Dr. H. Mukherjee vs Union Of India on 28 September, 1993

Equivalent citations: 1994 AIR 495, 1994 SCC SUPL. (1) 250, AIR 1994 SUPREME COURT 495, 1993 AIR SCW 3926, (1993) 5 JT 439 (SC), 1993 (5) JT 439, (1994) IJR 40 (SC), 1993 (2) UJ (SC) 780, 1994 (1) SCC(SUPP) 250, 1993 UJ(SC) 2 780, 1994 (1) UPLBEC 101, 1994 SCC (L&S) 454, (1994) 26 ATC 833, (1993) 67 FACLR 1223, (1993) 4 SCT 822, (1993) 3 SCJ 482, (1993) 5 SERVLR 590, (1994) 1 UPLBEC 101, (1993) 2 CURLR 1107

Author: A.M. Ahmadi

Bench: A.M. Ahmadi, M.M. Punchhi, K. Ramaswamy

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           PETITIONER:
DR. H. MUKHERJEE

        Vs.

RESPONDENT:
UNION OF INDIA

DATE OF JUDGMENT28/09/1993

BENCH:
AHMADI, A.M. (J)
BENCH:
AHMADI, A.M. (J)
PUNCHHI, M.M.
RAMASWAMY, K.

CITATION:
 1994 AIR  495            1994 SCC  Supl.  (1) 250
 JT 1993 (5)   439        1993 SCALE  (3)887


ACT:



HEADNOTE:



JUDGMENT:
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The Judgment of the Court was delivered by AHMADI, J.- These appeals by special leave are directed against the decision rendered by the Principal Bench of the Central Administrative Tribunal

on February 9, 1993t whereby it directed the Appointments Committee of the Cabinet (for short 'ACC') to reconsider the suitability of Respondent 1, S.K. Bhargava for appointment to the post of Chief Controller of Explosives without taking into consideration the adverse remarks made in the year 1987 and the outcome of the Central Bureau of Investigation's (for short 'CBI') inquiry in which he was exonerated and in the light of the observations contained in its judgment. The facts giving rise to these two appeals, briefly stated, are as under.

2. Shri B.R. Dave, the Chief Controller of Explosives superannuated on June 30, 1984 but as no suitable candidate was available for appointment to the + (1993) 24 ATC 637 post he was granted reemployment for a period of one year i.e. from July 1, 1984 to June 30, 1985. On his vacating the post w.e.f. July 1, 1985 as no suitable candidate was available for manning the said post the seniormost Joint Chief Controller of Explosives was appointed on ad hoc basis as Chief Controller of Explosives, w.e.f. July 1, 1985. Dr H. Mukherjee who was the seniormost Joint Chief Controller of Explosives thus functioned as the Chief Controller of Explosives on an ad hoc basis w.e.f. July 1, 1985. The ACC approved the ad hoc appointment on condition that he will vacate the post on regular appointment being made in accordance with rules. It may be mentioned that under the relevant rules the post of Chief Controller of Explosives could be filled in by promotion/transfer on deputation (including short term contract) or by direct recruitment. Since no suitable candidate was available for filling the post by promotion/transfer a decision was taken to fill the post by direct recruitment. An advertisement was issued inviting applications for appointment to the said post on July 13, 1985. Pursuant thereto one R.C. Srivastava was selected for appointment but his selection was not approved by the ACC. A fresh advertisement was issued by the Union Public Service Commission on February 7, 1987, in pursuance whereof Respondent 1 came to be selected on June 10, 1987. On June 18, 1987 the approval of ACC was sought but while the matter was pending before the ACC, a CBI inquiry was commenced, against him in September 1987 in regard to some incident of 1985. This inquiry ended in his exoneration in December 1987. After he came to be exonerated the ACC took up the question regarding his appointment pursuant to the selection made by UPSC. It, however, appears that in his confidential report pertaining to the year 1987 an adverse comment was made to the following effect:

> "[H]e has not the ability to give leadership in a department which has all-India jurisdiction. He has also been orally advised not to bring outside influence in his service matters. He needs to develop a proper perspective about the role and functioning of the department. He has not done any meritorious work."

The said adverse remarks were communicated to him on May 20, 1988. He made a representation for expunging the said adverse remarks on June 10, 1988. His representation was partly accepted by the order dated October 4, 1988, in that, the remark 'He has not done any meritorious work' was ordered to be expunged. Thereafter on December 7, 1988, the ACC took the decision not to appoint him to the post in question. He challenged this decision by moving the Central Administrative Tribunal which allowed the application and gave directions as stated hereinabove. It is this order of the Tribunal which is questioned in these appeals. As the issue involved is the same we proceed to dispose of these appeals by this common judgment.

3. It may be mentioned that on the facts narrated above the Tribunal came to the following conclusion:

> "In the instant case no adverse remarks had been communicated to the appellant at the time of selection of the appellant by the UPSC in June 1987 for the post of Chief Controller of Explosives. There was no investigation or inquiry pending against him in regard to any alleged misconduct on his part at that point of time. That being so we are of the opinion that subsequent events such as communication of remarks to the applicant for the year 198 and the CBI inquiry initiated against him into alleged acts of misconduct which was dropped would have no bearing on the suitability of the applicant for the post of Chief Controller of Explosives. The subsequent events and developments should not be taken into account by the ACC while adjudging his suitability."

Proceeding further the Tribunal came to the conclusion that since no reason was assigned by the ACC for rejecting the recommendation made by the UPSC for the appointment of Respondent 1 as Chief Controller of Explosives by way of direct recruitment the decision was vitiated. In this view of the matter the Tribunal remitted the matter to the ACC to reconsider the recommendation of the UPSC without taking into account the adverse remarks of 1987 and the outcome of the CBI inquiry. It further directed that the ACC may take a decision in the light of the observations contained in the judgment which we have extracted earlier.

4. In view of the above, the short question which arises for consideration is whether the Tribunal was justified in taking the view that events subsequent to the recommendation made by the UPSC could not be taken into consideration for deciding whether or not the candidate recommended was suitable for appointment and whether the omission on the part of the ACC to state the reason for departing from the recommendation of the UPSC was fatal and vitiated the decision?

5. Before we answer the questions which arise for consideration it, is necessary to correct certain factual errors in the order of the Tribunal. It is not in dispute that in the ACR for the year 1987 an adverse remark was made by the reviewing authority which was duly communicated to Respondent 1. Respondent 1 had made a representation on June 10, 1988 for expunging that remark. That remark was partially expunged by the order of October 4, 1988. The Tribunal was, therefore, wrong in thinking that the representation was not disposed of before the ACC decided on December 7, 1988 that Respondent 1 was not suitable to be appointed to the post of Chief Controller of Explosives. The observation of the Tribunal in this behalf in the concluding line of paragraph 27 of the judgment is, therefore, factually inaccurate.

6. It is indeed true that till the UPSC made the recommendation for the appointment of Respondent 1 to the post of Chief Controller of Explosives on June 18, 1987, there was no adverse remark in his ACRs but in the ACR of 1986 shown to us the reviewing authority did state that he lacked the qualities of leadership. However, since that remark was not communicated to him as it was not considered to be adverse it had to be ignored. The learned counsel for Respondent 1 was, therefore, right in saying that there was no adverse remark in the confidential report of Respondent 1 up to the

point of time when the UPSC made the recommendation on June 18, 1987. However, certain developments took place after that recommendation was made and before ACC could reach a decision thereon. In September 1987 a CBI inquiry was commenced against Respondent 1 and hence the ACC could not process the proposal till the outcome of that inquiry. That inquiry ended in the exoneration of Respondent 1 and immediately thereafter when the ACC took up the proposal it was found that in the ACR of 1987 there was an adverse remark made by the reviewing authority which was communicated to Respondent 1 on May 20, 1988 and in regard to which Respondent 1 had made a representation on June 10, 1988. Till that representation was disposed of on October 4, 1988 the ACC could not take a decision on the question whether or not to accept the recommendation of the UPSC. That representation was partially allowed, in that, the last line in the adverse remark came to be quashed whereas the rest of the adverse remark was retained. The ACC, therefore, took into consideration the said adverse remark and came to the conclusion that Respondent 1 was not suitable for appointment to the high post of the Chief Controller of Explosives. This decision taken on December 7, 1988 was, therefore, based on an adverse remark made subsequent to the recommendation of the UPSC. The question is whether the ACC was justified in taking into consideration this subsequent development for by-passing the recommendation of the UPSC. The second question is whether the ACC was bound to state the reason in support of its decision? The Tribunal has come to the conclusion, relying on the decision of this Court in Jatinder Kumar v. State of Punjab2 that the ACC was bound to give reasons for not accepting the recommendation of the UPSC. Finding that no reasons were given by the ACC for by-passing the recommendation of the UPSC, it held that the decision of the ACC could not be sustained.

7. In Jatinder Kumar case' the facts reveal that the Inspector General of Police, Punjab had sent a requisition to the Selection Board to select and recommend 7 suitable persons for the post of Assistant Sub-Inspector of Police. While the matter was pending consideration 50 more posts fell vacant whereupon the Board was requested to recommend 57 persons for those posts. The candidates were interviewed and physically tested on various dates. Before the select list could be finalised the Inspector General of Police sent a further requisition to recommend 170 more persons in anticipation of further vacancies likely to occur on reorganisation of the police force. Thus in all 227 candidates were to be selected by the Selection Board but the Board prepared a panel of 144 candidates only. It appears that the proposal for disbandment of the Punjab Armed Police Battalion and creation of additional posts did not materialise and hence the additional 170 posts were not available to be filled in by direct recruitment. Out of the earlier 57 posts 9 were offered to the wards of the deceased police officers and the remaining 48 posts were offered to candidates recommended by the Board in the order of merit. As the remaining candidates recommended by the Board could not be appointed for want of vacancies, writ petitions were filed in the High Court but they were rejected by a learned Single Judge as well as by the Division Bench to which a Letters Patent Appeal was preferred. Thereupon an appeal was preferred by special leave to this Court wherein the question raised was whether the selection of a candidate by the Selection Board confers an unfettered right to be appointed on the recommendation made by the said Board. Dealing with this contention this Court after referring to the duties to be performed by the Union or State Public Service Commissions under Article 320 observed that the establishment of an independent body like Public Service Commission is to ensure selection of best available persons for appointment in a post to avoid arbitrariness and nepotism in the matter of appointment. The selection by the Commission,

however, is only a recommendation and the final authority for appointment is the Government. This Court, therefore, pointed out that the Government may accept the recommendation or may decline to do so but if it chooses not to accept the recommendation of the Commission, the Constitution enjoins the Government to 2 (1985) 1 SCC 122: 1985 SCC (L&S) 174: (1985) 1 SCR 899 place on the table of legislature concerned its reasons for so doing. The Government is made answerable to the legislature for any departure, vide Article 323 of the Constitution. This Court further pointed out that this, however, did not clothe the candidate with any right to appointment pursuant to the recommendation of the Commission. If, however, the vacancy is to be filled up the Government must make the appointment in the order of merit fixed by the Commission. So also the Government cannot appoint a person whose name does not appear in the list but it is always open to the Government to decide how many appointments it will make. It will thus be seen that this Court clearly laid down that the selection made by the Commission is only recommendatory in nature and the Government may or may not accept the same but if it chooses not to accept the same, Article 323 enjoins it to place on the table of the legislature its reasons or report for not accepting the recommendation. Article 323 provides that it shall be the duty of the Commission to present annually to the President/Governor a report as to the work done by the Commission and on receipt of such report the latter shall cause a copy thereof together with a memorandum explaining, as respects the cases, if any, where the advice of the Commission was not accepted, the reasons for such non- acceptance to be laid before the legislature concerned. Thus the reasons have to be communicated to the legislature if the advice of the Commission has not been accepted while placing a copy of the report as to the work done by the Commission before the legislature concerned. On a plain reading of the said Article it is, therefore, clear that the reasons have to be assigned in a memorandum to be placed along with a copy of the report of the Commission before the legislature concerned. Therefore, the decision in Jatinder Kumar case' is not an authority for the proposition that when the ACC does not accept the recommendation of the UPSC it is bound to communicate the reasons for departing from the said recommendation to either the UPSC or the candidate concerned. All that Article 323 requires is that along with the copy of the report of the Commission a memorandum containing the reasons for declining to accept the recommendations of the UPSC shall be placed before the House of Parliament. In the instant case the reason for declining to accept the recommendation of the UPSC is the adverse remark made in the confidential report for the year 1987. Therefore, the Tribunal is not right in coming to the conclusion that no reason had been given by the ACC for departing from the recommendation of the UPSC. In order to satisfy our conscious that the ACC had given due consideration to the recommendation made by the UPSC we called for the relevant file on which the ACC took its decision and satisfied ourselves that it had declined to appoint Respondent 1 as the Chief Controller of Explosives on account of the adverse remark in the ACR for the year 1987.

8. It is obvious from what we have stated above that this Court clearly observed in Jatinder Kumar case' that the selection made by the Commission was only recommendatory in nature and it was open to the Government to either accept the recommendation or to depart therefrom. Observations on which the Tribunal relies merely convey that if the Government does not depart from the recommendation of the Commission the Government must make the appointments strictly adhering to the order of merit as recommended by the Commission. It cannot disturb the order of merit according to its own sweet will except for good reasons, namely, bad conduct or character but that

does not mean that the Government cannot depart from the recommendation of the Commission. If it departs from the recommendation it must ultimately comply with the requirement of Article 323 of the Constitution. There is nothing in that article or in the rules to suggest that the Government cannot take into consideration the developments subsequent to the selection made by the UPSC. Such a view would not be in public interest and may lead to serious complications if the Government is enjoined to make the appointment notwithstanding certain serious matters having come to its notice subsequent to the recommendation made by the Commission. Counsel for Respondent 1, however, submitted that a line of demarcation must be drawn somewhere because the Government cannot be allowed to delay its decision till adverse circumstances appear against the candidate recommended for appointment. He submitted that this demarcation must coincide with the date on which the recommendation is made by the Commission and at any rate must be confined to a reasonable period subsequent thereto. We are afraid no hard and fast line can be drawn in this connection. Besides, in the instant case we do not find as a fact that the Government had deliberately delayed its decision. In fact immediately after the recommendation was made by the Commission on June 18, 1987, the CBI inquiry commenced in September 1987 and ended in December 1987. The ACC could not take a decision during the pendency of the inquiry. Immediately after the inquiry concluded and Respondent 1 was exonerated, the ACC proceeded to process the proposal and found an adverse remark in the ACR for the year 1987. This adverse remark was immediately communicated to Respondent 1 and after his representation was disposed of in October 1988 and his appeal against the decision also failed, the ACC took the final decision on December 7, 1988. In the circumstances it cannot be said that the ACC had deliberately delayed the decision. Assuming the decision taken by the ACC is justiciable, there can be no doubt that it can be challenged only on the ground that it smacks of mala fides or arbitrariness. The facts do not reveal that the decision taken by the ACC was either mala fide or arbitrary.

9. Counsel for Respondent 1 then placed reliance on two decisions, namely Asha Kaul (Mrs) v. State of J & K3 and Jagtar Singh v. Director, Central Bureau of Investigation4. In our view both these decisions do not assist Respondent 1. The former was a case pertaining to the approval and publication of the select list of District Munsifs prepared by the J & K Public Service Commission. Several complaints were received in regard to the select lists prepared by the Commission and forwarded to the Government. The Government found prima facie substance in the complaints and, therefore, kept the lists pending. However, the High Court kept on pressing for approval as it was keen to fill in the existing vacancies. The Government, therefore, approved thirteen names and published the list. Those persons were duly appointed but in the meantime a writ petition was filed for a mandamus to command the Government to approve the lists prepared by the Commission. On the Advocate-General's statement that the matter was under the active consideration of the Government, the petition was dismissed. Since the Government did not accord approval a fresh writ petition was filed which came to be allowed against which decision the appeals by special leave came to this Court. In the backdrop of 3 (1993) 2 SCC 573: 1993 SCC (L&S) 637: (1993) 24 ATC 576:

JT (1993) 2 SC 688

4 1993 Supp (3) SCC 49: 1993 SCC (L&S) 922: (1993) 25 ATC 8 1: JT (1993) 2 SC 703 these facts, this Court, while repelling the extreme submission that the Government as the appointing authority

wields absolute power to approve or disapprove of the list at its sweet will, observed, that where the Government is satisfied after due inquiry that the selection has been vitiated on account of violation of rules or for the reason that it smacks of corruption, favouritism, nepotism or the like, it may refuse to approve the list in which case it must record the reasons for its action and produce the same in court, if and when called upon, besides placing the same before the legislature as required by Article 323 of the Constitution. This decision is not an authority for the proposition that the Government must make an order disapproving the list along with the reasons therefore and convey the same to the High Court or the Commission. All that it says is that the Government must record its reasons for the disapproval on the file and if its action is questioned in court it must disclose the same to the court if called upon to do so. That requirement has been satisfied in the present case. The Tribunal, however, wrongly thought that subsequent events could not be taken into consideration and that is why it directed the ACC to reconsider its decision without noticing the adverse entry as well as the contents of the CBI report. In fact to satisfy ourselves we perused the file and found that the reason for disapproval was stated on the file. The subsequent decision turned on its own facts as the Court came to the conclusion that the material placed before the Court did not justify Government's refusal to make the appointment. Therefore, neither of the two decisions on which reliance is placed come to the rescue of Respondent 1. It seems well settled that the function of the Public Service Commission being advisory, the Government may for valid reasons to be recorded on the file, disapprove of the advice or recommendation tendered by the Commission, which decision can, if at all, be tested on the limited ground of it being thoroughly arbitrary, mala fide or capricious.

10. In view of the above discussion we cannot sustain the impugned decision of the Tribunal. We, therefore, allow the two Civil Appeal Nos. 3671 & 3671-A of 1993, set aside the decision of the Tribunal and direct that the petitions filed in the Tribunal shall stand dismissed. We, however, make no order as to costs. In view of the order allowing the appeals, Mr Dholakia concedes that Civil Appeal No. 3668 of 1993 is rendered infructuous. It will stand so disposed of with no order as to costs.