

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A.381/99 and O.A.460/99

Dated the 22nd day of December, 2000.

CORAM

HON'BLE MR A.M. SIVADAS, JUDICIAL MEMBER

HON'BLE MR G. RAMAKRISHNAN, ADMINISTRATIVE MEMBER

(I) O.A.No.381/99

P.M. Senan, Director of Cultural Affairs,
Government of Kerala,
Government Secretariat,
Thiruvananthapuram.

Applicant

By Advocate Mr N. Haridas.

Vs.

1. State of Kerala, notice to whom may be served on the Chief Secretary, Government Secretariat, Thiruvananthapuram.
2. L. Natarajan, I.A.S., Secretary (Home), Government Secretariat, Thiruvananthapuram.
3. Director of Public Relations & Secretary (Public Relations), Department of Public Relations, Government Secretariat, Thiruvananthapuram.
4. (Name of the Respondent No.4 deleted from the party array vide order dated 27.10.99 in M.A.No.1136/1999)
5. Union of India represented by Ministry of Personnel and Training, North Block, New Delhi.
6. Union Public Service Commission, Dholpur House, New Delhi, represented by its Secretary.
7. V. Bhavani, Secretary, Kerala Women's Commission, Elangam Gardens, Vellayambalam, Thiruvananthapuram-10.
8. S. Sreenivasan, Private Secretary to Hon'ble Minister for Food and Civil Supplies, Government Secretariat, Thiruvananthapuram.

Respondents

By Advocate Mr Govindh K. Bharathan, Sr.CGSC for R 5 & 6
" Mr C.A. Joy for Respondent -1
" Mr C. Khalid for Respondent 7 & 8.

(ii) O.A.No.460/99

V. Sisupalan, S/o Late P.K. Velayudhan,
Additional Development Commissioner & Director,
State Institute of Rural Development,
L.M.S. Compound, Trivandrum-695033.
Residing at 'Dhanus', Kallampilly House,
Sreekaryam, P.O. Medical College,
Trivandrum.

Applicant

By Advocate Mr K.P. Dandapani.

Vs.

1. State of Kerala, represented by Chief Secretary,
Government Secretariat,
Thiruvananthapuram.
2. (Name of Respondent-2 deleted from the
party array vide order on M.A. 1093/99
dated 15.10.1999.)
3. The Chief Secretary to Government of Kerala,
Government Secretariat,
Thiruvananthapuram.
4. Union Public Service Commission,
Dholpur House, New Delhi,
represented by its Secretary.
5. Union of India represented by
Ministry of Personnel & Training,
North Block, New Delhi.
6. The Commissioner of Rural Development Department,
Government of Kerala,
Commissionerate of Rural Development Department,
L.M.S. Compound, Thiruvananthapuram.
7. The principal Secretary to
Rural Development Department,
Government of Kerala,
Commissionerate of Rural development Department,
L.M.S. Compound, Thiruvananthapuram.
8. Smt V. Bhavani, Additional Secretary,
General Administration Department,
Government Secretariat, Thiruvananthapuram.
9. Shri S. Sreenivasan,
Additional Secretary on other duty as
Private Secretary to Hon'ble Minister
for Food, Tourism & Law,
Secretariat, Thiruvananthapuram.

Respondents

By Advocate Mr Govindh K. Bharathan, Sr.CGSC for R 4 & 5
" Mr C.A. Joy for Respondent -1
" Mr C. Khalid for Respondents 8 & 9

The applications having been heard on 10.11.2000, the Tribunal delivered the following on 22.12.2000.

O R D E R

HON'BLE MR A.M. SIVADAS, JUDICIAL MEMBER

Both these O.As were heard together and are disposed of by a common order.

2. The applicant in O.A. 381/99 seeks to quash A-17 select list selecting Respondents 7 & 8 to the Indian Administrative Service and to direct the first respondent to call for and consider the confidential report of the applicant, to include his name also in the list of eligible candidates to be considered and also to complete the selection process to the Indian Administrative Service for the year 1998 afresh in accordance with law.
3. The case of the applicant briefly is thus. From the year 1978 to 1986 he was working in gazetted rank. From the year 1986 onwards on getting promotion to the post of Senior Information Officer he was working in the grade of Under Secretary which is equivalent to Deputy Collector in the State Civil Service. Subsequently, he was promoted as Additional Director of Public Relations which is equivalent to the rank of Joint Secretary in the State Service. In the year 1994, he was posted as Director of Cultural Affairs. In the year 1995, he was posted as Officer on Special Duty in the department of Public Relations. He has received various awards, appreciations and good service entries. When he came to know that the selection process had commenced and his name was not included in the list of eligible candidates to be considered to Indian Administrative Service (Appointment by Selection), he filed O.A. 1270/98 before this bench of the Tribunal seeking a

direction to the respondents not to proceed with the selection process for Indian Administrative Service on 31.8.98 or any other date without including his name also in the list of eligible candidates to be considered. In the reply statement filed by the first respondent therein it was not denied that the Secretary had written his confidential report and the Minister concerned had reviewed the same. The second respondent who was the custodian of the confidential report of the applicant did not place his confidential report for evaluation to the Chief Secretary. The second respondent deliberately avoided the same as the second respondent was personally biased and inimical towards him. The said action of the second respondent while holding the post of Director and Secretary of Public Relation Department and also as the custodian of the confidential report of the applicant, is highly irregular, illegal and arbitrary and vitiated by mala fides. The omission on the part of the Chief Secretary in not calling for the confidential report of the applicant is discriminatory and violative of Article 14 of the Constitution of India. Non-inclusion of the name of the applicant in the short-list prepared by the Chief Secretary has resulted in miscarriage of justice. Official respondents are obliged to follow the reservation roster published by the Government of India and any attempt on the part of the said respondents to violate the reservation policy guaranteed in the Constitution of India will amount to gross illegality. The applicant belongs to other backward community. The applicant was entitled to get his name included in the list of candidates to be considered to the Indian Administrative Service. The list of eligible candidates prepared and selection process held pursuant thereto are illegal.

4. In the reply statement filed by the first respondent the contentions raised are that appointment of non-State Civil Service Officers to I.A.S. is governed by the provisions in the I.A.S (Appointment by Selection) Regulations, 1997. The Selection Committee constituted to make selection of non-State Civil Service Officers for appointment to the I.A.S. for the year 1998 met on 31.8.98 and considered the case of 10 officers to prepare a select list of two officers. The Union Public Service Commission approved the select list prepared by the Selection Committee and the officers included in the select list have been appointed as per Notification dated 5.11.98. There is no provision for reservation for SC/ST or O.B.C in the promotion quota under the Recruitment Rules. In the case of non-State Civil Service Officers the only criteria is that the officers who satisfy the eligibility criteria should be of outstanding merit and ability. For selection of officers to be sponsored for consideration by the Selection Committee by the State Government, the practice all along has been to obtain recommendations of the Secretaries concerned in respect of eligible officers working under them whom they consider as officers of "outstanding merit and ability". Secretaries of the Government recommend officers giving their particulars in a prescribed proforma together with their C.R. dossiers and integrity certificates of the officers concerned. This is done as only Secretaries to the Government will have a first hand knowledge about the officers working under them. The applicant was not at all recommended by the concerned Secretary to the Government for consideration for I.A.S. Assessment of an officer as "outstanding" for consideration for I.A.S. under the selection quota is to be made by the State Government. Therefore, the applicant has no right to claim that he be included in the list of eligible candidates to be considered by the 4th respondent.

5. In the reply statement filed by Respondents 7 & 8, they contend that they were selected to Indian Administrative Service by a duly constituted Selection Committee and the Select List was approved by the U.P.S.C. They have already been appointed to I.A.S. Their appointments are legal and there is no miscarriage of justice.

6. The applicant in O.A. 460/99 seeks to quash A-7 and to direct the respondents 1 & 2 to conduct a fresh process of selection considering the name of the applicant also for Indian Administrative Service selection, 1998 and to include the name of the applicant in the list of eligible candidates to be considered for conferring I.A.S.

7. The case of the applicant is thus. He is working as Additional Development Commissioner and Director, State Institute of Rural Development. He is a member of Ezhava community which is coming under "other backward communities". As per reservation roster, mostly every fourth vacancy should be given to the other backward communities. His name has not been considered by the Selection Committee because of the fact that his confidential reports have not been forwarded to the Committee by the Commissioner for Rural Development. He has been thus denied the opportunity to appear before the Selection Committee for interview for Indian Administrative Service selection, 1998. By not following the guidelines the confidential reports for the crucial period have not been forwarded. As a result of which he was not even considered for appointment by selection to the I.A.S. His confidential reports from 12.1.87 to 31.3.88 have been submitted to the Commissioner for Rural Development Department. Confidential reports from 12.1.87 to 30.9.97 have been submitted to the

Principal Secretary, Rural Development Department. confidential reports from 30.12.97 to 31.3.98 have been submitted to the Commissioner for Rural Development for reviewing and reporting the same. He was not considered by the Selection Committee for the reason that his confidential reports have not been forwarded to the Committee by the Commissioner. Non-forwarding of his annual confidential reports to the Selection Committee has resulted in denial of opportunity to him to appear before the Selection Committee for interview for I.A.S. selection, 1998.

8. In the reply statement filed by the first respondent the contentions raised are that though the applicant was recommended by the Secretary to Government for consideration for I.A.S. while finalization of the report, it was found that there were 18 eligible officers as recommended by the Secretaries to the Government. The State Government after carefully considering all the officers including the applicant, finalized a list containing 10 officers to be recommended to the U.P.S.C for consideration by the Selection Committee. In the list of 10 officers the applicant's name was not included. In the case of the applicant, his confidential reports for the periods 5.7.78 to 15.10.78, 25.1.79 to 27.10.83, 27.6.86 to 11.1.87, 13.8.87 to 31.12.88, 12.10.89 to 27.5.90 and 1.8.91 to 15.11.95 were not available. There is no provision for reservation of SC/ST or O.B.C in the promotion quota. Assessment of officers as "outstanding" for consideration for I.A.S. selection depends on the satisfaction of the Government after careful consideration of the records of the officer.

9. Respondents 8 & 9 contend that they were selected to Indian Administrative Service by duly constituted Selection Committee and the select list was approved by the U.P.S.C. They have already been appointed to I.A.S. Their appointments are legal and there is no miscarriage of justice.

10. We are dealing with these O.As bearing in mind what is the scope of judicial review as stated by the Apex Court in Tata Cellular Vs. Union of India [(1994) 6 SCC 651]. There it has been held that:

"Observance of judicial restraint is currently the mood in England. The judicial power of review is exercised to rein in any unbridled executive functioning. The restraint has two contemporary manifestations. One is the ambit of judicial intervention; the other covers the scope of the court's ability to quash an administrative decision on its merits. These restraints bear the hallmarks of judicial control over administrative action.

Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself.

In Chief Constable of the North Wales Police V. Evans Lord Brightman said:

"Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.

* * * *

"Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

In the same case Lord Hailsham commented on the purpose of the remedy by way of judicial review under RSC, Ord. 53 in the following terms:

"This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practised at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner (p.1160)."

In R.V. Panel on Take-overs and Mergers, ex p Datafin plc, Sir John Donaldson, M.R. commented:

"An application for judicial review is not an appeal."

In Lonrho plc V. Secretary of State for Trade and Industry, Lord Keith said:

"Judicial review is a protection and not a weapon."

"It is thus different from an appeal. When hearing an appeal the Court is concerned with the merits of the decision under appeal. In Amin, Re Lord Fraser observed that:

"Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made. Judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing the administrative decision without substituting its own decision, and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer."

11. In both these O.As applicants are governed by Indian Administrative Service (Appointment by Selection) Regulations, 1997, since both of them do not belong to the State Civil Service, but are serving in connection with affairs of the State.

12. Regulation-4 of the Indian Administrative Service (Appointment by Selection) Regulations, 1997 says thus:

"4. State Government to send proposals for consideration of the Committee.-(1) The State Government shall consider the case of a person not belonging to the State Civil Service but serving in connection with the affairs of the State who,-

(i) is of outstanding merit and ability; and

(ii) holds a Gazetted post in a substantive capacity; and

(iii) has completed not less than 8 years of continuous service under the State Government on the first day of January of the year in which his case is being considered in any post which has been declared equivalent to the post of Deputy Collector in the State Civil Service and propose the person for consideration of the Committee. The number of persons proposed for consideration of the Committee shall not exceed five times the number of vacancies proposed to be filled during the year:

Provided that the State Government shall not consider the case of a person who has attained the age of 54 years on the first day of January of the year in which the decision is taken to propose the names for the consideration of the Committee:

Provided also that the State Government shall not consider the case of a person who, having been included in an earlier select list, has not been appointed by the Central Government in accordance with the provisions of Regulation 9 of these regulations."

13. The stand of the first respondent, State of Kerala, is that applicants do not satisfy the first condition i.e., of "outstanding merit and ability".

14. Private respondents say that the Selection Committee made an overall assessment of the C.R. Dossiers of the officers and it is after the comparative assessment that the the best candidates are put in the select list.

15. What is meant by "outstanding merit and ability" is made clear by the Apex Court in Union of India and others Vs. S.N. Dubey and others [(1998) 6 SCC 388]. There it has been held that:

"Requirement of Rule 8(2) of the Recruitment Rules that selection for appointment to the service from amongst non-State Civil Service officers is to be made of a person of outstanding merit and ability only means that the best among such officers would be selected for appointment to the service."

16. Regulation-5 inter alia says that:

"The suitability of a person for appointment to the service shall be determined by scrutiny of service records and personal interview."

17. Though various grounds are raised in O.A.381/99, only grounds pressed into service are that omission on the part of Chief Secretary in not calling for the confidential reports of the applicant is discriminatory and is in violation of Article 14 of the Constitution of India and the procedure adopted by the second respondent while he was holding the post of Director and Secretary of the Public Relations Department and also as custodian of the confidential reports of the applicant, is vitiated by mala fides.

18. According to applicant in O.A. 381/99, the Chief Secretary of the first respondent, the State of Kerala, who was the authority to prepare the list of eligible candidates to be considered by the Selection Committee has not cared to call for the confidential report of the applicant for evaluation and that omission of the part of the Chief Secretary is discriminatory and is in violation of the right guaranteed under Article 14 of the Constitution of India. This is stated by the applicant as ground-B in the O.A. There is no denial of the same.

19. Applicant had submitted A-11 representation to the Chief Minister of Kerala. In the reply statement of the first respondent it is stated that A-11 representation of the applicant was brought to the notice of the Chief Secretary by the Principal Secretary, Cultural Affairs, on 4.4.98, that at that time proposal for consideration of officers for selection to I.A.S. under the non-State Civil Service quota was under consideration of the government, that recommendations from the Secretaries with particulars of officers were awaited, that the only decision that could be arrived at that time was that the applicant's case could be considered at the appropriate time if his name was recommended by the concerned Secretary to Government as an outstanding officer with full particulars, and that the applicant satisfied the eligibility criteria. So, it is clear from the reply statement that the Chief Secretary was made aware of the situation. In the absence of any specific denial of ground-B in the O.A. it is only to be taken that the Chief Secretary had not cared to call for the confidential reports of the applicant.

20. The the definite stand of the first respondent is that the concerned Secretaries to Government recommend eligible officers giving their particulars along with C.R. Dossiers. That means that C.R. Dossiers play a vital role and it is to be inferred, though not specifically stated in the reply statement that it is only after seeing the CR Dossiers of the officers, concerned secretaries are to recommend the eligible officers.

21. The specific case of the applicant in O.A. 381/99 is that his CR Dossiers were not looked into for the purpose of considering whether he is an eligible officer to be recommended by the concerned secretary for consideration by the Selection Committee for I.A.S.

22. Learned counsel appearing for the first respondent vehemently argued that concerned secretaries only will have the first hand knowledge about the officers working under them and the applicant's name was not recommended by the concerned Secretary as he was not of outstanding merit and ability. When we asked the learned counsel for the first respondent how the concerned Secretary will assess whether an officer is of outstanding merit and ability, it was submitted that it is based on the subjective satisfaction of the concerned Secretary. When Regulation-5 says that suitability of a person for appointment to the service shall be determined by scrutiny of service records and personal interview, the consideration of the State Government as per Regulation-4, cannot be based on the subjective satisfaction of the concerned Secretary. It should necessarily to be based on the scrutiny of the service records also. It can only be said that the regulations leave nothing of the subjective satisfaction of the concerned Secretary.

23. From A-13 it is clearly seen that the applicant's confidential reports were not called for by the Chief Secretary or the concerned Secretary. The specific case of the applicant is that the Director and Secretary of Public Relations Department is the custodian of his confidential reports and that the second respondent was the Director and Secretary of Public Relations Department at the relevant point of time. A-13 was submitted by the applicant to the Director and Secretary of Public Relations Department and in that submission the Director and Secretary of Public Relations Department has clearly stated that the applicant's confidential reports were not called for by the Chief Secretary or the concerned Secretary and the confidential reports were available in the Public Relations Department. So, it was a case that the second respondent did not forward the confidential reports of the applicant to the concerned Secretary for evaluation. That being so, the concerned Secretary had no opportunity to assess the eligibility of the applicant with reference to his confidential reports. Since the eligibility is to be evaluated by the scrutiny of the confidential reports also, there was no proper consideration. The first respondent says that the applicant was not at all recommended by the Secretary to Government for consideration to I.A.S. Recommendation or non-recommendation by the concerned Secretary should be based on the confidential reports of the applicant also. There is no case for the first respondent that the Secretary concerned did not recommend the applicant for consideration to I.A.S. after scrutinising the applicant's service records also. So, the position is that the Secretary concerned had no opportunity to scrutinise the confidential reports of the applicant or not

cared to call for the confidential reports of the applicant and scrutinise the same and thus, non-recommendation of the applicant for consideration to I.A.S. took place.

24. In M.A.1209/2000 filed by the applicant it is stated that during the last month it is reliably understood by him that the second respondent who is continuing as Secretary, Public Relations Department verified the confidential report of M.V. Vasu, Director of Cultural Affairs, recommended his name to be included in the list to be submitted to the Selection Committee, that in the case of the applicant, the second respondent did not adopt the same procedure and the procedure adopted by the second respondent in this year in the case of the present Director of the Cultural Affairs is legal and valid, but in the case of the applicant, he adopted an entirely different procedure and the same is absolutely arbitrary and illegal. The M.A was not opposed by the respondents and was allowed. If the stand of the first respondent or other respondents is that M.A.1209/2000 was for reception of certain documents and therefore, it was not opposed, it cannot be accepted as such for, if there was no objection for acceptance of the documents only, the respondents could have denied the particular averment made by the applicant in the M.A. and stated that no objection is confined only to the reception of the documents. That is not the case here.

25. The definite stand of the first respondent is that for selection of officers to be sponsored for consideration by the Selection Committee by the State Government, the practice all along has been to obtain recommendations of the concerned Secretaries in respect of eligible officers working under them whom they consider as officers of outstanding merit and ability and this is done only as the Secretaries to Government will

have a first hand knowledge about the officers working under them. So, it is clear that the concerned Secretaries to Government who have a first hand knowledge about the officers working under them alone will be recommended and that there can be no recommendations based on any hear say knowledge. This stand of the first respondent makes it abundantly clear that the concerned Secretary to Government will recommend the name of an officer only when that Secretary has got a first hand knowledge about the officer working under him. We directed the official respondents to produce the file relating to the selection in question along with the file showing whether the applicants were also considered for the said selection. In pursuance of the same, the files were produced. The file produced by the first respondent discloses a very unpleasant situation. Page-25 of the file produced by the first respondent shows that a stand has been taken just contrary to the stand taken in the reply statement that only Secretaries to Government will have a first hand knowledge about the officers working under them and that is why the practice has been adopted to obtain recommendations of the Secretaries concerned in respect of eligible officers working under them as they considered officers of outstanding merit and ability. Page-33 of the file also goes against the particular stand taken by the first respondent. It cannot be a case of pick and choose policy. The file produced by the respondent would go to show that the pick and choose policy was adopted in spite of the fact that the Chief Secretary has emphasized the need for fair play in the matter of recommendations by the concerned Secretaries as contained in page 11 of the file. Where it is a case of pick and choose, arbitrariness writ large. The authority concerned is not to act in an arbitrary manner, but only in a fair manner. The procedure adopted by the authority concerned should have been guided by reason. Whether the

applicant is of outstanding merit and ability is not considered by the State Government while it is the duty of the State Government as per Regulation-4 of Indian Administrative Service (Appointment by Selection) Regulation, 1997 to consider. That has taken away the applicant's right to get considered for selection to I.A.S. Failure to consider by the State Government from the materials available seems to be without any justification and that cannot be justified.

26. It is fundamental to the legitimacy of public decision-making that official decisions should not be infected with motive such as fraud (or dishonesty), malice or personal interest. Duty to act in good faith is inherent in the process.

27. Sir William Wade in his classic work "Administrative Law" has stated that procedural safeguards, which are so often imposed for the benefit of persons affected by the exercise of administrative powers, are normally regarded as mandatory, so that it is fatal to disregard them. However, wide the powers of the State and however extensive the discretion they confer, it is always possible to require them to be exercised in a manner that is procedurally fair.

28. In R.S. Das, Vs. Union of India and others, and Mrs. K. Goyal Vs. Union of India and others with Pritam Singh and others Vs. Union of India and others and Ajit Singh Nagpal Vs. Union of India and others (AIR 1987 SC 593) it has been held:

"If eligible officers are considered on merit, in an objective manner no Govt. servant has any legal right to insist for promotion nor any such right is protected by the Art. 14 or 16 of the Constitution."

So, it is clear that eligible officers are to be considered on merit in an objective manner.

29. In Parvez Qadir Vs. Union of India (AIR 1975 SC 446) it has been held thus:

"The past performance of an officer being one of the criteria for making selection, the only way to adjudge their suitability is by perusal of confidential records. It is true that confidential records do not sometimes give a true picture due to the vagaries of the recording officer. The human fallibility and want of objectivity in the superior officer are factors which cannot be eliminated altogether. For that manner one can ask what method is perfect. For this reason, certain safeguards have been provided in order to make them as objective as possible. If there is an adverse entry against any officer that officer is given an opportunity to explain. After the explanation is given, the superior officer as well as the Govt. ultimately decide whether that remark by the recording officer was justified or not, and if it is not justified the Govt. can always order its deletion. Sometimes vagary may enter into the service confidentials, and it cannot be postulated that all superior officers who have been empowered to finalize such entries will suffer from any of those traits because the actions of the officer concerned may not have any immediate impact upon him and consequently his sense of objectivity will not be dimmed or strained. In our view, often enough, the entries in confidential records are themselves an insignia of the capacity and capability of the maker as a superior officer as well as a commentary on the quality of the officer against whom that confidential remark is being noted. But those who are charged with the duty to over see that these entries are fair, just and objective quite often do intervene and ratify any entry on representation being made against it at the proper time. In these circumstances, we do not think that the method of selection based on past performance as disclosed by the confidential records is not the proper method for adjudging suitability of the officer concerned."

30. In R.S. Dass Vs. Union of India and others (AIR 1987 SC 593) it had been held thus:

"An ancillary argument was raised to demonstrate discrimination. It was urged that the regulations do not lay down any guidelines for categorization of officers of the State Service into various categories with the result the Committee even if acting bona fide may apply different standards at different times. The argument was further developed that the Committee members change and, therefore, the same Committee or different Committee is likely to apply its own standard

in judging the suitability of officers in different manner in different years which would result into discrimination. This submission is found on the assumption that the Committee is free to categorise officers at its sweet will but that assumption is misconceived. Under Regn.5 the Committee has to categorize officers on the basis of their service records into four categories as discussed earlier. The categorization is objectively made on the material available in the service records of the officers. There is hardly any scope for applying different standards or criteria at different times as the service records namely the character roll entries would indicate the category of the officers as adjudged by the authority recording annual confidential remarks."

31. In Orissa Small Industries Corpn. Ltd and another Vs. Narasingha Charan Mohanty and others [(1999) 1 SCC 465] it has been held that:

"That apart, the Court is not entitled to assess the respective merit of the candidates for adjudging their suitability for being promoted and the only right the employee has is a right of consideration. The said right of consideration not having been infringed in the present case, the High Court was not justified in issuing the impugned direction for reconsideration of his case."

32. So, it clear that the employee has got a right of consideration and that right is not to be infringed. The case of the applicant herein is that his right of consideration has been infringed by not scrutinising his service records. A-13 dated 17.9.98 makes it clear that the confidential records of the applicant was not scrutinised, for the reason therein it is specifically stated that confidential reports of the applicant for the period 17.7.87 to 10/89, 1990 to 1992, 4/93 to 7/94, 9/94 to 12/95 and 1996 to 1997 were available in the General Administration (Public Relations Rules) Department and the Chief Secretary or the concerned Secretary has not so far called for the confidential reports of the applicant.

33. In Union of India and another Vs. Samar Singh and others [(1996) 10 SCC 555] it has been held thus:

"This would show that the Committee, keeping in view the record and experience including the conceptual and leadership abilities, achievements and potential for general management positions, had recommended 19 IAS officers for holding the post of Secretaries and 7 IAS officers for holding a non-secretarial post. Merely because the minutes of the Committee do not contain the reason for non-selection of the respondent does not mean that there has been no proper consideration of the merits and suitability of the respondent and as a result the selection is vitiated. From the minutes of the Special Committee it is evident that in the matter of empanelment of officers the Special Committee has taken into account the criteria that are laid down for holding such selection in para 14 of the Central Staffing Scheme and, therefore, it cannot be said that the said selection is vitiated on account of non-inclusion of the name of the respondent in the panel.

"Shri Ashok Grover, learned Senior Counsel appearing for the respondent, has laid emphasis on the remarks in ACRs about appraisal of the performance of the respondent subsequent to his promotion on the post of Additional Secretary to which reference has been made by the Tribunal in the impugned judgment. The learned counsel has submitted that since the performance has been rated as outstanding and excellent, the Tribunal was justified in holding that there is no proper consideration of the case of the respondent by the Special Committee. We are unable to agree. As is evident from para 14 of the Central Staffing Scheme record is one of the matters which has to be taken into consideration by the Special Committee while making the selection. Apart from the record there are other matters that have to be considered, namely, merit, competence, leadership and flair for participating in the policy-making process and the need of the Central Government which is the paramount consideration. We are unable to hold that since the performance of the respondent after his promotion as Additional Secretary had been found to be excellent and outstanding, the non-inclusion of his name from the panel by the Special Committee must lead to the inference that there was no proper consideration of the merit and suitability of the respondent for empanelment by the Special Committee."

When it is stated there that the minutes of the Committee do not contain the reason for non-selection that does not mean that there has been no proper consideration of merit and suitability means that the Selection Committee is not bound to give reason for non-selection, but it was a case where the Committee keeping in view of the C.R. Dossiers came to the conclusion that the respondent therein was not fit to be

included in the list. So, it is clear that C.R. Dossiers have to be looked into and that has not been in the case of the applicant in O.A. 381/99.

34. According to the first respondent, the practice all along has been to obtain recommendations of the concerned secretaries in respect of eligible officers working under them whom they consider as officers of outstanding merit and ability.

35. Recommendations of the concerned Secretaries should necessarily be based on the service records also. It cannot be based on their subjective satisfaction. The assessment should necessarily be in an objective manner. If the stand of the first respondent is that the concerned Secretaries are to recommend names of the eligible officers working under them purely based on the subjective satisfaction of the Secretaries concerned, such a practice though in vogue for a very long period, cannot be upheld. If on judicial scrutiny, it cannot stand test of reasonableness and constitutionality, it cannot be allowed to continue and has to be struck down. So, the stand of the first respondent that the practice has been in vogue and if that practice is based on the subjective satisfaction of the Secretaries concerned, such a practice cannot hold good.

36. It has been held in Kumari Shrilekha Vidyarthi and others Vs. State of U.P. and others [(1991) 1 SCC 212] that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution of India and basic to the rule of law, the system which governs us. Thus, arbitrariness is the very negation of the rule of law. Non-arbitrariness

being a necessary concomitant of the rule of law, it is imperative that all actions of every public functionary, in whatever sphere, must be guided by reason and not humour, whim, caprice or personal predilections of the persons entrusted with the task on behalf of the State and exercise all powers must be for public good instead of being an abuse of power.

37. In State of Bihar Vs. Kumar Promod Narain Singh and others [JT 1997 (5) S.C.677] it has been held that:

"Appointment of selected candidates by pick and choose is an arbitrary exercise of power."

38. The applicant has alleged mala fides against the second respondent. There cannot possibly be any set of guidelines in regard to the proof of mala fides. Mala fides, where it is alleged depends upon its own facts and circumstances [See JT 2000 (5) 378]. From the facts and circumstances of the case especially in the light of the fact that when mala fides are alleged against the second respondent who is brought in the party array by name, the second respondent has not chosen to come forward and deny the same. Thus mala fides on the part of the second respondent cannot be totally ruled out.

39. Giving the first hamlyn lecture in 1949 (Freedom under the law) Lord Denning concluded with these words:

"No one can suppose that the executive will never be guilty of the sins that are common to all of us. You may be sure that they sometimes do things which they ought not do; and will not do that they ought to do. But if and when wrongs are thereby suffered by any one of us, what is the remedy? Our procedure for securing our personal freedom is efficient but our procedure for preventing abuse of power is not."

40. It is necessary to vouch safe fairness to the affected person. That is sought to be achieved by casting an obligation on the authorities to observe fair procedure and thus control the exercise of their power.

41. As far as O.A. 460/99 is concerned, though various grounds are raised the only ground pressed into service is that due to non-consideration of the applicant's confidential reports for the crucial period, he was not considered for appointment by selection to I.A.S.

42. The first respondent says that the applicant was recommended by the Secretary to Government, Rural Development for consideration for I.A.S, that while finalizing the proposals it was found that there were 18 eligible officers as recommended by the Secretaries to Government, that the case of one Anil Kumar was also considered in view of the directions of this Bench of the Tribunal in O.A.1036/98, that the State Government then carefully considered the cases of 19 officers including the applicant and finalized the list of 10 officers to be recommended to the U.P.S.C. for consideration by the Selection Committee, that the short list of the candidates to be required is done by the Chief Secretary, that for certain periods from 5.7.1978 to 15.11.95 the confidential reports of the applicant were not available and on a careful consideration of the case of the applicant, his name was not included.

43. Applicant filed an application in O.A.1358/98 for a direction to the supplemental 17th respondents therein, who is the 7th respondent herein, to place his confidential reports before the Selection Committee for consideration for his appointment to I.A.S and as per directions of this Tribunal, the 7th respondent filed A-2 affidavit. In A-2, it is stated

that the confidential reports of the applicants were incomplete, that though the applicant's confidential reports for the period from 30.6.1977 to 31.7.1997 were not continuous were made available to the General Administration Department so as to assess the applicant's suitability and it cannot be said that non-availability of confidential reports for a few broken periods was the reason for non-inclusion of the applicant for consideration for conferring I.A.S. So the grievance of the applicant was brought to the notice of the authorities concerned.

44. Relying on A-4, the applicant says that A-4 Circular directs all the Principal Secretaries/Secretaries and Head of Department that in case where it is not feasible to write Confidential Reports for past periods as none of the Reporting/Reviewing/Accepting Authorities are in service, the Head of the Department may certify that the performance of the officer during the relevant periods and therefore, the contention that the confidential reports of the applicant could not be reviewed and forwarded to the General Administration Department is not maintainable. A-4 is the Circular Memorandum dated 16.6.1998 issued by the Chief Secretary to Government of Kerala. Paragraph 4.2 of the same says that:

"This Circular Memorandum is issued with the sole intention of enabling those Departments where convening of Departmental Promotion Committee meeting is held up for want of confidential reports for a long period, to regularize all previous temporary promotions after holding Departmental Promotion Committee meetings. It is not to be relied upon in future by erring Departments."

First respondent does not say whether there is any other circular though A-4 may not meet the situation in the case of the applicant.

45. From the file produced by the first respondent it is seen that the State Government considered the case of the applicant also, but he was not found eligible to be included in the list of persons for consideration to selection by the Selection Committee. It is also seen from the file produced by the first respondent that the State Government has prepared grading of 19 officers including the applicant and out of that 19, 10 persons were found eligible to be considered and that was excluding the applicant. Certain points have been awarded to the applicant for grading. While awarding points to applicant in the course of grading, points have been awarded to him for the broken periods during which his confidential reports were not available as stated by the first respondent in the reply statement. But on what authority the grading was done based on points awarded is not known. It cannot be without any authority. Applicant specifically says that he has submitted all the confidential reports to the authority concerned. There is no specific denial of the same. That being so, if his confidential reports for any period is missing he cannot be made to suffer. Consideration as per regulation-4 should be a proper consideration. There was no proper consideration of the applicant.

46. Learned counsel appearing for the applicant drew our attention to the ruling in Brij Behari Lal Agarwal Vs. Hon'ble High Court of Madhya Pradesh and others (AIR 1981 SC 594) wherein it has been held that:

"What we would like to add is that when considering the question of compulsory retirement, while it is no doubt desirable to make an overall assessment of the Government servant's record, more than ordinary value should be attached to the confidential reports pertaining to the years immediately preceding such consideration. It is possible that a Government servant may possess a somewhat erratic record in the

early years of service, but with the passage of time he may have so greatly improved that it would be of advantage to continue him in service upto the statutory age of superannuation. Whatever value the confidential reports of earlier years may possess, those pertaining to the later years are not only of direct relevance but also of utmost importance."

47. Accordingly, A-17 in O.A.381/99 which is A-7 in O.A.460/99 is quashed. Official respondents are directed to complete the selection process to Indian Administrative Service (Appointment by Selection) for the year 1998 afresh in accordance with law within four months from the date of receipt of a copy of this order. For that purpose, the first respondent shall call for and consider the confidential reports of the applicant in O.A. 381/99 for the relevant period and in the case of the applicant in O.A.460/99, if the confidential reports for any period during the relevant period not available, the first respondent shall formulate proper procedure for the purpose of consideration under Regulation-4 of the Indian Administrative Service (Appointment by Selection), 1997.

48. Original Applications are disposed of as above. No costs.

Dated the 22nd of December, 2000.

Sd/-
(G.RAMAKRISHNAN)
ADMINISTRATIVE MEMBER

Sd/-
(A.M.SIVADAS)
JUDICIAL MEMBER