

IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI

ORIGINAL APPLICATION NO.796 OF 2016
WITH
MISC. APPLICATION NO.437/2016

DISTRICT : MUMBAI

Dr. Sonali Gopal Badhe.)
R/o. Alsi-Plots, Akola - 444 001.)
Maharashtra State.)... **Applicant**

Versus

1. The State of Maharashtra.)
Through Principal Secretary &)
Remembrancer of Legal Affairs,)
M.S., Mantralaya,)
Mumbai - 400 032.)
2. Principal Secretary & Remembrancer)
Of Legal Affairs, M.S, Mantralaya,)
Mumbai - 400 032.)...**Respondents**

Applicant in Person.


Shri N.K. Rajpurohit, Chief Presenting Officer for Respondents.

P.C. : R.B. MALIK (MEMBER-JUDICIAL)

DATE : 09.12.2016.

JUDGMENT

1. This Original Application (OA) relates to a matter pertaining to the remarks in the Annual Confidential

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Report (ACR) written by the Officers holding the post of Principal Secretary, Law and Judiciary which were Average or below Average, but which came to be improved by the Hon'ble Chief Minister as "Good-B". A further up-gradation as Outstanding "A+" is being sought hereby and a mandatory relief in that behalf is sought.


2. I have perused the record and proceedings and heard the Applicant in person and Shri N.K. Rajpurohit, the learned Chief Presenting Officer for the Respondents.

3. The sum and substance of the case of the Applicant is that she came to be appointed by Union Public Service Commission (UPSC) in the Directorate of Enforcement, Central Government in July, 2010. She was working as Assistant Legal Advisor (ALA). In due course, she happened to apply for the post of Administrator General and Official Trustee, Maharashtra State (to be hereinafter called "the Mumbai Post". A letter of appointment to that post came to be issued on 19.9.2013. The Applicant joined the said post, but she did so by keeping her lien on the earlier post held by her in the Directorate of Enforcement. She actually joined the said Mumbai Post on 17.10.2013. It seems that the Law and Judiciary Department of the State of Maharashtra was the




controlling ministry for that post. Keeping the claims and contentions, counter contentions apart, it so happened that the Principal Secretary of Legal Affairs made an order dated 31.12.2014 whereby the services of the Applicant came to be terminated apparently when she was still in what is called "probation period".

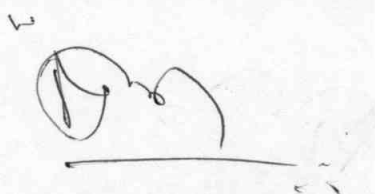
4. The Applicant moved this Tribunal with **Original Application No.28/2015 (Dr. Sonali G. Badhe Vs. The State of Maharashtra and one another)**. This OA was heard by the 2nd Division Bench of this Tribunal of which, I was also a member. By a Judgment dated 23.7.2015, the 2nd Bench of this Tribunal quashed and set aside the order impugned therein and the Respondents were directed to reinstate the Applicant to the said post with all the service benefits such as they were on the day, the impugned order was passed. Four weeks time was given for compliance and the OA was allowed in those terms. It will not be out of place to read the said Judgment herein to the extent it is warranted hereby. I shall do it just a while from now. But before I did that, I may as well note certain factual features which have become indisputable. As already mentioned above, the Applicant had kept her lien on her old post. She exercised her right and resumed the duties there on 25.6.2015. In order to do so, she tendered resignation



from the said Mumbai post and pursuant thereto, she came to be relieved formally on 17.12.2015. After resuming her old post of ALA in the Enforcement Directorate at Ahmedabad, requests were sent to the Respondents to send her Service Book. It needs to be mentioned at this stage itself that the 1st Respondent hereto is the State of Maharashtra in the Department of Remembrancer of Legal Affairs and the 2nd Respondent is the Principal Secretary of that department. It was in this set of circumstances that the Respondents ultimately forwarded the ACR written by the then Principal Secretary, Law & Judiciary for the period from 1.4.2014 to 10.8.2014, dated 9.3.2016 and another ACR by his successor for the period from 11.8.2014 to 31.12.2014, dated 8.3.2016. Reading the said ACRs at Pages 77 onwards, I find that the column of self-assessment has been left blank. The learned CPO wanted to pick holes in the case of the Applicant for having been negligent in this behalf. The Applicant countered the contention of the learned CPO. Now, at this stage itself, it is necessary for me to mention that there are several points raised by the Applicant against the ACRs written by the two Senior Officers above referred to. They were countered by the learned CPO and the learned CPO on his part, referred to a large number of facts that befell the consideration of the 2nd Bench in



deciding OA 28/2015. In my opinion, I have to strictly go by the facts such as they are in the context of the relief sought rather than meandering into pointless academics. It so happened that in the ultimate analysis, and it is a common ground, the matter was submitted to the Hon'ble Chief Minister who was pleased to upgrade the ACR of the Applicant and it is quite clear that the highest authority of the State must have done it because he found good reasons to do so and there must have been the instances of the remarks of the two Senior Officers above referred to as unsustainable. My scope herein is limited to proceed on the actual fact that she was given the grade of "B+". She made another representation to the Hon'ble Chief Minister on 28.3.2016 *inter-alia* referring to the Judgment of the 2nd Bench of this Tribunal and prayed that she be rated as "Excellent" and "A+" vide Exh. 'G' (Page 105 of the Paper Book (PB)), the State Government informed her that once the appellate authority had taken a particular decision, there could not have been any review thereof in accordance with the G.R. of 1.11.2011, and therefore, her request was not accepted. This order is also the subject matter of challenge in Prayer Clause (c) (Page 21 of the P.B.) and that really is the crux of the matter. My scope, therefore, is more or less constricted to examine as to whether the request of the Applicant for a further up-gradation of the

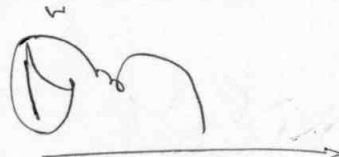
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ACR could have been entertained, and therefore, although I do not strictly disagree with a number of points raised against the manner in which the ACRs were written in the light of the relevant instruments, it is not open to me to examine that aspect of the matter in my jurisdiction of judicial review of administrative action. I must repeat times out of number that the Hon'ble Chief Minister as superior authority has already examined this aspect of the matter and upgraded the Applicant. The issue is only as to whether there can be a further up-gradation and as a necessary fall out as to whether the jurisdiction of the Hon'ble Chief Minister has in any manner hampered in considering the further up-gradation. I must make it very clear that it is entirely within his jurisdiction to consider on merit as to whether a case is made out therefor. I express no opinion about it. But as of now, the issue is as to whether there is any bar as such which the letter impugned by Prayer Clause (c) seeks to convey.

5. Now, in so far as the learned CPO's attempts to find various faults with the performance of the Applicant while holding the Mumbai Post and in that connection, referring to the report submitted by an Officer of the Law & Judiciary Department Shri Dharne, I am very clearly of the view that it is neither congruous nor legally permissible for



me to even touch those aspects even with a barged pole. That is quite simply because those issues were involved clearly and directly in OA 28/2015 and the 2nd Bench went into the details thereof. The said Bench speaking through me addressed itself to various aspects of the matter and in effect found fault with the order therein impugned which was signed by one of the two Officers holding the post of Principal Secretary and RLA who reported one of the two impugned ACRs herein. We did not find fault with the Applicant's performance of the duties while holding the Mumbai Post and on several such points, we did not quite agree with the Darne report also. Though it is not necessary now for me to repeat the same all over again because that particular Judgment of the 2nd Bench of this Tribunal was not carried to the Hon'ble High Court and as such has become conclusive, binding and final and that is the reason why I do not think, it is possible even for me to, kind of, reconsider whatever the learned CPO mentioned against the so called conduct of the Applicant while holding the said Mumbai Post. Another aspect is that if the learned CPO wanted to rely upon those facts to justify the adverse remarks, then also he has no real basis to do so because quite simply, once the judicial determination was there before the concerned reporting authorities, regardless of whether they should have taken a completely



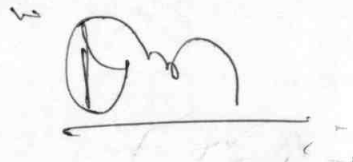
contrary view or not and whether it stood the test of propriety and congruity, but the point remains that if there was a detailed judicial finding on one hand and the remarks of the said two Officers on the other, the later cannot prevail over the former. This aspect of the matter will also have to be borne in mind if this matter as a result hereof is remitted back for consideration of further upgradation. It is so simple as that, and therefore, I would refrain from re-considering the facts tried to be put forth by the learned CPO with regard to the so called conduct of the Applicant while working here in Mumbai while holding that particular post.

6. It may also be noted that the record from the Office of the Hon'ble Chief Minister has not been produced in this matter. However, I must make it clear that the said record could have been sent for, but the course of action that I am going to adopt in this matter is such that I am not going to get hampered by the absence of the said record. It must be clearly understood, however, that the upshot of the above discussion is that I have refrained from re-examining the facts and facts at issue such as they were as subject matter of OA 28/2015, regardless of whether, they were cited by whichever side. I must repeat that the conclusions therein have become final and binding

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and all concerned including the concerned authorities would be bound thereby.

7. Before I consider the merit of the impugned communication of 20th July, 2016 discussed hereinabove, it will be appropriate in my view to discuss the authorities cited by both the sides. The Applicant relied upon a Judgment of the Central Administrative Tribunal reported as **Unknown Vs. Union of India which is a Judgment of 31st October, 2012.** The Applicant laid particular emphasis on Paras 7 and 10 thereof. The CAT relied upon the Judgments of the Hon'ble Supreme Court in **Manishankar Vs. Union of India and others (2008) 1 SCC (L & S) 819** and **Abhijit Ghosh Dastidar, 2008 (3) SCC 429** from CAT's earlier Judgment which was reproduced in Para 7 of Unknown's case. The said Para emphasizes the need to communicate the adverse remarks to the concerned employee especially when it concerns the matter of his promotion. In Para 10 a Judgment of the Hon'ble Supreme Court in **Nutan Arvind Vs. Union of India, (1996) 2 SCC 488** was relied upon which laid down *inter-alia* that when a high level Administrative Committee had considered in the matter of selection and the respective merits of the candidates, the scope for judicial interference would be little.




8. In Rejoinder, the Applicant relied upon the Judgment of the Hon'ble Delhi High Court in **Director General, E.S.I.C. Vs. Dr. Satish Kumar Azad in Writ Petition (C) 7193/2015, dated 3rd August, 2015 and others.** That was a matter where the Applicants came to be denied the promotion by taking into consideration the un-communicated adverse remarks in their ACRs and opportunity was not given to them to make a representation thereagainst. In Para 8 which was specifically emphasized by the Applicant, a note was taken by the Hon'ble High Court that though the remark, "good" was not bad but when it was not communicated and the issue arose in the context of, "good" and "very good", the fact that the said remark was not communicated would be significant in favour of the Applicant, and in that behalf even "good" will not be good enough.

9. The Applicant then relied upon a common Judgment of the Hon'ble High Court of Chhatisgarh in **Writ Petition (S) No.1989/2009 (Tarendra Kumar Jha Vs. High Court of C.G. & Other Writ Petitions).** That was a matter pertaining to a Judicial Officer of the higher subordinate judiciary. Full Court of the High Court on the administrative side had taken a certain decision about him



and on the judicial side, the Hon'ble High Court was pleased to interfere therewith in a manner prone to shake the conscience of a reasonable person. In Para 46, which was specifically emphasized by the Applicant, the Hon'ble High Court was pleased to refer to a Judgment of the Hon'ble Supreme Court in the matter of writing the ACRs of Judicial Officers.

10. It is quite clear that in this matter, the adverse remarks were written by both the authorities after they demitted the Office and in fact a long time thereafter. The first available opportunity to the Applicant to make representation thereagainst was availed of by her and the Hon'ble Chief Minister was pleased to upgrade her in exercise of his powers. It is no doubt true that going by the letter and spirit of the G.R. of 1.11.2011, it was necessary for the Respondents to communicate to the Applicant the adverse remarks preferably with some kind of a notice to her that she could make a representation thereagainst and thus an opportunity of showing cause ought to have been afforded to her before the Applicant could have been made to be visited with the adverse consequences of the adverse report. That was not done, and therefore, the first available opportunity as I mentioned just now became available to her only much late

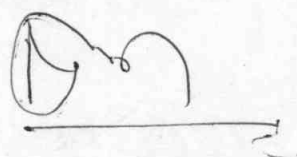


in the day. In fact, relying upon the said G.R, the Applicant told me that the reporting and/or reviewing authorities could not have been empowered to write her CR because the time limit therefore had expired. I have already indicted more than once hereabove that in the peculiar fact situation of this matter, I shall refrain from revisiting those aspects of the matter because in any case, the Hon'ble Chief Minister not only heard the case of the Applicant against the adverse remarks but advanced substantial remedy. But the fact remains that legally no adversity could be visited upon an employee on the basis of un-communicated adverse remarks and an opportunity has to be given to her to make representation against the adverse remarks. These aspects will have to be borne in mind if this matter was remitted to the Hon'ble Chief Minister.

11. The learned CPO referred me to **Mrs. Anil Katiyar Vs. Union of India and others, 1997 (1) SCC 280**. That was also a matter pertaining to the appointment quite likely by way of promotion to the post of Deputy Government Advocate in a certain Government agency. The selection was apparently made on the basis of the ACRs. The principles laid down are the same which I have acted on namely that in such matters, this Tribunal does



not act as an appellate authority over the reporting and reviewing authorities and about the scope of the jurisdiction. The learned CPO then referred me to **Deputy Inspector General of Police Vs. R. Mookan, 1999(0) AIR SCW 4716.** It was held there by the Hon'ble Supreme Court that the judicial authorities cannot give straightaway directions for promotion etc., and therefore, the said directions were modified. The next Judgment relied upon by the learned CPO was in the matter of **K. Samantaray Vs. National Insurance Co.Ltd., 2004 (9) SCC 286.** A particular portion thereof has been emphasized by the learned CPO which lays down inter-alia that a Government employee has only a right to be considered for promotion and no right to be promoted as such by a judicial fiat. In the matter of review, the learned CPO relied upon a Judgment of the Hon'ble Orissa High Court in the matter of **Collector Vs. Dharamu Sahu and others, Civil Review No.75/90 and M.C.No.113/90, dated 19.11.1990.** On the same issue, he relied upon a Judgment of the Hon'ble Supreme Court in the matter of **M. Satyanarayana Murthy and others Vs. Mandal Revenue Officer cum Land Acquisition Officer, AIR 1990 SC 40.** These two Judgments interpreted the statutory procedural law enshrined in order 47 Rule 1 of the Code of Civil Procedure. It must be clearly understood, however, that in



this matter, the point of review is of the ACR, and therefore, the principles governing Section 114 read with order 47 of the CPC cannot just be bodily lifted and applied hereto. One more Judgment of the Hon'ble Bombay High Court at its Nagpur Bench was cited but that was in respect of the award of cost which is the subject matter of companion MA and I shall turn thereto a little while from now.

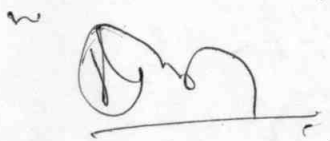
12. In so far as the Judgments cited by the learned CPO are concerned, it must be found that I have already applied the principles emerging therefrom to the present facts. Now, according to the Applicant, who relied upon the Judgment of the Hon'ble Chhatisgarh High Court, I can straightaway upgrade her by making an order on this OA while according to the learned CPO while relying upon **R. Mookan** (supra) I have no such powers and I will have to in the manner of speaking remit the matter back to the Hon'ble Chief Minister. In my opinion, in the first place, it must be found which I do that on facts, a case for consideration of up-gradation is made out though for the reasons already set out, I have refrained from making detailed observations with regard to the manner in which the reporting and reviewing authorities performed their functions in relation to a matter of great moment for the Applicant as far as her career prospects are concerned but



the fact remains that, that aspect of the functioning of the said authorities leave a lot to be desired, and therefore, there is apparently a case for considering the said up-gradation. In so far as the stand of the Respondents manifested by Exh. 'G' that under the G.R. of 1.11.2011, there cannot be any review, in my opinion, on the present facts such a stand is erroneous. Here, the exercise of right of lien and consequent cessation of the Applicant's assignment here to the Mumbai post and her reporting back to duty to her earlier post and then receipt of the ACRs after both the Officers had demitted their Office are all the facts that provide to this OA a very peculiar and exclusive hue which one cannot lose sight of. In my opinion, therefore, in the peculiar set of circumstances, when the Hon'ble Chief Minister was moved by the Applicant, she exercised her rights under Clause 35 of the Annexure to the said G.R. and it is not as if the embargo of Clause 41 which lays down that once the representation against the adverse remarks was rejected, same representation cannot be made will quite clearly not be applicable. Clause 41 in fact needs to be fully reproduced in Marathi.

“प्रतिकूल शे-यांविरुद्ध अभिवेदन एकदा फेटाळल्यानंतर त्याच शे-यांविरुद्धचे दुसरे अभिवेदन विचारात घेऊ नये. अभिवेदन फेटाळताना ते अभिवेदन, ज्या कागदपत्रांच्या आधारे तपासले जाईल त्या कागदपत्रांवर अभिवेदन कोणत्या कारणासाठी फेटाळले जात आहे ती कारणे स्पष्टपणे नमूद करावीत.”

(emphasis supplied)



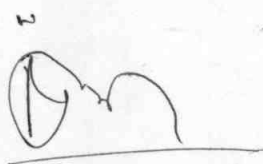
13. In my opinion, it is quite clear that the move made by the Applicant was never rejected by the Hon'ble Chief Minister. If anything the said move succeeded quite substantially and therefore, the embargo under Clause 41 would not be applicable. Still further, the Hon'ble Chief Minister being the highest administrative authority can surely be moved again, regardless of his earlier order for the purpose of reviewing or revising the earlier order in favour of the Applicant. The precise nomenclature like revision or review is immaterial. I am, therefore, clearly of the view that the Applicant was entitled to be given an audience in the matter of further up-gradation and the stand of the Respondents in Exh. 'G' hereto is unsustainable. I make it clear however that this is not such a matter like the exceptional one which was there before the Hon'ble Chhatisgarh High Court in the ruling above referred to. On the other hand, I do not entirely agree with the learned CPO in so far as his interpretation of the Judgment of the Hon'ble Supreme Court is concerned. In my opinion, the power to pass a particular order is always there but the manner of exercise of that power is equally important and that is the mandate of the Hon'ble Supreme Court. Circumspection and restraint must govern the making of orders by the Tribunal.

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14. In the set of above circumstances, in my opinion, although it appears to me that there is a case of further up-gradation, but for the foregoing, the matter will have to be remitted to the Hon'ble Chief Minister after setting aside and quashing Exh. 'G' hereto with a request to consider the representation of the Applicant about further up-gradation.

15. Now, turning to the MA, I find that it is brought by the Respondent No.1. It is against the order dated 25.10.2016 made by the Hon'ble Vice-Chairman when the matter was before him. A direction was given to the Respondents to file Affidavit-in-reply but no reply was forthcoming. One final opportunity was given, but still the Affidavit-in-reply was not filed, and therefore, cost of Rs.10,000/- was imposed on the Respondent No.1. The statement of the Applicant was recorded that because of the delay on the part of the Respondents, her promotion in the Government of India post was jeopardized.

16. The Respondent No.1 has given out several reasons why according to him, the cost should not have been imposed and has also tried to set down the reasons as to why there was good cause because whatever efforts were needed were made and in that connection, the Officers have been named. An unreported Judgment of the



Hon'ble Bombay High Court at Nagpur Bench in **C.P.No.184/2016 in Writ Petition No.818/2016 (Shivaji B. Shelgaonkar Vs. State and Ors. and other C.Ps dated 26.10.2016** was relied upon. Normally, such orders of award of cost, etc. are fact specific. In the present set of facts, regard being had to the circumstances herein, I am of the considered view that the Hon'ble Vice-Chairman was justified in imposing cost. This is a matter of judicial discretion which in fact the concerned quasi Judicial Officer himself will be slow to interfere with. In so far as the above referred citation in **Shivaji** (supra) is concerned, that order was made under the contempt jurisdiction of the Hon'ble High Court. It was held by the Hon'ble High Court that although to begin with sterner measures were adopted but in as much as the orders were ultimately complied with, the further action was not considered necessary to be taken. In my opinion, what is important is the observations made by Their Lordships and if the learned CPO wanted me to read a mandate therein that cost should first be imposed and then be held as some kind of a surety to be refunded once the reply was filed, that is not the mandate of the Hon'ble High Court and that is not in tune with the public policy. There is no case made out for interfering with the said order of the Hon'ble Vice-Chairman.



17. The order dated 20th July, 2016 (Exb. "G", Page 105 of the PB) stands hereby quashed and set aside. The matter is remitted to the Hon'ble Chief Minister for considering the representation of the Applicant for her further up-gradation of Confidential Remarks as prayed by her. It is requested that the matter be decided as early as possible and in any case within eight weeks from today and its outcome be communicated to the Applicant within one week thereafter. The Original Application is allowed in these terms with no order as to costs.

18. The Misc. Application of the 3rd Respondent in relation to the award of cost stands hereby dismissed with no order as to costs.

Sd/-

(R.B. Malik)
Member-J
09.12.2016

9.12.16

Mumbai

Date : 09.12.2016

Dictation taken by :

S.K. Wamanse.