

(1987) 12 AHC CK 0009

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 4434 of 1987

D.K. Agarwal

APPELLANT

Vs

The High Court of Allahabad and Another

RESPONDENT

Date of Decision : 10-12-1987

Acts Referred:

Constitution of India, 1950 — Article 136, 226, 233

Uttar Pradesh Higher Judicial Service Rules, 1975 — Rule 20(3), 27, 27A

Citation : (1988) 1 AWC 201

Hon'ble Judges : V.K. Mehrotra, J;A. N. Verma, J

Bench : Division Bench

Advocate : Ravi Kant, for the Appellant;

Final Decision : Allowed

Judgement

V.K. Mehrotra, J.—Sri D.K. Agarwal was inducted in the U.P. Nyayik Sewa as a Munsif in the year 1957. He was confirmed, after his first posting on February 25, 1959 as a Munsif, on February 25, 1961. In January, 1968 he was posted as a Civil Judge and was confirmed as such in March, 1974. In this State, like many others, there is a Higher Judicial Service. It is governed by the U.P. Higher Judicial Service Rules, 1975 (briefly, the Rules). D.K. Agarwal was promoted to this service on October 13, 1971. He was selected for this service on the criterion contained in Rule 20 (3) namely, seniority-cum-merit. On April 20, 1977 he was confirmed in this Service. He was appointed as a District Judge on October 31, 1983.

2. Some posts in the Higher Judicial Service are to be filled in by officers in the Selection Grade. Rule 27 regulates the grant of Selection Grade. It says:

27. Appointment to the Selection Grade—Appointment to the Selection Grade posts in the service shall be made by the Governor in consultation with the court from amongst the members of the service holding the post of District and Sessions Judge on the basis of merit.

3. The Service also has some posts in the super-time scale in respect whereof Rule 27A was added to the Rules in the year 1984. It says:

27-A. Appointment to the supertime scale posts in the Service shall be made by the Court from amongst the members of the Service holding Selection Grade posts on the basis of merit.

4. D.K. Agarwal was considered for grant of Selection Grade. He was recommended for it by a Committee of three Hon'ble Judges. The recommendation was accepted in a meeting of the Full Court held on January 25, 1986. According to his case, D.K. Agarwal became due for grant of & supertime scale on August 1, 1986. However, in a meeting of the Full Court held on January 17, 1987 he was found not fit for grant Of supertime scale. It is this decision which has been assailed by D.K. Agarwal in this writ petition under Article 226 of the Constitution. The petition was presented before the court on March 9, 1987. The Respondents were called upon to place their version in the form of a counter affidavit before the admission of the writ petition. They have done so. A supplementary counter affidavit has also been filed in reply to the supplementary affidavit of the petitioner by which he purported to place the events, that took place subsequent to the presentation of the writ petition, on the record. After filing of the rejoinder affidavit, counsel for the parties prayed that the petition be heard finally and disposed of at the admission stage itself. We heard them at some length and proceed to decide it finally.

5. The petitioner says that, along with the other eligible officers for grant of supertime scale, his case was also considered by the Selection Committee consisting of three Hon'ble Judges of this Court and the Committee, after thoroughly scrutinising his service record and being satisfied that he was possessed of necessary merit, recommended his name for the grant of supertime scale." The recommendations were placed before a meeting of the Full Court on May 17, 1986. In this meeting one of the Hon'ble Judges (Hon. Mr. Justice K. N. Misra) complained orally against the petitioner in respect of his alleged involvement in some smuggling activity in June, 1985 at which the matter was deferred for consideration to a subsequent meeting. The case of the petitioner is that in May, 1986 some inquiry was conducted by Justice K. N. Misra behind the back of the petitioner through the District Judge, Gonda on the basis whereof he made the allegations against the petitioner in the Full Court meeting of May 17, 1986. The District Judge is said to have written to the District Magistrate, Gonda inquiring about the involvement of the petitioner in smuggling activities who, after making inquiry into the matter, found the accusation as malicious and baseless and wrote to the District Judge around May 31, 1986. The petitioner also says that Hon'ble Mr. Justice K. N. Misra made inquiries from the Secretary, Vigilance, U.P. Government, who also informed him that there was no truth in the allegation that the petitioner was involved in any smuggling activity.

6. The petitioner was, however, asked by the Registrar of the Hon'ble Court that he was required to appear before the Selection Committee on July 12, 1986. The

petitioner did so and, according to him, no inquiry was made from him by the Selection Committee about the allegation of his involvement in smuggling activity.

7. Later on, the petitioner received a D. O. letter dated July 30, 1986 from the Addl. Registrar, High Court asking him to submit his explanation with regard to the facts stated in the letter dated June 11, 1986 written by the Hon''ble Mr. Justice K. N. Misra to Hon''ble the Chief Justice. The explanation was sent by the petitioner through his letter of August 5, 1986. The subject matter of the letter of June 11, 1986 was about the allocation of criminal work to different Magistrates while he was posted as District Judge, Gonda. The case of the petitioner is that he had done so strictly in accordance with the directions and instructions issued by the High Court from time to time and under intimation to the then Hon''ble Administrative Judge (Hon. Mr. Justice K. N. Goyal). The petitioner says that he had made a complaint to the High Court about the work and conduct of one Sri R. K. Sharma, the then Chief Judicial Magistrate, Gonda who was thereafter transferred from that station. He feels that Sharma presumably made a complaint to the Hon''ble Mr. Justice K. N. Misra, who became the Administrative Judge after expiry of the term of Hon''ble Mr. Justice K. N. Goyal as the Administrative Judge.

8. The next meeting of the Full Court took place on September 6, 1986. On that date, another letter dated September 3, 1986 of Hon''ble Mr. Justice K. N. Misra was delivered to the then Hon''ble Acting Chief Justice. This letter contained allegation about illegal appointment by the petitioner of one Suresh son of Mababir Prasad as a peon on his last working day as the District Judge, Gonda after making Hans Nath, a permanent peon, to resign from the post. The petitioner is said to have wrongly given out that he had appointed Suresh since his father Mababir Prasad had died in harness even though Mahabir Prasad had died almost a year after his retirement from service on attaining the age of superannuation.

9. The matter about the grant of supertime scale to the petitioner was deferred in the meeting of September 6, 1986 so that the petitioner may be asked to give his explanation to the allegation made in the letter dated September 3, 1986. The petitioner gave his explanation through his letter dated November 7, 1986. He gave out his version justifying his action in appointing Suresh. The petitioner says that there was no material on the record on the basis whereof any reasonable person could take the view that the petitioner was not entitled to grant of supertime scale. However, in the meeting of January 17, 1987 the Full Court decided that the petitioner was not fit for the grant of super time-scale. The case of the petitioner is that before the meeting of January 17, 1987 the Hon''ble Administrative Judge incharge of Kanpur Region gave some secret report to the Hon''ble Chief Justice painting a black picture about the petitioner's conduct and character and that on the basis of that report, which was not circulated to the Hon''ble Judges attending the Full Court meeting, the decision to refuse supertime scale to the petitioner was taken.

10. The petitioner made a representation dated January 18, 1987 against the decision of January 17, 1987. This representation for reconsideration of the decision of January 17, 1987 was considered by the Full Court initially on May 16, 1987 and thereafter on July 10, 1987. The Full Court declined to change its earlier order. The case of the petitioner is that an adverse entry was given to him by the Administrative Judge on July 9, 1987 on the eve of the Full Court meeting dated July 10, 1987. This adverse entry was taken into consideration by the Full Court without its communication to the petitioner and without an opportunity to the petitioner to make a representation against it.

11. The decision by which the petitioner was refused super-time scale was taken by the Full Court in its meeting of January 17, 1987. The grievance of the petitioner is that this decision was founded upon some material which was not a part of the record before the proceedings of the Full Court meeting and was never disclosed to him nor were the Hon'ble Judges attending that Full Court meeting made aware of it. The allegation in this regard, contained in the supplementary affidavit of the petitioner sworn on July 13, 1987, was replied to in paragraph 6 (1) of the supplementary counter affidavit sworn on September 2, 1987. The allegation aforesaid has not been specifically denied. However, what happened on January 17, 1987 in the Full Court meeting becomes apparent from what Sri S. S. Bhatnagar, learned Advocate General, U.P. stated before us on September 9, 1987 during the course of bearing of the present petition. He said this:

The former Chief Justice Hon'ble K. J. Shetty, had instructed me to examine the record. Sit in Court only to receive our directions. After this Court had heard the matter and I met the Hon'ble C. J. I informed him that I could not find in the record anything to overrule the 3 JJ. report. His Lordship told me that the Hon'ble A. J. had written to him a letter which contained serious imputations against the petitioner. He was satisfied that a person with that background should not be granted supertime scale and that on that basis he had assured the Judges in the Meeting that he was personally satisfied that the petitioner should not be granted supertime scale and all Judges present unanimously accepted his advice. His Lordship asked me to see the letter myself which he told me was in his custody and his safe. It could not be available immediately but it was sent to my chamber in a sealed cover. It was opened by the Registrar or some other officer of the Court. I read it and it was again put in a sealed cover-with the seal of my Private Secretary under his signature. Hon'ble C. J. had also told me during my subsequent discussion that "it may be shown to the Court but not to the party. But it may be clarified that I never put it on the record and that I always kept it in my custody.

12. From this statement it is clear that the letter which the Administrative Judge had written to the Chief Justice was not made a part of the record. Naturally, the occasion of its disclosure, at any stage, to D.K. Agarwal hardly ever arose. What would be the effect of this non-disclosure will be considered a little later.

13. We were invited by the learned Counsel for D.K. Agarwal to record a finding that the role of Justice K. N. Misra in the matter was almost that of a prosecutor and that his presence in the meeting of the Full Court on January 17, 1987 when a decision was taken that D.K. Agarwal is not fit for grant of super-time scale, vitiated that decision. Counsel for the petitioner invoked the principle of bias and urged that the presence of Justice K. N. Misra and his participation in the deliberations in the Full Court meeting would vitiate the decision for, through the extent to which he was able to influence the views of other Hon'ble Judges present in the meeting could not be predicated yet, it could not be reasonably ruled out that he did influence the other Judges in the ultimate decision. Some decisions were cited by the learned Counsel. Of them, we may notice some which, according to the counsel, were nearest to the facts of the present case. In *Institute of Chartered Accountants of India Vs. L.K. Ratna and Others*, , a Disciplinary Committee appointed under the provisions of Chartered Accountants Act, 1948 held inquiry against Ratna for alleged professional misconduct by him as a member of the Institute of Chartered Accountants of India. The Committee came to the conclusion that prima facie the allegation was established. It then made a report to the Council of the Institute, which manages the affairs of the Institute and which has power to take action against a delinquent Member. The Disciplinary Committee consisted of five Members. They were all the members of the Council as well. The Council accepted the recommendation made by the Disciplinary Committee against Ratna. The submission before the Supreme Court was that the members of the Disciplinary Committee having participated in the deliberations of the Council when it considered the case of Ratna, the decision was vitiated on the principle of bias.

14. The Supreme Court, on examining the general scheme of the Act and the basic principles of law, concluded that the President and the Vice-President of the Council, who were also Members of the Disciplinary Committee, held significant status in the meeting of the Council and a Member, whose conduct has been the subject of inquiry by the Disciplinary Committee ending in conclusion adverse to him, could legitimately entertain an apprehension that the President and the Vice-President of the Council and other Members of the Disciplinary Committee would maintain the opinion expressed by them in their report and would press for the acceptance of the report by the Council. The circumstances that the President would preside over the meeting of the Council and would thus be in a position to control and possibly dominate the proceedings during the meeting, could reasonably raise an apprehension in the mind of the Member accused of misconduct that partisan consideration would be accorded to the report of the Disciplinary Committee. The principle that justice should not only be done but should also appear to have been done, would be applicable in such a situation, particularly, when there was no evidence in the scheme of the Act to exclude an objection on the ground of bias. The Supreme Court suggested suitable legislative amendment to be made in the Act. The decision of the High Court that the finding of the Council holding Ratna guilty of misconduct was vitiated by the

participation of the Members of the Disciplinary Committee was upheld.

15. In *Ashok Kumar Yadav and Others Vs. State of Haryana and Others*, a Constitution Bench speaking through Bhagwati, J. (as he then was), said (in paragraph 16 of the report), that "it is one of the fundamental principles of our jurisprudence that no man can be a judge in his own cause and that it is in accordance with natural justice and common sense that the justice likely to be so biased should be incapacitated from sitting". Further, that "the question is not whether the Judge is actually biased or in fact decides partially, but whether there is real likelihood of bias. What is objectionable in such a case is not that the decision is actually tainted with bias but that the circumstances are such as to create a reasonable apprehension in the mind of others that there is likelihood of bias affecting the decision. The basic principle underlying this rule is that justice must not only be done but must also appear to be done and this rule has received wide recognition".

16. The decision was in respect of a selection made by the Haryana Public Service Commission to the Haryana Civil Service (Executive) and other allied Services. The close relatives of two of the members of the Commission, namely, Sri R. C. Marya and Sri Raghubar Dayal Gaur were also amongst candidates who were interviewed by the Commission. During their interview, these members had withdrawn. The High Court had taken the view that the selections were vitiated on account of participation of these members in the selection process. The Supreme Court, after referring to some decisions said that the common ground between the parties being that Sri Raghubar Dayal Gaur and Sri R. C. Marya did not take part in the interview of their close relatives and, in fact, retired from the room when the interviews were being held, there was no infirmity attaching to the selection made by the Public Service Commission on this ground. The conclusion of the Supreme Court is contained towards the end of paragraph 18 of the report.

17. The Judges of the High Court while discussing matters in a Full Court meeting normally take a decision by consensus. That has been the convention in this Court. During the deliberations each Judge who participates in the meeting is free to give expression to his opinion about the matter. Occupying as they do, high constitutional office, the bonafides of the Judges of the High Court is not open to question. The expression of opinion by a Judge at a Full Court meeting or drawing by him of the attention of the other Judges to facts within his knowledge in regard to an officer whose matter is up for consideration before the Full Court, does not make him a prosecutor as is suggested by the counsel for the petitioner. If certain facts come to the knowledge of a Judge attending the Full Court meeting, he would be failing in his duty as a member of the august body of Judges if he does not bring it to the knowledge of the other Judges. Where, as in the case of Justice K. N. Misra, the Hon'ble Judge also happens to be the Administrative Judge, the circumstance that certain facts unknown to the other Judges, would be within his knowledge about the particular officer would add to

his responsibility of bringing them to the notice of the entire body of Judges attending a meeting. We have not been able to appreciate the submission that the repeated disclosure by Justice K. N. Misra of certain facts which came to his knowledge, from time to time, either to the Chief Justice or to the other Hon'ble Judges attending the Full Court meeting, would make him an accuser in relation to an officer like the petitioner whose matter is up for discussion before the Full Court.

18. The sequence of events which have been outlined by the petitioner cannot, in our opinion lead to the inference that Justice K. N. Misra was playing the role of a prosecutor or that his presence in the meeting of the Full Court would vitiate the proceedings. After all, where the question is about judging the merit of an officer for grant of super-time scale, any information which a Judge felt was relevant to the decision about it, is to be given to the other Judges of the Court in the meeting. Merely because a particular Judge does so in various meeting of the Full Court would not mean that he was biased against the officer concerned or that his presence in the meeting would vitiate the decision taken in it. The deliberations of the Judges of the High Court in a Full Court meeting cannot be equated with proceedings of statutory bodies nor can an inference of bias in the entire body of Judges be drawn from the fact of participation in the meeting of any particular judge of the Court who takes an active interest in the proceedings by providing to his brethren information in his possession about an officer. The principle that justice should not only be done but should also appear to be done is unexceptionable but an allegation of bias, founded upon that principle, cannot be sustained in a case like the present where an august body of Judges of a High Court in a Full Court meeting is deliberating on and taking a decision in the matter of grant or otherwise of super-time scale to one of the members of the Higher Judicial Service, under its administrative control. The two decisions of the Supreme Court mentioned above do not lay down anything to the contrary. Likewise, the three decisions of English Courts, which were also placed before us on behalf of the petitioner, do not militate against the view taken by us. We may notice them now.

19. In *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* (1968) 3 All.E.R. 304, Lord Denning, M. R., observed at pages 309-310 that while it was acknowledged that there was not actual bias on the part of Mr. Lannon, and no want of good faith, in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself nor does it look to see if there was a real likelihood of bias. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right minded persons would think that, in the circumstances, there " was a real likelihood of bias on his part then he should not sit. The case related to fixation of rent of certain premises. Mr. Lannon was appointed Chairman of rent assessment committee. Earlier, while the Rent Act, 1965 was going through the Parliament as a Bill, the tenants of Regency Lodge where Mr. Lannon lived were interested in it. Mr. Lannon attended and addressed several meetings of the

tenants. The question was about the ineligibility of Mr. Lannon to sit on the rent assessment committee. It is obvious that the problem which the Court of Appeal was considering, arose in an entirely different set of circumstances and the decision has no bearing on the question which we are considering.

20. In *Hannam v. Bardford City Council* (1976) 2 All ER 690 the Court of Appeal was considering a question whether the fact that three governors of the School maintained by the Council sat on the staff sub-committee rendered its decision invalid because the employment of Hannam was terminated at a meeting of the School governors. Three of the ten members of the sub-committee were governors of the School who had, however, not attended the meeting of the governors when the decision to terminate the employment was taken. The staff sub-committee resolved not to prohibit the dismissal of Hannam. The Court of Appeal held, on the principle that no man could be a judge of his own cause, that the three governors when acting as members of the sub-committee did -not cease to be an intergral part of the body whose action was being impugned and that it made no difference that they did not personally attend the meeting of the governors in which the employment of Hannam was terminated. We may add that wis principle has not been accepted by our Supreme Court as is clear from its decision in *Ashok Kumar Yadav and Others Vs. State of Haryana and Others*, .

21. In *R. v. Barnsley Metropolitan Borough Council, ex parte Hook* (1976) 3 All ER 452 the Court of Appeal set aside the decision of amenities services committee of the local authority because it has heard the market manager"s evidence in the absence of the applicant and the market manager, who was in the position of a prosecutor, had been present at the deliberations of the committee when it came to its decision. The decision does not help the petitioner on our conclusion that the role of Justice K. N. Misra was not that of a prosecutor.

22. The submission which was next made on behalf of the petitioner by Sri Ravi Kant with some emphasis was that the decision which the court made on January 17, 1987 affected the petitioner adversely, it deprived him of his claim to be given supertime scale. It should, therefore, have contained the reasons on which it was founded. In other words, it should have been a speaking order.; since it was not so and no reasons for denial of supertime scale to the petitioner were forth coming, the order deserves to be quashed. Reliance was placed on some decisions of the Supreme Court in support of the submission. Our attention was drawn to the decision in *The Siemens Engineering and Manufacturing Co. of India Ltd. Vs. The Union of India (UOI)* and Another, in paragraph 6 whereof it was laid down by the Supreme Court that where an authority makes an order quasi-judicial in nature, the authority performs quasi-judicial function, it was incumbent for it to record its reason, for, the giving of reasons was a fact of natural justice. In *Mohd. Rashid Ahmad v. State of U.P.* AIR 1976 SC 592 the Supreme Court said that while deciding whether an employee, who had been provisionally absorbed in a service, was fit for final absorption the State Government was under an implied duty to act in a quasi-judicial manner and

hear the employee before taking the decision. That was a case where the Supreme Court was dealing with the question whether the State Government was under an obligation to hear an employee, who had been provisionally absorbed in the U.P. Palika Centralised Services, when deciding whether he was to be finally absorbed therein or not.

23. We have given due consideration to the submission but we are unable to accept it. The consideration of the question whether an Officer of the U.P. Kgher Judicial Service, who had been granted Selection Grade, was entitled to a post in the supertime scale does not require the court to follow any quasi-judicial procedure nor does it involve any quasi-judicial function on its part. The decision is taken by the court administratively. The decision is to be taken with reference to the criterion enshrined in Rule 27-A. The case of an eligible Officer is to be considered by the court in accordance with such procedure as it decides within the ambit of the Higher Judicial Service Rules. No opportunity of hearing to an Officer, whose case is being considered, is contemplated by the Rules nor can giving of such an opportunity be implied either from any of the rules or from the nature of the function, which the court performs in making a selection for filling in posts in the supertime scale. Admittedly, the petitioner was not selected for appointment to a post in the supertime scale. It cannot be said that the impugned decision dated January 17, 1987 deprives him of any right which he had acquired on being appointed to a post in the supertime scale, on account of his selection therefor. In this view of the matter, it cannot be said that the decision of the Court taken on January 17, 1987 visits him with any civil consequences of a nature which obligated it to record reasons for the decision. The present is not a case where the petitioner was once selected for appointment to a post in supertime scale and the decision to that effect was later altered to his prejudice.

24. It was then urged that the decision of January 17, 1987 was unsustainable for it was based upon the re-appraisal of the same material upon which the petitioner had been found fit for appointment to a selection grade post on the basis of a similar criterion of merit under Rule 27 of the Rules. The test of merit which was found satisfied while selecting the petitioner to be appointed on a selection grade post could not be said to have not been satisfied while considering his case for appointment to a post in the supertime scale. The precise submission, on this aspect, was two fold. Firstly, that the decision recorded in the meeting of January 17, 1987 was arbitrary because on the same material the court had earlier held in favour of the petitioner about his merit for the purpose of his appointment to a post in the selection grade; Secondly, that for judging the suitability of the petitioner for appointment to a post in the supertime scale all that could have been looked into by the court was the performance of the petitioner after his posting in a selection grade post and not any material, which had earlier been seen, while deciding to post him on a selection grade post. We may re-capitulate that the petitioner was selected for being posted to a selection grade post on January 25, 1986. The argument was

that material only between this date and August 1, 1986, when the petitioner became eligible for being considered for appointment to a post in the supertime scale, could be looked into by the court for a decision whether or not he should be appointed to a post in the supertime scale.

25. The submission, we feel, is not sound. While it cannot be doubted that any arbitrary decision about the merit of an Officer for appointment to a post either in the selection grade or in the supertime scale, for which selection is to be made on the basis of merits as envisaged by Rules 27 and 27-A, will be liable to be struck down, it cannot be said that where the Officer is considered to be fit for appointment to a post in the selection grade on the basis of consideration of his case with reference to his merit, he must necessarily be found fit for appointment to a post in the supertime scale, which unquestionably is a post higher than that in the selection grade, on the same material. Merit has not been defined in the Rules but it is axiomatic that the concept of merit for a post in the lower grade or scale is bound to be different from that in higher grade or scale. No objective standard has been prescribed for judging the merit of an Officer when considering his case for appointment to a post in the lower or higher grade. It has, eventually, been left to the judgment of the authority charged with the obligation of making the selection. In the case of selection made by a body like the Judges of a High Court one cannot but assume that the discretion in the matter of selection with reference to an undefined test of merit, will be exercised reasonably and rationally. Even if the material on the basis whereof merit of an Officer is to be judged is the same, the fact that an Officer has been found fit for appointment to a post in the selection grade on the criterion of merit may not necessarily lead to a decision that he has to be treated to be possessed of requisite merit for appointment to a post in the higher supertime scale, which is a post of promotion. There is, in our opinion, no bar to the re-consideration of the same material leading to a different conclusion in such a case.

26. If the submission of Sri Ravi Kant that the material which had been considered for grant of selection grade could not be looked into again while deciding about the grant or otherwise of supertime scale were to be accepted, it may lead to the necessary corollary that there is no additional material available in the case of a particular Officer for the period subsequent to the grant of selection grade to him, no decision to give the supertime scale could be taken in his case. When we put it to Sri Ravi Kant, he was unable to say that a decision to select an Officer for appointment to a supertime scale could not be taken on the same material on which a decision had earlier been taken selecting him for appointment to a post in the selection grade. And, it is here that the infirmity in his submission became evident. We have no hesitation in holding that there is nothing to prevent the Court from looking into the work and conduct of an Officer afresh, when deciding whether he was entitled to be selected for a post in the supertime scale, again for the same period for which it had looked into the work and conduct of the Officer for a decision whether he is entitled to be posted on a post in selection grade.

27. The decisions in the *The State of Punjab Vs. Dewan Chuni Lal*, and *D. Ramaswami Vs. State of Tamil Nadu*, are of no assistance to the petitioner in the present case. In neither of these cases was the problem similar to the one which we are examining in the present case. In the first of these cases, the Supreme Court held that after a Police Sub-Inspector has been allowed to cross-efficiency bar, a departmental inquiry against him based on charges founded upon adverse confidential report of Superior Officer, relating to period earlier than the year in which he was allowed to cross-efficiency bar, could not be sustained. In the second case, the Supreme Court set aside the order of compulsory reitirement passed against Rama Swami in the month of September after he had been promoted in the month of May to a selection post on the ground of merit and suitability. The Supreme Court found that after his promotion, there was no entry in the Service-book to his discredit or hinting even remotely that he had outlived his utility as a government servant. To quote the words of their Lordships (in paragraph 4 of the report):

In the face of the promotion of the Appellant just a few months earlier and nothing even mildly suggestive of ineptitude or inefficiency thereafter it is impossible to sustain the order of the government retiring the Appellant from service We do not say that previous history of Government (Servant) should be completely ignored, once he is promoted.... But when there is nothing in the present conduct casting any doubt on the wisdom of the promotion, we see no justification for needless digging into the past.

28. These decisions do not lend any support to the contention made before us that once an officer is found to possess requisite merit to be appointed to the post in the lower grade, he cannot be refused selection to a post in higher grade on the basis of merit founded upon the same material which was considered earlier. The concept of promotion to a higher post on the basis of merit rules out, as it were, an automatic promotion when the merit of an officer has been held to be sufficient to warrant his appointment to a post in the lower grade on the same material.

29. The plea that only that material which related to the period upto August 1, 1986 when the petitioner became eligible for being considered for appointment to a post in supertime scale could be looked into by the Court overlooks a vital aspect, namely, that when the Court considers the case of an officer for grant of supertime scale on the basis of his merit, it cannot ignore any material or information relating to the work and conduct of an officer which is within its knowledge on the date when the decision is being taken by it. The concept of merit in the case of appointment to a senior position in the Higher Judicial Service of a State embraces within its scope every aspect of the personality of the officer relating to his work and conduct. The mere fact that some aspect of the work and conduct of the officer relates to a period subsequent to the date when he became eligible for being considered for appointment to a post in the mpertime scale, will not enable the Court to brush it aside only on the ground

that it is subsequent to the date when the officer became so eligible. The Court is, as it were, under an obligation to take notice of these factors which touch the merit of an officer which are within its knowledge at the time when the case of an officer is being considered. Any other view may lead to startling consequences; For example, an officer who has unexceptional merit as far as his work and conduct is concerned upto the period when he became eligible for being considered for appointment to a post in the supertime scale may have acquired a dubious reputation about his integrity or may have been found unworthy for appointment due to his questionable conduct during the period between the date of his eligibility and the date when his case for appointment is considered by the Court- Would the Court be justified in taking the view that he had the necessary merit to be appointed to a post in supertime scale irrespective of the lapses on his part attributable to the period between the date when he became eligible to be considered for appointment and the date when he is actually considered for appointment by the Court. To us, the answer seems to be plain and it is that such an officer cannot be permitted to claim that having regard to his merit, as on the date when he became eligible for consideration, he should be appointed to a post in the supertime scale irrespective of his lapses subsequent thereto. We have no hesitation in taking the view that it is open to the Court to take into account all the material and facts in regard to an officer which comes to its notice at the time when the case of the officer is being considered even though it may relate to the period subsequent to the date when the officer has become eligible for consideration under the Rules. The consideration by the Court of that material or those facts would not vitiate its decision in regard to that officer.

30. From the affidavits filed in this petition, and during his submission on behalf of the petitioner, his learned Counsel was at some pains to point out circumstances, including the material or information which was brought to the notice of the Court from time to time, with a view to persuade us to take the view that on the basis of that material no reasonable person could take the view that the petitioner was not fit for appointment to a post in the supertime scale. We are deliberately refraining ourselves from referring to them or expressing any opinion about the same. This we are doing because we are of opinion that the matter deserves to be reconsidered by the Court and any observation by us may influence such reconsideration either in favour of the petitioner or against him. We are not inclined to take the view, for the reasons which we shall presently disclose, that we should direct the Court to appoint the petitioner to a post in the supertime scale or make a declaration that the petitioner is fit to be appointed for such a post. But, before it, we may deal with that aspect of the case which, in our opinion, leads us to the view that the decision of the Court dated January 17, 1987 deserves to be quashed.

31. The deliberations in a Full Court meeting, as observed by us earlier, include consideration by the Judges of facts brought to their notice, albeit orally, by some of their brethren. The decisions are generally taken on the basis of a

consensus. As such, it is difficult to accept a submission that consideration of some factor which is not made part of a record of the proceedings of the meeting will necessarily vitiate the decision of the Court. Our approach, we feel, is consistent with the fact that the body of Judges constitutes high authority and it is naturally to be assumed that it would act reasonably, fairly and impartially. In the instant case also, we are unable to say that the Full Court has acted otherwise. However, from the narration of facts as contained in the earlier part of the judgment, it is clear that after the Full Court meeting of May 17, 1986, the petitioner was called upon to appear before the Selection Committee on July 12, 1986 when clarification in respect of certain allegations made against him was sought from the petitioner (as is clear from the report of the selection committee dated July 12, 1986 which was made available to us by the learned Standing Counsel for our perusal). Then the petitioner was required, through a D. O. letter dated July 30, 1986 to him, by the Addl. Registrar of the High Court to give his explanation with regard to the facts stated in the letter dated June 11, 1986 written by Hon"ble Mr. Justice K. N. Misra to Hon"ble the Chief Justice which explanation was sent by the petitioner through the letter dated August 5, 1986. Thereafter, another letter dated September 3, 1986 was sent by Mr. Justice K. N. Misra to the Hon"ble Acting Chief Justice, so that the consideration of the petitioner's case was deferred again by the Full Court on September 6, 1986, with a view to give an opportunity to the petitioner to explain the allegations made in that letter. The petitioner gave his explanation through his letter dated November 7, 1986. Clearly, therefore, this Court felt that before taking into account the allegations contained in the various communications from Justice K. N. Misra, the petitioner should be afforded an opportunity of giving his version about them.

32. The statement made by the Advocate General before us on September 9, 1987 says that the then Chief Justice had told the Full Court that the Hon"ble Administrative Judge had written to him a letter which contained serious imputations against the petitioner and that he was satisfied that a person with that back-ground should not be granted fsupertime scale and further that all the Judges present in the meeting unanimously accepted the advice of the Chief Justice. In the normal course, the decision taken by the Full Court, in these circumstances, would not be open to challenge on the ground that the information sent by Hon"ble Administrative Judge to the Hon"ble Chief Justice had not been made part of the record or had not been circulated to the other Judges attending the meeting. After all, it is always open to the brother Judges to go by the assessment made by the Chief Justice or any of their brethren and endorse the same without anything more. It is always a matter of confidence which the Judges of the Court repose in the Chief Justice or any one of their brethren and when a decision is taken by them on the basis of an assessment made by one of them, the decision cannot be characterised as untenable in law. Since, however, in the case of petitioner D.K. Agarwal, the court had taken the view, in its earlier meetings, that opportunity be given to the petitioner to give

his explanation in regard to the allegations made against him, we feel that the petitioner should have been given an opportunity to give explanation in regard to the imputations made against him in the letter written to the Chief Justice by the Hon^{ble} Administrative Judges. Any decision, in the circumstances of the present case, arrived at against petitioner Agrawal without giving him an opportunity of giving his own explanation in regard to the "serious imputations" contained in the letter of the Hon^{ble} Administrative Judge against him would be inconsistent with the modality which the Court had adopted for considering the question of the suitability or otherwise of petitioner Agrawal for a post in the supertime scale. On this ground, and having regard to the peculiar circumstances of this case, we quash the decision of the Full Court dated January 17, 1987 to the effect that petitioner D.K. Agrawal is not fit for being appointed to a post in the supertime scale. We wish to make it absolutely clear that in case the Full Court had not itself decided to give an opportunity of explanation to petitioner Agrawal in respect of the allegations made against him by deferring consideration of his case for this purpose in its meetings of January 16, 1986 and September 6, 1986, we may not have been persuaded to take the view that where some information is given by one of the Judges to his brethren in a Full Court meeting, it would be necessary for the Court to give an opportunity of explanation to the officer to whom the information relates. We are tempted to borrow the words of a Division Bench of Kerala High Court in the case of Mary Teresa Dias v. Chief Justice 1986 (1) SLR 380 while speaking through Bhaskaran Nambiyar, J. though in a slightly different context of recommendation for appointment to the post of a District and Sessions Judge in the Kerala Higher Judicial Services, where it said (in paragraphs 19 and 20 of the report) that:

The High Court is thus vested with the power of recommendation under Article 233 of the Constitution, not only as a check on an arbitrary exercise of power by the executive in the matter of appointment but also to ensure that a body intimately conversant with the efficient functioning of the judiciary and specially competent to assess the suitability of those persons gives it expert views to the appointing authority. When this power of recommendation is thus vested not in one but in several individuals, in a collective constitutional entity, the High Court, the joint deliberations and the conclusion so arrived at resile the margin of error of judgment to the very minimum. It is the entrustment of this power to the High Court that constitutes the essence of the fairness in the recommendatory process in the matter of appointment to the post of District Judges. When the Judges recommend under Article 233 they naturally import their own knowledge and experience in making the assignment and for adjudging the suitability of the candidate; they may be guided by the "reputation" of a candidate, whether He or she has a "good reputation" or a "bad reputation". "A man's character is the reality of himself. His reputation is the opinion that others have found of him." (Henry Ward Beecher). However, the image which an individual projects about his or her equipment and character and the impression so gained in the minds of all the Judges leading to the selection or exclusion cannot be discarded

as irrelevant or extraneous. To say that all knowledge gained before one becomes a Judge has to be eschewed, is to insist on the impracticable and the impossible. One man's fancy need not be another man's poison and it is for that reason also that it is not the opinion of one but the opinion of all that enters into the verdict for making the recommendation.

The contention in this case that the Judges have imported their knowledge before they became a Judge and therefore the entire selection is vitiated proceeds on the basis misunderstanding of the constitutional intent and object in entrusting the duty of recommendation on the High Court before appointment can be made.

We entirely agree with the principle underlying these observations.

33. The decision of the Full Court in its meeting of January 17, 1987 having been quashed, what further direction should be given in the case. This aspect too was subject matter of serious contest between the parties. Counsel for petitioner Agrawal strenuously pleaded for a direction from us for D.K. Agrawal to be appointed to a post in supertime scale or else, at least for a declaration that he was suitable for such appointment to be made by us. Some decisions were placed before us saying that positive direction of this nature could be made by this Court. We may only mention those in which question of promotion was involved.

34. In the District Registrar Palghat v. M. B. Koyakutty (1979) 2 SCC 150 the High Court of Kerala had issued a direction requiring the District Registrar to promote Koyakutty to the Upper Division and then determine his rank in the cadre of Upper Division Clerks. A grievance about it was made before the Supreme Court on" behalf of the District Registrar. The Supreme Court said (in paragraph 30 of the report) that-

Ordinarily, the court does not issue a direction in such positive terms; but peculiar feature of this case is that it has (not) been disputed that Koyakutty Respondent satisfies the two-fold criterion for promotion laid down in the statutory rules Since existence of both the criteria viz., seniority and fitness for promotion was not disputed, the High Court was justified in issuing the direction it did.

35. In Hari Singh Varma v. Union of India (1986) (52) IFLR 561 a learned Single Judge of Bombay High Court, directed the authorities "to treat the petitioner as having been promoted to the post of Office Superintendent from the date on which the third Respondent was promoted to that post and to give him all consequential benefits."

36. In State of Gujarat Vs. S. Tripathy and Others, the Supreme Court dismissed the appeal of the State of Gujrat by saying that no justifiable ground had been made out warranting interference under Article 136 of the Constitution with the decision of the High Court and in the concluding portion of the judgment said (in

paragraph 4 of the report) that:

... We agree with the High Court that Shri Tripathy was wrongly passed over. However, instead of directing the Government of Gujrat to consider afresh the claim of Shri Tripathy for promotion to the selection grade and the supertime scale, we declare that the Respondent should have been given selection grade with effect from March 6, 1981 (the date from which the High Court observed that he ought to have been given such promotion) and the supertime scale with effect from November 1, 1983 and direct the Government of Gujrat to give the consequential monetary benefits.

37. Learned Standing Counsel, equally strenuously, contended that this Court can only direct a reconsideration of the matter by the Full Court. He also placed reliance upon some decisions. Of them, we may notice only that which touches the question of promotion. In *State Bank of India v. Mohd. Mynuddin* (1987) 2 SCC 597 it was observed (in paragraph 5) that:

Whenever promotion to a higher post is to be made on the basis of merit no officer can claim promotion to the higher post as a matter of right by virtue of seniority alone with effect from the date on which his juniors are promoted. It is not sufficient that in his confidential reports it is recorded that his services are "satisfactory

A reference was made by their Lordships to an earlier decision of the Supreme Court in *State of Mysore v. Syed Mahmood* (1968) 2 SCC 713, in which the decision was that "where the State Government or a statutory authority is under an obligation to promote an employee to a higher post which has to be filled up by selection the State Government or the statutory authority alone should be directed to consider the question whether the employee is entitled to be so promoted and that the court should not ordinarily issue a writ to the Government or the statutory authority to promote an. officer straightway.

38. We need not express any opinion on the question whether it is open to this Court to direct the promotion of an officer or not. We will -assume for purposes of this case that we have the jurisdiction to do so. We are not inclined, in the circumstances of the present case, to issue a direction of the nature prayed for by the petitioner. And, the reason is that the matter of promotion, which is within the domain of the Court, can be judged by it on the basis of facts before it as on the date when it takes a decision in the matter. In the present case, apart from the material which was considered by the Court before it took the decision on January 17, 1987, there is a subsequent entry given on July 9, 1987 n regard to the work and conduct of petitioner Agarwal relating to the year 1986-87 which was not available earlier. There is a representation of the petitioner against it. There is a letter of the Administrative Judge sent to the Chief Justice in respect whereof an opportunity of explanation is to be given by the Court to the petitioner in ragard to the imputations in it against the petitioner. There is also the assessment of the then Chief Justice about the work and conduct of

petitioner Agarwal made by the Chief Justice on July 14, 1987 and for ought we know, there may be some material, favourable or otherwise to the petitioner, which the Court may have before it by the time it takes up the case of the petitioner for re-consideration in pursuance of our direction. We would not be justified in arrogating to ourselves, sitting on the judicial side of the Court, the task which, in law, should be done by the Court on its administrative side. We are not expected, as it were, to sit in appeal over the decision taken by the Court on its administrative side and come to a conclusion of our own about the merit of the petitioner for appointment to a post in the supertime scale. The Full Court may like to consider afresh the report of the selection Committee dated July 12, 1986 which, we may observe in passing, felt that a lenient view deserved to be taken in the case of the petitioner. We are clearly of opinion that it would not be a sound exercise of discretion on our part to declare that the petitioner is fit for being appointed to a post in the supertime scale or that he be appointed to such a post. The preferable course appears to us to direct that the case of the petitioner for appointment to a post in the supertime scale be re-considered by the Court at a very early date keeping in view the fact that the petitioner is to retire from service in February, 1988. We only hope that it would be possible for the Court to re-consider the petitioner's case soon.

39. The writ petition shall stand allowed in the aforesaid terms but we leave the parties to bear their own costs.