CENTRAL ADMINISTRATIVE TRIBUNAL, GUWAHATI BENCH.

Date of Order : This the 17th Day of June, 1998.

Justice Shri D.N.Baruah, Vice-Chairman.

Shri G.L.Sanglyine, Administrative Member.

O.A.No. 82 of 1997.

Shri Nawab Imdad Hussain . . . Applicant

- Versus -

Union of India & Ors. . . . Respondents.

O.A.No. 83 of 1997.

Shri Debendra Nath Hazarika . . . Applicant

- Versus -

Union of India & Ors. . . . Respondents

O.A.No. 84 of 1997.

Shri Anil Kumar Chaharia . . . Applicant

- Versus -

Union of India & Ors. . . . Respondents

O.A.No. 87 of 1997

Shri Jivan Singh . . . Applicant

- Versus -

Union of India & Ors. . . . Respondents

Mr A.K.Bhattacharyya, Advocate for all the applicants.
Mr S.Ali, Sr.C.G.S.C for respondents No.1 & 2.
Dr Y.K.Phukan, Sr.Govt.Advocate, Assam for respondents No.3,4 & 5.
Mr B.K.Sharma, Advocate for respondents No. 7 & 8.
Mr G.N.Das, Advocate for respondent No.10.

O.A.No. 52 of 1997.

Shri Ajit Kumar Das . . . Applicant

- Versus -

Union of India & Ors. . . . Respondents

O.A.No. 53 of 1997

Shri Promode Chetia . . . Applicant

- Versus -

Union of India & Ors. . . . Respondents

O.A.No. 54 of 1997

Shri Derajuddin Ahmed . . . Applicant

-Versus-

Union of India & Ors. . . . Respondents

Mr B.K.Sharma, Advocate for all the applicants.
Mr G.Sarma, Addl.C.G.S.C for respondent No.2
Mr Y.K.Phukan, Sr.Govt.Advocate, Assam for respondents No.3,4 & 5.

contd..

contd..12

O.A.No. 136 of 1997.

Shri Sailendra Nath Talukdar

- Versus -

Union of India & Ors.

. . . Applicant

. . . Respondents.

Mr P.Prasad, Advocate for the applicant.

Mr S.Ali, Sr.G.G.S.C for respondent No.1.

Mr G.Sarma, Addl.C.G.S.C for respondent No.2.

Mr Y.K.Phukan, Sr.Govt. Advocate, Assam for respondents 3,4 & 5.

O R D E R

BARUAH J.(V.C)

By this order we dispose of all the above Original Applications as these applications involve common questions of law and similar facts. All these applicants belong to Assam Police Service (for short APS). They were recruited to the APS in different years from 1976 to 1979 and they had been posted after their appointment in different places. They served in various capacities. Each of the applicants claims that he is honest, deligent and intelligent officer and the recepient of various medals and letters of appreciation. They had undergone various training courses. All the applicants also claim that they are entitled to be considered for promotion to the Indian Police Service (for short IPS) Cadre.

2. A Selection Committee was constituted as per Regulation 3 of Indian Police Service (Appointment by Promotion) Regulation 1955 and the Committee in its meeting in June 1996 prepared a list of eligible candidates for promotion to the IPS cadre from the officers of APS. It is learnt by them that some of the applicants' names did not find place in the select list but their juniors have either been included or superseded them.

3. All the applicants appeared in the competitive examination and they were selected to APS on the basis of combined competitive examination held from time to time. The present applicants were appointed during the period from 1974 to 1979. The selection committee constituted for the purpose of recruitment of officers to the IPS cadre in its meeting held

in the month of June 1996, as stated by the applicants, a select list was prepared. But till the time of filing of the applications the select list was not published. However, the applicants claim to know about the select list and according to them following 6 persons were selected :

1. Shri Ajit Kumar Das (applicant in O.A.52/97)
2. " Derajuddin Ahmed (applicant in O.A.54/97)
3. " Promode Chetia (applicant in O.A.53/97)
4. " Rohini Kr. Bania (respondent No.10 in O.A.82/97)
5. " Birendra Kr.Hazarika(respondent No.11 in O.A.82/97)
6. " Sailendra Nath Talukdar (applicant in O.A.136/97)

Being aggrieved by the decision of the Selection Committee the applicants submitted representations stating inter alia that their exclusion from the select list was illegal,arbitrary and it was done by non application of mind. Similar several representations had also been filed either jointly or individually by other officer.

4. The applicant Nawab Imdad Hussain also submitted that he alongwith some other similarly situated applicants submitted application before this Tribunal. The application was registered and numbered as O.A.288/96. In February 1997 this Tribunal disposed of the said O.A. directing the Director General of police, Assam to dispose of the representation within 1 month and also gave direction that until such disposal no one should be appointed to IPS. Shri Derajuddin Ahmed , applicant in O.A. No.54/97 also filed similar application claiming promotion with retrospective effect and made an interim prayer not to hold any selection scheduled to be held in the last week of March 1997. This Tribunal on 20.3.1997 passed order in the said O.A. and issued notice to the respondents to show cause as to why interim order as prayed for should not be granted and pending reply to the show cause notice the respondents were directed not to finally publish the selection list for promotion to IPS in the year 1996.

contd..12

5. Shri Ajit Kumar Das, applicant in O.A.52/97 in his application has stated that in the list prepared by the Selection Committee constituted in the year 1996, his name appeared in Sl.No.1 and therefore he had every reason to expect promotion to IPS. He therefore claims for a direction to the respondents to promote him to the IPS cadre with retrospective effect. Similarly Shri Promode Chetia, applicant in O.A.53/97 claims that his name appeared in Sl.No.3 of the select list and the name of Shri Derajuddin Ahmed, applicant in O.A.54/97 appeared in Sl.No.2 of the select list. He has also made similar prayer to direct the respondents to promote the applicants to the IPS cadre with retrospective effect. The other applicants namely, applicants in O.A.No.82/97, 83/97, 84/97, 87/97 and 136/97 have challenged the select list and pray for setting aside the said select list.

6. On various dates all the above applications were admitted and in due course respondents had entered appearance. In O.A. No.52/97, 53/97, 54/97 and 136/97 only the second respondent, namely, the Union Public Service Commission have filed their written statements. All the written statements are similar in nature. In O.A.82/97, the Union Public Service Commission, respondent No.1 and private respondents No.7, 8, 9 and 10 have filed written statements. Similarly in O.A.83/97 only respondents No.7, 8 and 9 have filed written statements. In O.A.87/97 Union of India and the private respondents viz. Promode Chetia and Rohini Kumar Bania have filed written statements.

7. Heard learned counsel Shri A.K.Bhattacharyya appearing on behalf of the applicants in O.A.82/97, 83/97, 84/97 and 87/97, Mr B.K.Sharma, learned counsel for the applicants in O.A.52/97, 53/97 and 54/97, Mr P.Prasad, learned counsel for the applicant in O.A.136/97, Mr S.Ali, learned Sr.C.G.S.C, Dr

12

Y.K.Phukan, learned Senior Government Advocate, Assam and Mr G.Sarma, learned Addl.C.G.S.C., Mr B.K.Sharma and Mr G.N. Das also appeared on behalf of respondents No.7, 8 in O.A. 82/97, 83/97, 84/97 and 87/97.

8. Mr A.K.Bhattacharyya submitted before us that Selection Committee as per rule was required to classify the eligible officers in various grades, namely, "Outstanding", "Very Good", "Good" and "Unfit" on the basis of the entire service records including those not included in the ACRs. Learned counsel further submitted that :

(a) it was not enough for the Selection Committee to make the selection and classify the officers in various grading on the basis of the ACRs only;

(b) the facts and circumstances of the present case amptly showed that selection committee while making the selection had sufferred from the vice of malice in law and therefore, the entire selection was liable to be set aside by this Tribunal in exercise of the power of judicial review and ;

(c) in the present case the selection committee while making the selection did not act fairly and reasonably in preparing the select list as it had violated the provisions of Article 14, 16 and 21 of the Constitution.

9. Mr B.K.Sharma, learned counsel for the applicants in O.A.No.52/97, 53/97 and 54/97 on the other hand submitted that the applications filed by the applicants in O.A.No.82/97, 83/97, 84/97, 87/97 and 136/97 did not merit any consideration and were liable to be dismissed summarily. He also submitted that the applicants suppressed the material facts in-as-much as O.A.No.288/96 was filed by Nawab Imdad Hussain and others, the applicant in O.A.No.82/97 alongwith others was disposed

contd..6

contd..12

contd..20

of by this Tribunal by order dated 28.2.1997 with a direction to dispose of the representation submitted by the said applicants. In the representation only point urged upon was regarding the seniority and no other ground was taken in that O.A.288/96. Therefore, the other grounds taken in the present applications were barred by the principles of constructive res judicata. It was pointed out that the ground taken in the O.A. filed in 1996 was that Shri Ajit Kumar Das and Derajuddin Ahmed, applicants in O.A.52/97 and 54/97, were junior to the applicants was untenable in law in-as-much as the seniority had never been a criterion for selection to the IPS; the seniority comes to play only when merits were equal. Besides, in the applications new grounds had been raised. According to Mr Sharma the ACRs reflect the achievements and performances of an officer and there cannot be any fresh consideration in respect of medal, award, letters of appreciation received by the officers. If these things were required to be taken into account again there would be double appreciation which was never contemplated by the relevant rules. This position had been made clear in O.A.136/97. According to the learned counsel this was not the criterion of selection. The arguments advanced by the learned counsel for the said applicants were absolutely falacious and not tenable. The learned counsel submitted that it was done in accordance with law and relevant rules after taking into consideration of all the relevant facts and on perusal of the ACRs and making the gradings as required. Learned counsel further submitted that the action of the Selection Committee can be reviewed by this Tribunal only in case of any error in decision making process and not the decision as the Tribunal was not sitting as a Court of appeal. The counsel appearing on behalf of the respondents No.1 to 6

also adopted the arguments made by Mr B.K.Sharma. Mr S.Ali, learned Sr.C.G.S.C appearing on behalf of the Union of India and Mr G.Sarma, learned Addl.C.G.S.C appearing on behalf of UPSC also supported the decision of the Selection Committee. According to them there was nothing wrong in the decision making process. Therefore, no interference with the decision of the Selection Committee was called for. On the rival contentions raised by the learned counsel for the parties the following points fall for determination :

(1) Whether the present applications are hit by the principles of constructive res judicata ?

(2) Whether the decision of the Selection Committee in making the selection was just and proper and whether the action of the Selection Committee is arbitrary, unfair and unreasonable and ;

(3) Whether the action of the Selection Committee suffers from the vice of malice ?

9. All India Services Act 1951 was enacted under the provisions of Article 312 of the Constitution to regulate the recruitment and the conditions of service of persons appointed to any such service. In 1954 the Indian Police Service (Recruitment) Rules was made in exercise of the powers conferred by Section 3 of All India Services Act, 1951 by the Central Government in pursuance of Rule 9(1) of the Indian Police Service (Recruitment) Rules 1954. The Assam Police Service Rules 1966 was made in exercise of powers conferred by the proviso to Article 309 of the Constitution of India.

10. Point No.(1)

Principle of res judicata being founded on a general principles of law, it applies outside the provisions of Section 11 of the CPC. This principle is aimed at achieving

contd..12

contd..20

finality in the litigation. Constructive res judicata is a special and artificial form of res judicata. Explanation IV of Section 11 of the CPC has dealt with the provisions of constructive res judicata. In an appropriate case, the principle of constructive res judicata may also be applicable even though in such case CPC is not applicable. This rule can be said to be a technical but the basis on which the said rule rests is founded on consideration of public policy. The general principle of res judicata bars retrial on a particular issue which has been finally decided in an earlier suit or proceeding where the issues and parties in the subsequent suit is substantially same. The constructive res judicata covers the area where there is no final decision on a particular issue as no such issue was raised in the earlier decision. But then the principle of constructive res judicata is available if the general provisions of res judicata are fulfilled. It means that when a matter is decided finally then only the principle of res judicata is applicable. In the absence of such final decision, the question of constructive res judicata does not arise.

11. In the present case the earlier O.A.288/96 was disposed of by this Tribunal with a direction to consider the representations earlier filed. In fact no question was decided in the said case by this Tribunal. Therefore, the principle of res judicata is not applicable in the present case not to speak of constructive res judicata.

12. Point No. (2)

Under sub-rule(1) of Rule 9 of the Indian Police Service (Recruitment) Rules, 1954, the Central Government have made Regulation known as Indian Police Service (Appointment by Promotion) Regulations, 1955 (for short "the Regulation 1955"). Regulation 3 of the said Regulation provides for constitution

a Committee for making selection. The procedure for preparation of list of suitable officers is prescribed in Regulation 5 of "the Regulation 1955". As per the said Regulation each Committee shall ordinarily meet at intervals not exceeding one year and prepare a list of such members of the State Police Service, as held by them to be suitable for promotion to the service. The number of members of the State Police Service to be included in the list shall be calculated as the number of substantive vacancies anticipated in the course of the period of 12 months, commencing from the date of preparation of the list, in the posts available for them under Rule 9 of the Recruitment Rules plus twenty per cent of such number or two whichever is greater. The Committee shall consider for inclusion in the said list, the cases of members of the State Police Service in the order of seniority in that service of a number which is equal to three times the number referred to in sub-regulation(1). However, such restriction is not applicable in respect of a State where the total number of eligible officers is less than three times the maximum permissible size of the Select List and in such a case the Committee shall consider all the eligible officers. Under sub-regulation 3 of Regulation 5 the Committee is debarred from considering the case of the members of the State Police Service who have attained the age of 54 years on the first day of April of the year in which it meets provided that a member of the State Police Service whose name appeared in the Select List in force immediately before the date of the meeting of the Committee shall be considered for inclusion in the fresh list, to be prepared by the Committee, even if he has in the meanwhile attained the age of 54 years. The Selection Committee then shall proceed to consider the case of each eligible

contd..12

candidate on an overall relative assessment of their service records and then grade them as 'Outstanding', 'very good', 'Good' or 'Unfit'.

13. In the present case the Selection Committee made the gradation after making an assessment on the basis of ACRs. But then what is the meaning of service records; does it mean the ACRs alone or something else. Learned counsel for the applicants in O.A.82/97, 83/97, 84/97 and 87/97 Mr Bhattacharyya submitted that service records would not mean ACRs alone. This expression 'service records' would also include other relevant records which might indicate the officer's achievement or failure in the discharge of his duties. Therefore, apart from the ACRs such other records should also be looked into. Failure to consider those other records would vitiate the entire selection proceedings. Any selection list so prepared would be illegal and invalid.

14. It is well established that Annual Confidential reports are prepared on an overall assessment of the officers of a particular grade for which such reports are written. The competent authority, reviewing authority and the accepting authority are to act fairly and objectively in showing the character, integrity and performance of the incumbents. While making the assessment those authorities are required to take into consideration of the entire service records of the officer. Besides his personal knowledge regarding integrity and otherwise also required to be considered at the time of writing of the ACRs. Adverse remarks are also sometimes required to be incorporated in the reports. The object of making adverse remarks is to assess on merit and performance of officer concerned so as to grade him in various categories as 'outstanding', 'very good', 'good', 'satisfactory' etc. for

which the reviewing or accepting authority have to act fairly and objectively in assessing the character and performance of the officer. Therefore, in our opinion annual confidential report reflects the entire service records and there is nothing wrong on the part of the Selection Committee to consider only the ACRs for the purpose of making an overall relative assessment of the officers and grading them on such assessment. It has been held by the Supreme Court in State of U.P. and another vs. Ved Pal Singh and another reported in (1997) 3 SCC 483 that it is necessary to record the confidential report objectively and dispassionately with a reformative purpose to enable the public servant to reform himself to improve quality of the service and efficiency of the administration and maintenance of discipline in service. Confidential reports placed on record in the said case did disclose such deleterious tendency in writing the confidential reports.

15. In the present case the learned counsel for the applicants however, could not show any instance which demonstrates dereliction of duties in writing ACRs. The ACRs are written by reporting officer on the basis of the materials either placed by the officer himself or from other service records. These are scrutinised and verified by the reviewing officer and the accepting officer. Therefore, we are of the opinion that assessment of the officers made by the Selection Committee on the basis of the ACRs and subsequent gradation on such assessment, fulfil the requirement of Regulation 5 of the said 'Regulation 1955'. Mr Bhattacharyya had also drawn our attention to the fact that the Selection Committee unreasonably and unfairly put Sri Sailendra Nath Talukdar an eligible candidate for the said year in sl.No.6 even though he received Police Medal in 1993, awarded by the President of India for meritorious

contd..12

contd..20

service on the Republic Day, 1993. This was, according to Mr Bhattacharyya, no less an achievement and the officers whose name appeared in the select list from sl.No.1 to 5 did not have such distinction in their service carrier. In spite of that Sri Talukdar was put at the bottom. Mr Bhattacharyya also submitted, had this aspect been considered the selection would have been surely different. We have already said that the ACRs are written after taking into consideration of all the achievements of the officer and his draw backs. In our opinion the ACR of respondent No.6 was also written by the concerned officers after taking all into consideration. While making the assessment those facts had also been considered. Unless something is shown that those were not taken into consideration in writing ACRs, it is difficult for this Tribunal to hold that ACRs were not properly written. Besides, the entries made in the ACRs were never under challenge. The learned counsel for the applicant could not show anything in this regard. The Selection Committee is an expert body and this body knows how to make the assessment. This Tribunal, in our opinion, is not competent to interfere with the decision of the Selection Committee in making the assessment and subsequent gradation unless there is something patently wrong on the face of it. As we do not find anything in this regard we are not inclined to interfere with the decision of the Selection Committee in respect of placement of the successful candidates. Mr Bhattacharyya further brought to our notice of a photocopy of the Meghalaya Engineering (Public Works) Service Rules 1995 by way of illustration and pointed out how to prepare the select list. We find no force in this argument in-as-much as the analogy is not at all applicable. Learned counsel also challenged the decision of the Selection Committee on other counts. According to him the decision of the Selection Committee

21

sufferredfrom two major irregularities as a result of which the decision of the Selection Committee in making the select list was not fair and reasonable; on the contrary it only demonstrated that it had acted arbitrarily and unfairly, therefore, it violated the provision of Article 14 of the Constitution. He also submitted that Sri Birendra Kumar Hazarika, a selected candidate was not an eligible person for selection in-as-much as he was overaged at the relevant time. Sri Hazarika crossed the age of 54 years on the first day of April 1996 i.e. the date of consideration of the candidates, as required under the provision of Regulation 5(3) of the Regulation 1955. While making this submission he had drawn our attention to sub-regulation 3 of Regulation 5 of "1955 Regulation". As per the provision of the said Regulation a candidate must not attain the age of 54 years on the first day of April of the year in which it meets. We quote the relevant portion of Regulation 5(3) as under :

> "Regulation 5(3): The Committee shall not consider the cases of the Member of the State Police Service who have attained the age of 54 years on the first day of April of the year in which it meets."

However, as per the proviso to sub-regulation 3 of Regulation 5 a member of the State Police Service whose name appeared in the select list in force immediately before the date of the meeting of the Committee shall be considered for inclusion in the fresh list, to be prepared by the Committee, even if he has in the meanwhile attained the age of 54 years. The second proviso however says that a member of the State Police Service who has attained the age of fifty-four years on the first day of January of the year in which the Committee meets shall be considered by the Committee if he was eligible for consideration on the first day of April of the year or of any of the years immediately preceeding the year in which such meeting was

...contd...

held but could not be considered as no meeting of the Committee was held during such preceeding year or years. Relying on this provision Mr Bhattacharyya submitted that admittedly Mr Hazarika had reached the age of 54 years. Therefore, his case was wrongly considered and selected. This is a very serious allegation and a very important point. However, this point was not taken in the pleading neither at the time of filing of the application nor it was taken in any rejoinder thereafter. Only in the written argument this point was raised. Unfortunately in this case Union of India did not file any written statement. The Union Public Service Commission however, filed written statement. As this point was not taken there could not be any reply. This is a factual aspect. The applicants ought to have taken this point in their pleadings at the time of filing of the applications or thereafter by way of amendment or by filing a rejoinder. We have perused the record. We do not find anything in this regard. We are therefore unable to consider this as-pect of the matter. The established principle of law is that nothing should be looked into unless pleaded. A plea not raised in the petition or in the rejoinder should not be taken into consideration. In M.S.M. Sharma vs. Sri Krishna Sinha and others reported in A.I.R 1959 S.C 395 the Supreme Court disallowed a new point to be raised in case of a bias by the Chief Minister. It observed :

> "The case of bias of a Chief Minister(respondent No.2) has not been made in any way in the petition and have raised this question for the defence of those which were not mentioned in the petition but were put forth in the rejoinder to which the respondents had no opportunity to reply."

Again in another decision Dr R.K.S.Chauhan and another vs. State of U.P. and others reported in 1995 Supp (3) S.C.C 688 also depricated the practice of considering a plea not taken.

23

The Court observed :

> "We are, therefore, of the opinion that the High Court fell into an error in making out a case which was not pleaded by the unsuccessful candidates in the application filed before the Tribunal and which it appears was made out for the first time by the High Court. Even when the matter was pending before the High Court the unsuccessful candidates never sought leave to amend their application and include this plea. The appellants as well as the State, therefore, had hardly any opportunity to place their point of view in that behalf. We are, therefore, of the opinion that the said ground on which the High Court quashed the selection cannot be allowed to stand."

Again in Additional District Magistrate (City) Agra vs. Prabhakar Chaturvedi and another reported in (1996) 2 SCC 12 the Supreme Court observed thus :

> "..... I find that the order of the High Court cannot be sustained. So far as non-supply of Enquiry Officer's report is concerned it has to be kept in view that no such contention was raised in the writ petition before the High Court. The High Court has noted this aspect. Nothing could be pointed out to us by learned counsel for the respondents to controvert this observation of the High Court. Whether the pleadings in the writ petition should be treated as pleadings in a suit or not is not relevant for deciding this question."

Similar view was taken by the Supreme Court in The Chancellor and another vs. Dr Vijayanda Kar and others reported in (1994) 1 S.C.C 169. In the said decision the Supreme Court held :

> "Facts not pleaded in the writ petition should not be taken into consideration."

In view of the above we are of opinion that the Tribunal should refrain from making an enquiry regarding the allegation brought by the applicants. Even assuming that such consideration is permissible, on perusal of the record we do not find anything to indicate that he was overaged. This fact ought to have been pleaded giving the opportunity to the other side to controvert

contd..20

24

if necessary. Therefore, we are unable to accept the submission of Mr Bhattacharyya. Besides the learned counsel submitted that this officer had a blemish carrier. Said Hazarika was dismissed from service on 10.7.1987 after he was found guilty by a Commission of Enquiry in a matter of death of one Subhash Sarma. However, he was reinstated but he was again suspended in August, 1989 and again reinstated in 1991 pending disposal of proceeding. The aforesaid suspension period was regularised only on 10.10.1996. Mr Bhattacharyya contended that the officer was found guilty of misconduct and therefore it was not proper to place him at par with officers who were not guilty by any misconduct. Such tainted officer ought not to have been treated equally with other officers. In this connection Mr Bhattacharyya had drawn our attention to a decision of Union of India vs. K.V.Janakiraman reported in (1991) 4 SCC 109. Learned counsel also submitted that the ACRs of the applicants were down graded without recording any reasons and thereby deprived them of getting opportunity for promotion alongwith other six selectees. This, positively violated the mandate of Article 16. If down-gradation of the ACRs of the applicants were not taken into consideration by the Selection Committee, assessment of their merits by the Selection Committee would have certainly been different. Therefore, the Select List of 1996 was liable to be set aside and quashed.

The learned counsel appearing on behalf of applicants in O.A.Nos. 82/97, 83/97, 84/97 and 87/97 also submitted that down gradation entries had been made in the ACRs without recording the reasons. However, on this point, learned counsel did not place before us any rule requiring the reasons to be recorded. Besides this point was never urged before this

25

Tribunal in the applications as well as in the rejoinders. As this point was not taken the other side had no opportunity to refute the same. Therefore, the Tribunal is not to consider such ground. In view of the above we do not find that the Selection Committee while making the selection committed any irregularity or illegality requiring interference. It was also argued that the entire action of the Selection Committee in making the selection was arbitrary, unfair and unreasonable. It is a settled principle of law that any administrative action which is taken in an arbitrary manner cannot sustain in law. The Apex Court in very many cases have held that every administrative action must be informed of reason and if the action is not reasonable it cannot be fair and unfair action is liable to be struck down. In this connection learned counsel had drawn our attention to a decision of King's Bench Division, Pilling vs. Abergele U.D.C. Relying on the said decision he urged that any action taken without any reason would not be sustained. In the said decision Lord Goddard, Chief Justice observed thus :

> ".... I have always understood the law to be that where a duty to hear and determine a question is conferred on a local authority and the reasons which show that they have taken into account matters which they ought not to have taken into account or have failed to take into account matters which they bught to have taken into account, the court to whom an appeal lies ought to allow an appeal. . . . ."

The observation of Lord Goddard is well established principle of law. There is no dispute about it. But in the present case we do not find any relevance in-as-much as the applicants could not bring to our notice anything which would show that the Selection Committee had taken into consideration of some matters which were not required to take into consideration or for that the Committee took into consideration certain extraneous matter.

contd..20

It was further argued that there was a total non application of mind on the part of the Committee in not taking into consideration certain relevant factors which ought to have been taken into consideration. His first contention was that ineligible officer Shri Birendra Kumar Hazarika was put in serial No.5 of the select list who was overaged on the date of selection for promotion within the meaning of Regulation 5(3). He further submitted that proviso to the said Regulation was not at all applicable in the facts and circumstances of the case. Shri Hazarika attained the age of 54 years 10 months in April, 1997 and by that time he was much overaged, he ought not to have been considered for promotion to IPS under Regulation 5(3). Therefore, the Selection Committee had acted in violation of the mandatory provisions of Regulation 5(3). The entire decision making process was vitiated by error of law and therefore the selection must go. Learned counsel also argued that the Selection Committee while making the selection took into consideration of some extraneous matter and therefore the action cannot be sustained. We have already indicated that the point of over age was not taken in the pleadings, there was nothing in the records which we have already indicated herein before. Therefore, we are unable to accept the submission of the learned counsel that there was non application of mind.

16. Point No. (3)

The applicants in these Original Applications No. 82/97, 83/97, 84/97 and 87/97 have challenged the action of the Selection Committee also on the ground that the action of the Selection Committee sufferred from the vice of malice both in law and fact. There can be malice in fact when action is taken by an authority with the sole purpose to victimise a person. Mala fides means want of good faith, personal bias,

contd..19

grudge, oblique or improper motive or ulterior purpose. The administrative action must be said to be done in good faith. An act done honestly is deemed to have been done in good faith. An administrative authority must, therefore, act in a bonafide manner and should never act for an improper motive or ulterior purposes or contrary to the requirements of the statue, on the basis of the circumstances not contemplated by law, or improperly exercised discretion to achieve some ulterior purpose. The determination of a plea of mala fide involves two questions, namely, (i) whether there is a personal bias or an oblique motive, and (ii) whether the administrative action is contrary to the objects, requirements and conditions of a valid exercise of administrative power. But then the plea of mala fide must not only be taken but also be proved. Such action may be inferred from the facts and circumstances of a case. Mere assertion or a vague or bald statement is not enough. It must be demonstrated either by admitted or proved facts . If it is established that the action has been taken mala fide for any such considerations or by fraud on power or colourable exercise of power, it must be struck down. Administrative authority has wide discretion in taking a decision. But then, power to act in discretion is not power to act ad-arbitrarium. It is not a despotic power, nor hedged with arbitrariness. If done it brings the authority concerned in conflict with law. When the power is exercised mala fide it undoubtedly gets vitiated by colourable exercise of power.

From the records we do not find anything that the Selection Committee had done something for oblique purpose.Therefore, we do not find any malice of fact in making the selection.

17. Learned counsel also submitted that in the present case the action of the Selection Committee sufferred from the vice

contd..20

of malice in law. Malice in law could be inferred from doing of wrongful act intentionally without any just cause or excuse or without there being reasonable relation to the purpose of the exercise of statutory power. When some wrong is done or injury is inflicted by the action of an authority in contravention with the provisions of law it can be said to be malice in law. Such action also cannot be sustained. An authority inflicting injury on a person contrary to law would be guilty of malice in law. Similarly when a discretionary power is conferred it has to be exercised by an authority in a proper manner. If such power is exercised improperly such action cannot sustain. If any action is taken without application of mind it can also be said to be an action in malice in law. Similarly while exercising such power if the authority takes some extraneous matter not at all relevant or takes into consideration which is absolutely irrelevant there is malice in law. Similarly a public authority actuated by a mistaken plea in the exigencies of a non existing things takes into consideration, such mistaken plea said to have been done in bad faith. Such action shall suffer from the vice of malice. Learned counsel Mr A.K.Bhattacharyya had in this connection drawn our attention to a passage from de Smith's famous Treatise, namely, 'Judicial Review of Administrative Action, Fourth Edition'. We quote the same passage :

> "The influence of extraneous matters will be manifest if they have led the authority to make an order that is invalid ex-facie, or if the authority has set them out as reasons for its order or has otherwise admitted their influence. In other cases, the courts must determine whether their influence is to be inferred from the surrounding circumstances. If the influence or irrelevant factors is established, it does not appear to be necessary to prove that they were the sole or even the dominant influence; it seems to be enough to prove that their influence was substantial."

By pointing out to this passage of the Book Mr Bhattacharyya tried to show that if the administrative action is taken by taking into consideration of some extraneous matter such action must be invalid. The influence of extraneous matter has to be inferred from the surrounding circumstances. If the influence of irrelevant and extraneous factors are established in taking the decision it is not necessary to prove that they are the sole or even dominant influence in taking such action. The decision taken in Pilling vs. Abergele U.D.C was noticed with approval by the Supreme Court in the case of Smt S.R. Venkataraman vs. Union of India & Ors. reported in AIR 1979 SC 49. In the said case quoting a passage from Shearer vs. Shields (1914) Appeal Case 808 observed that "malice in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want of reasonable or probable cause." The Supreme Court further held that "if a discretionary power has been exercised for an unauthorised purpose, it is generally immaterial whether its repository was acting in good faith or in bad faith." The Supreme Court also approved the view taken by Chief Justice Lord Goddard in Pilling vs. Abergele Urban District Council (1950) 1 KB 636 that "where a duty to determine a question is concerned on an authority which state their reasons for the decision, and the reasons which they state show that they have taken into account matters which they ought not to have taken into account, or that they have failed to take matters into account which they ought to have taken into account, the court to which an appeal lies can and ought to adjudicate on the matter." In the said decision the apex Court further held thus :

> ". . . . that there will be an error of fact when a public body is prompted by a mistaken

belief in the existence of a non-existing fact or circumstance. This is so clearly unreasonable that what is done under such a mistaken belief might almost be said to have been done in bad faith; and in actual experience, and as things go, these may well be said to run into one another."

Therefore, from the above decision it is clear that a malice in law may be an action by taking into irrelevant or extraneous matter or failed to take irrelevant matter or taken contrary to the established rule. If such action is taken, the authority shall be held of doing an act which is malice in law. The contention of Mr Bhattacharyya was that in the instant case the Selection Committee took into some irrelevant factors from ACRs of the applicants. However, Mr Bhattacharyya could not show anything in this regard except that the reviewing authority or accepting authority down graded without recording any reasons. This point was never taken in the applications. Besides, we do not find anything that in such cases reasons are to be recorded. Mr Bhattacharyya had also drawn our attention to the factor namely, non consideration of the fact that Shri Sailendra Nath Talukdar was the holder of Indian Police Medal in 1993 and Sri Debendra Nath Hazarika was a holder of outstanding service Gold Medal. We have already said that while writing the ACRs it is to be presumed unless otherwise proved everything were taken into consideration and after taking into consideration the ACRs had been written and at this stage this cannot be a subject matter of challenge. Mr Bhattacharyya further submitted that there must be some record. The record must indicate the reasons for making the selection. We do not find any force on the submission of Mr Bhattacharyya in this regard. As we have already indicated that plea of malice not only to be pleaded but to be proved. We do not find anything of this kind in the present applications. It is well known that the

Selection Committee is a body of expert and no Court or Tribunal should take the role of an expert body. Unless there is some-thing patently wrong, the Court or Tribunal should be slow into interfering with the opinion expressed by the expert in the absence of mala fide against the experts (see Neelima Mishra vs. Dr Harindra Kumar Paintle AIR 1990 SC 1402). In the present case no such thing was brought to the notice of the Tribunal. Therefore, we are unable to accept the submission of Mr Bhattacharyya. Therefore this ground also fails. Mr G.N.Das, learned counsel appearing on behalf of respondent No.10 Shri Bania submitted that the applicants have no vested right to be promoted to IPS although they have the right to be considered for such promotion. The preparation of the select list of eligible officers belonging to the State Police Service for promotion to IPS is within the purview of the IPS Regulation 1955. He submitted that there was a duly constituted D.P.C considering the selection and non-inclusion of the names of the applicants in O.A.No.82/97, 83/97, 84/97, 87/97 and 136/97 in the select list could not be called in question by way of judicial review. He had also drawn our attention to a decision of the Apex Court in Dalpat Abasaheb Solunke & Ors. vs. Dr.B.S.Mahajan & Ors. reported in (1990) 1 SCC 305. In the said decision, the apex Court held thus :-

> "It is needless to emphasise that it is not the function of the court to hear appeals over the decisions of the Selection Committee and to scrutinize the relative merits of the candidates. Whether a candidate is fit for a particular post or not has to be decided by the duly constituted selection Committee which has the expertise on the subject. The court has no such expertise. The decision of the Selection Committee can be interfered with only on limited grounds, such as illegality or patent material irregularity in the constitution of the Committee or its procedure vitiating the Selection, or proved mala fides affecting the Selection etc. It is not disputed

Contd..

that in the present case the University had constituted the Committee in due compliance with the relevant statutes. The Committee consisted of experts and it selected the candidates after going through all the relevant material before it. In sitting in appeal over the selection so made and in setting it aside on the ground of the so called comparative merits of the candidates as assessed by the court, the High Court went wrong and exceeded its jurisdiction."

The decision quoted above squarely applies in this case. In the present cases also we hold that the Selection Committee was duly constituted and this Committee consists of expert and they made the selection. We find nothing wrong on the face of it. As held by the apex Court, we are not sitting as on a court of appeal. Therefore it will be imprudent on our part to consider the relative merits of the candidates. It is not the business of this Tribunal to examine as to why Sri Talukdar's name was put in sl.6 more so when we do not find anything wrong in decision making process. It is the decision of the Selection Committee. Similarly, respondent No.9 Shri Promod Chetia also supported the decision of the Selection Committee. He also submitted that the Tribunal is not a court of appeal and therefore not supposed to go into the merit of the ACRs and quash it on the ground that there were no factual basis of recording the ACRs. We have also considered the written statements of Union of India and Union Public Service Commission. Considering the entire facts and circumstances of the case we are of the opinion that the learned counsel for the applicants could not bring to our notice anything requiring the interference of the decision of Selection Committee by this Tribunal.

17. In view of the above the applications No. 82/97, 83/97, 84/97, 87/97 and 136/97 have no force. Therefore these applications must be dismissed. The applicants in applications No.52/97, 53/97 and 54/97 have stated that they are

entitled to get the promotion. We are in agreement with these applicants. Their applications should be allowed. Accordingly we dismissed the applications No.82/97, 83/97, 84/97, 87/97 and 136/97 and allow the applications No.52/97, 53/97 and 54/97 with direction to make appointment as per recommendation of the Selection Committee.

Considering the entire facts and circumstances of the case we however, make no order as to costs.

Sd/- VICE CHAIRMAN
Sd/- MEMBER (ADMN)

pg

contd..