IN THE CENTRL ADMINISTRATIVE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI.

Regn. No. O.A. 3010/92 Date of decision 19-2-93.

Bigyan Kumar & Ors. Applicants

Shri Pankaj Kalra with Shri N.M. Popli Counsel for the applicants

vs.

Union of India Respondents

Shri M.L. Verma Counsel for the respondents

2. Regn. No. OA 3011/92

Tej bahadur Chetri & Ors. Applicants

Shri Pankaj Kalra Counsel for the applicants

vs.

Union of India Respondents

Shri M.L. Verma Counsel for the respondents

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The Hon'ble Mr. S.P. Mukerji, Vice-Chairman(A).

The Hon'ble Mr. C.J. Roy, Member (J).

1. Whether Reporters of local papers may be allowed to see the judgment? yes

2. To be referred to the Reporter or not? yes

3. Whether their Lordships wish to see the fair copy of the judgment? No

4. Whether it needs to be circulated to other Benches of the Tribunal? No.

(Judgment of the Bench delivered by Hon'ble Mr. S.P. Mukerji, Vice-Chairman (A).)

JUDGMENT

Since common questions of law are involved in the aforesaid two petitions transferred to this Tribunal under the orders of the Hon'ble Supreme Court, they were heard together and are disposed of by a common judgment by this order. For the purpose of references and facts, petition No. OA 3010/92 has been taken up as the representative petition. The petitioners have been working

and were locally recruited as Class III and Class IV employees in the Pension Paying Office of the Ministry of Defence, Government of India, situated at Pokhara under the administrative control of the Indian Embassy at Nepal. Of the 40 petitioners in OA 3010/92, 3 are Indians and 37 are Nepalese; 10 of them are ex-servicemen of the Indian Army; 32 are working in Class III posts and 8 in Class IV posts. They have been working for the last 5 to 20 years. The 5th and the 15th petitioners retired on 1.1.89 and 1.2.93 respectively during the pendency of the petition. In petition No. 3011/92, all the 15 petitioners are Nepalese citizens. One of them is holding a Class III post and 14 Class IV posts and 8 of them have been ex-servicemen of the Indian Army. They have also put in more than 5 to 20 years of service.

2. The identical reliefs prayed for by the petitioners in O.As 3010/92 and 3011/92 are as follows:

(a) declaring that the petitioners are regular and permanent employees of the Central Government;

(b) directing the respondents to give to the petitioners all the allowances to which other Class-III and IV employees of the Government of India are entitled from the respective dates of their appointment;

(c) declaring that the petitioners would be entitled to pension and other retiral benefits to which their counter parts are entitled;

(d) declaring that the unilateral change in the terms and conditions of the service of concerned petitioners is illegal and unconstitutional;

(e) declaring that the order dated 9.2.87 of respondents is illegal and unconstitutional to the extent it denies the petitioners allowances such as D.A., A.D.A., H.R.A., Interim Relief;

(f) directing the respondents to grant the consequential relief and the arrears within a specified duration;

(g) award the cost to the petitioners;

(h) pass any other order or orders as may be deemed necessary in the interest of justice."

3. The Pension Paying Office situated at Pokhara was established in 1960 to give better services to the ~~Indian~~ military pensioners of Nepalese origin domiciled in Nepal. The applicants claim that they should be given the same benefits of DA, ADA, HRA, Interim Relief and pensionary benefits as are available to their counterparts in India based Pension Paying Offices under the Ministry of Defence. They have referred to a number of rulings of the Hon'ble Supreme Court (AIR 1982 S.C. 879; 1985 (2) SCALE 354, AIR 1986 SC.586) to claim parity of scales of pay for doing identical work under the same employer. For this purpose, they have relied upon the provisions under Articles 14, 16, 21, 23, 39 (d) and 51 of the Constitution of India. They have argued that the Govt. of India should function as a model and enlightened employer and should not discriminate in the matter of conditions of service between the petitioners locally recruited in Nepal and their India based counterparts. They have invoked the principle of equal pay for equal work also. They have cited the case of Nepalese based employees of the C.P.W.D. which was dismissed on the basis of the assurance given by the learned Attorney General to the High Court that the respondents would extend the benefit of pay scales and D.A. and other benefits in accordance with the report of the Pay Commission. They have argued that in order to cater to the needs of a large number of ex-Gorkha defence personnel and their families, Pension Paying Offices having headquarters at Kathmandu were opened at Pokhara and a few other places and a full time office was opened at Pokhara in 1960. The Assistant Military Attachee in the Indian Embassy exercises functional control, but the establishment is governed by the Ministry of Defence. The staff employed in the establishment consists of not only Indians deputed from India or recruited locally, but also Nepalese nationals recruited locally. Class III and Class IV posts were sanctioned by order at Annexure I both on a perma-

nent as well as on a temporary basis. 80% of temporary posts satisfying specified certain conditions were converted into permanent posts vide order dated 1st November 1966 at Annex. III issued by the Ministry of Defence. A Board of officers in the Indian Embassy met on 21st March 1972 for confirmation of staff against the permanent posts and vide Annex. IV an order was issued on 28th March, 1972 (page 48 of the paper book). Some of the applicants who were Nepalese citizens (for example, 1st, 2nd, 3rd and 4th applicants figured at Sl. Nos. 21, 25, 27 and 26 respectively in the list of 28th March) alongwith others were confirmed. In 1968 (Annex. V), Recruitment Rules for the civilian staff in the Pension Paying Offices in Nepal were issued. According to the applicants' application, during 1975-76, the petitioners were coerced to sign certain papers on the threat of termination whereby they were compelled to forfeit their permanency. They were also made to understand that the recruitment rules at Annex. V were rescinded in 1975. Their grievance is that they have been treated as temporary employees inspite of some of the petitioners having been confirmed. Treating them as temporary has been challenged as ultra vires of Article 14 of the Constitution. Their representations for confirmation and benefits of pay and allowances (Annex. VII Colly) brought forth no result. On the other hand, they were harassed by various restrictive orders (Annex. VIII Colly) issued by the respondents from time to time. Their pay scales were revised vide order dated 16.4.79 at Annex. IX. These pay scales were further revised in 1982 (Annex. X) and they continued to be paid Dearness Allowance, ADA, House Rent Allowance, etc. The petitioners have alleged that on the basis of the order of the Supreme Court, the Nepal based employees of the CPWD were granted the same emoluments as were paid to their corresponding India-based employees, but the corresponding benefits were not extended to the petitioners. The petitioners have argued that denying them the benefits as available to India-based employees, including retiral benefits, is arbitrary and unconstitutional. They have argued that the Missions and defence establishments in foreign countries are nothing but extension of Indian territory and the Nepalese nationals stand on an equal footing as

the Central Services in the Government of India. Nepal based employees who are Indians or Nepalese discharge the same functions as Indian nationals in India are recruited from India and accordingly the same rights and benefits should be made available to them. The petitioners are further aggrieved by the orders dated 9.2.87 (Annex. XII) whereby while revising their pay scales, their D.A., ADA, HRA, Interim Relief etc. were withdrawn. The learned counsel for the petitioners further stated that they are not being given any foreign allowance. They have also made a grievance of the fact that medical reimbursement, children education allowance, city compensatory allowance, benefits like advances for marriage ceremony, construction of house, etc. have never been given to the petitioners while the same were sanctioned in the case of Nepalese based employees of the ICM Highway Project. They have been denied retiral benefits even after putting in service of 20 years or more.

4. The applicants have alleged that by treating them differently from similarly situated Class III and Class IV persons working in the Pension Paying Offices of Government of India, they have been subjected to hostile discrimination. They have also argued that in view of the order dated 28.3.1972 (p.48 of annexure 4) they cannot be treated as temporary employees and denial of their service rights is contrary to Articles 14 and 16 of the Constitution as foreign Missions are extension of the sovereign territory of India. They cannot be discriminated and treated differently from the Nepal based employee of the C.P.W.D. They should also have been made quasi-permanent under the C.C.S. (Temporary Service) Rules. In their counter affidavit filed by the Ministry of Defence it has been stated that the petitioners being foreign nationals, recruited by the foreign territory of Indian Missions, they

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cannot invoke the jurisdiction of this Court. They had been appointed purely on contractual basis by the Embassy in the foreign territory and the rules applicable to the Government servants in India do not apply to them. They have referred to the order at annexure 1 dated February, 1957 in which the locally recruited staff in Missions abroad are excluded from C.C.S.(C.C.A) Rules. They have stated that the Ministry of Defence vide their letter dated 29.1.1962 have prescribed that the rules applicable to pay and allowances and other terms and conditions sanctioned by the Ministry of External Affairs as amended from time to time will also apply automatically to analogous posts under the Ministry of Defence. They have argued that consequent on revision of pay scales of the local employees of Ministry of External Affairs, D.A., A.D.A., H.R.A., I.R. Additional I.R., Bonus etc. were withdrawn. They have also stated that in accordance with the revised pay rules the provisions thereof do not apply to locally recruited employees of Indian Missions abroad vide annexure 2 dated 13th September, 1986. xIxyxt It has been contended that the principles of 'equal pay for equal work' does not hold good at an international leval, as such, enforcement of this rule internationally is impossible. The common practice for diplomatic Mission is to lay down scales of pay for their local employees in relation to scales operating in their country rather than operative in the home country. They have denied the allegation that the applicants were coerced to sign an option. The respondents have stated that the applicants, who are Nepali citizens, cannot be equated with the Indian citizens.

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5. In the rejoinder the applicants have stated that if the Executive and the Legislature in India have powers over the Indian authorities in Nepal including the Pension Payment Office, there is no reason why the judiciary in India would have no such powers. The powers of all the organs of the State are co-extensive, same as specifically prescribed otherwise in the Constitution. Part III of the Constitution is not restricted to only citizens but to foreign employees also. They have also argued that the Nepalis cannot be equated with other foreigners as they already enjoy certain privileges in the matter of recruitment under the Government of India. They have stated that between Fundamental Rights and Contractual Rights, the former would prevail and any classification between them and the Indian employees would be arbitrary. They have also stated that the offices where they are working are governed by the Municipal Law of India. They have also invoked the Human Rights Charter and other international covenants in support of their claim. They have asserted that they are not employees of the Ministry of External Affairs but are of Ministry of Defence. They have stated that the principle of 'equal pay for equal work' holds good even at the international level.

6. We have heard the learned counsel for both the parties and gone through the documents. The question of jurisdiction of the Principal Bench of the Tribunal to hear this petition should not detain us long. Apart from the fact that these petitions filed in the Hon'ble Supreme Court have been remitted to this Bench for disposal, in accordance with law, the scheme of the Central Administra-

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tive Tribunal visualized in the Administrative Tribunals Act of 1985(hereinafter referred as 'Act'), comprehends grievances not only against the authorities within the territory of India, but also outside it. The objection raised by the learned counsel for the respondents that since the cause of action had arisen in Kathmandu, outside India, prima facie the petition does not lie with the Tribunal, does not impress us. In the definition, Section 3(p) of the Act, it has been indicated that "Service" means service within or outside India. Further clause (q) of the same section defines "service matters" as follows:

> "Service matters", in relation to a person, means all matters relating to the conditions of his service in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India, or as the case may be, of any corporation or society owned or controlled by the Government, as respects -
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> i) Remuneration (including allowances), pension and other retirement benefits;
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> ii) tenure including confirmation, seniority, promotion, reversion, premature retirement and superannuation.
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> iii) leave of any kind;
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> iv) disciplinary matters; or
>
> v) other matter whatsoever."

The above definitions make it clear that service rendered outside India, and service matters even though outside the territory of India, but under the control of the Government of India, would fall within the jurisdiction of this Tribunal. Article 12 of the Constitution of India also defines the "State" to include, inter alia, "all local or other authorities within the territory of India or under

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the control of the Government of India". So long as, therefore, the authorities with whom the alleged cause of action has arisen are under the control of the Government of India, its location outside the territory of India does not make any difference so far as the purview of the municipal Courts and the Tribunal is concerned.

7. It will, therefore, be useful to consider the contention whether the Embassy of India can be deemed to be an extension of the territory of India within the boundaries of Nepal. The learned counsel for the petitioners drew our attention to the material available in the book entitled "A Diplomat's Hand Book of International Law & Practice" by Sh.B.Sen published in The Hawue, (1965 edition). On page 80 of that book, the doctrine of exterritoriality has been described as follows;-

> "Exterritoriality. The first and oldest appears to be the doctrine of exterritoriality" which implies that the premises of a Mission in theory or outside the territory of the receiving State and represent a sort of extension of the territory of the sending State. Similarly, an Ambassador who represents by fiction the actual person of his sovereign must be regarded by a further fiction as being outside the territory of the power to which he is accredited. This doctrine which held the field for a considerable period both among text writers and in judicial decisions has come to be adversely criticised in recent years though it is still referred to in a somewhat restricted sense."

The above will show that the fiction of the premises of the Embassy representing extension of the territory of a State is being questioned on various grounds now. For one thing, if the premises of a Mission has been the extension of the territory of the sending country, no law or authority of the host country would have been applicable within the premises, but this is not so. If a crime is

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committed within the premises of a Mission, the law of the host country will also apply. Further, had the mission been a territory of the sending country, all persons irrespective of whether he is a diplomatice agent or a member of the administrative staff would have enjoyed complete immunity within the premises. This is not so. Non-diplomatic staff do not enjoy any immunity 'per se' within the premises of the mission. There is no absolute immunity so far as the premises under persons residing in the premises of a mission or concerned it has been held that immunity flows not from the conspect of extended sovereignty of the sending State, but the functional necessity of the duties and obligations of the Embassy in the host country. The following extracts from the aforesaid book, throw some more light on this issue:

> "It is this concept of "functional necessity" which, it is said, casts an obligation on States to grant a certain minimum of immunities, and that minimum comprises such immunities, and privileges as will permit the diplomatic envoy to carry out his functions without hindrance or avoidable difficulty. Nothing less will ensure compliance with themaxim 'ne impediatur legato'. It is on the basis of "functional necessity" that the Internatinal Law Commission proceeded in preparation of the Draft Articles on the subject, and the Vienna Convention on Diplomatic Relations 1961 also appears to have proceeded on this footing for it is stated in the preamble to the convention that "the purpose of such privileges and immunition is not to benefit individuals but to ensure the efficient performance ofthe functions of diplomatic missions as representing states".....Whatever may be the theoretical basis for grant of diplomatic immunities, which form an exception to the rule that all persons and things within a sovereign State are subject to its jurisdiction, it is and has been an acknowledged rule of law that states are under an obligation to allow the diplomatic agent to enjoy full and unrestricted independence in the performance of his allotted duties, which necessarily implies immunity

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> for jurisdiction in respect of his person, his acts, and the premises of the diplomatic mission..... It is therefore, reasonable to assume that it would be open to a state party to the Vienna Convention 1961 to interpret the provisions relating to diplomatic immunities in a manner consistent with its own notions, and that it would be free to decide upon the extent of the immunities and privileges and the classes of persons entitled to them in accordance with its own practice"

It is true that the premises of a Mission under the residence of an envoy are protected by the principle of inviolability and this may indicate to be "an attribute of the sending state", but cannot be held to be giving the premises the characteristic of the territory or sovereignty of the sending state. The degree of immunity or inviolability of the premises under the diplimatic staff depends on not only on the reciprocity between the sending and the host countries, but also on the functional necessity of the working of the Embassy. It is generally agreed that the immunity of the premises of the mission affords no justification for an envoy to give shelter to a criminal within the premises. The Pan American summit of 1928 provides that if a crime is committed within the country by an alien the offender should be handed over to the local authorities. The following extracts from page 357 of Dr.Sen's book, referred to above, reinforces the contention that the Embassy premises cannot be regarded as an extension of the territory of the sending state:

> "The modern view regarding inviolability of diplomatic premises, as borne out by state practice and decisions of national courts, tends to show <u>that such premises are regarded as part and parcel of the territory of the state in which they are situated and that these premises are inviolable merely for the purposes which are necessary for effective functioning of the diplomatic mission. The theory of exterritoriality of diplomatic premises does no longer find support.</u> It is, therefore, asserted that the so-called right of diplomatic asylum has no basis in international law and as

such cannot be recognised. This view appears to find support from the following observation in the judgement of the International Court of Justice in the Asylum case.

> It (diplomatice asylum) withdraws the offender from the jurisdiction of the territorial state and constitutes an intervention in matters which are exclusively within the competence of that state. Such derogation from territorial sovereignty cannot be recognised unless its legal basis is established in each particular case".

8. The "territory of India" for the purpose of the Constitution of India is defined in article 1(3) as follows:

> "a) territories of the States;
>
> b) the Union territories specified in the First Schedule; and
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> c) such other territories as may be acquired"

9. The Hon'ble Supreme Court interpreted clause (c) above in Masthan Sahib versus Chief Commissioner Pondicherry and another, AIR 1963 S.C.533 in following terms:

> "10. There might be little difficulty about locating the territories which are set out in cls.(a) and (b) but when one comes to (c) the question arises as to when a territory is acquired and what constitutes "acquisition". Having regard to the subject dealt with the expression "acquired" should be taken to be a reference to "acquisition" as understood in Public International Law. If there were any public notification, assertion or declaration by which the Government of this country had declared or treated a territory as part and parcel of the territory of India, the Courts would be bound to recognise an "acquisition" as having taken place, with the consequence that that territory would be part of the territory of Union within Art.1(3)(c). In the present case, we have this feature that the administration of the territory is being conducted under the powers vested in the Government under the Foreign Jurisdiction Act".

10. It is thus clear that the concept of notional

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or fictional territory of India is not contemplated in the Constitution and the premises of the Indian Embassy much less premises of offices run under the administration control of the Embassy, cannot be contemplated within the definition of "territory of India" under the Constitution.

11. In the light of what has been discussed above, we are firmly of the view that the premises of the Pension Payment Office in Nepal cannot be considered to be an extension of the territory of India for the purpose of article 14 of the Constitution and accordingly the petitioners cannot invoke article 14 of the Constitution.

12. In Air India Vs. Nergesh Meenza (AIR 1981 S.C.1829) the Supreme Court distinguished various categories of employees falling within one class of service on the following 5 criteria:

a) the nature, the mode and the manner of recruitment of a particular category from the very start.

b) the classifications of the particular category.

c) the terms and conditions of service of the members of the category.

d) the nature and character of the posts and promotional avenues.

e) the special attributes that the particular category possess which are not to be found in other classes, and the like.

13. In the above light we see nothing wrong in categorising the locally recruited staff of Pension

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Payment Offices in Nepal as a distinct category from their India based counter parts. In the above light we do not see any justification for interfering in the matter of parity of pay scales and allowances between the applicants and their counterparts in India on one hand and other staff under the C.P.W.D. within or outside Nepal.

14. As regards parity of the pay scales and allowances, claimed by the petitioners, at par with their opposite numbers in India, or in the ICM Highway Project in Nepal, we do not find that there is much force in the claim based on Article 14 of the Constitution. In Kishori Vs. U.O.I. (AIR 1962 SC 1139), the Hon'ble Supreme Court held as under:

> "The abstract doctrine of 'equal pay for equal work' has nothing to do with Art. 14. Article 14, therefore, cannot be said to be violated where the pay scales of Class I and Class II income-tax Officers are different though they do the same kind of work. Incremental scales of pay can be validly fixed depended on the duration of an Officer's service."

Further, in Harbans Lal Vs. State of Himachal Pradesh (199(1)ATC 869), the Hon'ble Supreme Court held that the "principle of 'equal pay for equal work' is not one of the fundamental rights expressly guaranteed by the Constitution of India even though in Randhir Singh's case, the Supreme Court held that the said principle was to be read into Articles 14 and 16 of the Constitution. There are inbuilt restrictions in that principle, as pointed out in various decisions of the Supreme Court. The Supreme

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Court further held that "a claim for equal pay can be sustained only if the impugned discrimination is within the same establishment owned by the same management. A comparision cannot be made with counterparts in other establishments with different management or even in establishments of different geographical locations, though owned by the same master. Hence, the petitioners who are employees of the Himachal Pradesh State Handicraft Corporation, a company incorporated under the Companies Act, 1965 cannot claim wages payable to their counterparts in government service". It was further held in the same judgement that mere nomenclature of a post is not decisive of the equality of posts. In the case before us all locally recruited staff whether Indians or Nepalese, are being treated equally.

15. In a recent judgement, in the case of Secretary, Finance Department & Ors. Vs. West Bengal Registration Service Association & Ors. (ATR 1992 (2) S.C. 617) held that the determination of pay scales and equation of posts is a matter which is primarily the function of the executive and not the judiciary. The courts can interfere only when employees have been unjustly treated by the arbitrary State action or inaction. Since in the present case, no such arbitrariness is discernible, there is no case for judicial intervention.

16. Further, even if the principle of 'equal pay for equal work' is brought within the purview of Art. 14 of the Constitutin since the matter did not arise within the territory of India and outside the Embassy premises that Article cannot strictly be invoked in the present case.

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17) Having said all about the above Constitutional provisions, we are constrained to note that having confirmed some of the applicants vide order dated 20th March, 1972 (annexure 4), it does not lie in the mouth of the respondents to say that the applicants are temporary employees. The principles of just and fair treatment of the employees by the employer when the employer is no less than the Government of India warrant that the orders issued by them will have to be honoured otherwise there will be a credibility gap between the Government and its employees to whatever classification they may belong. Subject to this, we see no reason to believe that the applicants who were locally recruited in Nepal will have as a matter of right, parity of pay scales with their counterparts in India. Classification between locally recruited employees in Nepal and India based employess in the Pension Payment Offices is a valid classification and cannot be faulted in the matter of pay and allowances and other benefits. The merger of D.A., A.D.A. interim relief with the revised pay scales does not entitle the petitioners to claim these allowances over and above the revised pay scales especially when they have opted to come over on the revised terms. The question of granting Nepal based employees domiciled in Nepal, foreign alliance in their own country also does not arise. Further, the revised pay rules notified on 13th September, 1986 (annexure 2 to the counter) specifically exclude persons locally recruited for service in diplomatice, counsellor and other Indian establishments in foreign countries.

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18. As regards retiral benefits, in accordance with rule 2(f) of this Central Civil Services (Pension) Rules 1972 'persons' locally recruited for service in diplomatic Consular or other Indian establishments in foreign countries, are excluded from the benefits of Pension Rules. Since the applicants admittedly are locally recruited persons, recruited in Nepal for working in the Pension Payment Office in Nepal, they are not entitled to pensionary benefits.

19. In the conspectus of facts and circumstances discussed above, we allow the petition in part only to the extent of declaring that those of the applicants who were confirmed in various posts, vide order dated 20th March 1972 at annexure 4 to the petition shall be deemed to be confirmed employees of the Pension Payment Office and shall be entitled to all benefits and service conditions admissible to locally recruited employees thus confirmed. This will not, however, entitle them to any benefits of pay and allowances or retiral benefits beyond what is admissible to locally recruited confirmed employees of the Pension Payment Office in Nepal in accordance with the rules, orders and instructions issued by the respondents from time to time and applicable to them in the Pension Payment Office. There will be no order as to costs.

19.2.93

(C.J.ROY)
MEMBER(J)

(S.P.MUKERJI)
VICE CHAIRMAN(A)