(20)

Central Administrative Tribunal, Principal Bench

Original Application No.2966 of 2002

New Delhi, this the 16th day of January, 2004

Hon'ble Mr.Justice V.S.Aggarwal, Chairman
Hon'ble Mr.S.A. Singh, Member(A)

Mr.Harish K.Dogra,
Joint Secretary,
Ministry of External Affairs,
South Block, New Delhi .... **Applicant**

(Appeared in person)

Versus

1. Union of India,
   Through the Foreign Secretary,
   Ministry of External Affairs,
   Government of India,
   South Block, New Delhi.

2. Shri R.M. Abhyankar,
   Secretary (ANA)
   Formerly Special Secretary (East)
   Ministry of External Affairs,
   Government of India,
   South Block, New Delhi.

3. Shri P.V. Joshi,
   High Commissioner of India,
   Guyana
   C/o Ministry of External Affairs,
   Government of India,
   South Block, New Delhi.

4. Shri Surendra Kumar,
   Consul General of India,
   Chicago (USA)
   C/o Ministry of External Affairs,
   Government of India,
   South Block, New Delhi.

5. Smt.Nirupama Rao,
   Additional Secretary,
   Ministry of External Affairs,
   Government of India,
   South Block, New Delhi.

6. Shri Deepak Vohra,
   Ambassador of India,
   Yerevan, Armenia,
   C/o Ministry of External Affairs,
   Government of India,
   South Block, New Delhi.

7. Shri Bhaskar Kumar Mitra,
   Ambassador of India,
   Bahrain, Bahrain
   C/o Ministry of External Affairs,
   Government of India,
   South Block, New Delhi.

8. Smt. Meera Shankar,
Additional Secretary,
Ministry of External Affairs,
Government of India,
South Block,New Delhi.

9. Shri Neelakantan Ravi,
Consul General of India,
Munich, Germany
C/o Ministry of External Affairs,
Government of India,
South Block,New Delhi.

10. Shri Saurabh Kumar,
Ambassador of India,
Hanoi, Vietnam,
C/o Ministry of External Affairs,
Government of India,
South Block,New Delhi.

11. Shri Ram Mohan,
Ambassador of India,
Tunis, Tunisia,
C/o Ministry of External Affairs,
Government of India,
South Block,New Delhi.

12. Shri Kailash Lal Agarwal,
Ambassador of India,
Zagreb, Croatia,
C/o Ministry of External Affairs,
Government of India,
South Block,New Delhi.

13. Shri Nalin Surie,
Joint Secretary (EA)
Ministry of External Affairs,
Government of India,
South Block,New Delhi.

14. Dr.Sheel Kant Sharma,
Joint Secretary (DISA),
Ministry of External Affairs,
Government of India,
South Block,New Delhi.

15. Shri Kajor Mal Meena,
Ambassador of India,
Muscat, Oman,
C/o Ministry of External Affairs,
Government of India,
South Block,New Delhi.

16. Shri P.L. Goyal,
Ambassador of India,
Berne, Switzerland,
C/o Ministry of External Affairs,
Government of India,
South Block,New Delhi
formerly Additional Secretary(AD)
Ministry of External Affairs,
& Member-Secretary, DPC

17. Secretary (Personnel)
Ministry of Personnel, Public Grievances
and Pensions,
Government of India,
North Block, New Delhi. .... **Respondents**

(By Advocate: Shri Rajiv Shakdher)

O R D E R

By Justice V.S. Aggarwal, Chairman

Applicant Harish Dogra is a Joint Secretary in the Ministry of External Affairs. By virtue of the present application, he challenges the order/decision whereby he has been ignored for further promotion and seeks that a direction should be issued to promote him on the date of the vacancy as Grade II of IFS officer with consequential benefits and quash the recommendation of the Departmental Promotion Committee convened on 11.6.2002. He further prays that respondent no.2 should be debarred from sitting as a Member of the Departmental Promotion Committee.

2. Some of the relevant facts are that the applicant had been considered for promotion from Grade III to Grade II alongwith private respondents 3 to 15 in the Departmental Promotion Committee meeting held on 11.6.2002. Respondent No.2, for reasons that have been stated by the applicant, have borne on malafides/grudge against him and therefore, he could not take part in the meeting. The same was thus vitiated. Plea has also been raised that the Departmental Promotion Committee had not been properly constituted. It did not follow any clear-cut criteria for assessing the performance of the applicant and further that the Departmental Promotion Committee is only a

recommendatory body. Its role is advisory in nature and, therefore, it is only the Appointment Committee of the Cabinet which has the power to re-evaluate the confidential reports and assess the individuals to make selections.

3. The petition has been contested. The averments of the applicant have been controverted by respondent no.1.

4. It is insisted that the Departmental Promotion Committee that met on 11.6.2002 was properly constituted. This has already been so held in the earlier application (O.A.2640/2001). It is denied that respondent no.2 was bearing any malafide against the applicant. Respondent no.2 was stated to be a Special Secretary and a Member of the Committee of Secretaries in the Ministry of External Affairs. For all purposes, the post of Secretary and a Special Secretary are equivalent in terms of pay, grade and the nature of work and responsibility. Secretary means the Secretary to the Government of India in any Ministry and includes a Special Secretary in terms of Central Civil Services (Classification, Control and Appeal) Rules. It was pointed that the posts of Secretaries available in Ministry of External Affairs include that of the Foreign Secretary. They were filled up by Smt.Chokila Iyer, Foreign Secretary, Shri R.S. Kalha, Secretary (West), Shri Shashank, Secretary (ER) and Shri J.C.Sharma, Secretary (PCD). Since respondent no.2 had been promoted from the post of Additional Secretary to the next higher rank and there was no vacancy at the relevant time, he was given the post of Special Secretary. It is insisted that the

Departmental Promotion Committee could assess if the person is to be promoted or not. It cannot be guided merely by the overall grading and that the role of the DPC was basically advisory in nature.

5. Pertaining to the malafides attributed to respondent no.2, it was denied that he had any role in the transfer of the applicant from Istanbul to Headquarters in September 1996. The decision was taken after the approval of the External Affairs Minister. The applicant had joined the Consulate General at Istanbul on 31.7.95. Within one year of his joining, certain incidents involving the members of staff were reported to the Headquarters of the Ministry. This brought ill repute to the image of the country. The applicant being the Head of the Consulate General failed to enforce the discipline. A special investigation team was sent to Istanbul to enquire into the matter. There was no bias against the applicant on the part of Respondent No.2. So far as the confidential dossiers that were written, it was pointed that it was on the advice of the DOP&T to ignore the ACRs for the period for the reason that at the relevant time, the officer concerned was not available to assess the same. The same had been recorded by respondent no.2 in his capacity as the Ambassador of India. The applicant had not submitted the confidential report in time to respondent no.2 and the latter, as per rules, recorded the same without self-assessment. The applicant had represented and it is in this backdrop that the DOP&T had advised that the same be ignored. It is denied that in the earlier O.A.1174/97,

it was held that allegations of arbitrariness and malafide against respondent no.2 were substantiated.

6. Respondent no.2 had filed a separate reply. He denied that there was any malafide on his behalf against the applicant. He had no role in the transfer of the applicant from Istanbul to the Headquarters. Since the applicant had not submitted the ACRs in time, he had recorded the ACRs without the self-assessement by the applicant.

7. We have heard the parties counsel. On behalf of the applicant, great stress was laid on the plea that respondent no.2 was biased against him and, therefore, he was not the person competent to be in the Departmental Promotion Committee meeting.

8. The expression 'bias' by itself requires no further elucidation. In a Society governed by the rule of law, fair play is one of the basic ingredients but mere allegations by itself will not be enough. In the case **Election Commission of India and another vs. Dr. Subramaniam Swamy and another**, (1996) 4 Supreme Court Cases 104 where the matter was concerning bias attributed to the Election Commission, the Supreme Court held:

> "15. The next question then is if the Chief Election Commissioner, for reason of possible bias, is disqualified from expressing an opinion, how should the Election Commission conduct itself? As pointed out earlier Shri Sanghi, the learned counsel for the appellant, has very frankly and with his usual fairness stated that the Chief Election Commissioner preferred this appeal only

because he genuinely believed that the scheme of Article 324 did not conceive of a decision by majority, but if the Court comes to the conclusion that a decision can be reached without the Chief Election Commissioner participating in decision-making in the special circumstances of the case, the latter is not at all keen or anxious to hear and adjudicate upon the matter at issue before the Election Commission. We are quite conscious of the high office the Chief Election Commissioner occupies. Ordinarily we would be loath to uphold the submission of bias but having regard to the wide ramification the opinion of the Election Commissioner would have on the future of Ms J. Jayalalitha, we think that the opinion, whatever it be, should not be vulnerable. The participation of the Chief Election Commissioner in the backdrop of the findings recorded by the learned Single Judge as well as the Division Bench of the High Court would certainly permit an argument of prejudice, should the opinion be adverse to Ms. J. Jayalalitha."

Thereafter the Supreme Court even considered the doctrine of necessity and held:

"16. We must have a clear conception of the doctrine. It is well settled that the law permits certain things to be done as a matter of necessity which it would otherwise not countenance on the touchstone of judicial propriety. Stated differently, the doctrine of necessity makes it imperative for the authority to decide and considerations of judicial propriety must yield. It is often invoked in cases of bias where there is no other authority or Judge to decide the issue. If the doctrine of necessity is not allowed full play in certain unavoidable situations, it would impede the course of justice itself and the defaulting party would benefit therefrom."

9. Similarly in the case **State of W.B. and others vs. Shivananda Pathak and others**, (1998) 5 SCC 513, the same controversy had come up for consideration. The Supreme Court in this regard referred to the various precedents and held:

"31. This Court has already, innumerable times, beginning with its classic decision in A.K. Kraipak v. Union of India, (1969) 2 SCC 262 laid down the need of "fair play" or "fair hearing" in quasi-judicial and administrative matters. The

hearing has to be by a person sitting with an unbiased mind. To the same effect is the decision in S.P. Kapoor (Dr) v. State of H.P., (1981) 4 SCC 716. In an earlier decision in Mineral Development Ltd. v. State of Bihar, AIR 1960 SC 468 it was held that the Revenue Minister, who had cancelled the petitioner's licence or the lease of certain land, could not have taken part in the proceedings for cancellation of licence as there was political rivalry between the petitioner and the Minister, who had also filed a criminal case against the petitioner. This principle has also been applied in cases under labour laws or service laws, except where the cases were covered by the doctrine of necessity. In Financial Commr. (Taxation), Punjab v. Harbhajan Singh, (1996) 9 SCC 281 the Settlement Commissioner was held to be not competent to sit over his own earlier order passed as Settlement Officer under the Displaced Persons (Compensation & Rehabilitation) Act, 1954. The maxim nemo debet esse judex in propria sua causa was invoked in Gurdip Singh v. State of Punjab, (1997) 10 SCC 641.

10. Thereupon the Supreme Court went on to hold that it may not be possible to give proof of actual bias at times. There are many ways to discover the same and the Supreme Court consequently held:

"33. Bias, as pointed out earlier, is a condition of mind and, therefore, it may not always be possible to furnish actual proof of bias. But the courts, for this reason, cannot be said to be in a crippled state. There are many ways to discover bias; for example, by evaluating the facts and circumstances of the case or applying the tests of "real likelihood of bias" or "reasonable suspicion of bias". De Smith in Judicial Review of Administrative Action, 1980 Edn., pp.262, 264, has explained that "reasonable suspicion" test looks mainly to outward appearances while "real likelihood" test focuses on the court's own evaluation of the probabilities.

34. In Metropolitan Properties Co. v. Lannon, (1968) 1 WLR 815 it was observed "whether there was a real likelihood of bias or not has to be ascertained with reference to right-minded persons; whether they would consider that there was a real likelihood of bias". Almost the same test has also been applied here in an old decision, namely, in Manak Lal v. Dr Prem Chand Singhvi, AIR 1957 SC 425. In that case, although the Court found that the Chairman of the Bar Council Tribunal appointed by the Chief Justice of the Rajasthan High Court to enquire into the misconduct of Manak Lal, an advocate, on the complaint of one Prem Chand was not biased towards him, it was held that he should

not have presided over the proceedings to give effect to the salutary principle that justice should not only be done, it should also be seen to be done in view of the fact that the Chairman, who, undoubtedly, was a Senior Advocate and an ex-Advocate General, had, at one time, represented Prem Chand in some case. These principles have had their evaluation in the field of administrative law but the courts performing judicial functions only cannot be excepted from the rule of bias as the Presiding Officers of the court have to hear and decide contentious issues with an unbiased mind."

11. Similarly in the case of **Kumaon Mandal Vikas Nigam Ltd. Vs. Girja Shankar Pant and others**, (2001) 1 SCC 182, the Supreme Court went into the same controversy and referred to the fact that the doctrine of natural justice implies that it is not to secure justice but to prevent miscarriage of justice. The expression 'bias' had been considered and in paragraph 10, the Supreme Court held:

"10. The word "bias" in popular English parlance stands included within the attributes and broader purview of the word "malice", which in common acceptation means and implies "spite" or "ill-will" (Stroud's Judicial Dictionary, 5th Edn., Vol.3) and it is now well settled that mere general statements will not be sufficient for the purposes of indication of ill-will. There must be cogent evidence available on record to come to the conclusion as to whether in fact there was existing a bias which resulted in the miscarriage of justice."

12. Thereupon while scanning through the various propositions, the Supreme Court held that mere apprehension of bias or danger of bias is not enough. In paragraph 35, this principle had been explained:

"35. The test, therefore, is as to whether a mere apprehension of bias or there being a real danger of bias and it is on this score that the surrounding circumstances must and ought to be collated and necessary conclusion drawn therefrom - in the event however the conclusion is otherwise inescapable that there is existing a real danger of bias, the administrative action cannot be sustained: If on the other hand, the allegations

pertaining to bias is rather fanciful and otherwise to avoid a particular court, Tribunal or authority, question of declaring them to be unsustainable would not arise. The requirement is availability of positive and cogent evidence and it is in this context that we do record our concurrence with the view expressed by the Court of Appeal in Locabail case, 2000 QB 451."

13. In another decision in the case of **State of Punjab vs. V.K. Khanna and others**, AIR 2001 SUPREME COURT 343, the Supreme Court again held that it is not mere apprehension of bias but there has to be something more to establish the same. The Supreme Court recorded:

"8. The test, therefore, is as to whether there is a mere apprehension of bias or there is a real danger of bias and it is on this score that the surrounding circumstances must and out to be collated and necessary conclusion dawn therefrom. In the event, however, the conclusion is otherwise that there is existing a real danger of bias administrative action cannot be sustained. If on the other hand allegations pertain to rather fanciful apprehension in administrative action, question of declaring them to be unsustainable on the basis therefore would not arise."

14. From the aforesaid, it is clear that bias is something as a preconceived opinion to decide the case on an issue in a particular manner. It is a condition of mind which weighs the judgement and renders the person concerned unable to exercise the impartiality in a particular case.

15. Mere apprehension will not be a substitute for establishment of bias. In day-to-day working, a person can come across many officers and necessarily their confidential dossiers would be recorded. That by itself will not be enough to establish bias.

16. From the facts, it is obvious that while the

applicant was working at Turkey, respondent no.2 was the Ambassador at that place. Some instances have been given which the applicant justifies that it had not come up to the expectation of respondent no.2. The confidential report of the applicant had been recorded and it is not in dispute that thereafter on his representation and on the advice of the DOP&T, keeping in view that there was no self-assessment made by him, the same have been ignored. The reason explained by respondents is that the applicant had submitted the ACRs very late.

17. Can in such a situation it be stated that bias can be attributed to respondent no.2 or not?

18. We find that in the peculiar facts, the said plea must be rejected. There is no legal bar that a person who has been recording the confidential reports, cannot be a part of the Departmental Promotion Committee meeting. In day-to-day working, as already referred to above, these facts are noticed but they do not imply bias. Merely because something happened, cannot be moulded into a controversy of bias against an individual. There is no legal infirmity therefore if respondent no.2 took part in the Departmental Promotion Committee meeting to consider the claim of the applicant. Bias simply on the ground that they were together at Turkey and certain incidents took place resulting in the confidential reports of the applicant to be recorded, cannot be attributed. It has specifically been denied that respondent no.2 had any hand in the transfer of the applicant. We find that in the

peculiar facts, simply on these grounds, bias cannot be attributed and on that count, the applicant cannot be stated to have claim for quashing of the Departmental Promotion Committee.

19. Reverting back to the second argument that the Departmental Promotion Committee was not properly constituted, at the outset attention had been drawn towards the decision of the Supreme court in the case of **Union of India and another v. U.D. Dwivedi**, (1997) 3 SCC 182. The Supreme Court of course was concerned with slightly different facts. The Chairman was held to have not been appointed properly. It was held that its recommendations would also be invalid when made in a Departmental Promotion Committee meeting.

20. The argument advanced has been that respondent no.2 was not the Secretary to the Government of India and, therefore, could not take part in the Departmental Promotion Committee meeting.

21. It was not disputed before us that the said departmental promotion committee meeting had to comprise of five Secretaries including the Foreign Secretary. It is an admitted case of the parties that there were four Secretaries present and respondent no.2 was the fifth Member of the Committee and he was a Special Secretary.

22. The respondents contend that a Special Secretary is also a Secretary to the Government of India. Besides

this plea, it has also been urged that his name had been approved by the Appointment Committee of the Cabinet and there were four Secretaries available in the Ministry of External Affairs and in view of that, respondent no.2 had been promoted from the post of Additional Secretary.

23. During the course of submissions, learned counsel for the respondents had drawn the attention of this Tribunal that Secretary has been defined under Section 2 (l) of the Central Civil Services (Classification, Control and Appeal) Rules. It reads:

> "2(l) "Secretary" means the Secretary to the Government of India in any Ministry or Department, and includes -
>
> (i) a Special Secretary or an Additional Secretary,
>
> (ii) a Joint Secretary placed in independent charge of a Ministry or Department,
>
> (iii) in relation to the Cabinet Secretariat, the Secretary to the Cabinet,
>
> (iv) in relation to the President's Secretariat, the Secretary to the President, or as the case may be, the Military Secretary to the President,
>
> (v) in relation to Prime Minister's Secretariat, the Secretary to the Prime Minister, and
>
> (vi) in relation to the Planning Commission, the Secretary [or the Additional Secretary] to the Planning Commission."

24. According to him, therefore, the Special Secretary would be a Secretary to the Government of India. We have not the least hesitation in rejecting this contention. The reason being that this definition is only for purposes of the Central Civil Services (Classification, Control and Appeal) Rules and cannot be taken to be for all

other purposes.

25. During the course of submissions, our attention has not been drawn to any instructions or order that a Special Secretary is a Secretary to the Government of India. In fact, perusal of the reply clearly indicates that respondent no.2 was posted as Special Secretary because the post of Secretary was not vacant in the Ministry of External Affairs.

26. As regards the plea that respondent no.2 had been approved as Secretary, Government of India, we take liberty in referring to the order Annexure R-4 dated 10.9.2001 whereby his name has been approved as Secretary, Government of India. It reads:

> "The Appointments Committee of the Cabinet has approved the proposal for empanelment of the following 12 IFS Officers for promotion to Grade I of IFS (Secretary level) (pay Rs.26,000/- plus usual allowances) w.e.f. the date of the assumption of the charge of the post and until further orders:
>
> Names S/Sh.
> 1) Aftab Seth
> 2) Harsh Kumar Bhasin
> 3) R.M. Abhyankar."

27. It clearly shows that it is subject to respondent no.2 assuming the charge of the post of Secretary. Respondent no.2, at the relevant time, had only assumed the charge as Special Secretary on 4.12.2001. The said order reads:

> "The Appointments Committee of the Cabinet has approved the appointment of Shri R.M. Abhyankar, IFS(1968) as Special Secretary in the Ministry of

External Affairs.

Sd/-
(Chitra Chopra)
Secretary
Appointments Committee of the Cabinet"

28. Therefore, it is obvious that respondent no.2 had only assumed charge of the post of Special Secretary when he took part in the Departmental Promotion Committee meeting. He had not become the Secretary.

29. Another limb of the argument was that respondent no.2 was drawing Rs.26,000/- as salary which is the pay of the Secretary. In our opinion, that is non-consequential because any person drawing the special pay will not be the Secretary to the Government of India. We hold, therefore, that respondent no.2 was not Secretary to the Government of India on the relevant date and, therefore, he could not have taken part in the Departmental Promotion Committee meeting. To that extent, claim of the applicant is justified.

30. For these reasons, we allow the present application only in part. It is directed that qua the applicant, a fresh Departmental Promotion Committee meeting should be held in accordance with the instructions on the subject.

(S.A. Singh)
Member(A)

(V.S. Aggarwal)
Chairman

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