation, the petitioner cannot re-agitate those points, which were not raised in the 1st round of litigation.

As per the basic principles of resjudicata and/or constructive res-judicata, any matter which might and ought to have been made ground of defence or attack in the former proceeding, shall be deemed to have been a matter directly and substantially in

issue in the latter proceeding. Apparently, in the first proceeding the petitioner effectively dealt with the issues so as to question the very jurisdiction of the DPC and the promotion order issued by the respondent. On the issues raised in the writ petitioner, the writ appellate court directed holding of review DPC. Review DPC was held in terms of the direction issued by the Division Bench in WA 35(AP) /08. Review DPC went against the petitioner, thus having failed to succeed, petitioner resorted to the second writ petition pertaining to the review DPC, held in terms of the direction issued by the Division Bench. Now some new grounds have been introduced by the petitioner on same set of issues, which were not raised by the petitioner on the same set of facts on the earlier occasion .

22. It has been rightly pointed out that admittedly there was no ACR for the year 2002-03 of the petitioner as well as the private Respondent No.5, since the officer, who had gone on retirement had not written the annual confidential report. However, this will not debar the Departmental Promotion Committee to take the annual confidential report of the previous years, even if it being of lower post, for covering the requisite number of years as prescribed in the Recruitment Rules. This discretion is solely with the Departmental Promotion Committee, which is not disputed. However, the direction issued by the Division Bench in WA **No.38(AP)/2008**, did not indicate anything relating to shortage of one year in considering the ACR and on the top of it this point was not agitated by the petitioner before

the appellate forum. Therefore there is no reason for a writ court to examine such issues like an appellate body unless illegality or patent material irregularity is shown.

23. It has been pointed out on behalf of the State respondent that the annual confidential report for the year 2003-04-05 in respect of the petitioner was written by officers, who were holding the post of Deputy Commissioner and as such they were not competent to write annual confidential report in terms of the Govt. Order No. LM-16-2000 dated 4.8.2000. Besides, in one of the annual confidential reports, the petitioner was graded as 'Good', which is far below the benchmark for promotion to the post of Controller, Legal Metrology, in the scale of pay of Rs.12000-16500/- per month. Apparently, in terms of the guidelines and notifications adopted by the State of Arunachal Pradesh, for promotion of officers in the pay scale of Rs.12000/- to Rs.16500/-, the benchmark prescribed is 'Very Good'.

24. It has been further pointed out on behalf of the State respondents that though the petitioner was in Serial No.1 in the *inter se* seniority list, but in fact he would not qualify for the post of Controller, Legal Metrology till June, 2004, since the petitioner managed to acquire required educational qualification i.e. Graduation Degree only in the month of June, 2004. Therefore, the petitioner would be qualified for consideration of his case for promotion to the post of Controller, Legal Metrology only in the month of January, 2010, as per provisions of the Recruitment Rules for the post of Controller, Legal Metrology and Consumer Affairs, 2001.

25. Rules governing the promotion for the post of Controller, Legal Metrology and Consumer Affairs provides that the benchmark prescribed for promotion in the scale range of Rs.12000-16500/- per month (pre-revised) is 'Very Good'. Admittedly, the petitioner did not have benchmark for promotion in terms of the guidelines governing the field.

26. The Department is required to place the names of the officers, who come under the zone of consideration before the DPC, for consideration. But, in the instant case, apparently, the department had placed the names of person, who did not come under the zone of consideration for promotion to the post of Controller (LM&CA). In fact, apparently the petitioner was not qualified for promotion to the post of Controller (LM&CA) due to the shortage of qualifying period of service prescribed in terms of the Recruitment Rules, as he acquired required educational qualification only in June, 2004. Besides, the petitioner was graded as 'Good' and three of his Annual Confidential Reports, for the period 2002-03, 2003-04 and 2004-05 had been written by incompetent authority i.e. Deputy Commissioner, which was in violation of the procedure of writing ACR, as notified by the Govt. vide order No. LM-60/2000 dated 4.8.2000.

27. As rightly pointed out on behalf of the respondents that the Recruitment Rules for the post of Controller, Legal Metrology and Consumer Affairs, provides 5 years qualify service in the grade of Deputy Controller, with minimum qualification (Degree in Arts/Sc./Com. or Engineering from a recognized University). Apparently, as the petitioner admittedly got his Degree only in the

year, 2004, in the course of his employment, the petitioner had no requisite qualification for the period of 5 years, as required under the Rules for being considered for promotion to the post of Controller, Legal Metrology. Since the petitioner had no requisite qualification and he was not qualified due to shortage of qualifying period of service prescribed in the Recruitment Rules, he could not have been considered for promotion. Moreover, the petitioner was graded as 'Good' in the annual confidential report for the year, which is far below the 'benchmark' prescribed for consideration for promotion to the post of Controller, Legal Metrology and Consumer Affairs.

28 . In ***Dalpat Abasaheb Solunke v. B.S. Mahajan, (1990) 1 SCC 305***, the Apex Court discouraged the High Courts against sitting as appellate Court over the decision of the departmental selection committee, in the following words:

"It is needless to emphasise that it is not the function of the court to hear appeals over the decisions of the Selection Committees and to scrutinize the relative merits of the candidates. Whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject. The court has no such expertise. The decision of the Selection Committee can be interfered with only on limited grounds, such as illegality or patent material irregularity in the constitution of the Committee or its procedure vitiating the selection, or proved mala fides affecting the selection etc.

29. . In the case of ***Y. Chaoba Singh -vs- State of Manipur, and Ors.*** reported in **1998 (4) GLT 312** this Court approvingly referred to the decision of the apex Court rendered in ***Dalpat Abasaheb solunke (supra), Dr. B. S. Mahajan (supra)*** .

30. In the case of ***Pongrem Arangham –vs- State of Arunachal Pradesh and ors*** reported in ***2010 (1) GLT 311***, a Single Bench of this Court observed as follows:

"(14) Having gone through the provisions of 1999 Rules, I find that the DPC, while considering the promotion to the post of DDI, followed the procedures prescribed in the Rules and recommended in favour of the private respondent No. 4 after considering the merit and seniority of the candidates. The petitioner has not been able to substantiate his contention that the DPC recommended the respondent's case for promotion without following the provision of the Rules. Unless it is established that the DPC has committed material irregularity or illegality in following the provisions of law in recommending promotion in favour of a particular candidate, there is no scope for the writ Court to interfere with the recommendation made by the DPC.

31. By referring to a decision in ***Union of India and another –vs- AK Narula*** reported in ***(2007) 11 SCC 10***, the learned counsel for the petitioner submitted that certain amount of flexibility is available to the DPC to consider the case of the petitioner. The relevant extract of the decision reads as follows:

"15. The guidelines give a certain amount of play in the joints to DPC by providing that it need not be guided by the overall grading recorded in CRs, but may make its own assessment on the basis of the entries in CRs. DPC is required to make an overall assessment of the performance of each candidate separately, but by adopting the same standards, yardsticks and norms. It is

only when the process of assessment is vitiated either on the ground of bias, mala fides or arbitrariness, that the selection calls for interference. Where DPC has proceeded in a fair, impartial and reasonable manner, by applying the same yardstick and norms to all candidates and there is no arbitrariness in the process of assessment by DPC, the court will not interfere (vide SBI v. Mohd. Mynuddin¹, UPSC v. Hiranyalal Dev² and Badrinath v. Govt. of T.N.³). The Review DPC reconsidered the matter and has given detailed reasons as to why the case of the respondent was not similar to that of R.S. Virk. If in those circumstances, the Review DPC decided not to change the grading of the respondent for the period 1-4-1987 to 31-3-1988 from "good" to "very good", the overall grading of the respondent continued to remain as "good". There was no question of moving him from the block of officers with the overall rating of "good" to the block of officers with the overall rating of "very good" and promoting him with reference to DPC dated 13-6-1990. In the absence of any allegation of mala fide or bias against DPC and in the absence of any arbitrariness in the manner in which assessment has been made, the High Court was not justified in directing that the benefit of upgrading be given to the respondent, as was done in the case of R.S. Virk."

32. Learned counsel for the petitioner raised the point that the 'good' ACR remark, in one year, which stood as stumbling block for his promotion ought to have been communicated in terms of the

decision rendered in *Dev Dutt v. Union of India*, reported in **(2008) 8 SCC 725**, wherein the Apex Court held as follows:

"9. In the present case the benchmark (i.e. the essential requirement) laid down by the authorities for promotion to the post of Superintending Engineer was that the candidate should have "very good" entry for the last five years. Thus in this situation the "good" entry in fact is an adverse entry because it eliminates the candidate from being considered for promotion. Thus, nomenclature is not relevant, it is the effect which the entry is having which determines whether it is an adverse entry or not. It is thus the rigours of the entry which is important, not the phraseology. The grant of a "good" entry is of no satisfaction to the incumbent if it in fact makes him ineligible for promotion or has an adverse effect on his chances.

10. Hence, in our opinion, the "good" entry should have been communicated to the appellant so as to enable him to make a representation praying that the said entry for the year 1993-1994 should be upgraded from "good" to "very good". Of course, after considering such a representation it was open to the authority concerned to reject the representation and confirm the "good" entry (though of course in a fair manner), but at least an opportunity of making such a representation should have been given to the appellant, and that would only have been possible had the appellant been communicated the "good" entry, which was not done in this case. Hence, we are of the opinion that the non-communication of the "good" entry was arbitrary and hence illegal,

and the decisions relied upon by the learned counsel for the respondent are distinguishable.”

33. Apparently, neither the aforesaid issue of non-communication of ACR was raised in the earlier round of litigation, nor there was any direction by the appellate court in WA No.38(A)/2008, to consider the issue relating to non-communication of the ACR of the petitioner. That apart, the petitioner also did not qualify to be considered for promotion on more counts - i.e. the petitioner did not have requisite qualifying period service, since he did not have a graduate Degree, in terms of the Recruitment Rules, until 2004.

34. On careful perusal of the resolution adopted by the review DPC, it appears that the ACRs of the concerned officers were completed by obtaining fresh remarks from the competent authority, thereafter, the review DPC considered all those aspects, which are necessary for consideration of the promotion of the petitioner, as well as the private respondents, in accordance with law and in terms of the direction issued by the Division Bench of this Court in W.A. No.35(AP)/2008. This Court finds that the review DPC, while considering the promotion to the post of Controller, followed the procedures prescribed in the Rules and recommended in favour of

the private respondent No. 5 after considering the merit and seniority of the candidates. The petitioner has not been able to substantiate his contention that the review DPC recommended the respondent's case for promotion without following the provision of the Rules. Unless it is established that the review DPC has committed material irregularity or illegality in following the provisions of law in recommending promotion in favour of a particular candidate, there is no scope for this Court to interfere with the recommendation made by the review DPC.

35. Considering the entire facts and circumstances of the case, I find no merit in this writ petition warranting interference by this Court.

36. Consequently, the writ petition stands dismissed. No costs.

JUDGE

Sinha/