

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
NEW DELHI

O.A. No. 45/ 1986
TAX No.

DATE OF DECISION 29th June, 1987.

Shri Tejinder Singh Petitioner

In person Advocate for the Petitioner(s)

Versus

Union of India and others Respondent

Shri P. P. Rao, with Shri K. L. Mehta
Shri J. K. Sibal Advocate for the Respondent(s)
for respondents No. 1 to 3.
Advocate for respondents
No. 7, 20, 23 & 27.

CORAM :

The Hon'ble Mr. Justice K. Madhava Reddy, Chairman.

The Hon'ble Mr. Kaushal Kumar, Member (A).

1. Whether Reporters of local papers may be allowed to see the Judgement? *Yes*
2. To be referred to the Reporter or not? *Yes*
3. Whether their Lordships wish to see the fair copy of the Judgement? *No*
4. Whether to be circulated to other Benches? *Yes*

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(KAUSHAL KUMAR)
MEMBER (A)
29.6.1987.

K. Madhava Reddy

(K. MADHAVA REDDY)
CHAIRMAN
29.6.1987.

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CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH, DELHI.

Regn. No. O.A. 45/1986.

DATE OF DECISION: 29th June, 1987.

Shri Tejinder Singh

Applicant.

V/s.

Union of India and
Others

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Respondents.

CORAM: Hon'ble Mr. Justice K. Madhava Reddy, Chairman.
Hon'ble Mr. Kaushal Kumar, Member (A).

Applicant

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In person.

Respondents No.1 to 3 Through Shri P.P. Rao, Senior
Advocate with Shri K.L. Mehta.

Respondents No.7, 20, 23 & 27. Through Shri J.K. Sibal,
Advocate.

(Judgment of the Bench delivered by
Hon'ble Mr. Kaushal Kumar, Member)

JUDGMENT

The applicant, who is an Assistant Commissioner of Income Tax, has in this application challenged the legal validity of the promotion order dated 25th January, 1985 issued by the Government of India, Ministry of Finance, Department of Revenue, New Delhi, promoting 29 Assistant Commissioners of Income Tax to the grade of Commissioner of Income Tax (Level-II). The relief prayed for in this application is for issue of a direction to the respondents No.1 and 2 to promote the applicant as per his place in the panel of names recommended by the Union Public Service Commission. In the said panel comprising 32 names, the name of the applicant figures at Sl. No.2.

2. The main grounds on which the impugned order has been challenged is that the departure from the panel prepared by the UPSC is against the principle of estoppel and that the impugned order of promotion is arbitrary. The other grounds on which the applicant rests his claim are that the principles of natural justice and equity have been violated inasmuch as

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the appointing authority made a departure from the panel recommended by the Union Public Service Commission without any valid ground and issue of a show cause notice to him and that the procedure for rejecting the recommendation of the UPSC as contained in the Government of India, Department of Personnel and Administrative Reforms Office Memorandum dated 30th December, 1976 had not been followed.

3. The case of the respondents No.1 and 2 is that the applicant has no right for appointment on the basis of the recommendations made by the UPSC and in case the appointing authority has not approved his name, no right flows from the panel as such.

4. 29 Officers who had been included in the panel and approved for promotion were also impleaded as respondents vide our detailed order dated 3rd March, 1986.

5. A few facts necessary to appreciate the various contentions raised in this application may be noticed below: -

The applicant joined as Income Tax Officer, Class-I in June 1964 on the basis of the Competitive I.A.S. etc. Examination held in 1963. Subsequently, he was promoted to the post of Assistant Commissioner of Income Tax. Recruitment to the post of Commissioner of Income Tax (Level-II) is only by promotion from amongst the Assistant Commissioners of Income Tax. It is a 'Selection' post and the promotion is made purely on the basis of seniority-cum-merit as assessed by the Departmental Promotion Committee, which is presided over by the Chairman / Member of the UPSC. There are no statutory rules for promotion to the post of Commissioner of Income Tax and the procedure for selection is regulated by the Government of India Office Memorandum No. 22011/6/75-Estt. (D), dated 30th December, 1976. A Departmental Promotion Committee comprising the Chairman, UPSC, Secretary, Department of Revenue, Ministry of Finance,

Chairman, Central Board of Direct Taxes and a Member, Central Board of Direct Taxes, met on 1st and 2nd December, 1983 to draw up a panel for promotion to the grade of Commissioner of Income Tax (Level-II) for filling up 32 vacancies. The D.P.C. considered 96 names of Assistant Commissioners of Income Tax and recommended 32 names. The Committee selected 30 officers from amongst the first 35 officers in the seniority list of Assistant Commissioners. Two officers, including the applicant, who were recommended by the D.P.C. figured at Sl. No. 55 and 63 of the seniority list in the consideration zone. From the first 35 officers, four who had been graded as "Good" and one graded as "Not yet fit" were left out by the D.P.C. In the panel of 32 persons recommended by the D.P.C., the first three officers were graded as "Outstanding", while the remaining 29 officers were graded as "Very Good". The appointing authority in this case is the President of India, but as per Transaction of Business Rules, appointments to the post of Commissioner of Income Tax are required to be approved by the Appointments Committee of the Cabinet. The approval of the Appointments Committee was conveyed vide letter dated 24.1.1985 and this approval was confined to 30 officers, dropping the applicant (Sl. No. 2 of the panel) and Shri S. Bapu (Sl. No. 3 of the panel), and shifting Shri N.C. Jain (Sl. No. 1 of the panel) to Sl. No. 14. On 25th January, 1985, the Department of Revenue, Ministry of Finance, issued formal orders regarding promotion and posting of 29 Assistant Commissioners of Income Tax, as approved by the Appointments Committee of the Cabinet after omitting the name of Shri M.M. Rehman, who had in the meantime retired from service. It is this order of 25th January, 1985, which has been impugned in this application.

6. The panel recommended by the UPSC was earlier challenged through petitions filed in the Madras High Court,

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the Gujarat High Court and the Delhi High Court. The Madras High Court, vide its judgment dated 26th October, 1984 in Writ Petitions No. 2092 and 2093 of 1984 dismissed the writ petitions challenging the validity of the panel.

7. In the absence of any statutory rules for promotion to the post of Commissioner of Income Tax (Level II), we have to fall back upon the Office Memorandum dated 30th December, 1976, which lays down the detailed procedure for making promotions and functioning of the Departmental Promotion Committees. Under the heading "CONSULTATION WITH THE UPSC", it is provided that "The recommendations of the Departmental Promotion Committee, whether it included a member of the UPSC or not should be referred to the Commission for approval. Consultation with the Commission is compulsory under article 320(3) of the Constitution of India, read with UPSC (Exemption from consultation) Regulation 1958, as amended from time to time. Broadly speaking, subject to certain exceptions mentioned in the Regulations in so far as promotions are concerned, consultation with the Commission is compulsory in respect of promotions from Group B to Group A posts. However, a reference may be made to the Regulations, as and when necessary." It is further laid down that "Where UPSC is associated with the D.P.C., the recommendation of the DPC should be treated as recommendations of the U.P.S.C." Further it states that -

"If it is considered necessary by the appointing authority to vary or disagree with the recommendations made by the DPC, the procedure prescribed for over-ruling the recommendations of UPSC should be followed. The relevant portion of the procedure as set out in the Ministry of Home Affairs O.M. No. 18/42/50-Estts dated 27.11.50 is reproduced below: -

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"The Government of India have decided that where the Union Public Service Commission have been consulted in regard to any appointment(s) the recommendations made by the Commission should not be departed from unless, in the opinion of the Honourable Minister concerned, exceptional circumstances exist which in the public interest require such departure. In such a case the reasons for holding this opinion should be communicated to the Commission and the Commission given an opportunity of further justifying their recommendations. On the receipt of the observations of the Commission, their recommendations should be considered further by the Ministry still considers that the recommendations made by the Commission should not be accepted, the case should be referred with a self-contained summary to the Establishment Officer of the Government of India who will place it before the Appointments Committee of the Cabinet consisting of the Hon'ble the Prime Minister, the Hon'ble Minister for Home Affairs and the Hon'ble Minister administratively concerned with the appointment(s). In cases in which the Hon'ble Home Minister or the Hon'ble the Prime Minister happens to be the Minister concerned with the appointment, the Hon'ble Finance Minister will be added to the Committee. The decision reached by the Appointment Committee in all such cases should be communicated to the Commission by the Ministry administratively concerned. Final

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orders in accordance with the decision will also be issued by that Ministry, copy being endorsed to the Commission."

8. From the above, it is clear that in the present case, the recommendation of the D.P.C. has to be treated as recommendation of the UPSC, and further that consultation with the UPSC as enjoined by Article 320(3) of the Constitution has also to be made before appointments are made. Whereas it was contended by the applicant that consultation with the UPSC is mandatory, the learned counsel for the respondents Shri P.P. Rao argued that such a consultation was merely directory. Be that as it may, we have no doubt that where consultation is made with the UPSC, such consultation has to be full, effective and meaningful. We have to see how far the consultation in the present case was full and effective.

9. In *Chandra Mohan v. State of Uttar Pradesh* (A.I.R. 1966 S.C. 1987), the Supreme Court had occasion to examine the scope of Article 233 of the Constitution with reference to appointments to the U.P. Higher Judicial Service. The following observations of the Supreme Court are relevant: -

"7. The first question turns upon the provisions of Art. 233 of the Constitution.

Article 233 (1) reads:

"Appointments of persons to be, and the posting and promotion of district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State."

"We are assuming for the purpose of these appeals that the "Governor" under Art. 233 shall act on the advice of the Ministers. So the expression "Governor" used in the Judgment

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means Governor acting on the advice of the Ministers. The constitutional mandate is clear. The exercise of the power of appointment by the Governor is conditioned by his consultation with the High Court, that is to say, he can only appoint a person to the post of district judge in consultation with the High Court. The object of consultation is apparent. The High Court is expected to know better than the Governor in regard to the suitability or otherwise of a person, belonging either to the "judicial service" or to the Bar, to be appointed as a district judge. Therefore, a duty is enjoined on the Governor to make the appointment in consultation with a body which is the appropriate authority to give advice to him. This mandate can be disobeyed by the Governor in two ways, namely, (i) by not consulting the High Court at all, and (ii) by consulting the High Court and also other persons. In one case he directly infringes the mandate of the Constitution and in the other he indirectly does so, for his mind may be influenced by other persons not entitled to advise him. That this constitutional mandate has both a negative and positive significance is made clear by the other provisions of the Constitution. Wherever the Constitution intended to provide more than one consultant, it has said so: see Arts. 124(2) and 217(1). Wherever the Constitution provided for consultation of

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a single body or individual it said so: see Art. 222. Art. 124 (2) goes further and makes a distinction between persons who shall be consulted and persons who may be consulted. These provisions indicate that the duty to consult is so integrated with the exercise of the power that the power can be exercised only in consultation with the person or persons designated therein. To state it differently, if A is empowered to appoint B in consultation with C, he will not be exercising the power in the manner prescribed if he appoints B in consultation with C and D."

10. Again in Chandramouleshwar Prasad v. The Patna High Court and others (A.I.R. 1970 S.C. 370) the same view was reiterated by the Supreme Court when they observed:

"Consultation or deliberation is not complete or effective before the parties thereto make their respective points of view known to the other or others and discuss and examine the relative merits of their views. If one party makes a proposal to the other who has a counter proposal in his mind which is not communicated to the proposer the direction to give effect to the counter proposal without anything more, cannot be said to have been issued after consultation." (Para 7)

11. From the above, it is obvious that where the process of consultation is involved and that too with a constitutional body, the essence of consultation is that if any change or deviation is made from the recommendations of the body, the proposal for change, modification or deviation from the recommendations should be referred back to the body for its

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views before a final decision is taken by the competent authority. In fact, the circular dated 30th December, 1976 itself specifically provides that in cases where in the opinion of the Hon'ble Minister concerned, exceptional circumstances exist which in the public interest require such departure, the reasons for holding this opinion should be communicated to the Commission and the Commission given an opportunity of further justifying their recommendations. On the receipt of the observations of the Commission, their recommendations should be considered further by the Ministry and if it is still considered that the recommendations made by the Commission should not be accepted, the case should be referred with a self-contained summary to the Establishment Officer of the Government of India, who will place it before the Appointments Committee of the Cabinet for their decision. Thus the procedure does envisage that where the Minister concerned does not agree with the recommendations of the UPSC, a reference back has to be made to the Commission and after obtaining the views of the Commission, if the Minister still feels that a deviation has to be made from the recommendations of the UPSC, the matter has to be referred to the Appointments Committee of the Cabinet. Learned counsel Shri P.P. Rao laid great stress on the point that where a departure from the recommendations of the UPSC is made at the level of the Appointments Committee of the Cabinet, the procedure envisaged in the circular dated 30th December, 1976 does not provide for any reference back to the Commission, since the final arbiter in the matter is the A.C.C. We feel there is no justification for taking this view. The circular merely provides for a contingency where the disagreement is at the level of the Minister. It does not provide for a situation where the disagreement takes place at the level of the A.C.C. But from that it does not follow that if ACC disagrees, the

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appointment may be made without communicating the reasons to the UPSC and awaiting its opinion. On the other hand the opening words of the circular make it abundantly clear that whenever the recommendation made by the UPSC is sought to be overruled and appointments are sought to be made the procedure envisaged by the circular has to be followed. It does not make an exception in the case of appointments approved by the ACC.

12. The question here is one of principle of consultation and not the level at which the disagreement takes place. The President of India is the appointing authority and it is an internal procedural matter as to whether the approval of the recommendation of the UPSC is accorded at the level of the Minister or the Appointments Committee of the Cabinet. The essence of consultation is that in case of a divergence of views, the matter should be referred back to the UPSC and their views sought again. Consultation does not imply concurrence; but there can be a meaningful consultation only when the body or authority which makes the recommendations is apprised as to why the appointing authority does not agree with its recommendations and its views are sought once again. May be, on a reference back to the Commission, the Commission itself may agree to fall in line with the counter proposal or in the alternative, the Commission may give reasons for reiterating its earlier recommendations which on reconsideration, the appointing authority itself may accept, thus obviating the difference of opinion or divergence in either situation.

13. In the present case, although it was brought to the notice of the Finance Minister that in the meeting of the D.P.C., while two members viz., Chairman, CBDT and Member, CBDT were of one view regarding grading of the applicant, Secretary (Revenue) and Chairman, UPSC, took a different view regarding the grading. Even so, the Hon'ble Minister endorsed the

recommendations of the UPSC and the proposal which was sent to the Establishment Officer for seeking approval of the Appointments Committee of the Cabinet was in accordance with the recommendations of the UPSC. This itself shows that the Hon'ble Finance Minister did not find any exceptional circumstances which in the public interest required a departure from the recommendations of the UPSC.

14. The applicant relied on certain rulings in support of his contention that the recommendations of the UPSC could not be departed from.

15. In *S. Govindaraju v. K.S.R.T.C. & another (A.T.R. 1986 (2) S.C. 362)*, it was held:

"Once a candidate is selected and his name is included in the select list for appointment in accordance with the Regulations he gets a right to be considered for appointment as and when vacancy arises. On the removal of his name from the select list serious consequences entail as he forfeits his right to employment in future. In such a situation even though the Regulations do not stipulate for affording any opportunity to the employee, the principles of natural justice would be attracted and the employee would be entitled to an opportunity of explanation, though no elaborate enquiry would be necessary. Giving an opportunity of explanation would meet the bare minimal requirement of natural justice. Before the services of an employee are terminated, resulting into forfeiture of his right to be considered for employment, opportunity of explanation must be afforded to the employee concerned....." (last para).

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16. Again in *The State of Haryana v. Subash Chander Marwaha and others* (AIR 1973 S.C. 2216), the Supreme Court observed:

"One fails to see how the existence of vacancies gives a legal right to a candidate to be selected for appointment. The examination is for the purpose of showing that a particular candidate is eligible for consideration. The selection for appointment comes later. It is open then to the Government to decide how many appointments shall be made. The mere fact that a candidate's name appears in the list will not entitle him to a mandamus that he be appointed. Indeed, if the State Government while making the selection for appointment had departed from the ranking given in the list, there would have been a legitimate grievance on the ground that the State Government had departed from the rules in this respect. The true effect of Rule 10 in Part C is that if and when the State Government propose to make appointments of Subordinate Judges the State Government (i) shall not make such appointments by travelling outside the list and (ii) shall make the selection for appointments strictly in the order the candidates have been placed in the list published in the Government Gazette. In the present case neither of these two requirements is infringed by the Government. They have appointed the first seven persons in the list as Subordinate Judges. Apart from these constraints on the power to make the appointments,

rule 10 does not impose any other constraint.

There is no constraint that the Government shall make an appointment of a Subordinate Judge either because there are vacancies or because a list of candidates has been prepared and is in existence." (para 8).

17. We are afraid that both the above rulings relied upon by the applicant do not advance his case. In these cases, statutory rules and regulations themselves provided that selections were to be made in accordance with such rules and regulations and, therefore, it was held that no departure could be made in the matter of making appointments from the selections made in accordance with the rules and regulations. The mandatory rules or regulations did not leave any discretion with the Government to deviate from the select panel prepared by the Selection Board / Public Service Commission and the rules themselves required the appointments to be made in accordance with the provision. Such is not the case here. In the present case, the panel prepared by the D.P.C. on which the UPSC was also represented was merely a recommendatory panel and there are no statutory rules requiring acceptance of the said panel and it is for the appointing authority to approve and make appointments from the said panel.

18. Shri Sibbal, learned counsel for third party respondents was at great pains to draw a distinction between a "Select List" and a "Panel prepared by the DPC". He contended that a panel of names recommended by the DPC becomes a select list only when the said panel is approved by the appointing authority. In this connection, he referred to the procedure prescribed for preparation of a Select List under the Indian Administrative Service (Appointments and Promotions) Regulations, 1955 and argued that what was mandatory was the select list as approved

by the appointing authority and not a mere panel. In this connection, he also referred to the ruling of the Supreme Court in *Mani Subrat Jain etc. v. State of Haryana and others* (AIR 1977 S.C. 276) where it was held:

"10. The initial appointment of District Judges under Article 233 is within the exclusive jurisdiction of the Government after consultation with the High Court. The Governor is not bound to act on the advice of the High Court. The High Court recommends the names of persons for appointment. If the names are recommended by the High Court, it is not obligatory on the Governor to accept the recommendation."

19. We have no hesitation in holding that in the present case also, the applicant did not derive any legal right as such from the panel recommended by the UPSC. Such a legal right would accrue only after the panel has been approved by the appointing authority.

20. The contention of the applicant that there has been a breach of the principle of promissory estoppel cannot also be sustained. He argued that during the course of the last 50 years of the existence of the Income Tax Department, there had not been a single instance of the variation in the list prepared by the D.P.C. for promotions to any posts within the Department and thus the principle of estoppel had been violated. Merely because/there has been no departure from the recommendations of a D.P.C. would not attract the doctrine of promissory estoppel or warrant the assumption that no such departure can be made for good reasons.

21. Although the approval of the Appointments Committee of the Cabinet, as conveyed by the Establishment Officer in the letter dated 24.1.1985 does not indicate any reason for variation made in the proposal made by the Department of Revenue, which was in accordance with the recommendations of

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the UPSC, learned counsel Shri P.P. Rao tried to reconstruct certain reasons which could have impelled the Appointments Committee of the Cabinet to make the changes. These reasons may be briefly stated as follows: -

- (1) The note recorded by Shri V. Chidambaram, Chairman, CBDT, dated 2.1.1984 indicating that whereas two members of the D.P.C., namely, Chairman and Member of CBDT were of the view that the applicant should not be graded as 'Outstanding', the other two members, namely, Chairman, UPSC and Secretary (Revenue) took a different view and graded the applicant as 'Outstanding'. The view to which the Chairman, UPSC, was a party prevailed as per the existing practice. The two Members viz., Chairman and Member, CBDT, gave a note of dissent regarding the gradings assigned to the applicant.
- (2) A large number of officers junior to the applicant had been superseded.
- (3) All the C.R.s of the applicant for the relevant period were not available, and the C.R. for 1982-83 was not recorded by the competent authority.
- (4) The Appointments Committee of the Cabinet had taken an adverse view regarding the maintenance of C.R.s and the personnel management system in the CBDT.

22. In the light of the view which we are taking and the directions which we propose to issue in this case, we would not like to express any opinion on the adequacy or validity of the reasons for departure from the recommendations of the UPSC.

23. In A.K. Chakraborty v. Union of India (O.A. No. 654 of 1986), the Calcutta Bench of this Tribunal, vide its judgment dated 2nd March, 1987 took the view that where reasons had not been given as to why the assessment of the Appointments Committee was different from that of the D.P.C., the order of the Appointments Committee was held to be arbitrary and liable to be set aside.

24. In Jatinder Kumar and others v. State of Punjab and others (1985 (3) SLR 60), the Supreme Court made the following observations:

"12. The establishment of an independent body like Public Service Commission is to ensure selection of best available persons for appointment in a post to avoid arbitrariness and nepotism in the matter of appointment. It is constituted by persons of high ability, varied experience and of undisputed integrity and further assisted by experts on the subject. It is true that they are appointed by Government but once they are appointed their independence is secured by various provisions of the Constitution. Whenever the Government is required to make an appointment to a higher public office, it is required to consult the Public Service Commission. The selection has to be made by the Commission and the Government has to fill up the posts by appointing those selected and recommended by the Commission adhering to the order of merit in the list of candidates sent by the Public Service Commission. The selection by the Commission, however, is only a recommendation of the Commission and the final authority for appointment is the Government. The

Government may accept the recommendation or may decline to accept the same. But if it chooses not to accept the recommendation of the Commission the Constitution enjoins the Government to place on the table of the legislative Assembly its reasons and report for doing so. Thus, the Government is made answerable to the House for any departure vide Article 323 of the Constitution. This, however, does not clothe the appellants with any such right. They cannot claim as of right that the Government must accept the recommendation of the Commission. If, however, the vacancy is to be filled up, the Government has to make appointment strictly adhering to the order of merit as recommended by the Public Service Commission. It cannot disturb the order of merit according to its own sweet will except for other good reasons viz., bad conduct or character."

25. Thus, while the right of the appointing authority to make changes in the recommendations of the UPSC is well accepted and recognised, such changes have to be made only for good reasons and there has to be full, effective and meaningful consultation with the Commission before any changes in the recommendations of the Commission are made. In the absence of such a consultation any changes made in the recommendations of the Commission are liable to be set aside as being arbitrary and violative of Article 14. The level at which approval is accorded or changes are made would not detract from the validity of the principle of consultation or dispense with the necessity for such a consultation.

26. In view of the above discussion, the application is partly allowed with the direction that the appointing authority shall make a reference back to the Union Public Service Commission indicating the reasons for making a departure

from the panel recommended by the Commission and obtain their views before taking a final decision in the matter. In case after consultation with the UPSC in the manner indicated above, the name of the applicant is restored to its original position as recommended by the Commission, the applicant shall be entitled to promotion to the post of Commissioner of Income Tax (Level II) and consequential benefits from the date the person next below him in the said panel was so promoted. There shall be no order as to costs.

K. Madhava Reddy
(KAUSHAL KUMAR)
MEMBER (A)
29.6.1987.

K. Madhava Reddy
(K. MADHAVA REDDY)
CHAIRMAN
29.6.1987.