

Uoi Vs Krishna Mohan Dixit

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Court : Delhi

Decided On : Oct-08-2010

Judge : Mr. Pradeep Nandrajog ; Mr. Mool Chand Garg. J J.

Appeal No. : W.P.(C) 6013/2010 ; W.P.(C) 6039/2010 ; W.P.(C) 6554/2010 ;
W.P.(C) 6696/2010

Appellant : Uoi

Respondent : Krishna Mohan Dixit

Advocate for Def. : Mr.P.P.Khurana, Sr. Ms.Tamali Wad, Adv.

Advocate for Pet/Ap. : Mr.VSR Krishna, Adv.

Judgement :

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

ORDER

1. This common order shall dispose of the batch of the aforesaid writ petitions filed by Union of India, the petitioner herein aggrieved of the order passed by the Central Administrative Tribunal (hereinafter referred to as "the Tribunal") dated

22.10.2009 in O.A.Nos.2349/2009, 2377/2009, 2353/2009, the order dated 16.02.2010 in O.A.No.99/2010 and the order dated 21.08.2009 in O.A.No. 586/2009 giving directions to ignore some of the ACRs and to consider some other ACRs for the purpose of considering the case of the respondents who all are the members of Indian Revenue Service working as CIT and CCIT for further promotion by a review DPC on the ground that the ACRs in question were below bench mark "very good" and were not communicated to the respondents at the relevant time. The other reason given in some of the cases is that the adverse ACRs being three years old prior to the holding of the DPC could not be considered in view of the Memorandum dated 11.05.1990 issued by the Department of Personnel and Training (Do PT). Additionally reason to ignore the adverse ACR is that if the reporting officer and reviewing officer stands retired, there was no point in asking the respondent to make a representation.

2. The main decision has been given by the Tribunal in the case of Krishna Mohan Dixit (OA No. 586/2009) dated 21.08.2009. The said Judgment has been followed by the tribunal in other cases also.

3. The petitioners assail the decision of the tribunal inter alia, on the following grounds:-

(i) that the directions of the Learned Tribunal are not in consonance with law or for that matter the guidelines on the subject of making representations against the deemed adverse remarks in the ACR of an officer. It is submitted that the Tribunal without appreciating the guidelines issued by the nodal department i.e. Department of personnel and Training allowed the application and has passed the above directions by relying upon the orders dated 05.08.2009 passed by the Tribunal in the case of Sanjay Kumar v. Union of India and Ors. wherein the Ld. Tribunal took the view that the ACR for the year 2002-03 in which a grading of good was recorded in respect of the applicant therein should not be considered ignoring ratio of the full bench decision of the Tribunal in OA No.24 of 2007 decided on 07.05.2008 in the matter of Ashok Kumar Aneja v. Union of India and Ors. wherein it has been held that ACRs with below benchmark gradings should be communicated to the officer for his representation. It is submitted that the Ld.

Tribunal has erred in not relying upon the binding precedent set by a full bench which it is bound to follow as a judicial precedent.

(ii) As a matter of fact the decisions of the Honble Supreme Court in CA No.7631 of 2002 decided on 23.05.2008 in the case of Dev Dutt v. Union of India, 2008 (8) SCC 725 had ruled that the government be directed to convey to the concerned person the ACR, which may be below the benchmark and to have representation from the concerned officer and if in consideration thereof the ACR of the officer is upgraded commensurate with the benchmark, consider his case for promotion to the higher post. In the instant case however for no apparent reason the Ld. Tribunal directed ignoring of ACRs of the respondent which are below benchmark and for consideration of the respondent's case for promotion by a review DPC by ignoring below benchmark gradings. The directions of the Ld. Tribunal are per se illegal and not proper.

(iii) That the Tribunal has totally misdirected itself in passing the impugned directions in as much as in view of the DOPT instructions relating to making of representations against the adverse remarks, the said representations would not lie to either the reporting or review officers but to a still higher officer. Under such circumstances the retirement/ superannuation of the reporting or reviewing officer has nothing to do with the consideration of the representation against the below benchmark grading.

(iv) That apart the Tribunal has also erred in concluding that the ratio of the Honble Supreme Court judgment in the case of Abhijit Ghosh Dastidar v. Union of India and Ors. (SLP No.26556/2004 decided on 22.10.2008) would apply to the facts and circumstances of the case of the respondent also. It is submitted that the petitioner in that case had already superannuated on the date when the judgment was pronounced and it is in such circumstances that the Honble Supreme Court has passed the aforesaid directions by exercising its inherent powers. In the present case the respondent are still in service and therefore to invoke the ratio of the judgment in Abhijit Ghosh Dastidar is not correct or proper.

(v) It is submitted that retirement of an officer has nothing to do with the consideration of the representations against below benchmark gradings/adverse

remarks since the said representations do not lie either to reporting or reviewing officers but lie to a higher officer over and above the aforesaid officers.

4. According to the petitioners reliance placed in case of Shri Krishna Mohan Dixit v. Union of India as also in other cases upon the Office Memorandum dated 11.05.1990 after coming into force of the judgment in the case of Dev Dutt was highly improper as the said memorandum lost its ground and is no more applicable in the facts of these cases inasmuch the procedure now laid down in Dev Dutt's case is to communicate ACRs which were below the benchmark to the respondent so as to afford an opportunity to them for making a representation if they so desire before the higher authority to consider those representation and to reappraise the same and then to put up the upgraded ACR if any before the review DPC for considering the case of the respondents for further promotion. It is submitted that despite non-availability of Reporting Officer & Reviewing Officer, it is for the Higher Authority to review the same in terms of the Office Memorandum No. 30.01.1978 G.I.,D.P.&A.R.;,O.M.No.21011/1/77-Ests. and O.M. No.51/14/60-Estt.(A), dated the 31st October, 1961). Relevant portion is reproduced below:

"23. To whom representation lies.-Representation against adverse remarks will lie to the authority immediately superior to the countersigning authority, if any, or to the reporting officer. If the immediate superior authority has already reviewed the confidential report in question and has also expressed his view either agreeing or disagreeing with the adverse remarks recorded and accepted by the countersigning authority, the representation should, in that event, lie to the next higher authority."

5. It is thus submitted that merely because the Reporting Officer/ Reviewing Officer is not available on account of their retirement, the Tribunal went wrong in holding that that those ACRs where Reporting officer/ Reviewing Officer are not available should be ignored.

6. We may observe that the Honble Supreme Court in E.P.Rayappa v. State of Tamil Nadu (1974) ILLJ172SC and Maneka Gandhi v. Union of India (1978) SCR 621 has observed that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not

be arbitrary but must be based on some rational and relevant principle which is non-discriminatory; it must not be guided by an extraneous or irrelevant consideration, because that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is protected by Article 14 and it must characterize every State action, whether it be under authority of law or in exercise of executive power without making of law. The State cannot, therefore, act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory.

7. Keeping the aforesaid principles in view, the Honble Supreme Court in the case of Dev Dutt made the following observations: "5. The stand of the respondent was that according to para 6.3(ii) of the guidelines for promotion of departmental candidates which was issued by the Government of India, Ministry of Public Grievances and Pension, vide Office Memorandum dated 10.4.1989, for promotion to all posts which are in the pay scale of Rs. 3700-5000/- and above, the benchmark grade should be 'very good' for the last five years before the D.P.C. In other words, only those candidates who had 'very good' entries in their Annual Confidential Reports (ACRs) for the last five years would be considered for promotion. The post of Superintending Engineer carries the pay scale of Rs. 3700-5000/- and since the appellant did not have 'very good' entry but only 'good' entry for the year 1993-94, he was not considered for promotion to the post of Superintending Engineer.

6. The grievance of the appellant was that he was not communicated the 'good' entry for the year 1993-94. He submitted that had he been communicated that entry he would have had an opportunity of making a representation for upgrading that entry from 'good' to 'very good', and if that representation was allowed he would have also become eligible for promotion. Hence he submits that the rules of natural justice have been violated.

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 1993-94 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.

23. In the present case, the action of the respondents in not communicating the 'good' entry for the year 1993-94 to the appellant is in our opinion arbitrary and violative of natural justice, because in substance the 'good' entry operates as an adverse entry (for the reason given above).

37. We further hold that when the entry is communicated to him the public servant should have a right to make a representation against the entry to the concerned authority, and the concerned authority must decide the representation in a fair manner and within a reasonable period. We also hold that the representation must be decided by an authority higher than the one who gave the entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar to Caesar. All this would be conducive to fairness and transparency in public administration, and would result in fairness to public servants. The State must be a model employer, and must act

fairly towards its employees. Only then would good governance be possible.

43. We are informed that the appellant has already retired from service. However, if his representation for upgradation of the 'good' entry is allowed, he may benefit in his pension and get some arrears. Hence we direct that the 'good' entry of 1993-94 be communicated to the appellant forthwith and he should be permitted to make a representation against the same praying for its upgradation. If the upgradation is allowed, the appellant should be considered forthwith for promotion as Superintending Engineer retrospectively and if he is promoted he will get the benefit of higher pension and the balance of arrears of pay along with 8% per annum interest."

8. To summarize, the Honble Supreme Court gave following directions to deal with the adverse ACRs (below bench mark ACR), relevant for consideration by a DPC to consider the incumbent for further promotion :-

(i) The un-communicated adverse ACRs (those which are below bench mark) should be communicated to him for enabling him an opportunity of making representation to assail those entries such as if the entry was Good then to get it upgraded to Very Good, the bench mark;

(ii) The representation made, if any, should then be considered by the Higher Authority who would certainly entitled to reject the representation and confirm the Good entry (though of course in a fair manner);

(iii) The authority to decide representation must be an authority higher than the one who recorded subject entry, so as to avoid the principle of appeal from ceaser to ceaser.

(iv) If the ACR is upgraded, the review DPC to be held for considering the case of the incumbent afresh for promotion for the relevant year and in case, the incumbent is found fit then to promote him forthwith with retrospective effect. Even if the person has retired when considered by the review DPC for promotion, he would be entitled to all consequential benefits.

9. Subsequently, the Honble Supreme Court also dealt with the issue in Abhijit Ghosh Dastidar's case. However, in that case except relying upon the observations made in Dev Dutt's case (supra), no new law has been laid down. The judgment has also not distinguished Dev Dutt's case (supra), yet some observations in that judgment are reproduced hereunder:-

"5. According to the appellant, the adverse entries namely "good" were not communicated. The said aspect ought not to have been considered while considering his promotion. In support of the above claim, he relied on the decision of this Court in Dev Dutt v. Union of India and Ors. :(2008) 8 SCC 725 .

6. Pursuant to the direction of the CAT, Patna Bench on 09.09.2002 review of D.P.C. was held and the appellant was not found suitable for promotion. In March, 2003, there was a regular D.P.C. and the appellant was found fit for promotion with the same entries and accordingly promoted to Higher Administrative Grade Group-A and later retired from service.

8. Coming to the second aspect, that though the benchmark "very good" is required for being considered for promotion admittedly the entry of "good" was not communicated to the appellant. The entry of 'good' should have been communicated to him as he was having "very good" in the previous year. In those circumstances, in our opinion, non-communication of entries in the ACR of a public servant whether he is in civil, judicial, police or any other service (other than the armed forces), it has civil consequences because it may affect his chances for promotion or get other benefits. Hence, such non- communication would be arbitrary and as such violative of Article 14 of the Constitution. The same view has been reiterated in the above referred decision relied on by the appellant. Therefore, the entries "good" if at all granted to the appellant, the same should not have been taken into consideration for being considered for promotion to the higher grade. The respondent has no case that the appellant had ever been informed of the nature of the grading given to him.

9. Learned Counsel appearing for the appellant has pointed out that the officer who was immediately junior in service to the appellant was given promotion on 28.08.2000. Therefore, the appellant also be deemed to have been given

promotion from 28.08.2000.

10. Since the appellant had retired from service, we make it clear that he is not entitled to any pay or allowances for the period for which he had not worked in the Higher Administrative Grade Group-A, but his retrospective promotion from 28.08.2000 shall be considered for the benefit of re-fixation of his pension and other retrial benefits as per rules."

10. In view of the aforesaid decision it can simply be observed that the Honble Supreme Court while reiterating the view taken by it in DevDutt's case (supra), in the peculiar facts of the case where the incumbent stood superannuated took a view that in that particular case there was no necessity to call for a representation from the incumbent with respect to adverse ACRs and just to treat him as promoted as his juniors have also been promoted and he was promoted even regularly by a subsequent DPC of course without any pay or allowances for the period for which he had not worked in the higher administrative grade. Considering the law laid down by the Honble Supreme Court itself, suffice would it be to state that such observations cannot be considered as a binding precedent and would have to be taken as observations made in the peculiar facts of the case.

11. Reliance is placed upon the judgment of the Supreme Court in the case of State of U.P. & Anr. v. Synthetics and Chemicals Ltd. and Anr. (1991) 4 SCC 139. The relevant observations are in para 41 of the order which reads as under:-

"41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English Courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. A decision passed sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind' (Salmond 12th Edition). In Lancaster Motor Company {London} Ltd. v. Bremith Ltd. 1941 1KB 675, the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in Municipal Corporation of

Delhi v. Gurnam Kaur AIR 1989 SC38 . The Bench held that, 'precedents sub-silentio and without argument are of no moment'. The Courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141 Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decedendi. In Shama Rao v. State of Pondicherry AIR 1967 SC 1680 it was observed, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down there-in'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."

12. We are conscious of the fact that dismissing certain writ petitions in limine, this Bench had upheld orders passed by the Tribunal where in the absence of the Reporting Authority/ Reviewing Authority, following Abhijit Ghosh Dastidar's case directions were issued by the Tribunal to altogether ignore the below benchmark ACRs and consider the further preceding year ACR which were up to the benchmark. But we must confess that nobody drew our attention to paragraph 37 of the decision in Dev Dutt's case as also to the O.M. dated 30.01.1978, relevant extract whereof has been noted in para 4 above. The said decisions are dismissals in limine without reasons and hence are not binding precedents. Abhijit Ghosh Dastidar's case, as noted by us hereinabove follows the law laid down in Dev Dutt's case, but makes a departure with respect to the final direction issued for the reason the Supreme Court found that Abhijit Ghosh Dastidar had superannuated and it was in said context the Supreme Court did not direct further follow up action as per the law laid down by the Supreme Court in Dev Dutt's case. It is apparent that the direction in Abhijit Ghosh Dastidar's case has to be traced through the power of the Supreme Court under Article 142 of the Constitution of India.

13. Now coming to the Office Memorandum dated 11.05.1990 issued by the DOPT we find that it reads as under:- "12.1 :Where the DPC find that the adverse remarks in the confidential Report of an officer have not been communicated to him but the adverse remarks are of sufficient gravity to influence their assessment of the officer concerned, then the Committee shall defer consideration of the case of the officer, provided these remarks have been recorded in any of the CRs pertaining to three years immediately preceding years prior to the year in which DPC is held and direct the cadre controlling authority to communicate the adverse remarks to the officer concerned so that he may have an opportunity to make a representation against the same. Where the un- communicated adverse remarks pertain to a period earlier than the above or where the remarks are not considered of sufficient gravity to influence the assessment of the officer concerned, the DPC may ignore the remarks while making the assessment. (emphasis added). (Source: Swamys complete Manual on Establishment and Administration, Tenth Edition, 2006, pages 283-284)"

14. Neither in Dev Dutt's case nor in Abhijit Ghosh Dastidar's case there was any mention about the Office Memorandum dated 11.05.1990 issued by the Do PT, yet the Tribunal has passed the following directions in the case of Krishna Mohan Dixit in OA No.586/2009 on the basis of the aforesaid memorandum:- "In the light of above discussion the OA succeeds. The respondents are directed to hold review DPC for considering the applicant for promotion to the post of CIT by ignoring the ACRs for the period 2003-04 and 2004-05 and considering the ACRs for the period preceding the year 2001-02. The DPC shall ignore any ACR before the year 2001-02, which has similarly un-communicated adverse entry, which is a grading below the prescribed benchmark. The review DPC should be convened within four months of the receipt of a certified copy of this order. No costs."

15. Similar directions have been given in other connected matters as is apparent by the following Chart reproduced hereunder:- WP OA ACR'S Tribunal's (C) No. Observation 6013/ 586/ Year Repor Revie Gradin Hold Review 2010 2009 ting wing g by DPC officer officer DPC Ignore ACR for 2002- Very Very Very year 2003-04 03 good good good and 2004-05 2003- Good Good Good Ignore any un- 04 communicated 2004- Good Good Good ACR preceding 05 to 2001-02 2005-

Outsta Very Very 06 nding good good 2001- Outsta Outsta Very 02 (in nding nding good lieu of 2006- 6039/ 2349/ Year Remarks not Ignore below 2010 2009 communicate benchmark d ACRs 2003-2004 Good Take into 2006-2007 Good consideration two ACRs immediately preceding the said ACRS If previous ACR not available then take into consideration the only ACR available before the ACR in question. 6554/ 2353/ Year Remarks not Follow 2010 2009 communicat judgement of ed K.M. Dixit 2004-2005 Good Constitute 2005-2006 Good Review DPC Ignore 2 below benchmark ACRs Take into consideration two ACRs immediately preceding the said ACRS If previous ACR not available then take into consideration the only ACR available before the ACR in question 6696/ 2379/ Year Remarks not Ignore below 2010 2010 communicated benchmark 2002-2003 Good ACRs 2003-2004 Good Take into consideration two ACRs immediately preceding the said ACRS If previous ACR not available then take into consideration the only ACR available before the ACR in question 6723/ 99/ Year Remarks not Ignore ACR for 2010 2010 communicated year 2004-05 2004-2005 Good Take into consideration ACR for year of 18 2002-03 Constitute review DPC

16. A reading of the Tribunals order in Krishna Mohan Dixit case and the other cases goes to show that in all these cases, the Tribunal with respect to the Annual Confidential Reports which were adverse and which were prior to three years of the date of DPC, has directed to ignore the same (if they were below the benchmark and to go back relying upon Abhijit Ghosh Dastidar's case which as stated above was an observation in the peculiar facts of that case and does not lay down any binding precedent.

17. Shri VSR Krishna has also submitted that after the Judgments as cited above the nodal ministry has issued the Office Memorandum dated 13.04.2010 which holds the field today. It reads as under: "OFFICE MEMORANDUM

Subject: Below Benchmark gradings in ACRs prior to the reporting period 2008-09 and objective consideration of representation by the competent authority against remarks in the APAR or for upgradation of the final grading. The undersigned is directed to say that prior to the reporting period 2008-09, only the adverse remarks in the ACRs had to be communicated to the concerned officer for representation, if

any to be considered by the competent authority. The question of treating the grading in the ACR which is below the benchmark for next promotion has been considered in this Department and it has been decided that if any employee is to be considered for promotion in a future DPC and his ACRs prior to the period 2008-09 which would be reckonable for assessment of his fitness in such future DPCs contain final grading which are below the benchmark for his next promotion, before such ACRs are placed before the DPC, the concerned employee will be given a copy of the relevant ACR for his representation, if any, within 15 days of such communication. It may be noted that only below benchmark ACR for the period relevant to promotion need be sent. There is no need to send below benchmark ACRs of other years.

2. As per existing instructions, representations against the remarks or for upgradation of the final grading given in the APAR (previously known as ACR) should be examined by the competent authority in consultation, if necessary, with the Reporting and the Reviewing Officer, if any. While considering the representation, the competent authority decides the matter objectively in a quasi-judicial manner on the basis of material placed before it. This would imply that the competent authority shall take into account the contentions of the officer who has represented against the particular remarks/grading in the APAR and the views of the Reporting and Reviewing Officer if they are still in service on the points raised in the representation vis-a-vis the remarks/grading given by them in the APAR. The UPSC has informed the Department that the Commission has observed that while deciding such representations, the competent authorities sometimes do not take into account the views of Reporting/Reviewing Officers if they are still in service. The Commission has further observed that in a majority of such cases, the competent authority does not give specific reasons for upgrading the below benchmark ACR/APAR gradings at par with the benchmark for next promotion.

3. All Ministries/Departments are therefore requested to inform the competent authorities while forwarding such cases to them to decide on the representations against the remarks or for upgradation of the grading in the APAR that the decision on the representation may be taken objectively after taking into account the views of the concerned Reporting/Reviewing Officers if they are still in service

and in case of upgradation of the final grading give in the APAR, specific reasons therefore may also be given in the order of the competent authority.
(C.A.Subramanian) Director"

18. It is submitted that in terms of the aforesaid all the respondents have already made a representation which are pending consideration.

19. In any case what can be inferred from the law laid down by the Honble Supreme Court in Dev Dutt's case and Abhijit Ghosh Dastidar's case is as under:-

(i) Annual confidential Report which is below the benchmark within the period of 5 years which is relevant for the purpose of consideration of the case of the incumbent for the purpose of promotion, unless communicated earlier will not be considered unless and until an opportunity is granted to the incumbent to make a representation thereof to the competent authority and such representation is disposed of and order communicated to the incumbent after the aforesaid process is followed then the authorities would be obliged to have a review DPC for considering the case of the incumbent for promotion in the relevant year.

(ii) Even in those cases where the Reporting Officer and the Reviewing Officer is not available, the ACR is not to be ignored the process to be followed would be to give an opportunity to the incumbent to make a representation against the adverse ACRs which may be considered by the competent authority which in the event of any of the officer whether he is a Reporting officer or Reviewing Officer not available, would be considered by the higher authority, that is to say, if neither the Reporting Officer nor Reviewing Officer is available then it may be considered by the Accepting Authority.

20. In fact the issue is no more res-integra inasmuch as vide our orders dated 09.08.2010 passed in W.P.(C) No.5313/2010 we have already disposed of the controversy in so far as applicability of the Memorandum dated 11.05.1990 is concerned. Relevant portion is reproduced for the sake of reference.

"1. The grievance of the writ petitioner is that the Tribunal went wrong in applying the DOPT OM dated 11.05.1990 for the reason when the said OM was

promulgated, decision of the Supreme Court reported in JT 2008 (9) Supreme Court 463 Dev Dutt v. UOI and Ors. had not been pronounced. Counsel urges that OM dated 11.05.1990 envisaged only those ACR gradings which contained adverse remarks as conventionally understood and not remark which may be adverse as expounded by the Supreme Court in the decision in Dev Dutt's case. Needless to state for the first time in Dev Dutt's case it was held that though an ACR grading may not be adverse as conventionally understood, but if it is below the benchmark prescribed for promotion to a higher post, having an adverse impact on the entitlement to be promoted, it would be akin to an adverse remark.

2. We agree with the submissions made by the learned counsel for the petitioner that the OM dated 11.05.1990 cannot be made applicable to ACR gradings which otherwise are not adverse but would require to be intimated to the employee and response received on account of the grading being below prescribed benchmark.

3. Learned counsel for the respondent states at this stage that there were other issues raised in the OA filed before the Tribunal which may attract the subsequent decision of the Supreme Court in Abjijit Ghosh Dastidar's case arising out of Civil Appeal No.6227/2008 decided by the Supreme Court.

4. Accordingly we dispose of the petition setting aside the impugned decision and order dated 09.04.2010 declaring that OM dated 11.05.1990 has no application in the instant case."

21. Even otherwise the question of following Office Memorandum dated 11.05.1990 is out of question for the following reasons:-

(i) At the time when the Office Memorandum was enforced the judgment in Dev Dutt's case was not available;

(ii) The bench marks at that time were not Very Good;

(iii) Ignoring ACR for three years prior to the date of DPC has no relevance to the present day atmosphere where the bench mark is fixed and consideration has to be for ACR of five years;

(iv) In view of the judgment delivered by the Honble Supreme Court in the case UP Jal Nigam followed in Dev Dutt's case and Abjijit Ghosh Dastidar's case, all ACRs are to be communicated to the incumbent. Wherever the ACRs are below bench mark, a representation can be made by the affected person which will then be considered by the competent authority and in any case, not by the same authority which gave the adverse ACR but by an authority above it ; and,

(v) At least in the case of a person who is already in service, the question of ignoring the adverse ACRs instead of giving a chance of making representation does not arise.

22. In view of the aforesaid, we are of the considered view that the orders passed by the Tribunal in all these cases cannot be sustained. Thus the orders passed by the Tribunal would stand modified to the extent that the adverse ACRs which falls within the consideration zone i.e. in the relevant 5 years before the date of holding the DPC, if not communicated earlier but are below bench mark would be communicated within a period of 4 weeks from today to the incumbent officer if not communicated so far. The respondent would then be eligible to make a representation within 15 days thereof if not made already, and that such representation would be decided by the competent authority, which, of course, would be higher in rank to the authority who gave the adverse ACR within next 2 weeks irrespective of the fact whether the Reporting Officer or the Reviewing Officer or both are available or not. In case, the ACR is upgraded, making the incumbent eligible for consideration, review DPC would be held based upon the reappraised ACRs for the relevant period within six weeks. In case, the review DPC finds the incumbent fit for promotion, the benefit thereof would be given to him from the date when he was entitled for promotion to the next post had the ACR in question would not have been considered averse to him with all consequential benefits.

23. All the writ petitions are disposed of in terms of directions given above. Interim orders, if any, stands vacated.