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DATE OF DECISION:

O.A. No. 1091/87.  
O.A. No. 1085/87.

Shri B.G. Karna                   X                   Applicants.  
Shri H.S. Rastogi               X

Vs.

Union of India Respondents.

CORAM:

Hon'ble Mr. Justice J.D. Jain, Vice-Chairman.

Hon'ble Mr. Birbal Nath, Administrative Member.

For the applicants:            Mrs. Shyamala Pappu, Sr. counsel  
with Shri K.K. Rai, counsel.

For the respondents: Shri P.P. Khurana, counsel.

JUDGMENT (Oral)

On a due consideration, the Departmental Promotion Committee at its meeting held on 4.8.1986 recommended the names of 11 Superintending Engineers (Civil) for promotion to the post of Chief Engineer (Civil) level II from among quite a number of Superintending Engineers in the field of choice. The said recommendation, inter alia, included the names of Shri B.G. Karna (applicant in O.A. No. 1091/87) and Shri H.S. Rastogi (applicant in O.A. No. 1085/87). However, it would appear that the names were not approved for promotion to the said post by the Appointments Committee of the Cabinet and, therefore,

— their names were dropped from the panel. Feeling aggrieved, the applicants have challenged their supersession by means of the above mentioned O.As.

2. During the course of arguments, we have been shown the minutes of the Cabinet Committee but we are not apprised of the reasons on which the recommendations of the D.P.C. were turned down by the A.C.C. qua these two applicants. We, therefore, directed the respondents to show us the relevant file containing the reasons for not accepting the recommendations of the D.P.C. in relation to the applicants.

3. An affidavit has been filed by Shri Manish Behl, Secretary to the Government of India in the Ministry of Personnel, Public Grievances and Pension, Department of Personnel and Training claiming privilege under Sections 123 and 124 of the Indian Evidence Act and also under the provisions of Article 74(2) of the Constitution of India. The affidavit runs as under:-

"3. I have carefully gone through and considered contents of the relevant file of this Department in the light of the directions made by the Tribunal in their order dated 8th July, 1988 in O.A. No. 1091 of 1987 and O.A. No. 1085 of 1987. I have come to the conclusion that this file falls under the category of documents/records the production and disclosure of which are protected by Sections 123 and 124 of the Indian Evidence Act and Article 74(2) of the Constitution of India, as the communications/comments contained in the aforesaid nothing as well as correspondence portions of the file are unpublished official records relating to the affairs of the State as also equally the communications made in the official confidence and are, as such, privileged. Further the disclosure of the opinion expressed by the officers at various levels would affect the freedom and candour of expression of opinion in the execution of public duties. In these circumstances, the record cannot be produced alongwith the affidavit.

4. I realise the solemnity and significance attached to the exercise of powers under Sections

123 and 124 of the Indian Evidence Act, 1872 and the provisions of Article 74(2) of the Constitution of India. Privilege is not being claimed on the ground of expediency or to avoid an embarrassing or inconvenient situation or because it is apprehended that the file, if produced, would defeat the case of the State.

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The learned counsel for the applicant has contested the claim of privilege of the respondents to the production of the documents, and they have placed reliance on a recent judgment of the Principal Bench of this Tribunal in Dr. (Mrs.) Anandita Mandal Vs. Secretary to the Government of India, Ministry of Health and Family Welfare and Others<sup>1</sup> (M.P. No. 1363A/87 in O.A. No. 344/87).

In the said case too, privilege was claimed in respect of similar documents by the Secretary to the Government of India, Department of Personnel & Training, Ministry of Personnel on identical grounds. However, the learned Chairman, who spoke for the Bench, noticed that the file which had been produced before them related to the appointment to the post of Specialist Grade I (post of Professor of Micro-biology) by way of promotion and the applicant being an Associate Professor of Micro-biology was duly recommended by the U.P.S.C. alongwith one Dr. Madhu Sudan. Thus, the file contained the proposals based on the said recommendations, scrutiny of these proposals, submissions made to the Appointments Committee of the Cabinet and its decision thereon. As regards the claim under Article 74(2) of the Constitution, the learned Chairman observed:-

"Under Article 74(2) what the courts are barred from inquiring into is: "What advice was tendered by the Ministers to the President". In exercise of his functions, the President is aided by the Council of Ministers and has to act in accordance with the advice tendered by the Council of Ministers. It is this advice that is totally excluded from the purview of the Court. The courts are prohibited from inquiring into what advice was tendered by the Council of Ministers and the record containing such advice cannot be required to be produced in any court.

Protection afforded by Article 74(2) does not extend to any notings made by the Secretary or even by the Minister. However, so long as the advice is not tendered to the President by the Council of Ministers, it is not covered by Art. 74(2). It is not as if every order issued in the name of the President is preceded by an advice to the President by the Council of Ministers. ...."

The learned Chairman further noticed that "the proceedings of the Departmental Promotion <sup>Committee</sup> which are not placed for the President's consideration either with or without the advice of the concerned Minister or of the Appointments Committee of the Cabinet for approval do not constitute advice tendered by the Minister or the Council of Ministers to the President falling within the ambit of Article 74(2) of the Constitution. In this case, the recommendation or selection by the UPSC (DPC) was not at all placed before the President. No advice was tendered to the President by any Minister or Council of Ministers. The recommendations of the DPC (UPSC) did not go even to the Cabinet. They were only placed before the Appointments Committee of the Cabinet (ACC) and this Committee did not tender any advice to the President. Such a decision cannot be deemed to be an advice tendered to the President merely because the executive action is taken in the name of the President."

The learned Chairman further observed in the said judgment:-

"We have examined the record produced. We do not find anything therein the disclosure of which endangers the public interest or jeopardises the public security to justify preventing its disclosure to the applicant. The file merely contains opinion recorded on the recommendations made by the UPSC (DPC). We do not find any sensitive material therein, the disclosure of which would affect the friendly relations between two countries or any material which would affect the security of the State. In fact, it contains only the notings giving reasons as to why the recommendations made by the Departmental Promotion Committee presided over by a Member of the Union Public Service Commission could not be accepted.... The matter as already stated relates to the assessment of suitability and merit of the Associate Professor of Micro-biology for appointment to the post of Professor of Micro-biology. The claim of privilege in our opinion is inappropriate and is accordingly rejected...."

4. In our considered view, these observations would aptly apply to the facts of the instant case. We are in respectful agreement with the observations made above by the Principal Bench. We may notice here that the decision of the Bench adverted to above was challenged by way of Special Leave Petition being No. 772-773 of 1988 in the Supreme Court but the same was disallowed. Their Lordships of the Supreme Court observed as follows:-

"We have carefully considered the facts and circumstances of these two cases and heard learned counsel for the parties. We are satisfied that having regard to the innocuous contents of the material which the Administrative Tribunal has desired we need not enter into the question as to whether this material can be described as privileged. This course of action is acceded to by learned counsel of the parties. In the circumstances the special leave petitions are dismissed....."

5. Under the circumstances, we disallow the privilege claimed in this case and ~~we~~ proceed to examine the minutes of the A.C.C. in this respect.

6. The respondents have produced before us a sealed cover containing the relevant file of the Department of Personnel and Training (Office of the Establishment Officer) and the same has been opened in our presence. However, we do not think it will be in public interest to show the file as such to the parties. We have read out the relevant contents to the counsel for the parties. Reference in this context is made to the observations made by Court No. I of the Principal Bench in Shri V.D. Trivedi Vs. Union of India (M.P. No. 1328-A/87 in O.A. No. 272/87) to the following effect:

"4. However, we find that it is not necessary in public interest to disclose the name of the officers and the Ministers who have recorded their opinion or expressed certain views. Therefore, while rejecting the claim of privilege, we hold that the applicant will be entitled to the disclosure of the names of the officers or the Ministers

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who have recorded their opinion or expressed certain views. Accordingly, a copy of para. 4 of the Note dated 19.1.1987 concerning the applicant on page 2 of File No. 18(59) EQ/86 (ACC) which forms the basis for the approval of the ACC may be furnished to the applicant."

Hence, we order accordingly.

✓ 14/9/88  
(BIRBAL NATH)  
MEMBER

J.D. Jain  
(J.D. JAIN)  
VICE CHAIRMAN.

14.9.1988.