

(2000) 01 J&K CK 0005
In the Jammu And Kashmir High Court
Case No : LPA (OW) No. 740 of 1999

Union of India

APPELLANT

Vs

Col (Dr.) Jiban Chandra Saha

RESPONDENT

Date of Decision : 12-01-2000

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226

Citation : (2001) 3 SCT 309

Hon'ble Judges : B.P.Saraf, C.J and Arun Kumar Goel, J

Bench : Division Bench

Advocate : Ajay Abrol, M.K. Bhardwaj, Rohit Kapoor, Mukul Rohatgi, Advocates appearing for the Parties

Judgement

Arun Kumar Goel, J.—This appeal under Clause 12 of the J&K Letters Patent has been filed by the appellants against the judgment dated

21.10.1999 passed by the learned Single Judge of this Court in SWP No. 831/98. By means of the impugned judgment the writ petition filed by

respondent No. 1 (hereinafter to be referred as the writ petitioner) has been allowed in the following terms :

This brings us to the question of granting relief. As a necessary consequence of the finding, promotion of Colonel C.M. Ashraf to the rank of

Brigadier has to be quashed because without one time dispensation, he could not have made the grade. Since the dispensation is arbitrary as

unequals have been treated equals and once ACRs earned by him as Lt. Colonel are ignored, he becomes ineligible. But since he has been holding

the rank for more than one year, therefore, if the petitioner is entitled to promotion on the basis of last three ACRs earned by him in the rank of

Colonel, he would be entitled to be promoted from the date the private

respondents were promoted with all consequential benefits. In case there is no post available and the respondents are unable to promote him retrospectively, supernumerary post may be created with effect from the date the private respondents were promoted till the post in the rank of Brigadier becomes available. It is only in the event of respondents' failure to find out a post and promote him if he makes the grade on the basis as aforesaid that the promotion of respondent8 shall stand quashed. The respondents will have two months time to implement the judgment, failing which the appointment of respondent8 shall stand quashed. The petition is allowed with cost of Rs. 5000/.

2. The facts which are not disputed in this case are that the petitioner is serving officer in the Army Medical Corps (A.M.C) of Indian Army and he holds the rank of a Colonel. After having passed his M.B.B.S. he was commissioned in June, 1967. He passed his M.B.B.S. from Calcutta Medical College. While in the service of Indian Army he improved his qualification. Firstly he got the Diploma in Anesthesia in the year 1974 and thereafter did his Post Graduation (M.D.) in this branch of medicine in the year 1975 from the Armed Forces Medical College, Pune.

3. The petitioner remained posted at different places as enumerated in para 6 of the writ petition. He on the date of filing of the writ petition was

posted at Military Hospital, Jammu as Senior Adviser (Anesthesiology). The petitioner was promoted as Colonel some where in the year 1993.

Petitioner makes his grievance against his nonselection to the post of Brigadier. For this purpose Selection Board met on 18.2.1998. Against 48

available vacancies to the next rank of Brigadier, 96 officers were considered. Name of the petitioner in the order of merit was at S. No. 69. The

Selection Board found the petitioner unfit for promotion at present. There is another category of officers who were not found fit for promotions and

were termed as unfit permanently (in third chance). The petitioner makes the grievance against his such nonselection. This compelled him to file the writ petition.

4. For promotion from the post of Lt. Col to Colonel and equivalent; Colonel to Brigadier paragraph 8 of the promotion policy dated 25.2.1996 is relevant which is in the following terms :

8. No. of ACRs taken : All ACRs in the present rank will be taken into account for

purpose of promotion from Lt. Col to Col (and equivalent),
Col. to Brig (and equivalent) and Brig. to Maj. General (and equivalent). In case
two ACRs are available for a particular assessment year, their
average will be taken as final average of the particular period. A minimum of two/
three/fours ACRs should be available for consideration for
promotion to Maj. General/Brig/Col. respectively in the present rank"".

5. In this context it would also be relevant to notice a communication dated
16.12.1997 from the Ministry of Defence whereby only as a one time
measure dispensation was allowed to the provisions of the promotion policy
dated 26.2.1996. This is again in the following terms :

Ministry of Defence

Subject : Procedure for selection and promotion of AMC, AD Corps and MNS
Officers.

Reference Note No. 12 dated 07 Nov. 1997 recorded on DGAFMS file No. 5006/
DGAFMS/DGIX on the above subject.

2. The proposal has been considered in the Ministry and it has been decided that
dispensation may be granted as follows :

(a) Officer graded 'D' on account of insufficient input be exposed to the
subsequent regular Board after earning required minimum input for Board

Nos. 1 and 2.

(b) One unused ACR in the lower rank be utilised to complete the required
minimum for selection to the ranks of Maj Gen and Brig wef Selection

Boards of 1997 for vacancies of 1998.

3. This dispensation will be applicable for the Selection Boards to the rank of
Brigadier and Major General for the vacancies of 1998 only as a one

time measure to the provisions of policy letter No. 9(2)/92D(Med) dated 26th
February, 1996.

Sd/

(Ram Dhari)

Under Secretary (Med)

DGAFMS

MOD I.D. No. 9(2)/92/D(Med) dated 16.12.1997

6. The case as set up in the writ petition by the petitioner was that he was
entitled to be promoted after excluding his ACR for the year 199394. It

was further claimed that respondent Col. C.M. Ashraf had only earned two ACRs in the Rank of Colonel and one of his unused ACR in the rank

of Lt. Colonel could not have been considered by the Board. This tantamounts to equating unequal with equal. Only last three ACRs of the

petitioner were required to be considered and nothing more.

7. Another plea with a view to support the writ petition was based on malafides against Brig. S.C. Ketarpal (Retd) who at the relevant point of

time in the year 1993/94 was the Initiating Officer. He was inimically disposed towards the petitioner. Allegations of malafides and bias have been

enumerated by the petitioner in paragraphs 8 to 24 of the writ petition. These allegations are of serious nature and are fatal. In the aforementioned

background the petitioner prayed for the following reliefs.

(a) to quash the ACR of the petitioner for the year 1994 written by respondent No. 6.

(b) to quash the letter No. 18836/SB (M) No. 2/Brig/98/DGAFMS/DG1 (X) dated 21st of April, 1998 vide which the petitioner has been

intimated that he has been graded 'R' Unfit for promotion to the next higher rank of Brigadier.

(c) to quash the proceedings of the Selection Board (Med) No. 2 held on 18th Feb., 1998 vide which the petitioner has been declared and graded

'R' Unfit for promotion to the next higher rank of Brigadier.

(d) to quash the promotion of the respondent Nos. 7 to 18 insofar as they have been promoted only on the basis of three ACRs earned by them as

against the petitioner who has been considered for promotion on the basis of four ACRs out of which the ACR for the year 1994 has been written

by respondent No. 6 on the basis of his bias and malafids against the petitioner.

(e) to direct the respondents 1 to 6 to consider the petitioner for the promotion to the post of Brigadier only on the basis of the last three ACRs

earned by him after excluding the ACR for the period 1994.

(f) to direct the respondents 1 to 6 to promote the petitioner to the post of Brigadier.

8. The claim of the petitioner was contested and resisted by the official respondents in the writ petition. According to them all the ACRs in terms of

the relevant clause of Promotion Policy extracted hereinabove of all the eligible officers including the petitioner were considered. Such officers who

were entitled for being considered as per one time dispensation policy extracted hereinabove were also considered and it was only thereafter that

comperative merit was examined and then eligible officers have been promoted on the basis of the recommendations made by the Board.

9. Since Brig. S.C. Khetarpal had retired when the petition was filed, comments were called from him and on the basis of such comments,

averments made in paras 8 to 24 have been controverted, though no counter has been filed by Brig. Khetarpal separately. Regarding selection of

Col C.M. Ashraf, it is the stand of official respondents that there is nothing wrong or otherwise in view of the policy as well as one time

dispensation.

10. When this appeal was taken up for hearing learned Addl. Solicitor General fairly stated that in case ACR of 199394 is excluded, the petitioner

is entitled to be selected and promoted as Brigadier. He, however, at the same clarified that it cannot be excluded. Reliance in this behalf was

placed by him on clause 8 of the promotion policy (Supra). It was urged by him that this ACR could not be excluded in terms of clause 8 which

required all the ACRs in the present rank were to be taken into account for promotion from the post of Colonel to Brigadier (and equivalent) and

in any case there had to be minimum of three ACRs which should be available in the present rank i.e. of Colonel. Regarding specific case of Col.

C.M. Ashraf he relied on one time dispensation (Supra), therefore, there was nothing wrong with the promotion of the said officer.

11. Regarding nonfiling of affidavit by Brig. S.C. Khetarpal (Retd) he urged that since the officer had retired, as such, Army Authorities could not

force him to file counter or reply to the writ petition. He, however, submitted his comments which he furnished informally which have been

incorporated in the reply of the Union of India. The learned Single Judge, according to him had fallen into error while laying great emphasis

because of nonfiling of reply/counter by Brig. S.C. Khetarpal, so far as personal allegations against him were concerned.

12. Another argument raised by the learned Addl. Solicitor General was that assuming for the sake of argument without admitting, direction if at all

could be given by the learned Single Judge was to consider the case of the petitioner for promotion in accordance with law, therefore, the direction

given in the mandatory form to promote him was not within the domain of the writ Court as such, this appeal deserves to be allowed. He hastened to say that by making this submission, the appellants are neither admitting nor conceding the claim of the petitioner. When a reference is made to the writ petition neither the promotion policy nor one time dispensation has been challenged by the petitioner. Unless it was specifically challenged, a chance given to the official respondents in the writ petition to contest the same, appeal needs to be disposed of on the basis as pleaded in the writ.

13. On the other hand, Mr. M.K. Bhardwaj, learned counsel appearing for the petitioner forcefully urged that the judgment passed by the learned

Single Judge calls for no interference as conclusions arrived at by him were the only possible conclusions on the facts of the case. He at the same

time controverted all the pleas urged on behalf of the appellants. According to him by purposely downgrading the petitioner in the relevant ACR,

Brig. S.C. Khetarpal has done the mischief. Technically it may not be a case of adverse confidential report. However, this downgrading being

intentional based on personal malafides and bias therefore, in the circumstances it is in the nature of adverse report which was never communicated

to petitioner at any point of time. According to him even if it is not a case of adverse report it was enjoined upon the appellants as well as Brig.

S.C. Khetarpal to have informed the petitioner that his performance has gone down as such, he must improve. This having not been done

conclusions arrived at by the learned Single Judge call for no interference. On the plea of mala fides and bias he submitted that those being

personal to Brig. S.C. Khetarpal, unless he came forward and controvert those specifically, the averments made in the writ petition shall be taken

to be correct and on this ground also the appeal was liable to be dismissed. Regarding the position in which the petitioner was placed while

working under his immediate superior i.e. Brig. S.C. Khetarpal he submitted that while recording the ACRs a public responsibility was cast upon

him and he as a trustee was required to make entries in fact objectively, fairly and dispassionately. According to him ACR of 199394 should have

been excluded when minimum required number of ACRs in the present rank of Colonel of the petitioner were available. By not doing so his client

has been prejudiced. Thus, he urged for the dismissal of the appeal and upholding the order of learned Single Judge.

14. It may also be noted here that the learned counsel for the parties were not at variance that procedure of recording ACRs is that it is initiated by

the immediate superior. Then it is examined by the Reviewing Officer and it is thereafter that is accepted by the Accepting Officer. For the relevant

year i.e. 199394 the Initiating Officer Brig Kheterpal had awarded 7 out of 9 grading to the petitioner, whereas the Reviewing Officer had

assessed him 6 out of 9 and Accepting Officer has again assessed him 7 out of 9. Learned counsel for the parties were not at variance that 9 out of

9 is outstanding, whereas 8 out of nine is good and 7 out of 9 is above average. Cutoff merit of the last selected candidate is 7.98 as per

recommendations of the Selection Board.

15. Service record of the petitioner in original has been produced and it has been examined by us. In this behalf, we may observe that so far as

ACR of 199394 is concerned, it is first relating to the petitioner, after his promotion to the rank of Colonel. In the subsequent ACRs he is assessed

as 8 and above.

16. From the narration of the above facts, first question that falls for consideration is whether grading of the petitioner as 7 out of 9 can be termed

as adverse entry in the ACR or is simply downgrading. Consequence in the former case would be totally different than those in the later case.

17. It is a settled proposition in service jurisprudence that an adverse remark in the ACR needs to be communicated to the officer concerned so

that he is in a position to make mends in it and also he has a right to represent against such remarks. Petitioner has referred to the downgrading of

the ACRs of Col R.P. Singh and Col Kasthari. They both represented to the higher authorities. In case of Col R.P. Singh his downgraded portion

of the ACR was set aside by the appellate authority and thereafter the officer could make the grade for promotion by exclusion from consideration

of the ACRs in question. In case of Col. Kasthari also his complaint ex facie was accepted and a fresh Board was held for him wherein he has been

promoted.

18. A plea has been raised in reply to the writ petition that the petitioner had an alternate efficacious remedy under Section 47 of the Army Act;

without availing which he has rushed to this Court.

19. With a view to advance the case of the appellants Sh. Rohatgi relied on a number of decided cases which are being referred to hereinafter.

20. In 1989 Supp (1) SCC 574, State of Andhra Pradesh & another v. V. Sadanandam and others, it was held as under :

The mode of recruitment and the category from which recruitment to a service should be made are matters within the exclusive domain of the

executive. It is not for judicial bodies to sit in judgment over the executive's decision in these matters. When the rules provide for transfer on

promotion from other local categories or zones and when such transfers are not assailed on the ground of arbitrariness or discrimination, the policy

of transfer adopted by the government is not subject to judicial review.

21. In 1991(2) SCT 333 (SC) : 1991(2) SCC 295, Director, Lift Irrigation Corporation Ltd. v. Pravat Kiran Mohanty & others , while

considering the matter as to what is the right of a petitioner, it was observed by the Supreme Court of India as under :

x x x There is no fundamental right to promotion, but an employee has only right to be considered for promotion, when it arises, in accordance

with the relevant rules. From this perspective in our view the conclusion of the High Court that the gradation list prepared by the Corporation is in

violation of the right of the respondent/writ petitioner to equality enshrined under Article 14 read with Article 16 of the Constitution, and the

respondent/writ petitioner was unjustly denied of the same is obviously unjustified.

In this case the High Court had while allowing the writ petition quashed the gradation lists of SubAssistant Engineers (Electrical) and SubAssistant

Engineers (Mechanical). As a consequence of which the Government and the Corporation were directed to consider the question of promotion

treating the writ petitioner and the respondents as belonging to two cadres of Sub Assistant Engineer (Electrical) and (Mechanical). Initially there

were three categories of service in the Corporation, namely, Mechanical, Electrical and MechanicalElectrical Composite unit. In the year 1971

three tentative gradation lists were prepared for classification purpose of those three Divisions as SubAssistant Engineer (Mechanical),

SubAssistant Engineer (Electrical), Supervisors, Electrical and Mechanical which

included Electrical Supervisors, Mechanical Supervisors, Drilling Supervisors and Foreman cum Instructors. In the year 1977 the Corporation decided to reorganise its set up and to classify the employees into two categories namely, SubAssistant Engineer (Electrical), SubAssistant Engineer (Mechanical) to attend to the respective works, namely, mechanical and electrical. Objections were called. The writ petitioner in this case did not file objections and on consideration of the objections filed by others, two gradation lists were prepared in the order of seniority from the respective dates of appointment to the posts and higher scale of pay held by respective persons and fitted them in the respective lists as per options. It was quashed by the High Court and in the appeal while allowing the writ petition the aforesaid observations were made by the Supreme Court.

22. In 1996(2) SCT 355 (SC) : 1996(8) SCC 762, State Bank of India v. Kashinath Kher and others, while considering the eligibility and

experience for promotion to the post of MMGSIII from MMGSII in the Bank, the eligibility criteria was completion of two years' tenure of the

assignment as Branch Manager or as Manager of a business division for a minimum period of 2 years. Because of nonavailability of posts or

nonenforcement of the directions many of the officers in MMGSII could not get the benefit of working in the line assignment. In these

circumstances the Board of Directors of the Bank decided that all those who were required to be promoted would be considered subject to the

fulfilment of the eligibility criteria; and officers who have completed the required service and found fit for promotion would be placed in service in

the line assignment and also in rural/semiurban service would be considered for promotion and if found fit would be selected, those put in ListB

would be promoted only on their completing the required service. Thereafter, their placement on completion of the above service conditions would

be below his immediate senior in MMGSII but promoted earlier to them in MMGSIII. This decision of the Board was questioned by some officers

while working as MMGSII on the ground that clubbing of the Officers in ListB with those in ListA is violative of Article 14 as being unequals they

could not be treated as equals. This writ petition was allowed by the High Court. What was observed in this case and is relevant for the purposes of

present case was in the following terms :

It is true, that the criteria being conditions of service cannot be relaxed and it is not the case of the appellantBank that they have done that

exercise. What the Board of Managing Directors of the Bank has done is giving an opportunity to the officers, who are otherwise eligible, to

complete the required service conditions and then they would be given promotion, on completion of requisite conditions thereof. In view of the fact

that they did not have the opportunity to serve the complete and qualifying service, with a view to see that those who had the advantage of

completing the service would not steal a march over the seniors, they equally adopted an equitable principle of putting the Officers in List B and

giving them seniority after promotion below his immediate senior in MMGSII so that injustice will not be meted out to such officers for no fault of

theirs. The procedure adopted by the Bank is just, fair and reasonable.

It is not a case of ineligible persons made eligible but a case of giving opportunities to those offices, who for no fault of theirs, were not made

eligible to be considered and given opportunity to be considered for promotion and after consideration, on fulfilment of the service of line

assignment and rural/semiurban service for a minimum of two years were promoted to the MMGSIII. Thus, the policy adopted by the Board is not

violative of Article 14 of the Constitution. But it is necessary that in considering whether the candidate has completed the line of assignment or

rural/semiurban service for the required period, a clear demarcation be drawn between the officers who either due to volitional refusal to serve and

those on account of inaction or deliberate omission on the part of the controlling authority did not have an opportunity as the case may be, to get

the required service qualifications. Therefore, an exercise requires to be done by the appellant to identify this grouping and consider all those

candidates who have otherwise become eligible but did not get opportunity, for no fault of theirs, to secure the service qualification but should be

denied to those who volunteered not to go for line assignment or rural or semiurban service as the case may be, and then to consider according to

the criteria prescribed under the rules or the circulars issued from time to time.

23. In 1997(1) SCT 392 (SC) : 1996(10) SCC 555, Union of India & anr. v. Samer Singh & others , appeal was filed against the judgment of the

Central Administrative Tribunal (CAT) wherein the Tribunal had allowed the claim

of one Samer Singh. In this case the said Samer Singh had approached the Tribunal against his nonempanelment and appointment on the post of Secretary to the Government of India or equivalent post. His case was allowed by the Tribunal and it was declared that action of Union of India in omitting his name from the panel prepared for the said appointment without consideration was arbitrary, unsustainable and void. As such, a direction was issued to the Union of India to consider the suitability of the respondent for empanelment and appointment on the post of Secretary to the Government of India or equivalent post afresh as on the date on which the private respondents were considered for empanelment after taking into account Annual Confidential Reports (ACRs) for the relevant period together with other relevant facts and materials in the light of the relevant para of the Central Staffing Scheme and if on such reconsideration he was found fit, a further direction was issued to consider him for appointment against one such post. After examining the matter, while allowing the appeal of Union of India and setting aside the judgment of the Tribunal, it was observed by the Supreme Court as under:

Shri Ashok Grover, learned Senior Counsel appearing for the respondents, has laid emphasis on the remarks in ACRs about appraisal of the performance of the respondent subsequent to his promotion on the post of Additional Secretary to which reference has been made by the Tribunal in the impugned judgment. The learned counsel has submitted that since the performance has been rated as outstanding and excellent, the Tribunal was justified in holding that there is no proper consideration of the case of the respondent by the Special Committee. We are unable to agree. As is evident from para 14 of the Central Staffing Scheme record is one of the matters which has to be taken into consideration by the Special Committee while making the selection. Apart from the record there are other matters that have to be considered, namely, merit, competence, leadership and flair for participating in the policymaking process and the need of the Central Govt. which is the paramount consideration. We are unable to hold that since the performance of the respondent after his promotion as Additional Secretary had been found to be excellent and outstanding, the noninclusion of his name from the panel by the Special Committee must lead to the inference that there was no proper

consideration of the merit and suitability of the respondent for empanelment by the Special Committee.

24. In 1997(2) SCT 157 (SC) : JT 1996(10) S.C. 768, Mrs. Anil Katiyar v. Union of India and others , while considering the matter relating to

the grading of the appellant Anil Katiyar, it was held as under :

Having regard to the limited scope of judicial review of the merits of a selection made for appointment to a service or a civil post, the Tribunal has

rightly proceeded on the basis that it is not expected to play the role of an appellate authority or an umpire in the acts and proceedings of the DPC

and that it could not sit in judgment over the selection made by the DPC unless the selection is assailed as being vitiated by mala fides, or on the

ground of it being arbitrary. It is not the case of the appellant that the selection by the DPC was vitiated by mala fides.

The question is whether the action of the DPC in grading the appellant as 'very good' can be held to be arbitrary. Shri G.L. Sanghi, the learned

senior counsel appearing for the Union Public Service Commission, has placed before us the confidential procedure followed by the DPCs in the

Union Public Service Commission for giving overall gradings, including that of 'outstanding' to an officer. Having regard to the said confidential

procedure which is followed by the Union Public Service Commission, we are unable to hold that the decision of the DPC in grading the appellant

as 'very good' instead of 'outstanding' can be said to be arbitrary. No ground is, therefore, made out for interference with the selection of

respondent No. 4 by the DPC on the basis of which he has been appointed as Deputy Government Advocate. But, at the same time, it must be

held that the Tribunal was in error in going into the question whether the appellant had been rightly graded as 'outstanding' in the ACRs for the

years 1990/91 and 1991/92. The observations of the Tribunal that out of the two 'outstanding' gradings given to the appellant one 'outstanding'

grading does not flow from various parameters given and the reports entered therein, cannot therefore, be upheld and are accordingly set aside.

25. On the other hand Mr. M.K. Bhardwaj, learned counsel for the petitioner referred to and relied upon the following decisions :

1996(2) SCT 227 (SC) : 1996(2) SCC 363, U.P. Jal Nigam and others v. Prabhat Chandra Jain and others . In this case the High Court had

illustrated by observing that an adverse element is 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 that is required was to inform him of the

change in the form of an advice. This judgment has been relied upon by the learned Single Judge while allowing the writ petition. In order to

properly explain, it is extracted hereinbelow :

What we say in this order shall not only cover the case of the first respondent but shall also regulate the system of recording annual confidential

reports prevalent in the U.P. Jal Nigam the first petitioner herein.

The first respondent was downgraded at a certain point of time to which the Service Tribunal gave a correction. Before the High Court, the

petitioners' plea was that downgrading entries in confidential reports cannot be termed as adverse entries so as to oblige the Nigam to

communicate the same to the employee and attract a representation. This arguemnt was turned down by the High Court, as in its view confidential

reports were assets of the employee since they weigh to his advantage at the promotional and extensional stages of service. The High Court to

justify its view has given an illustration that if an employee legitimately had earned an `outstanding' report in a particular year which, in a succeeding

one and without any communication to him, it would certainly be adverse and affect him at one or the other stage of his career.

We need to explain these observations of the High Court. The Nigam has rules, whereunder an adverse entry is required to be communicated to

the employee concerned but not 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 that is required by the authority recording confidentials in the situation is to

record reasons for such downgrading 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 onetime achievement. This would be an undesirable situation. All the same the sting of adverseness must, in all events, not be 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 Jal Nigam, we do not find any difficulty in accepting the ultimate result arrived at by the High Court. The special leave petition is, therefore, dismissed.

In 1996(3) SCT 61 (SC) : 1996(5) SCC 103, Sukhdeo v. Commissioner, Amravati Division and anr. , relied upon by Mr. Bhardwaj, learned

counsel appearing for the petitioner, was for affording prior opportunity in writing by informing him of the deficiency he noticed for improvement

and if inspite of the opportunity, the employee does not improve then it would be an obvious fact and would form material basis in support of the adverse remarks.

In 1996(4) SCT 212 (SC) : 1996(10) SCC 369, M.A. Rajasekhar v. State of Karnataka and anr. , it was held as under :

Calling that in question, the appellant filed on OA. It is now settled law that the object of making adverse remarks is to assess the competence of

an officer on merits and performance of an officer concerned so as to grade him in various categories as outstanding, very good, good, satisfactory

and average, etc. The competent authority and the reviewing authority have to act fairly or objectively in assessing the character, integrity and

performance of the incumbent. It is seen that in the review order, various grounds on which the various criteria are to be complied with were

specifically noted thus :

` 3. A perusal of Annexure A1 goes to show that in most of the aspects the work of the applicant is satisfactory. According to the form in which the

confidential remarks of the officers are to be written, the reporting officer is

required to indicate his assessment of the officer on the following aspects of his work :

1. Knowledge of work;
2. Power of expression;
3. Power of acquiring general information;
4. Attention to detail;
5. Industry;
6. Judgment;
7. Speed of disposal;
8. Willingness to accept responsibility and to take decision;
9. Relationship with subordinates and colleagues;
10. Public relations;
11. Integrity.

The report about all the above aspects is satisfactory. There is no adverse report about integrity. However, the underlined remarks in Annexure A1

are made. The last sentence in those remarks indicates that the intention of the officer who wrote those remarks was to treat the remarks as

advisory. He has stated that the officer should evince more interest. When all the ten aspects of the work which are required to be assessed by the

rules are satisfactory the alleged adverse remarks get considerably diluted and we are of the considered opinion that the ends of justice would be

served if the remarks are treated as advisory with a direction that they should not be made use of against the applicant for any purpose'.

It was found that his integrity was not doubted and his work also in all those respects was found to be satisfactory. Under those circumstances, the

remark that he 'does not act dispassionately when faced with dilemma' must be pointed out with reference to specific instances in which he did not

perform that duty satisfactorily so that he would have an opportunity to correct himself of the mistake. He should be given an opportunity in the

cases where he did not work objectively or satisfactorily. Admittedly, no such opportunity was given. Even when he acted in a dilemma and lacked

objectivity in such circumstances, he must be guided by the authority as to the manner in which he acted upon. Since this exercise has not been

done by the respondents, it would be obvious that the above adverse remark was not consistent with law.

In 1997(2) SCT 234 (SC) : 1997(4) SCC 7, State of U.P. v. Yamuna Shanker Misra and another , while referring to the object of writing ACRs,

it was observed as under :

x x x 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 confidentials 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.

1999(4) SCT 774 (SC) : 1999 SCC 546, State of Bihar v. Dr. Brij Kumar Mishra and others , relied upon by Mr. Bhardwaj, does not in any

manner improve the case of the petitioner and it does not act as a precedent in view of what was observed by the Supreme Court :

x x x The learned counsel appearing for the appellants were apprehensive that if

the impugned judgment is not set aside, it may become precedent and in other cases pertaining to the University, such directions may be issued in future also preventing the authorities and the State Government from exercising their statutory powers. The apprehension is misconceived and without any substance. To allay even such apprehension we deem it appropriate to clarify that the impugned judgment has been passed under peculiar circumstances of the case and is no precedent with respect to the subject regarding which the appellants have conceived an apprehension. Thus no benefit can be derived by the petitioner from this decision.

26. As already pointed out that allegations of mala fide, if established, would certainly entitle the petitioner to some relief in the writ petition. As such, the first and foremost question that needs to be determined is whether the allegations made against Brig S.C. Kheterpal can be accepted.

27. Serious allegations of mala fides have been made by the petitioner against Brig. S.C. Kheterpal. In fact these allegations are personal to him. In case the petitioner is able to establish those in accordance with law, situation would be different. So far as proceedings in a writ are concerned no evidence is led and de hors of law of pleadings not only facts but evidence is required to be pleaded and whatever evidence is available needs to be produced; whereas in case of a suit only facts are to be pleaded and not the evidence.

28. Besides this averments made in the writ petition are required to be supported with an affidavit in accordance with law. It assumes significance as it is in the nature of a statement made on oath instead of being subscribed before a person duly empowered in that behalf.

29. So far as the matter relating to filing of affidavit in support of the writ petition is concerned, this Court has framed rules in this behalf known as

'Writ Proceedings Rules, 1997'. These were published in the extraordinary Government Gazette Volume 110 dated 3.6.1997 No. 91 PartIII vide

Notification No. 7 dated 3.6.1997 issued by the High Court of Jammu and Kashmir. Format of the affidavit is prescribed in ScheduleI of these

rules. This format is in the following terms :

ScheduleI

I Son of aged resident of hereby state on oath/solemn affirmation that I have read the petition/the petition has been read over and explained to me

and that the contents of paratoof the petition are true to my personal knowledge and those of parastoare true upon information received fromson of

resident of, which I believe from the record which I believe to be true and those of parastoare true upon legal advice received by me which I

believe to be true.

I solemnly swear/affirm that this affidavit is true, no part of this is false and nothing has been concealed.

Deponent.

When a reference is made to the affidavit filed by the petitioner in support of the writ petition for no purpose whatsoever it can be looked into. For

ready reference the contents of the affidavit are reproduced below :

Before the Hon'ble High Court of J&K.

In the matter of :

Col (Dr) Jiban Chandra Saha v. Union of India & Ors.

Affidavit.

I, Col (Dr) Jiban Chandra Saha, Aged 53 years Senior Advisor (Anesthesiology) 166 Military Hospital, Satwari, Jammu Cantt, do hereby

solemnly swear and declare as under :

1. That I am well versed with the facts of the case and am competent to swear and affirm this affidavit and to file the accompanying writ petition

which has been drafted by my counsel on my instructions.

2. That the contents of para No. 1 to 60 are by way of facts. The contents of the rest of the paras are by way of submissions and the last para is

by way of a prayer.

Sd/ Deponent

Verification :

Verified at Jammu on this 28th day of May, 1998 that whatever has been submitted hereinabove is true and correct to the best of my knowledge

and belief and nothing has been concealed therefrom.

Deponent.

30. Keeping in view the serious allegations made as noted hereinabove, petitioner was required to support those not only by laying foundation in

the writ petition but also was further required to support it by a legal and proper

affidavit under the Writ Proceedings Rules of 1997. This omission appears to be purposeful on the part of the petitioner. In case the petitioner was sure that such allegations of mala fides and bias against Brig S.C. Kheterpal were correct there was nothing which prevented him from filing a proper affidavit as per rules or at least he could model it as per principles of Order 19 of the Code of Civil Procedure. In addition to this, we feel it is not the form, but substance of the affidavit which is material and has to be looked into. Unfortunately a perusal of the affidavit (supra) shows that it neither meets in form nor in substance. In the absence of affidavit abovesaid allegations of bias etc. cannot be looked into. See 1982 Kashmir Law Journal 639, Bhim Singh v. D.D. Thakur, and other connected cases. Relevant observations which are material in this case as under :

57. In the petition filed by Shri Bhim Singh, the allegations of mala fide have not been supported by any properly verified affidavit. The affidavit filed in support of the petition does not disclose in the verification the nature and the source of his knowledge. The verification of the affidavits in all the three petitions suffers from the same defects as were noticed by the Supreme Court in Barium Chemicals case (supra), and therefore, the charges of mala fide must fail on that ground also.

31. Furthermore in no case the plea of mala fide can be upheld, the reason being Brig. S.C. Kheterpal has assessed the petitioner 7 out of 9, it was the reviewing officer who has assessed him 6 out of nine and the Accepting Officer has assessed him 7 out of 9. In these circumstances the plea of mala fide seems to have been raised without being supported according to law with a view to maintain this writ petition. No doubt, ordinarily the officer against whom personal mala fides are alleged must come forward and meet the case specifically set up against him. For the view that has been taken hereinabove, nonfiling of the affidavit firstly because it was beyond the control of the official respondents and secondly in view of the decision of this Court referred to hereinabove as well as in view of the decision in the case of Barium Chemical, relied upon in the case of Bhim Singh v. D.D. Thakur (Supra), the petitioner's case on the basis of mala fides cannot be sustained. Thus the findings recorded by the learned Single Judge in this behalf also cannot be upheld.

32. So far as matter relating to promotion policy and one time dispensation

where minimum three ACRs in the present rank were not available is concerned, those have not been challenged in the writ petition. As such, the appellants were well within their rights to have considered the matter on the basis of the existing promotion policy whereunder all the ACRs with a minimum of three, ofcourse subject to one time dispensation (Supra) were to be considered by the Board. Admittedly, this has been done. It is not for this Court to determine as to what should be and what should not be the criteria which is relevant while considering the promotion of eligible officers. Once this is accepted then the plea of the petitioner that his last three ACRs should have been considered and not all as well as the findings recorded by the learned Single Judge that in case of including Col. C.M. Ashraf, who was promoted with the help of two ACRs in the rank of Colonel and one unused ACR in the rank of Lt. Colonel cannot be accepted as well as upheld.

33. It is not Col. C.M. Ashraf alone, but there are four more officers, who were considered on the basis of two ACRs in the present rank of Colonel and one unused ACR in the rank of Lt. Colonel. As such, no exception can be taken to promotion of all these five officers.

34. Regarding Colonel Ashraf, learned Single Judge has observed that he and the petitioner were commissioned in the Army on the same day.

They were eligible for being considered for the rank of Colonel. When the petitioner was promoted whereas Colonel C.M. Ashraf could not make the grade and was promoted in the second attempt. It is specific case of the appellants that said Officer was selected by the selection committee on 2.5.1994 to the post of Colonel, but he could pick up the rank on 7.5.1995 for want of vacancy. With a view to mitigate hardship in such like

cases, one time dispensation was ordered by the competent authority.

35. The decision in the case of State Bank of India (Supra) completely negatives the plea of the petitioner so far as one time dispensation is concerned. Therefore, the findings recorded by the learned Single Judge in this behalf cannot be upheld.

36. Mr. M.K. Bhardwaj laid great emphasis on the decision in the case of U.P. Jal Nigam (Supra) and urged that downgrading in the instant case

is the result of bias and amounts to adverse remarks, alternatively he urged that in any case, the petitioner should have been put to notice regarding

this fact. Both these pleas cannot be accepted for the reasons set out hereinafter. A reference to the opening para 1 of this judgment clearly shows that the order not only covers the case of Prabhat Chander Jain, first respondent in the case but is to mend the system of recording annual confidential reports prevalent in the U.P. Jal Nigam the first petitioner. While considering the matter of recording ACRs under the U.P. Jal Nigam Service Rules, the aforesaid decision was given and it cannot be read out of context wherein it was meant. The other reason is that it is the judgment on its own facts.

37. Another reason to hold that this is not a case of downgrading is that this was the first ACR of the petitioner recorded after his promotion to the rank of Colonel. It is not his case that in the rank of Colonel prior to it his grading is more than '7'. This lends credence to the observations of the Reviewing Officer Brig. S.C. Khetarpal that the petitioner was orally informed regarding his weaknesses during the relevant year. In these circumstances by no stretch of imagination it can be said that this is a case of downgrading of the ACR of the petitioner in the relevant year in the rank of Colonel.

In this view of the matter even if, it be assumed that the decision of U.P. Jal Nigam (Supra) is applicable, it does not advance the case of the petitioner in any manner.

38. In the face of para 8 of the promotion policy, the argument urged on behalf of the petitioner that only three last ACRs should have been looked into would result in something being said by this Court, but is not warranted by the policy which is in force and as already observed it has not been challenged.

39. Arguemnt urged on behalf of the appellants that direction for consideration of the petitioner for promotion was the maximum that could be given. This plea needs to be accepted as it was for the authorities concerned to reexamine the case and then decide it. This Court could not substitute itself as promoting authority as such, the findings to the contrary given by the learned Single Judge cannot be sustained.

40. So far promotion of Col C.M. Ashraf is concerned, no fault can be found with it, particularly because of promotion policy and one time dispensation which we feel was within the competence of the appellants. Further

reason to uphold the promotion of Col. C.M. Ashraf is the two decisions of State Bank of India v. Kashinath Kher & others and State of A.P. v. C. Sadanandam (Supra). Thus, in our considered view none of the legal or fundamental rights of the petitioner have been violated when he was not found suitable for promotion at present. Therefore, no exception can be taken to such decision of the Board.

41. No other point is urged.

42. As a result of the aforesaid discussion this appeal deserves to be allowed and as a consequence of which the judgment under appeal dated

21.10.1999 is hereby set aside and as a further consequence of it writ petition SWP No. 831/98 stands dismissed. There is no order as to costs.

43. Original record produced by Mr. R. Kapoor, Addl CGSC has been returned to him in the sealed cover.