

(2006) 05 AHC CK 0092

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 73680 of 2005

Dr. Virendra Kumar Sharma and Dr. Hari Shankar	APPELLANT
Vs	
The State of U.P. and Others	RESPONDENT

Date of Decision : 11-05-2006

Acts Referred:

Constitution of India, 1950 — Article 192(1), 316

Citation : (2006) 6 AWC 6263

Hon'ble Judges : V.M. Sahai, J;Sabhajeet Yadav, J

Bench : Division Bench

Advocate : Jeevan Prakash Sharma, for the Appellant; Ram Bhawan and S.C., for the Respondent

Final Decision : Allowed

Judgement

1. By this petition the petitioners have challenged the impugned order dated 23.7.2005 passed by the respondent No. 4 contained in Annexure 5 to the writ petition whereby the respondent No. 5 was appointed on the post of Medical Officer Ayurvedic on contract basis initially for a period of one year which can be extended for a period of 3 years. A further relief of mandamus is sought for directing the respondent No. 4 to declare the result of Primary Health Centre Milak Khanam District Rampur.

2. The relief sought in the writ petition rests on the allegations that an advertisement was published in the daily news paper, Dainik Jagaran dated 13.3.2005 by the respondent No. 4 inviting applications for holding selection on the post of Ayurvedic and Unani Medical Officer on contract basis in pursuance of Govt. Order dated 3.2.2005 in District Rampur. In pursuance thereof being fully eligible and qualified the petitioners applied for the post. Thereafter on 18.3.2005 a clarification in the advertisement was made about the Reservation of post. The selection was to be made only on the basis of interview and academic performance. Initially the interview was scheduled to be held on 23.3.2005, but it was changed subsequently and again it was scheduled to be held on 3.6.2005

at 10.00 A.M. It is alleged that the respondent No. 5 who is the son of the respondent No. 4 has also applied for the post in question, which was advertised by the respondent No. 4 on 13.3.2005. For holding selection and conducting the interview a selection committee was constituted by District Magistrate, Rampur who was the Chairman of the said selection committee and the respondent No. 4 the father of the respondent No. 5 became Secretary of the said selection committee apart from 3 other members who have also been appointed as members of that selection committee. As scheduled the interview took place on 3.6.2005. It is alleged that the Chairman of selection committee was not present when the interview was held by selection committee the Secretary of the aforesaid selection committee/the respondent No. 4 has participated in the interview and he himself has selected his son the respondent No. 5 on the post of Medical Officer of Primary Health Centre, Meerapur District Rampur.

3. It is further alleged that the petitioner No. 2 belongs to scheduled caste and he has applied for the post of Medical Officer in Primary Health Centre, Meerapur District Rampur and the respondent No. 5 and one Dr. Alok Kumar have also applied for the same post. It is also alleged that in G.O. dated 3.2.2005, under which the selection was held, it was stipulated that the applicant must be permanent resident of the same district where he has applied and when competent suitable candidates are not available in the district concerned the candidates of neighbour district may also be considered for selection in Primary Health Centre, but the respondent 4 has appointed his son on the post of Medical Officer at Primary Health Centre, Meerapur District Rampur in respect of which the petitioner No. 2 has applied whereas the respondent No. 5 is a permanent resident of district Lakhimpur Khiri and he is a permanent practitioner of said district which is far away about 250 Km from Rampur. The petitioner No. 1 applied in respect of the post of Medical Officer at Primary Health Centre, Milak Khanam Rampur though interview in respect of which was held on 3.6.2005 under the respondent No. 4 but the result of the aforesaid Primary Health Centre, has not been declared by the respondent No. 4 till the date. Feeling aggrieved against which the petitioners submitted their representation before the respondent No. 4 for declaration of their result on 9.8.2005 but till today the respondent No. 4 has not declared the result of the petitioners.

4. A detailed counter affidavit has been filed on behalf of the respondent No. 1 to 4 in the writ petition whereby the relevant reply of the averments contained in the writ petition have been given in para 9, 10, 11,16 and para 20 of the counter affidavit which are as under:

9. That the petitioners No. 1 who is in General category cannot be given appointment being a very low position in the merit list and in no case in place of the respondent No. 5 who has been selected in reserve category belonging to Scheduled Caste. Beside the petitioners No. 1 had applied to be appointed in Primary Health Centre, Milak Khanam the appointment of the respondent No. 5 has been made at Primary Health Centre, Meerapur, Rampur.

10. That in so far as the objection as regards the father of the respondent No. 5 being a member Secretary in selection committee is concerned, it is submitted that there is no prohibition on appointment or selection of any sons or relatives of the members of the committee. Besides according to the procedure of appointment as per Clause 12 of Para 2 of the scheme, the 90 marks are to be given on (he basis of marks obtained in the qualifying examination and degrees diploma or other certificates, which cannot be changed at the discretion of the selection committee or any member thereof. So far as the 10 marks for interview are concerned they are to be awarded by all the members of the selection committee separately on average basis. It is therefore submitted that presence of the answering respondent No. 4 in the interview will make no difference so Jar as the marks or merit is concerned.

11. That as regards the place of residence is concerned, the respondent No. 5 for the last 3 years is residing in Rampur itself as his father is posted there and he has also given the certificate of residence of in this regard.

16. That in reply to the contents of Para 9 to 11 of the writ petition, It is submitted that the respondent No. 4 being a member secretary of the selection committee was bound to sit in the interview and there is no prohibition for the sons or relatives of the members of the committee to apply and appear in selection. The selection of the respondent No. 5 as such cannot be set-aside on the ground of being son of the member of the committee unless and until some undue favour is shown to have been done in the process of selection, which is made strictly according to merit. The petitioners are far below in merit list and the selection of the respondent No. 5 cannot he sat aside at their instance.

20. That in reply to the contents of para 15 of the writ petition, it is submitted that from the Government, 8 posts out of 15 total posts were shown vacant in district Rampur but according to the Chief Medical Officer there were 9 vacant posts, for which the selection is made. As such, the 9 posts are filled up in the said selection but the appointment formerly not issued to the candidate Dr. (Ms.) Vidushi Gupta who has been selected for Primary Health Center Milak Khanam and the selection of Dr. (Ms.) Vidushi Gupta is sent for permission to the State Government on the receipt whereof appointment letter shall be given. It is pertinent to state that the selection is made for the vacancies in the district, the choice is taken from the candidates as a preference for their placement. The petitioner No. 1 is for below in the merit list who has not been selected.

5. We have heard Sri Jeevan Prakash Sharma, learned Counsel for the petitioner and the learned standing counsel for the respondent No. 1 to 4 as well as Sri Ram Bhawan appearing for the respondent No, 5.

6. Having gone through the rival submissions of learned Counsel for the parties and from the perusal of records a short question though not specifically pleaded and argued by the learned Counsel for the petitioners arises for our consideration is as to whether in given facts and circumstances of the case, the selection and

consequent appointment of respondent No. 5 is vitiated under law, i.e. on account of reasonable likelihood of bias affecting the process of selection, when the respondent No. 4 who is father of respondent No. 5 has admittedly participated in the process of selection being member of Selection Committee or could be saved by applying the doctrine of necessity?

7. In this connection it is necessary to point out that it is not in dispute that in the process of selection respondent No. 4 who is father of respondent No. 5 has participated as Member Secretary of Selection Committee. It is also not in dispute that Selection Committee was constituted under certain Government Order. It is also not the case of respondents that under the said G.O. no other officer except the respondent No. 4 could be appointed as Member Secretary of the Selection Committee and it was a case of statutory necessity that he must participate in aforesaid selection and no alternative substitute was permissible under the said G.O. or Rules, therefore, we would like to deal with issue in some detail with reference to case laws having material bearing with the issue hereinafter. It is noteworthy to mention that the issue has received consideration of Hon''ble Apex Court on several occasions.

8. First of all we would like to refer the decision of Constitution Bench of Apex Court rendered in A.K. Kraipak and Others Vs. Union of India (UOI) and Others, , which is a landmark decision on the question of rule against bias affecting the process of selection wherein what happened that one Naquishbund the Acting Chief Conservator of Forests, Jammu and Kashmir was a member of selection Board constituted for selecting officers to the Indian Forest Service from those serving in the Forest Department of Jammu and Kashmir, Naquishband who was a member of selection Board was also one of the candidate for selection to the Indian forest Service. He did not sit on the selection Board at the time when his name was considered but he did sit on the selection Board and participated in the deliberations of selection Board while preparing a list of selected candidate in order of preference. Hon''ble Apex Court held that his presence vitiated the selection on the ground that there was reasonable likelihood of bias affecting the process of selection. In the aforesaid case the Hon''ble Apex Court emphasised that it was not necessary to establish bias but it was sufficient to invalidate the selection process if it could be shown that there was reasonable likelihood of bias. Likelihood of bias arises on account of proprietary interest or on account of personal reasons such as hostility, friendship or family relationship with others. This case is fountain of rule against bias affecting the process of selection and has contributed a lot in development of Administrative law. The observations made by Hon''ble Apex Court in para 15 of the decision is reproduced as under:

15. It is unfortunate that Naquishbund was appointed as one of the members of the selection board. It is true that ordinarily the Chief Conservator of forests in a State should be considered as the most appropriate person to be in the selection board. He must be expected to know his officers thoroughly, their weaknesses as well as their strength. His opinion as regards their suitability for selection to the

All India Service is entitled to great weight. But then under the circumstances it was improper to have included Naqishbund as a member of the selection board. He was one of the persons to be considered for selection. It is against all canons of justice to make a man judge in his own cause. It is true that he did not participate in the deliberations of the committee when his name was considered. But then the very fact that he was a member of the selection board must have had its own impact on the decision of the selection board. Further admittedly he participated in the deliberations of the selection board when the claims of his rivals particularly that of Basu was considered. He was also party to the preparation of the list of selected candidates in order of preference. At every stage of his participation in the deliberations of the selection board there was a conflict between his interest and duty. Under those circumstances it is difficult to believe that he could have been impartial. The real question is not whether he was biased. It is difficult to prove the state of mind of a person. Therefore what we have to see is whether there is reasonable ground for believing that he was likely to have been biased. We agree with the learned Attorney-General that a mere suspicion of bias is not sufficient. There must be a reasonable likelihood of bias. In deciding the question of bias we have to take into consideration human probabilities and ordinary course of human conduct. It was in the interest of Naqishbund to keep out his rivals in order to secure his position from further challenge. Naturally he was also interested in safeguarding his position while preparing the list of selected candidates.

9. The aforesaid decision has been subsequently applied and followed by Four Judges Bench of Hon'ble Apex Court in Ashok Kumar Yadav and Others Vs. State of Haryana and Others, while taking note of the earlier decisions of Hon'ble Apex Court and some decisions of High Courts noticed for approval, in para 16,17 and 18 of the decision the Hon'ble Apex Court has held as under:

16. We agree with the petitioners that it is one of the fundamental principles of our jurisprudence that no man can be a judge in his own cause and that if there is a reasonable likelihood of bias it is in accordance with natural justice and commonsense that the justice likely to be so biased should be incapacitated from sitting. The question is not whether the judge is actually biased or in fact decides partially, but whether there is a 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 a likelihood of bias affecting the decision. The basic principle underlying the rule is that the justice must not only be done but must also appear to be done and this rule has received wide recognition in several decisions of this Court. It is also important to note that this rule is not confined to cases where judicial power *stricto sensu* is exercised. It is appropriately extended to all cases where an independent mind has to be applied to arrive at a fair and just decision between the rival claims of parties. Justice is not the function of the courts alone. It is also the duty of all those who are expected to decide fairly between contending parties. The strict standards applied to

authorities exercising judicial power are being increasingly applied to administrative bodies for it is vital to the maintenance of the rule of law in a welfare State where the jurisdiction of administrative bodies is increasing at a rapid pace that the instrumentalities of the State should discharge their function in a fair and just manner. This was the basis on which the applicability of this rule was extended to the decision making process of a selection committee constituted for selecting officers to the Indian Forest Service in *A.K. Kraipak and Others Vs. Union of India (UOI) and Others*, Hegde, J speaking on behalf of the Court countered the argument that Naquishbund did not take part in the deliberations of the Selection Board where his name was considered by saying :

But then the very fact that he was a member of the Selection Board must have its own impact on the decision of the Selection Board. Further admittedly, he participated in the deliberations of the Selection Board when the claims of his rival....were considered. He was also party to the preparation of the list of selected candidates in order of preference. At every stage of his participation in the deliberation of the Selection Board there was a conflict between his interest and duty...The real question is not whether he was biased. It is difficult to prove the state of mind of a person. Therefore what we have to see is whether there is reasonable ground for believing that he was likely to have been biased....There must be a reasonable likelihood of bias. In deciding the question of bias we have to take into consideration human probabilities and ordinary course of human conduct.

This Court emphasised that it was not necessary to establish bias but it was sufficient to invalidate the selection process if it could be shown that there was reasonable likelihood of bias. The likelihood of bias may arise on account of proprietary interest or on account of personal reasons, such as, hostility to one party or person! friendship or family relationship with the other. Where reasonable likelihood of bias is alleged on the ground of relationship, the question would always be as to how close is the degree of relationship or in other words, is the nearness of relationship so great as to give rise to reasonable apprehension of bias on the part of the authority making the selection.

17. The High Court of *D.K. Khanna Vs. Union of India (UOI) and Others*, drawing inspiration from *A.K. Kraipak's* case, held that where one of the members of the Committee constituted for selecting members of the State Civil Service for promotion to the Indian Administrative Service, was the son-in-law of a candidate who was competing for inclusion in the list of selected candidates, the entire selection process was vitiated by the presence of such member, though he did not take any part in the consideration of his father-in-law's candidature or in any manner try to influence his colleagues in regards to his father-in-law. The High Court observed that the degree of relationship in this case was so close as to reasonably give an impression to the other candidates that there was a real likelihood of the son-in-law as his own. So also in *Surinder Nath Goel's* case (1973) 1 Serv LR. 690 (supra) the High Court of Punjab and Haryana took the

same vie where it was found that two of the candidates appearing for selection were related to one of the members of the selection committee. The same approach was adopted by the High Court of Andhra Pradesh in M. Ariffudin 's case (1973) 2 Serv LR. 119 (supra) where one of the members of the Andhra Pradesh Public Service Commission who sat on the Commission and participated in the selection for the posts of Professor and Lecturer in the Andhra Pradesh Technical Education Service, was a partner with some of the candidates appearing for the selection and it was held that the entire selection process was vitiated because there was clearly reasonable likelihood of bias in favour of those candidates on the part of such member of the Commission. We may point out that so far as this last decision is concerned, it does not appear that the member of the Commission who was a partner with some of the candidates, withdrew when those candidates came to be interviewed and did not participate in the consideration of their candidature.

18. We must straightway point out that A.K. Kraipak and Others Vs. Union of India (UOI) and Others, is a landmark in the development of administrative law and it has contributed in a large measure to the strengthening of the rule of law in this country. We would not like to whittle down in the slightest measure the vital principle laid down in this decision which has nourished the roots of the rule of law and injected justice and fair play into legality. There can be no doubt that if a selection committee is constituted for the purpose of selecting candidates on merits and one of the members of the selection committee is closely related to a candidate appearing for the selection, it would not be enough for such member merely to withdraw from participation in the interview of the candidate related to him but he must withdraw altogether from the entire selection process and ask the authorities to nominate another person in his place on the selection committee, because otherwise all the selections made would be vitiated on account of reasonable likelihood of bias affecting the process of selection. But the situation here is a little different because the selection of candidates to the Haryana Civil Service (Executive and allied services) is being made not by any selection committee constituted for that purpose but it is being done by the Haryana Public Service Commission which is a Commission set up under Article 316 of the Constitution. It is a commission which consists of a Chairman and a specified number of members and is a Constitutional Authority. We do not think that the principle which requires that a member of a selection committee whose close relative is appearing for selection should decline to become a member of the selection committee or withdraw from it leaving it to the appointing authority to nominate another person in his place, need be applied in case of a Constitutional Authority like the Public Service Commission, whether Central or State. If a member of a Public Service Commission were to withdraw altogether from the selection process on the ground that a close relative of his is appearing for selection no other person save a member can be substituted, in his place. And it may sometimes happen that no other member is available to take the place of such member and the functioning of the Public Service Commission may

be affected. When two or more members of a Public Service Commission. Of course, we must make it clear that when a close relative of a member of a Public Service Commission is appearing for interview, such member must withdraw from participation in the interview of that candidate and must not take part in any discussion in regard to the merits of that candidate and even the marks or credits given to that candidate should not be disclosed to him. Chinappa Reddy, J. observed to the same effect in *Javid Rasool Bhat and Others Vs. State of Jammu and Kashmir and Others*, while dealing with a similar question which arose before him for consideration:

The procedure adopted by the selection committee and the member concerned was in accord with the quite well-known and generally accepted procedure adopted by the Public Service Commission everywhere. It is not unusual for candidates related to members of the Service Commission or other selection committee to seek employment. Whenever such a situation arises, the practice generally is for the member concerned to excuse himself when the particular candidate is interviewed.. ..Here in the present case it was common ground between the parties that Shri Raghubar Dayal Guar did not participate at all in interviewing Trilok Nath Sharma and likewise Shri R.C.Marya did not participate at all when Shakuntala Rani and Balbir Singh came to be interviewed and in fact, both of them retired from the room when the interviews of their respective relatives were held. Moreover, neither of them took any part in any discussion in regard to the merits of his relatives nor is there anything to show that the marks or credits obtained by their respective relatives at the interviews were disclosed to them. We are therefore of the view that there was no infirmity attacking to the selections made by the Haryana Public Service Commission on the ground that though their close relatives were appearing for the interview. Shri Raghubar Dayal Gaur and Shri R.C.Marya did not withdraw completely from the entire selection process. This ground urged on behalf of the petitioners must therefore be rejected.

10 In *Rattan Lal Sharma Vs. Managing Committee, Dr. Hari Ram (Co-education) Higher Secondary School and others*, of the decision Hon'ble Apex Court held as under:

11....For appreciating a case of personal bias or bias to the subject matter the test is whether there was a real likelihood of a bias even though such bias has not in fact taken place. De Smith in his *Judicial Review of Administrative Action* (1980) at page 262 has observed that a real likelihood of bias means at least substantial possibility of bias. In *R.V. Sunderland Justices* (1901) 2 KB 357 (373) it has been held that the Court will have to judge the matter as a reasonable man would judge of any matter in the conduct of his own business. In *R.V. Sussex Justices* (1924) 1 KB 256 (259) ii has been indicated that answer to the question whether there was a real likelihood of bias depends not upon what actually was done but upon what might appear to be done. In *Halsbury Laws of England*, (4th Edn.) Vol. 2, para 551, it has been indicated that the test of bias is

whether a reasonable intelligent man, fully apprised of all the circumstances, would feel a serious apprehension of bias. The same principle has also been accepted by this Court in *Manak Lal Vs. Dr. Prem Chand*, This Court has laid down that the test is not whether in fact, a bias has affected the judgment, the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the Tribunal might have operated against him in the final decision of the Tribunal. It is in this sense that it is often said that justice must not only be done but must also appear to be done.

11. In view of settled legal position enunciated hereinbefore by Hon''ble Apex Court it is clear that it is one of the fundamental principle of our jurisprudence that no man can be judge of his own cause and if there is a reasonable likelihood of bias it is in accordance with the natural justice and common sense that justice likely to be so biased should be incapacitated from sitting. The question is not whether the judge is actually biased or in fact decided partially but whether there is real likelihood of bias what is objectionable in such cases 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 test is not whether in fact a bias has affected the judgment, the test always is and must be, whether a litigant, fully apprised of all the circumstances would feel a serious apprehension of bias and whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in final decision of the tribunal.

12. It is also important to note that this rule is not confined to cases where judicial power *stricto sensu* is exercised. It is extended to all cases where an independent mind has to be applied to arrive at a fair and just decision between the rival claim of the parties. Delivery of justice is not the function of courts alone rather it is also duty of all those who are expected to decide fairly between contending parties. The strict standards are applied to the authorities exercising judicial power are being increasingly applied to administrative bodies for it is vital to the maintenance of the rule of law in a welfare state, this was the basis on which the applicability of this rule was extended to decision making process of a selection committee constituted for holding selections of officers to Indian Forest Service in *A.K. Kraipak's* case (*supra*) wherein what happened that one Naquishbund the Acting Chief Conservator of Forests, Jammu and Kashmir was a member of selection Board constituted for selecting officers to the Indian Forest Service from those serving in the Forest Department of Jammu and Kahsmir, Naquishband who was a member of selection Board was also one of the candidate for selection to the Indian forest Service. He did not sit on the selection Board at the time when his name was considered but he did sit on the selection Board and participated in the deliberations of selection Board while preparing a list of selected candidate in order of preference. Hon''ble Apex Court held that his presence vitiated the selection on the ground that there was reasonable likelihood of bias affecting the process of selection. In the aforesaid case the Hon''ble Apex Court emphasised that it was not necessary to establish

actual bias but it was sufficient to invalidate the selection process if it could be shown that there was reasonable likelihood of bias. Likelihood of bias arise on account of proprietary interest or on account of personal reasons such as hostility, friendship or family relationship with others, where reasonable likelihood of bias is alleged on the ground of relationship, the question would always be as to how close is the degree of relationship or in other words, is the nearest of relationship so great as to give rise to reasonable apprehension of bias on the part of the authority making the selection.

13. The aforesaid decision has been consistently followed by Hon"ble Apex Court itself, and Ashok Kumar Yadav case (supra), while placing reliance upon A.K.Kraipak case Hon"ble Apex Court has further explained the doctrine, and has held that if a selection committee constituted for the purpose of selecting candidates on merits and one of the member of the selection committee is closely related to a candidate appearing for selection it would not be enough for such member merely to withdraw from participation in the interview of the candidate related to him but must withdraw altogether from entire process of selection and ask the authorities to nominate another person in his place in the selection committee, otherwise selection would be vitiated on account of reasonable likelihood of bias affecting the process of selection, and further held that we do not think that the principle which requires that a member of selection committee, whose close relative is appearing for selection should decline to become a member of selection committee or withdraw from, leaving it to the appointing authority to nominate another person in his place need to be applied in cases of constitutional Authority, like the Public Service Commission, whether Central or State for the simple reason that if a member of Public Service Commission were to withdraw altogether from selection process on the ground of close relative of his appearing for selection no other person save a member can be substituted in his place. And it may some time happen that no other member is available to take place of such member and the functioning of Public Service Commission may be affected. However, when a close relative of a member of Public Service Commission is appearing for interview such members must withdraw from participation in the interview of that candidate and must not take part in any discussion in regard to the merit of that candidate and even the marks or credits given to that candidate should not be disclosed to him.

14. Besides the aforesaid proposition laid down by Hon"ble Apex Court, we would like to point out further that if the committee is constituted under an administrative order or under statutory rules a member is disqualified in a given situation vis-a-vis a particular candidate whose promotion or selection is in question there can be no difficulty in his reclusing himself and requesting another officer to be substituted in his place in committee. Alternatively, when there are three or more members in such committee, the disqualified member could leave it to the other remaining members to take decision. In case however they differ then authority which constituted the committee, could be requested to nominate a third member in case of committee having three members. Thus a distinction

has to be drawn between such selection or other committees and Central or State Public Service Commissions established under the provisions of Constitution. It is not unusual for candidates related to members of the service commission or other selection committee to seek employment, but whenever such a situation arises, the practice generally is for the member concerned to excuse or reclude himself in the manner indicated herein before. This is settled legal position in case of rule against bias affecting the process of selection. The aforesaid view has been reinforced by subsequent decisions of Apex Court and we shall refer to them.

15. In this connection without any violence to the propositions laid down by Hon"ble Apex Court in A.K. Kraipak's case (supra) and Ashok Kumar Yadav's case (supra) it is necessary to point out that the members of the Public Service Commission Central or State established under our Constitution are no doubt men of high calibre and unquestionable integrity but having regard to the present scenario of rampant corruption in public life which has become national malady now a days, this Court cannot lose sight of the situations and we would like to add that since under the conduct of business Rules and Regulations framed by such multimember commissions, if different Boards are constituted for the purpose of holding selection it would be most appropriate that if any close relative is appearing in such selection the matter should be left by such member to a Board chaired by another member for the purpose of deliberations and awarding marks in interview and where interview is not required and selection has to be held on the basis of service records of the employees for promotion, then for the purpose of awarding marks on the basis of such service records the matter should be left by such member to the Board of another member. The aforesaid Rules shall also be applied with necessary modification where the commission is required to be consulted in disciplinary action of Government servants. Apart from it, we are further of the view that rules against bias enunciated herein before should be appropriately applied in disciplinary proceedings, departmental appeals against such disciplinary actions and should also be extended to screening committees constituted for the purpose of compulsory retirement of public servants or other employees where the rules of natural justice apply.

16. Now testing the facts of present case on the touchstone of aforesaid settled legal proposition it is necessary to point out that admittedly the respondent No. 4 has participated in the process of selection in question, and took interview when his son was appearing in interview, and he did not abstain in deliberations in interview and allocation of marks and preparation of selection list, though the selection committee was comprised of three more members. Now further question arises for consideration is as to whether such selection can be saved by applying the doctrine of necessity or not?

17. In this connection it is significant to point out that the doctrine of bias cannot be invoked against the necessity rather it has to give way to the doctrine of

necessity. In this connection it would be useful to make reference of few observations of professor H.W.R. Wade, made in Part 14 of Administrative Law (Fifth Edition) at page 426 and 427 of the Book as under : ,

Indivisible authorities : cases of necessity

in all the cases so far mentioned the disqualified adjudicator could be dispensed with or replaced by someone to whom the objection did not apply. But there are many cases where no substitution is possible, since no one else is empowered to act. Natural justice then has to give way to necessity, for otherwise there is no means of deciding and the machinery of justice or administration will break down.

This point made an appearance in *Dimes v. Grand Junction Canal* (1852) 3 H.L.C. 759, already recounted. Before (he appeal could proceed from the Vice-Chancellor to the House of Lords, the Lord Chancellor had to sign an order for enrolment. But it was held that his shareholding in the company, which disqualified him from hearing the appeal, did not affect the enrolment, since no one but he had power to effect it. "For this is a case of necessity, and where that occurs the objection of interest cannot prevail. " Reference was made to a year back case of 1430 where an action was brought against all the judges of the Court of Common Pleas in a matter which lay only in that court. Comparable situations have occurred in modern cases. In one, a county court registrar was sued unsuccessfully in his own court, and had to tax costs in his own favour. In another, the government of Saskatchewan called upon the court to determine whether the salaries of judges were liable to income tax: and the Privy Council confirmed that the court was right to decide it, as a matter of necessity.

In administrative cases the same exigency may easily arise. Where statute empowers a particular minister or official to act, he will usually be the one and only person who can do so. There is then no way of escaping the responsibility, even if he is personally interested. Transfer of responsibility is, indeed, a recognized type of *ultra vires*. In one case it was unsuccessfully argued that the only minister competent to confirm a compulsory purchase order for land for an airport had disqualified himself by showing bias and that the local authority could only apply for a local Act of Parliament. The court will naturally not allow statutory machinery to be frustrated in this way. For similar reasons a governor of a colony may validly assent to an Act of indemnity for his own actions, since otherwise the Act could not be passed at all. It is generally supposed, likewise, that a minister must act as best he can even in a case where he, for instance, himself owns property which will be benefited if he approves a development plan. Such cases of private and personal interest are conspicuous by their absence in the law reports. But there have been cases involving public funds. The Local Government Superannuation Act, 1937 gave employees of local authorities statutory rights to pensions under certain conditions, but provided that any question concerning these rights should be decided first by the local authority, and then in case of dispute by the minister, whose decision on questions of fact was to be final. The Court of Appeal held that there was no escape from these

clear provisions.

18. Now at this juncture, we would like to refer some decisions of Hon''ble Apex Court where the doctrine of necessity was considered as exception to the rule against the doctrine of bias. In Election Commission of India and another Vs. Dr. Subramanian Swamy and another, of the decision the Hon''ble Apex Court has dealt with the doctrine of necessity in detail as under:

16. We must have a clear conception of the doctrine. It is well settled that the law permits certain things to be done as a matter of necessity which it would otherwise not countenance on the touchstone of judicial propriety. Stated differently, the doctrine of necessity makes it imperative for the authority to decide and considerations of judicial propriety must yield. It is often invoked in cases of bias where there is no other authority or Judge to decide the issue. If the doctrine of necessity is not allowed full play in certain unavoidable situations, it would impede the course of justice itself and the defaulting party would benefit therefrom. Take the case of a certain taxing statute which taxes certain perquisites allowed to Judges. If the validity of such a provision is challenged who but the members of the judiciary must decide it. If all the Judges are disqualified on the plea that striking down of such a legislation would benefit them, a stalemate situation may develop. In such cases the doctrine of necessity comes into play. If the choice is between allowing a biased person to act or to stifle the action altogether, the choice must fall in favour of the former as it is the only way to promote decision-making. In the present case also if the two Election Commissioners are able to reach a unanimous decision, there is no need for the Chief Election Commissioner to participate, if not the doctrine of necessity may have to be invoked.

17. We think that is the only alternative in such a situation. We are, therefore, of the opinion that the proper course to follow is that the Chief Election Commissioner should call a meeting of the Election Commission to adjudicate on the issue of disqualification of Ms. J. Jayalalitha on the grounds alleged by Dr. Swamy. After calling the meeting he should act as the Chairman but then he may refuse himself by announcing that he would not participate in the formation of opinion. If the two Election Commissioners reach a unanimous opinion, the Chief Election Commissioner will have the opinion communicated to the Governor. If the two Election Commissioners do not reach a unanimous decision in the matter of expressing their opinion on the issue referred to the Election Commission, it would be necessary for the Chief Election Commissioner to express his opinion on the doctrine of necessity. We think that in the special circumstances of this case this course of action would be the most appropriate one to follow because if the two Election Commissioners do not agree, we have no doubt that the doctrine of necessity would compel the Chief Election Commissioner to express his views so that (the majority opinion could, be communicated to the Governor to enable him to take a decision in accordance (herewith as required by Article 192(1) of the Constitution.

19. In *Badrinath v. Government of Tamil Nadu and Ors.* J.T. 2000 (Supp) (1) SC 346 in para 83, 84 and 85 of the decision Hon"ble Apex Court has held that unless there is a statute or statutory rule compelling the person to take a decision and there is no legally permissible alternative to substitute the adjudicator by another adjudicator, the doctrine of necessity can not be pressed into service. For ready reference para 83, 84 and 85 of the decision is reproduced as under:

83. It may be noticed that where a statute or a statutory rule constitutes a designated authority to take administrative or quasi-judicial decisions and where the person concerned is disqualified to take a decision on the principle of likelihood of bias, then the law (in certain circumstances explained below) makes an exception in the situation and the said person is entitled to take a decision notwithstanding his disqualification for otherwise no decision can be taken by anybody on the issue and public interest will suffer. But the position in the present case is that there is no statute or statutory rule compelling the Chief Secretary to be a member of the Screening Committee. If the Committee is constituted under an administrative order and a member is disqualified in a given situation vis-a-vis a particular candidate whose promotion is in question, there can be no difficulty in his "recusing" himself and requesting another senior officer to be substituted in his place in the Committee, Alternatively, when there are three members in the Committee, the disqualified member could leave it to the other two - to take a decision. In case, however, they differ, then the authority, which constituted the Committee, could be requested to nominate a third member. These principles are well settled and we shall refer to them.

84 This Court had occasion to deal with identical situations and these rulings go against the respondents. In *J. Mohapatra and Co. and Another Vs. State of Orissa and Another*, , the official members as well as non-official members of a Committee were, having regard to their interest, disqualified for being on the Committee. It was argued that the Government having appointed the Committee by resolution, the doctrine of necessity applied. The said contention was rejected. It was held that it was not difficult for those disqualified members to be substituted by other members. This Court held:

It is true, the members of this Sub-Committee were appointed by a Government Resolution and some of them were appointed by virtue of the official position they were holding, such as, the Secretary, Education Department of Government of Orissa, and the Director, Higher Education etc. There was, however, nothing to prevent those whose books were submitted for selection from pointing out this fact to the State Government so that it could amend its Resolution by appointing a substitute or substitutes, as the case may be. There was equally nothing to prevent such non-official author-members from resigning from the Committee on the ground of their interest in the matter.

85. Again, in *Institute of Chartered Accountants of India Vs. L.K. Ratna and Others*, this Court held that in the absence of statutory compulsion, the principle

of "necessity" does not apply. This Court observed that:

In the Regulations there was nothing to suggest that decision could not be taken by the other members of the Disciplinary Committee who were not disqualified.

20 Again in case of Amar Nath Chowdhury Vs. Braithwaite and Company Ltd. and Others, of the decision of the Hon''ble Apex Court the doctrine of necessity has been dealt with. For ready reference para 6 and 8 of the decision is reproduced as under:

6. One of the principles of natural justice is that no person shall be a judge in his own cause or the adjudicating authority must be impartial and must act without any kind of bias. The said rule against bias has its origin from the maxim known as "*Debet Esse Judex in Propria Causa*", which is based on the principle that justice not only be done but should manifestly be seen to be done. This could be possible only when a Judge or an adjudicating authority decides the matter impartially and without carrying any kind of bias. Bias may be of different kind and form. It may be pecuniary, personal or there may be bias as to the subject matter etc. In the present case, we are not concerned with any of the aforesaid form of bias. What we are concerned with in the present case is whether an authority can sit in appeal against its own order passed in the capacity of Disciplinary Authority. In *The Financial Commissioner (Taxation) Punjab and others Vs. Harbhajan Singh*, , it was held that the Settlement Officer has no jurisdiction to sit over the order passed by him as an Appellate Authority. In the present case, the subject-matter of appeal before the Board was whether the order of removal passed by the Disciplinary Authority was in conformity with law. It is not disputed that Shri S. Krishnaswami, the then Chairman-cum-Managing Director of the Company acted as a Disciplinary Authority as well as an Appellate Authority when he presided over and participated in the deliberations of the meeting of the Board while deciding the appeal of the appellant. Such a dual function is not permissible on account of established rule against bias. In a situation where such a dual function is discharged by one and the same authority, unless permitted by an act of legislation or statutory provision, the same would be contrary to rule against bias. Where an authority earlier had taken a decision, he is disqualified to sit in appeal against his own decision, as he already prejudged the matter otherwise such an appeal would be termed an appeal from Caesar to Caesar and filing of an appeal would be an exercise in futility. In that view of the matter, in the present case, fair play demanded that Shri Krishnaswami, the then Chairman-cum-Managing Director of the Company ought not to have participated in the deliberations of the meeting of the Board when the Board heard and decided the appeal of the appellant.

8. In view of the aforesaid definition of the expression "Board", the Board could have constituted a Committee of the Board Management or any officers of the Company by excluding Chairman-cum-Managing Director of the Company and delegated any of its power, including the appellate power, to the such a committee to eliminate any allegation of bias against such an appellate authority.

It is, therefore, not correct to contend that rule against bias is not available in the present case in view of the "doctrine of necessity". We are, therefore, of the view that reliance of the doctrine of necessity in the present case is totally misplaced.

21. In view of foregoing discussions following legal propositions emerge in respect of administrative or quasi-judicial decisions tainted with bias:

(1) If a selection committee constituted for the purpose of selecting candidates on merits and one of the member of the selection committee is closely related to a candidate appearing for selection it would not be enough for such member merely to withdraw from participation in the interview of the candidate related to him but must withdraw altogether from entire process of selection and ask the authorities to nominate another person in his place on the selection committee, otherwise selection would be vitiated.

(2) The above principle as it stands cannot be applied in respect of selection made by Central or State Public Service Commissions, where member of the commission whose close relative is appearing for selection, consisting of interview or promotions etc. without interview, he need not to withdraw from selection altogether rather he should abstain in interview of his close relative and further deliberations in allocation of marks, but in multimember commissions where other alternatives are available, it would be most appropriate to leave the matter of interview and deliberations of allocations of marks to another member comprising Board of selection.

(3) Where the selection committee is constituted under statutory rules or Government orders, a member is disqualified in a given situation vis-a-vis a particular candidate whose promotion or selection is in question there can be no difficulty in his reclusing himself and requesting another officer to be substituted in his place in committee. Alternatively, when there are three or more members in such committee, the disqualified member could leave it to the other remaining members to take decision. In case however they differ then authority which constituted the committee, could be requested to nominate a third member in case of committee having three members.

(4) The aforesaid rule shall also be applied with necessary modification in the matter pertaining to disciplinary action where the commission is to be consulted and in cases where the Inquiry Officer or Disciplinary or Appellate Authority is disqualified to take decision on account of bias, affecting such decision.

(5) There can be no difficulty in applying the rule in connection of members of screening committee constituted for the purpose of compulsory retirement with necessary modification, if any member of screening committee is disqualified on account of bias in taking even advisory decision.

(6) However before setting-aside such decisions tainted with bias, it is necessary for the courts or tribunals to examine that as to whether the decision can be

saved by applying the doctrine of necessity in the manner indicated herein before as exception to the rule against bias affecting the decision but where there is no such statutory compulsion, the doctrine of necessity cannot be pressed into service.

22. Now testing the facts of the case, on the aforesaid settled legal position enunciated herein before, in the parameters of doctrine of necessity, it is to be seen that it is not in dispute that selection committee in question was constituted not under statutory rules under which except the respondent No. 4 no other officer could be appointed as member Secretary or member of the said selection committee or substituted by any other officer of the district concern, on account of his absence, the selection would have vitiated under the such statutory rules, or nomination of any other officer would have been contrary to such rules and there was statutory necessity in that sense that such statutory duty could not be discharged by other officer and in such situation selection would have been vitiated thereby, therefore, his participation in the aforesaid selection was indispensable under the statute, but it is not the case of respondents in the counter affidavit nor any such statutory rules have been pointed out and placed before us during the course of arguments.

23. Contrary to it, it is not in dispute that selection committee in question was constituted in view of certain Government order by the District Magistrate of the concerned district, which is not available on record, as either of the parties did not bring aforesaid Government order before the Court so as to demonstrate the constitution/composition of selection committee and impact of irregular constitution of selection committee on selection. The respondent No. 4, namely Dr. Ram Das father of respondent No. 5, was Chhetriya Ayurvedic Evam Unani Adhikari of concerned district Rampur, admittedly he was appointed as member secretary of the said selection committee and his son was appearing in the said selection. Besides, the District Magistrate as Chairman of said selection committee and respondent No. 4, three other officers of the concerned district were also admittedly nominated as members of said selection committee. The respondent No. 4 did neither withdraw himself altogether from the aforesaid selection nor left the selection and deliberations in interview and awarding marks in interview including preparation of select list to be done by remaining members of selection committee rather his participation in aforesaid stages of selection has not been disputed in counter affidavit filed on behalf of the respondents. In spite of the fact known to the respondent No. 4, that his son is appearing in the said selection/interview, he did not reclude himself from the aforesaid process of selection including interview and other subsequent stages and did not ask the competent authority to substitute him by nominating another officer in his place in case it was necessary under the aforesaid Government order. It is also not disputed that District Magistrate being Chairman of Selection Committee was absent in interview, the respondent No. 4 could easily ask him to be present in interview and in subsequent stages of process of selection instead of participating himself in the selection process but unfortunately it was not done in

the selection in question. Therefore, in such a situation, in our considered opinion, in absence of statutory compulsion the doctrine of necessity does not apply, hence cannot be pressed into service.

24. Now further, in such a fact and situation of the case, it is not necessary to prove that the respondent No. 4 was actually biased, either in favour of his son or against rival candidates of his son and bias has actually affected the process of selection. What is necessary to examine is closeness of relationship with the respondent No. 5 who was admittedly son of the respondent No. 4 and as to whether there was reasonable likelihood of bias, which arises on account of such close relationship, in such a facts and circumstances, what is further necessary to examine that as to whether the litigant, fully apprised of the facts and circumstances of the case would feel a serious apprehension of bias and could reasonably apprehended that a bias attributable to a member of selection committee might have operated against him, in such process of selection. Thus we are of the considered opinion that in given facts and circumstances of the case there is little scope for doubt to hold that the petitioner No. 2 could reasonably apprehend in their mind that bias attributable to the member of selection committee i.e. against the respondent no, 4 might have operated against him in said selection process and as such the selection of respondent No. 5 is tainted with bias, affecting the process of selection on post in question, in respect of Primary Health Centre, Meerapur, District Rampur, reserved for a candidate belonging to the scheduled caste for which the petitioner No. 2, being member of scheduled caste has applied and said selection could also not be saved by application of doctrine of necessity, which could be used as an exception to the rule against bias affecting the process of selection, therefore, the said selection in respect of aforesaid Primary Health Centre and pursuant appointment of respondent No. 5 is not sustainable in the eye of law and deserves to be quashed.

25. However in this connection it is necessary to make it clear that the selection committee has held the selection for 8 or 9 posts of Medical Officers to be appointed on contract basis in respect of 8 or 9 Primary Health Centres of District Rampur but since the Primary Health Centre, Meerapur, Rampur was reserved for members of scheduled caste and the petitioner No. 2 has applied only with regard to the aforesaid post and since we have quashed the selection and appointment of respondent No. 5 which pertains to Primary Health Centre, Meerapur, Rampur alone, therefore, our observations should be confined to the Primary Health Centre, Meerapur, Rampur alone, which is reserved for scheduled caste.

26. Now further question arises for consideration is that in given facts and circumstances of the case what relief can be granted in the writ petition? In this connection it is pointed out that it is not in dispute that the petitioner No. 2, respondent No. 5 and one Dr. Alok Kumar have applied for the said post but at the same time the petitioner No. 2 cannot be held selected or deemed selected in

absence of any such declaration made by the selection committee. In absence of necessary materials on record, we are not inclined to make such declaration. Therefore, we have no alternative except to direct the respondents for holding fresh selection in respect of aforesaid Primary Health Centre, Meerapur, Rampur within a period of three months from the date of production of certified copy of this order before District Magistrate, Rampur, In aforesaid selection the petitioner along with Dr. Alok Kumar shall also be permitted to appear at the strength of their original application form and other candidates shall be permitted to appear according to the rules or Government order after advertising the vacancy in daily newspapers having wide circulation. It is needless to say that vacancy must remain reserved for scheduled caste candidates,

27. So far as selection in respect of Primary Health Centre, Milak Khanam, District Rampur is concerned, it is stated in para 20 of the counter affidavit that the petitioner No. 1 is far below in the merit list and the selected candidate having better merit has already been appointed on the post in question. Since no material has been placed on record on the basis of which the selection in respect of the aforesaid Primary Health Centre can be found faulty by this Court, therefore, the relief sought in the writ petition in respect of aforesaid Primary Health Centre cannot be granted and we are not inclined to grant any relief to the petitioner No. 1 of the writ petition.

28. In view of the aforesaid observations and directions, the writ petition filed by petitioner No. 2 stands allowed. In the result the selection and appointment of the Respondent No. 5 on the post in question is hereby quashed. The respondent No. 5 is directed to vacate the post in question forthwith. However, in given facts and circumstances of the case, we are not inclined to direct recovery of salary paid to the respondent No. 5 on the post in question.

There shall be no order as to costs.