

(2004) 10 DEL CK 0098

In the Delhi High Court

Case No : Writ Petition (C) No. 13355 of 2004

B. Krishan

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 26-10-2004

Acts Referred:

Cantonments Act, 1924 — Section 14(2)

Citation : AIR 2005 Delhi 119 : (2004) 115 DLT 428

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : S.K. Taneja and Rajesh Gupta, for the Appellant; Suresh Kait, (for No. 1) and M. Sarada, (for No. 3), for the Respondent

Final Decision : Allowed

Judgement

Sanjay Kishan Kaul, J.—The petitioner has impugned the nomination of respondent No. 3, Mr. J. Pratap as a Civilian Member of the Cantonment Board of Secunderabad by respondent No. 1, Union of India. The challenge is based on the violation of statutory provisions of the Cantonment Act, 1924 (hereinafter to be referred to as, the said Act"). Section 13 of the said Act provides for constitution of the Cantonment Boards and Section 14 deals with the power to vary the constitution of the Boards in special circumstances. The nomination/appointment of respondent No. 3 is in pursuance to the power exercised u/s 14(2)(c) of the said Act and over this, there is no dispute. The relevant Section 14 is as under :

"14. POWER TO VARY Constitution OF BOARDS IN SPECIAL CIRCUMSTANCES

(1) Notwithstanding anything contained in Section 13, if the Central Government is satisfied-

(a) that, by reason of military operations it is necessary, or

(b) that, for the administration of the cantonment, it is desirable, to vary the

constitution of the Board in any cantonment under this section the Central Government may, by notification in the Official Gazette, make a declaration to that effect.

.....

(2) Upon the making of a declaration under sub-section (1), the Board in the cantonment shall consist of the following members namely :

.....

(c) one member, not being a person in the service of the Government, nominated by the Central Government in consultation with the Officer Commanding in Chief, the Command.

.....

2. The short controversy, thus, for consideration is whether the nomination of respondent No. 3 by the Central Government has been done" in consultation with the Officer Commanding in Chief, the Command."

3. The contention of the petitioner is that there has been no consultation with the said Officer, who is the persona designata under the statute,

4. It may be noticed that there is a background to the issue of nomination arising from the fact that the Cantonment Boards were functioning without the appointment of a Civilian Member and W.P. (C) No. 4369/ 2003 was filed aggrieved by such non appointment/non-nomination, which was decided on 9-1-2004. The said writ petition was disposed of in view of the fact that the counsel for Union of India therein submitted that the process of nomination of a Civilian Member u/s 14(2)(c) of the said Act had already commenced and was expected to be completed within a period of six weeks from the date of the Order. The provisions of Section 14 had to be invoked in view of the fact that the term of the Board, which had been constituted u/s 13 of the said Act, had expired on 29-2-2003. This expiry date refers to even the extended period of time of the Board of one year as Section 15 of the Act envisages the life of the Board for five years with proviso for one year extension of elected members. The proviso is as under :-

"15. TERM OF OFFICE OF MEMBERS-

(1) Save as otherwise provided in this section the term of office of a member of a Board shall be five years and shall commence from the date of the notification of his election or nomination under sub-section (7) of Section 13, or from the date on which the vacancy has occurred in which he is elected or nominated, whichever, date is later :

Provided that the Central Government may, when satisfied that it is necessary in order to avoid administrative difficulty, extend the term of office of all the elected members of a Board by such period, not exceeding one year, as it thinks fit :

Provided further that a member whose term of office has been so extended, shall cease to hold office on the date of the notification of the election of his successor under sub-section (7) of Section 13."

5. The counter-affidavit filed by respondents No. 1 and 2 has specifically stated in para 6 that the GOC in C was consulted and only thereafter the Civilian Member was nominated by the Central Government. It is, however, stated that the recommendation of the Officer is not mandatory to be accepted by respondent No. 1.

6. The affidavit of respondent No. 3 refers to the fact that a recommendation was made by the Colonel with approval of the Station Commander on 19-2-2003 and, thus, due process has been followed. It was further stated that respondent No. 3 had worked as a Vice President of the Board from 1997-2003. It may be noticed that there are certain allegations made by the petitioner against respondent No. 3 in respect of the functioning of respondent No. 3, which are denied by respondent No. 3. A copy of the letter dated 19-2-2003 has been placed on record showing the panel of names suggested in the order of preference for consideration of the GOC-in-C, which reads as under:

"Tele : 2788 2006 Headquarters Andhra Sub Area Secunderabad-10 3873/1/Q31
19 Feb. 2003 GOC-in-C (Through Col Q (Wks/Lands) HQ Southern Comd. Pune.
ELECTION OF THE CANTONMENT BOARDS/TERMS OF THE OFFICE OF ELECTED
MEMBERS 1. Ref. Principal Director defense Estates Southern Comd. Pune letter
No. 530/GEN/ VII/DE dt. 11 Feb 03 reed by this HQ on 14 Feb 03.

2. Civilian Member. The following panel of names is suggest in the order of preference for consideration of the GOC-in-C. For nomination as the civilian member to serve on the proposed varied board of Secunderabad Cantonment :-

(a) Dr. Y. Madan Mohan Reddy.

(b) Shri Pratap.

(c) Smt. M. Bhaskara Lakshmi.

3. Their bio data Along with willingness certificate are enclosed.

4. Nominated Military Officer. I hereby nominate Col. AS Kumarswamy, SM as the nominated military officer to serve on the proposed varied board of Secunderabad Cantonment.

5. The above has the approval of the Stn. Cdr.

Sd/-

(A. S. Kumaraswamy)

Col. Q"

7. The reading of the said letter would show that the said proposal was sent for

election of the Cantonment Boards/terms of the office of the elected Members and the contention of learned senior counsel or the petitioner is that this recommendation is prior to the directions contained of this Court dated 9-1-2004 for nominating the Member u/s 14(2)(c) of the said Act, which has nothing to do with the election process. This is so since the elections are yet to take place though they are overdue and that is why the invocation to the provision of Section 14 had to take place.

8. The original records were called for from respondent No. 1, which show that the GOC-in-C had recommended the name of Dr. V. Madan Mohan Reddy. Two other names were also considered, but the name of the petitioner was not one of the names, which was considered or discussed for such nomination. The Joint Secretary by a note dated 9-7-2004 recommended that the original recommendation of the GOC-in-C (Southern Command) be accepted. At that stage, there were certain recommendations received from a Member of Parliament. The decision was taken by the defense Minister on 18-7-2004. For the first time, the name of respondent No. 3 has cropped up in that decision and the nothing shows that the only basis for the same is the recommendation made by the local Member of Parliament.

9. Learned senior counsel for the petitioner in view of the aforesaid submits that there can be no doubt that there is no consultation with the persona designate and, thus, the nomination of respondent No. 3 is contrary to the provisions of the said Act and is liable to be struck down.

10. Learned senior counsel has referred to judgment of the Supreme Court in Indian Administrative Service (S.C.S.) Association, U.P. and Others Vs. Union of India (UOI) and Others, in which the word "consultation" was discussed and as to when the same is mandatory or directory and the consequences of its non-compliance. This is summarised in para 26 of the said judgment, which is as under :

"26. The result of the above discussion leads to the following conclusions :

(1) Consultation is a process which requires meeting of minds between the parties involved In the process of consultation on the material facts and points involved to evolve a correct or at least satisfactory solution. There should be meeting of minds between the proposer and the persons to be consulted on the subject of consultation. There must be definite facts which constitute the foundation and source for final decision. The object of the consultation is to render consultation meaningful to serve the intended purpose. Prior consultation in that behalf is mandatory.

2. When the offending action affects fundamental rights or to effectuate built-in insultation, as fair procedure, consultation is mandatory and non-consultation renders the action ultra virus or invalid or void.

3. When the opinion or advice binds the proposer, consultation is mandatory and

its infraction renders the action or order illegal.

4. When the opinion or advice or view does not bind the person or authority, any action or decision taken contrary to the advice is not illegal, nor becomes void.

5. When the object of the consultation is only to apprise of the proposed action and when the opinion or advice is not binding on the authorities or person and is not bound to be accepted, the prior consultation is only directory. The authority proposing to take action should make known the general scheme or outlines of the actions proposed to be taken be put to notice of the authority or the persons to be consulted; have the views or objections, take them into consideration, and thereafter, the authority or person would be entitled or has/have authority to pass appropriate orders or take decision thereon. In such circumstances it amounts to an action, "after consultation",

6. No hard and fast rule could be laid, no useful purpose would be served by formulating words or definitions nor would it be appropriate to lay down the manner in which consultation must take place. It is for the Court to determine in each case in the light of its facts and circumstances whether the action is "after consultation"; "was in fact consulted" or was it a "sufficient consultation".

7. Where any action is legislative in character, the consultation envisages like one u/s 3(1) of the Act, that the Central Government is to intimate to the State Governments concerned of the proposed action in general outlines and on receiving the objections or suggestions, the Central Government or Legislature is free to evolve its policy decision, make appropriate legislation with necessary additions or modification or omit the proposed one in draft bill or rules. The revised draft bill or rules, amendments or additions in the altered or modified form need not again be communicated to all the concerned State Governments nor have prior fresh consultation. Rules or Regulations being legislative in character, would tacitly receive the approval of the State Governments through the people's representatives when laid on the floor of each House of Parliament. The Act or the Rule made at the final shape is not rendered void or ultra virus or invalid for non-consultation."

11. Learned senior counsel further referred to judgment of the Supreme Court in Chandramouleshwar Prasad Vs. The Patna High Court and Others, where it was observed in paras 7 and 9 as under :

"7. The question arises whether the action of the Government in issuing the notification of October 17, 1968 was in compliance with Article 233 of the Constitution. No doubt the appointment of a person to be a District Judge rests with the Governor but he cannot make the appointment on his own initiative and must do so in consultation with the High Court. The underlying idea of the article is that the Governor should make up his mind after there has been a deliberation with the High Court. The High Court is the body which is intimately familiar with the efficiency and quality of officers who are fit to be promoted as District Judges. The High Court alone knows their merits as also demerits. This does not

mean that the Governor must accept whatever advice is given by the High Court but the Article does require that the Governor should obtain from the High Court its views on the merits or demerits of persons among whom the choice of promotion is to be limited. If the High Court recommends A while the Governor is of the opinion that B's claim is superior to A's it is incumbent on the Governor to consult the High Court with regard to its proposal to appoint B and not A. If the Governor is to appoint B without getting the views of the High Court: about B's claim vis-a-vis A's to promotion, B's appointment cannot be said to be in compliance with Article 233 of the Constitution. The correspondence noted above which passed between the High Court and the Secretariat from 28th September, 1968 to 7th October, 1968 shows that whereas the High Court had definitely taken the view that Misra as the senior Additional District and Sessions Judge should be directed to take charge from Chakravarty, the Government was not of the view that according to the records in its appointment department Misra was the senior officer at Shahabad among the Additional District and Sessions Judges. Government never suggested to the High Court and that the petitioner was senior to Misra or that the petitioner had a better claim than Misra's and as such was the person fit to be appointed temporarily as District and Sessions Judge. Before the notification of October 17, 1968 Government never attempted to ascertain the views of the High Court with regard to the petitioner's claim to the temporary appointment or gave the High Court any indication of its own views with regard thereto excepting recording dissent about Misra's being the senior officer in the cadre of Additional District and Sessions Judges at Arrah. Consultation with the High Court under Article 233 is not an empty formality. So far as promotion of officers to the cadre of District Judges is concerned the High Court is best fitted to adjudge the claims and merits of persons to be considered for promotion. The Governor cannot discharge his function" under Article 233 if he makes an appointment of a person without ascertaining the High Court's views in regard thereto. It was strenuously contended on behalf of the State of Bihar that the materials before the Court amply demonstrate that there had been consultation with the High Court before the issue of the notification of October 17, 1968. It was said that the High Court had given the Government its views in the matter; the Government was posted with all the facts and there was consultation sufficient for the purpose of Article 233. We cannot accept this. Consultation or deliberation is not complete or effective before the parties thereto make their respective points of view known to the other or others and discuss and examine the relative merits of their views. If one party makes a proposal to the other who has a counter proposal in his mind which is not communicated to the proposer the direction to give effect to the counter proposal without anything more, cannot be said to have been issued after consultation. In our opinion, the notification of October 17, 1968 was not in compliance with Article 233 of the Constitution. In the absence of consultation the validity of the notification of October 17, 1968 cannot be sustained.

..... 9. The correspondence between the High Court, and the

Secretariat in the years 1962, 1963 and 1968 was placed before us in detail. We were also shown the notes prepared at the Secretariat and the Chief Minister's views thereon from time to time. Having considered all this material and the affidavits affirmed in this case, our definite conclusion is that there was no foundation for the petitioner's charge of mala fides against the High Court or the veiled insinuations against its present Chief Justice. Supersession of the petitioner by Misra and others had been decided upon as far back as 1962 and 1963 when the High Court had a different Chief Justice. In making its recommendation in 1968 the High Court was merely attempting to give effect to a decision arrived at in 1962 and 1963. The cause of the supersession of the petitioner was the adverse remarks against him by some of the former Judges of the High Court. Whatever be the effect of these remarks the petitioner may be considered to have outlived them by reason of the fact that the High Court recommended his case for posting as an Additional District and Sessions Judge in November, 1962. The position of a person in a Civil List gives no indication of his intrinsic quality as an officer. The list merely shows that length of service of the officers according to the dates of their appointment, their posting at the time when the list is published and their posting at the time when the list is published and (their designation and scale of pay at that time. The Gradation List of the High Court has no legal basis and its preparation is not sanctioned by the Bihar Superior Judicial Service Rules. The seniority inter se of the petitioner and the three respondents will have to be determined when the question of their confirmation comes up for consideration. At the present moment the question does not arise and M.P. Singh who now holds the office of the District and Sessions Judge at Arrah is undoubtedly senior to them all. We only hope that there will be no such misunderstanding between the High Court and the Secretariat in the future and if there ever be any difference of opinion attempts will be made to resolve them by mutual deliberation without one or the other making an order or giving a direction contrary to the views of the other before deliberation."

12. Learned senior counsel lastly referred to judgment of the Supreme Court in Gauhati High Court and Another Vs. Kuladhar Phukan and Another, where it was observed in para 14 as under :

"14. The doctrine of separation of powers and the need for having an independent judiciary as a bulwark of constitutional democracy persuaded the founding fathers of the Constitution assigning a place of distinction to the judiciary. Chapter VI of the Constitution dealing with subordinate Courts seeks to achieve the avowed object of insulating even the subordinate judiciary from the influence of the executive and the legislature. Article 234 provides for appointments of persons other than District Judges to the judicial services of a State being made by the Governor of the State in accordance with the rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State. Article 235 vests in the High Court the control over District Courts and

Courts subordinate thereto. All the matters touching the service career or incumbents in subordinate judiciary including their posting and promotion are subject to the control of the High Court. Once a person has entered in the judicial service, he cannot depart there from save by the leave of the High Court. It is settled by a catena of decisions that the word "control" referred to in Article 235 of the Constitution has been used in a comprehensive sense and includes the control and superintendence of the High Court over the subordinate Courts and the persons manning them, both on the judicial and the administrative side. Even in such matter in which the Governor may make a decision, the decision cannot be taken save by consultation with the High Court. The consultation is mandatory and the opinion of the High Court is binding on the State Government; else the control, as contemplated by Article 235, would be rendered negated. Such control and consultation are not a matter of mere formality; they are the constitutional power and privilege of the High Court, also its obligation, and cannot be diluted by sheer inaction or failing to act when the High Court must act. The Governor cannot proceed to act in any matter relating to subordinate judiciary and bypass the process of consultation merely because the High Court though, "informed" did not act or respond. The consultation here means meaningful, effective and conscious consultation. In *Tej Pal Singh Vs. State of U.P. and Another*, it was held that in a matter affecting the service career of a Judicial Officer ordinarily the initiative for an action must come from the High Court and even otherwise in the absence of recommendation of the High Court an action taken by the Governor would be illegal and devoid of constitutional validity. Such error, if committed, would be incurable and even an ex-post facto approval would not cure the invalidity."

13. Learned senior counsel also referred to the Law Lexicon for the meaning of word "consult", which is given as under :

"Consult.- The word "consult" implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct, or at least, a satisfactory solution. Such a consultation may take place at conference table or through correspondence. The form is not material but the substance is important. It is necessary that the consultation shall be directed to the essential points and to the core of the subject involved in the discussions. The consultation must enable the consulter to consider the pros and cons of the question before coming to a decision. A person consults another to be elucidated on the subject-matter of the consultation. A consultation may be between an uninformed person and an expert or between two experts."

14. The position, which emerges from the aforesaid, is that the process of consultation requires at least a discussion and expression of views on a particular matter. The consultation has to be meaningful, effective and conscious. There is neither any conference nor any impact of the mind of the persona designata. There has to be a basis for the final decision and the ultimate object has to be achieved. There must be prior consultation and absence of the same will make

the decision ultra vires, invalid and/or void.

15. Both learned counsel for the respondents have, however, sought to emphasise the fact that there has been consultation. However, I find from the records that the same is not correct. Even assuming for the sake of argument that the contention of learned counsel for respondent No. 1 is correct that the recommendation need not be mandatory, the least that is required is a consultation on that issue and the expression of views of the different persons involved in the process of decision making. The noting in the file clearly shows that name of respondent No. 3 was not even discussed at the stage when the recommendation was made for the nomination in question. The name only cropped up only on account of the local Member of Parliament recommending his name. Even at that stage, there has been no reference back to the persona designata for expression of his views on the name which was brought into consideration at such a late stage.

16. An important aspect to be considered is that this consultation is not administrative in nature, but legislative in character. The matter pertains to administration of the Cantonment areas and the representation of a Civilian on the Board, which administers the area. Since there is a role of the Army in the cantonment area, the Legislature in its wisdom has specifically provided that the Civilian Member should be nominated by the Central Government, but in consultation with the Officer Commanding-in-Chief, the Command. Thus, more weightage has to be given to the recommendation of the persona designata and if at all the decision has to be overruled, the same should be for cogent reasons. There is total absence of any such reasons and the most important aspect is that there is no consultation whatsoever in so far as the appointment/nomination of respondent No. 3 is concerned. The appointment/nomination of respondent No. 3 is, thus, in the teeth of the Section and cannot be sustained.

17. A writ of mandamus is, thus, issued quashing the nomination of respondent No. 3 to the Cantonment Board, Secunderabad and it is directed that a fresh nomination be made of the Civilian Member in accordance with law u/s 14(2)(c) of the said Act within a maximum period of one month from today.

18. The writ petition is allowed with costs of Rs. 5,000/-.

CM9327/2004

No further orders are called for in this application in view of disposal of the writ petition. Application stands disposed.