Union Of India & Ors vs Kali Dass Batish & Anr on 5 January, 2006

Equivalent citations: AIR 2006 SUPREME COURT 789, 2006 (1) SCC 779, 2006 AIR SCW 227, 2006 LAB. I. C. 877, 2006 (2) AIR KANT HCR 626, 2006 (2) SERVLJ 201 SC, 2006 (1) SCALE 190, 2006 (1) UPLBEC 1050, 2006 (2) SRJ 469, (2006) 3 ALLMR 250 (SC), (2006) 2 SERVLJ 201, (2006) 5 ALL WC 4573, (2006) 2 JCR 105 (SC), (2006) 2 SCJ 1, (2006) 1 UPLBEC 1050, (2006) 1 MAD LJ 184, (2006) 1 PAT LJR 385, (2006) 1 SCT 332, (2006) 1 SUPREME 187, (2006) 1 SCALE 190, (2006) 1 ESC 48, (2006) 2 ANDH LT 58, (2006) 1 LAB LN 503, (2006) 2 JLJR 1, MANU/SC/139/2006

Bench: Chief Justice, B.N. Srikrishna, R.V. Raveendran

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           CASE NO.:
Appeal (civil)  6663 of 2004

PETITIONER:
Union of India & Ors.

RESPONDENT:
Kali Dass Batish & Anr.

DATE OF JUDGMENT: 05/01/2006

BENCH:
C.J.I. , B.N. Srikrishna & R.V. Raveendran

JUDGMENT:
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J U D G M E N T with Civil Appeal Nos. 7575-7576 of 2004 SRIKRISHNA, J.

This group of appeals raises the following question for determination of this Court:

> What is the scope of 'judicial review' in an order for appointment of a member of the Central Administrative Tribunal made in consultation with the Chief Justice of India?

> The Central Administrative Tribunal (hereinafter referred to as "the CAT") is one of the Tribunals constituted under Section 4 of the Administrative Tribunals Act, 1985 (hereinafter referred to as "the Act") with its jurisdiction determined by Section 14 of the Act. It exercises jurisdiction, powers and authority exercisable immediately on and from the appointed day by all courts other than the Supreme Court with regard to service matters and disputes pertaining to service inter alia of Central Government employees. It comprises 'Administrative Members' and 'Judicial Members' as

respectively defined in Section 3(a) and 3(i) of the Act. Sub-sections (3) and (3A) of Section 6 of the Act prescribe the qualifications respectively for appointment of 'Judicial Member' and 'Administrative Member'. The Department of Personnel and Training, Government of India by Order dated 15.4.1991/ 23.4.1991 has laid down detailed guidelines about the constitution and procedure to be adopted by the Selection Committee for selection of Vice-Chairman and Members of the CAT. In the case of selection of a Judicial Member, the Selection Committee is required to be chaired by the nominee of the Chief Justice of India, who shall be a sitting Judge of the Supreme Court of India and shall comprise the following additional members: (i) Secretary, Ministry of Law and Justice (Department of Legal Affairs); (ii) Secretary, Ministry of Personnel; and (iii) Chairman of the CAT.

Seven vacancies of Judicial Members and three vacancies of Administrative Members of the CAT arose during the period 1.7.2001 to 31.12.2001. Nominations were invited for these vacancies from different authorities.

First and Second Respondents in C.A. No. 6663/2004, namely, K.D. Batish and Ram Kishore Prasad, respectively, were amongst the candidates for selection to the post of Judicial Member in the CAT. The Selection Committee met under the Chairmanship of Hon'ble Mr. Justice G.B. Patnaik (as he then was) on 18.7.2001 and considered the names of 121 persons for selection to the aforesaid vacancies. First and Second Respondents were also among those considered for selection. The Selection Committee recommended the names of seven persons for appointment as Judicial Members and three persons for appointment as Administrative Members in the main list and an equal number of persons in the waiting list. The candidates whose names appeared in the waiting list were to be appointed in case any of the persons named in the main list were not appointed for any reason. The names of First Respondent-K.D. Batish and Second Respondent- Ram Kishore Prasad were at Sl. Nos. 1 and 6, respectively, of the main list. It is the established procedure that where members of the Bar are considered for such important judicial posts, their antecedents are required to be verified through the Intelligence Bureau (hereinafter referred to as "the IB") and a report obtained from the IB. Accordingly, the names of all such recommended persons were sent to the IB. After obtaining the report from the IB, the Director (AT), Ministry of Personnel, Public Grievances and Pensions made a noting on the file on 25.10.2001 in which he noted in respect of First Respondent as under: "(i) In legal circles, he is considered to be an advocate of average caliber. (ii) It is learnt that though he was allotted to the Court of Justice R.L. Khurana, the learned Judge was not happy with his presentation of cases and asked the Advocate General to shift him to some other court, which was done. (iii) He was a contender for the Shimla AC seat on BJP ticket in 1982 and 1985. When he did not get the ticket, he worked against the party and was expelled from the party in 1985. He was subsequently reinducted by the party in 1989." The Director (AT) was, however, of the view that since the candidate had been recommended by the Selection Committee headed by a Judge of the Supreme Court, the benefit of doubt had to be given to him and the dissatisfaction of Justice Khurana with his performance must be treated as counterbalanced by the recommendation of the Selection Committee headed by the Sitting Judge of the Supreme Court.

On 29.10.2001 the Joint Secretary (AT & A), Ministry of Personnel and Training made a noting to the following effect: "(i) Shri Batish has strong political affiliations and was a contender for the Shimla AC seat in 1982 and 1985 from BJP; (ii) He appears to be of average caliber and Justice Khurana of the Himachal Pradesh High Court seems to have asked the Advocate General to shift him to some other Court; and (iii) There is nothing adverse against his character or integrity."

On 30.10.2001 the Secretary (P) made a noting on the file that Shri Batish need not be appointed since his performance was so poor that he was shifted to another Court. On 31.10.2001 the Minister of State made a noting and directed that the IB Report along with the department recommendations be sent to the Chief Justice of India. Accordingly, the Secretary (Personnel) vide Confidential Memorandum dated 6.11.2001 forwarded all necessary papers including the IB Report and sought the concurrence of the Chief Justice of India with regard to the names recommended by the Central Government.

On 12.11.2001 the Chief Justice of India concurred with the proposal submitted to him vide Confidential Memorandum dated 6.11.2001. On 14.1.2002 the appointments of the selected candidates were notified, but the First and Second Respondents were not appointed.

On 30.6.2003 the Second Respondent-Ram Kishore Prasad filed a Writ Petition No. 3098/2003 before the Jharkhand High Court challenging the action of the Central Government in not appointing him as a Judicial Member of the CAT and sought a direction to the Central Government to appoint him on the ground of his being included in the select list. On 23.9.2003 the High Court of Jharkhand at Ranchi dismissed the writ petitiion filed by the Second Respondent inter alia holding that mere inclusion of the name of a candidate in the select list gave him no right to be appointed, that in the case of appointment to a judicial post like the CAT it was not only the right, but also the duty, of the appointing authority to verify the antecedents of the candidate on the basis of the report and inputs from the IB, that it was open to the appointing authority not to appoint any person whose name had been included in the list prepared by the Selection Committee, that in excluding the petitioner-Second Respondent, on the basis of IB report received, which was made available to the Chief Justice of India, and whose concurrence to the proposal was obtained by the Government of India after apprising the Chief Justice of India of all the relevant facts, left no scope for judicial review, and that there was no case of mala fides worth considering. In this view of the matter, the writ petition was found to be without merit and dismissed. The Second Respondent took out an application Civil Review No. 119/2003 for review of the aforesaid judgment, which came to be dismissed by the order of the Jharkhand High Court made on 11.8.2004. Being aggrieved by the aforesaid judgments, the Second Respondent has filed Civil Appeal Nos. 7575-7576/2004 in this Court.

The First Respondent-K.D. Batish filed a Writ Petition No. 812/2003 before the High Court of Himachal Pradesh at Shimla impugning the decision of the Central Government not to appoint him as a Judicial Member of the CAT and seeking a mandamus for his appointment.Though the said writ petition was contested by the Union of India, the High Court by its judgment dated 25.5.2004 allowed the writ petition and directed the respondents to the writ petition (Union of India and the appointing authority) to reconsider afresh, as a special case, the petitioner-K.D. Batish for his

appointment as a Judicial Member of the CAT, based on his selection by the Selection Committee.

The Union of India has challenged the judgment of the High Court of Himachal Pradesh in CWP No. 812/2003 by its Civil Appeal No. 6663/2004 in which K.D. Batish and Ram Kishore Prasad are the First and Second Respondents, respectively. Ram Kishore Prasad was a Respondent in the writ petition before the Himachal Pradesh High Court and therefore appears to have been made a Respondent in this case also.

The learned Solicitor General made a frontal attack on the judgment of the High Court of Himachal Pradesh contending that the High Court has far exceeded its powers of judicial review and grievously erred in interfering with the decision of the Union of India and the appointing authority not to appoint the First and Second Respondents to the posts of Judicial Members of the CAT, after obtaining the concurrence of the Chief Justice of India. He also contends that the High Court erred in adopting the extraordinary procedure of calling for an affidavit of the Registrar General to be filed on the basis of instructions obtained from Justice Khurana of the same High Court to be used as substantive evidence in the decision of the said writ petition, though the High Court itself was aware that it was an "unusual procedure".

The learned Solicitor General further contends that the High Court singularly failed to keep in mind the scope of Sections 6 and 7 of the Act, that along with the proposal for appointment of the candidates all the relevant papers, including the IB report, had been forwarded to the Chief Justice of India for his concurrence, and that, after consideration of all the material, the Chief Justice of India had concurred with the proposal of the Government of India for the appointment of the candidates as indicated in the proposal.

There is merit in the submissions of the Ld. Solicitor General. It appears that the High Court has acted in the matter as if dealing with an appointment made by an executive officer. It must be remembered that, the CAT is a Tribunal constituted under Article 323A of the Constitution and is expected to have the same jurisdiction as that of a High Court. Consequently, Parliament has taken great care to enact, vide Sections 6 and 7 of the Act, that no appointment of a person possessing the qualifications prescribed in the Act as a Member shall be made, except after consultation with the Chief Justice of India. The consultation with the Chief Justice of India is neither a routine matter, nor an idle formality. It must be remembered that, a member of an Administrative Tribunal like the CAT exercises vast judicial powers, and such member must be ensured absolute judicial independence, free from influences of any kind likely to interfere with independent judicial functioning or militate thereagainst. It is for this reason, that a policy decision had been taken by the Government of India that while considering members of the Bar for appointment to such a post, their antecedents have to be verified by the IB. The antecedents would include various facts, like association with anti-social elements, unlawful organizations, political affiliations, integrity of conduct and moral uprightness. All these factors have necessarily to be verified before a decision is taken by the appointing authority to appoint a candidate to a sensitive post like Member of the CAT. In Delhi Administration v. Sushil Kumar this Court emphasized that even for the appointment of a Constable in Police Services, verification of character and antecedents is one of the important criteria to test whether the selected candidate is suitable to a post under the State. Even if such

candidate was found physically fit, had passed the written test and interview and was provisionally selected, if on account of his antecedent record, the appointing authority found it not desirable to appoint a person of such record as a Constable, the view taken by the appointing authority could not be said to be unwarranted, nor could it be interdicted in judicial review. These are observations made in the case of a Constable, they would apply with greater vigour in the case of appointment of a Judicial Member of the CAT. It is for this precise reason, that sub- section (7) to Section 6 of the Act requires that, the appointment of a Member of the CAT cannot be made "except after consultation with the Chief Justice of India". This consultation should, of course, be an effective consultation after all necessary papers are laid before the Chief Justice of India, and is the virtual guarantee for appointment of absolutely suitable candidates to the post.

Unfortunately, the High Court seems to have proceeded on the footing that the appointment was being made on its own by the Central Government and that there was an irregular procedure followed by the Secretary by giving undue importance to the IB report. It was most irregular on the part of the High Court to have sat in appeal over the issues raised in the IB report and attempted to disprove it by taking affidavits and the oral statement of the Advocate General at the Bar. We strongly disapprove of such action on the part of the High Court, particularly when it was pointed out to the High Court that, along with the proposals made by the Government, the Minister of State had specifically directed for submission of the IB report to the Chief Justice of India for seeking his concurrence, and that this was done. We note with regret that the High Court virtually sat in appeal, not only over the decision taken by the Government of India, but also over the decision taken by the Chief Justice of India, which it discarded by a side wind. In our view, the High Court seriously erred in doing so. Even assuming that the Secretary of the concerned department of the Government of India had not apprised himself of all necessary facts, one cannot assume or impute to a high constitutional authority, like the Chief Justice of India, such procedural or substantive error. The argument made at the Bar that the Chief Justice of India might not have been supplied with the necessary inputs has no merit. If Parliament has reposed faith in the Chief Justice of India as the paterfamilias of the judicial hierarchy in this Country, it is not open for anyone to contend that the Chief Justice of India might have given his concurrence without application of mind or without calling for the necessary inputs. The argument, to say the least, deserves summary dismissal.

In this matter, the approach adopted by the Jharkhand High Court commends itself to us. The Jharkhand High Court approached the matter on the principle that judicial review is not available in such a matter. The Jharkhand High Court also rightly pointed out that mere inclusion of a candidate's name in the selection list gave him no right, and if there was no right, there could be no occasion to maintain a writ petition for enforcement of a non-existing right.

In Punjab State Electricity Board and Ors. v. Malkiat Singh , this Court reiterated the observations of the Constitution Bench of this Court in Shankarsan Dash v. Union of India as under:

> "7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for

recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subhash Chander Marwaha , Neelima Shangla v. State of Haryana or Jatinder Kumar v.

State of Punjab ." (emphasis supplied) This, in our view, is the correct approach to be adopted in dealing with a matter of this nature.

In K. Ashok Reddy v. Government of India and Ors. this Court indicated that however wide the power of judicial review under Articles 226 or 32 there is a recognised limit, albeit self-recognised, to the exercise of such power. This Court reiterated a passage from Craig's Administrative Law (Second Edn., p. 291)., vide Paragraph 21, as under:

"The traditional position was that the courts would control the existence and extent of prerogative power, but not the manner of exercise thereof. .... The traditional position has however now been modified by the decision in the GCHQ case. Their Lordships emphasised that the reviewability of discretionary power should be dependent upon the subject-matter thereof, and not whether its source was statute or the prerogative. Certain exercises of prerogative power would, because of their subject-matter, be less justiciable, with Lord Roskill compiling the broadest list of such forbidden territory ...."

The observations of Lord Roskill, referred to above are from Council of Civil Service Unions v. Minister for the Civil Service (GCHQ case) as under:

"But I do not think that that right of challenge can be unqualified. It must, I think, depend upon the subject- matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject-matter are such as not to be amenable to the judicial process."

Finally, this Court emphasised judicial restraint by citing with approval a passage in De Smith's Judicial Review of Administrative Action, (vide Paragraph 23) as under:

> "Judicial self-restraint was still more marked in cases where attempts were made to impugn the exercise of discretionary powers by alleging abuse of the discretion itself rather than alleging non-existence of the state of affairs on which the validity of its exercise was predicated. Quite properly, the courts were slow to read implied limitations into grants of wide discretionary powers which might have to be exercised on the basis of broad considerations of national policy."

Based on this reasoning, it was acknowledged that the transfer of a Judge of the High Court based on the recommendation of the Chief Justice of India would be immune from judicial review as there is "an inbuilt check against arbitrariness and bias indicating absence of need for judicial review on those grounds. This is how the area of justiciability is reduced . "

> We, respectfully, reiterate these observations, and expect them to be kept in mind by all courts in this Country invested with the power of judicial review.
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> The respondents have relied on the judgments of this Court in R.S. Mittal v. Union of India in support of their contentions. In our view, the said authority hardly advances their case. In the first place, all that the authority says is that where a Selection Board headed by a sitting Judge of the Supreme Court had recommended certain candidates for appointment as Members of the ITAT, it was not open to the Government of India to sit on the said recommendation without taking action. That was not a case where a decision taken not to appoint a candidate for good reason was concurred in by the Chief Justice of India.
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> The judgment in Dr. A.K. Doshi v. Union of India on which the respondents relied is also of no consequence. That was also not a case of concurrence of the Chief Justice of India and, in any event, this Court had found a certain amount of mala fides on the part of the Secretary of the Department concerned.
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> The Second Respondent-Ram Kishore Prasad, who argued his own case adopted the arguments of the First Respondent. In addition, he submitted lengthy written arguments and contended that his name was deleted with mala fide intention for illegally favouring one J.K. Kaushik, who was down below in the merit list. Apart from the bald allegation, there is no material, whatsoever, presented before the High Court in support of this mala fide intention, nor did the High Court accept the case.
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> We have carefully perused the written arguments filed by the Second Respondent. Reliance on the judgment in Sarwan Singh Lamba and Ors. v. Union of India and Ors. helps in no way. Sarwan Singh (supra) is not an authority which militates against the view we are inclined to take. On the other hand, even this judgment suggests that where the candidates were duly qualified and eligible for the posts against which they were appointed, and all of them had been appointed after consultation with the Chief Justice of India, there was no violation of any law or procdure in their appointments.

We consider it unnecessary to refer in detail to a number of authorities on which the Second Respondent has relied for, in our view, they are not relevant.

In the result, we are of the view that the impugned judgment of the High Court of Himachal Pradesh is erroneous and needs to be set aside, while the judgment and order of the High Court of Jharkhand are right and in consonance with the position in law and need to be upheld. Hence, we dismiss Civil Appeal Nos. 7575-7576/2004 directed against the judgment and order of the High Court of Jharkhand.

We allow the appeal of the Union of India in Civil Appeal No. 6663/2004 and set aside the impugned judgment of the High Court of Himachal Pradesh in Writ Petition No.812/2003.

There shall be no order as to costs.