

(1999) 01 DEL CK 0016
In the Delhi High Court
Case No : C.W. No. 4665 of 1996

Jose Paul (Dr.)

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 09-01-1999

Acts Referred:

Citation : (1999) 77 DLT 653 : (1999) 48 DRJ 839

Hon'ble Judges : K. Ramamoorthy, J;Devinder Gupta, J

Bench : Division Bench

Advocate : Mr. C.S. Vaidyanathan, Mr. Ravinder Bhat and Mr. Hetu Arora, for the Appellant; Dr. A.M. Singhvi Sr. Advocate, Mr. A.K. Vali, Ms Indu Malhotra and Ms Kavita Wadia, for the Respondent

Judgement

K.RAMAMOORTHY, J.—The petitioner has challenged in the writ petition the appointment of the 5th respondent as the Chairman of the Jawaharlal Nehru Port Trust, New Bombay a category I major port in India. His grievance is that he possessed the requisite knowledge and experience for the appointment as a Chairman and he was denied consideration in accordance with law by respondents 1 to 4.

2. The petitioner has given his pen picture in the following terms:

CURRICULUM VITAE OF DR. JOSE PAUL, DEPUTY CHAIRMAN, JNPT, NEW BOMBAY
First Name & Surname : JOSE PAUL Family Name : Sankoorikal Date of Birth : 17.08.1941 Place of Birth : Narakal Ernakulam Distt Kerala State, INDIA
Religion : Christianity Roman Syrian Catholic Position held : a) Asstt. Traffic Manager Cochin Port Turst (196870) : b) Dy. Traffic Manager Cochin Port Trust (197075) : c) Traffic Manager New Mangalore Port Trust (197579) : d) Traffic Manager Tuticorin Port Trust (198289) : e) Addl. Traffic Manager, Cochin Port Trust (198289) : f) Deputy Chairman, New Chairman, New Mangalore Port Trust (15.04.1989 to 17.07.1994). : g) Deputy Chairman, Jawaharlal Nehru Port Trust New Bombay (18.07.1994 to 24.9.95) : h) Acting Chairman, Jawaharlal Nehru Port Trust, New Bombay (25.9.95 to 3.9.96) : i) Deputy Chairman, Jawaharlal

Nehru Port rust New Bombay (4.9.96 onwards). Academic : a) M.A (Political Science) Qualifications University of Mysore, Indian Passed in Second Class. : b) Ph.d in Port Management University of Wales, United Kingdom Passed with considerable credit Professional : a) Fellow of the British Qualifications Institute of Management (FBIM); b) Fellow of the Chartered Institute of Transport, London (FCM). Participation in : Selected by the Government advanced training of India and the British courses abroad. Council for participation in an advanced training course on "Port Management" held in Brighton, UK from September 1983 to Dec.83. Prizes received in : First Prize and the Aklyama International Award in the international Competition Essay Competition organized by the International Ass. of Ports and Harbours. Tokyo, Japan in 1986 Prize \$US 750. Silver Medal and a Scroll presented in person at the World Port Conference in Seoul, South Korea in May 1987. Publications in : a) Paper on "The Impact of International Port charges on shipping Journals/Newspapers freight rates" the Dock and Harbour Authority. Fox low Publications, London (March 1986). b) Paper on "Port Policy of Swedenacritical apparaaisal" The Dock and Harbour Authority, Fox low Publication, London (January 87). c) Akiyama prize winning paper under IAPH Award scheme "How could the efficiency of Indian Major Ports be improved? IAPH Journal, Japan (March 87). Publication in : 1. "Does India need a National Newspapers National Ports Authority"? Published in "Economic Times" dated 14.6.90 and "Marine Times" dt.30.6.90 and "Indian Ports Journal" dt. Jan-March 1990. 2)"How to manage resistance to change?" published in the "Economic Times" dated 16.09.1990. "Marine Times" dt. 08.12.1990 and "Indian Ports Journal" dated December 1990. Papers presented in : 1. Major Sea Ports their regional national influence on development and international of local, regional and Conference. national economy. 2. Privatisation in Indian Major Ports Its scope and applicability. 3.Cargo handling and labour deployment practices in India for container traffic Countries visited : Australia, Belgium, Canada, Federal Republic of Germa ny, France, Japan, Nether land, Philippines, Singa pore, South Korea, Sweden, Switzerland , USA, UK and U.A.E. : At all invitation of the Netherlands Minister of Transport, Public Works and Water Management, visited the Netherlands as a member of the Indian Delegation during November 06.12.1995. World Ports visited : Gothenburg, Malmo, Bremen Bremerhaven, London, Live poof, Dover, Felixstowe, Cardiff, New Port, Port Talbot, Swansea, Clyde, Southampton, New York, Incheon, Manila, Singapore Rotterdam, Amsterdam, Osaka Le Havre, Dunkirk, Hamburg Toronto, Montreal, Antwerp, Zeebrugge, Sydney, Melbourne, Port Zaid. : At the invitation of the Govt. of United Kingdom (Foreign & Commonwealth Office), visited various British Ports and other connected organisations in U.K. during the period March 05.30.1995. Consultant to the : 1.Prepared a policy paper National Planning on "Development and Impro Commission, New Delhi improvement of Indian Major Ports Policy issues and Perspectives" for the Planning Commission, Govt. of India, New Delhi (Aug. 1988). 2. Member of the Working Group on Ports constituted by the Planning Commission to draw up 8th Plan propo sal for the Ports sector in India. Adviser to the Union : For selection of senior Public Service positions in D. G.

Shipping Commission, New Delhi Ministry of Surface Transport/Ports and Shipping Sectors.

3. He has also referred to the fact that he received an Award in Japan and also relied upon the appreciation letters Annexures C & D which read as under:

Annexure C D.O. No. DS(PT)/1/JNPT/96 Government of India Ministry of Surface Transport 1, Parliament Street New Delhi 110 001. R.K. Srivastava Deputy Secretary (PT) Tel: 3715095 9.2.1996 Dear Sr. Jose Paul,

The performance of JNPT for handling a record quantum of urea in a day has been appreciated by the Minister (SFT) recently. It is hoped that the Port will maintain the same standard of performance in future also. This appreciation of M(SFT) may be communicated to all concerned.

With regards,

Yours sincerely,

Sd/

Annexure D

Minister

Surface Transport India

M. Rajasekara Murthy 24th April 1996

Dear Dr. Jose Paul,

I am happy to know that JNPT has achieved creditable performance during the year 199596 with a growth rate of 37.20% over the previous year. I am particularly please to read that the growth rate in handling containers is as high as 38.95%.

Your Port has achieved impressive growth rate in most of the performance indicators, thus showing a considerable improvement in productivity. The managerial and financial performance have been commendable.

I congratulate you and your colleague officers and employees of the Port for having achieved an excellent all round performance during the year 199596.

With regards,

Yours sincerely,

Sd/

4. On the 25th of September 1995, the post of Chairman JN Port fell vacant. The petitioner was functioning as Deputy Chairman. He accordingly was appointed as Acting Chairman with effect from 25.09.1995. The petitioner's claim is that having regard to his expertise in the field of Port Management and his long

experience, in the light of the guidelines issued by the Government of India on 22.12.1987, he should have been considered for appointment as Chairman.

5. The learned Senior Counsel for the petitioner Mr. C.S. Vaidyanathan formulated his points as under:

I. The policy issued by the Government of India had not been followed while considering the officers who come within the zone of Consideration. The policy would lay down the criteria for officers for being considered.

II. The Selection Committee which met on 23.02.1996 and 8.05.1996 had proceeded on totally irrelevant considerations and had expressed its view without any justifiable reasons.

III. With a view to defeating the rights of the petitioner for being appointed as the Chairman of the Jawaharlal Nehru Port Trust a device was evolved seeking to upgrade the post of the Chairman and taking the view that it could be filled up by only an officer of the rank of an Additional Secretary or Secretary to the Government of India.

IV. Even assuming that the manner of approach by the respondents in upgrading the post could be set to be valid, the respondents had not followed the procedure prescribed by getting the approval of the Appointment Committee of the Cabinet and the Government's Transaction of Business Rules had not been followed and there had been no meeting of the minds to consider the appointment of the 5th respondent in accordance with law.

V. The respondent No.3 Mr. T. S. R. Subramanian and Respondent No.4 Mr. Satish Chandra, Principal Secretary abused their power and acted in a manner not authorised by law and Therefore, the whole procedure adopted by them in appointing the 5th respondent as the Chairman of the Jawaharlal Nehru Port Trust is vitiated by malice in law.

6. Dr. A.M. Singhvi, the learned senior counsel for the Union of India submitted that the Government of India had acted in accordance with law, that the claim of the petitioner was considered in accordance with the guidelines and the upgradation was made taking into account relevant aspects. With reference to the charge of the petitioner that the Appointment Committee of the Cabinet had not considered the matter at all and there had been no meeting of the minds, the learned senior counsel submitted that the matter was placed before the Appointment Committee of the Cabinet and the Appointment Committee of the Cabinet had approved the appointment of the 5th respondent and it is only thereafter, necessary notification was issued under the Major Port Trust Act, 1962.

7. We now go to the point relating to the adherence to the guidelines in selecting the suitable officer for the post of the Chairman Jawaharlal Nehru Port Trust. The policy was issued by the Government of India on 22.12.1987. The same is as under:

GOVERNMENT OF INDIA

MINISTRY OF TRANSPORT>br> DEPTT. OF SURFACE TRANSPORT

(PORTS WING)

No.A12022/21/86PEI

New Delhi the 22nd December, 87

To

Shri

Chairman,

Sub: Appointment of Port Officers as

Chairman/Deputy Chairman in Port

Trusts Policy regarding.

Sir,

I am directed to say that u/s 3(1)(a) & (b) of Major Port Trusts Act, 1963, the Central Government have been vested with the powers to make appointments to the posts of Chairman and Deputy Chairman in Major Port Trusts. Central Government in exercise of the powers conferred upon them, fill up these posts either by appointing officers drawn from IAS/other Central Services or by Officers drawn from Port Services, depending upon the suitability of such candidates and operational requirements of Ports. It has been the policy of Department to consider suitable port officials also as and when vacancies of Port Chairman and Deputy Chairman arise. However, no definite guidelines have been set in this regard and Government consider it necessary and desirable that suitable guidelines be formulated in this regard. After careful consideration, the Central Government have been pleased to decide that the guidelines as indicated below may be followed in this regard:

A) Appointment to the post of Chairman.

i) For this purpose the posts of Chairman at various Ports Trusts may be categorised as:

a) Category I : Bombay, Calcutta, Nhava Sheva b) Category II : Madras, Cochin, Visakhapatnam c) Category III : Kandla, Mormugao, Paradip, New Mangalore and Tuticorin. ii) In order to qualify for being considered for the post of Chairman in Major Port Trusts, it is desirable that the person should possess the following:

a) General managerial ability;

b) Experience and talent in men management in a highly unionised environment;

c) Experience and ability in financial management;

d) Ability to formulate and implement development plans and also to prepare broad perspective plan for development of a Port:

e) Ability for coordination with various agencies such as State Government, the law and order agencies, different agencies of Central Government such as Customs, Railways, Labour Ministry etc:

f) Experience and ability in personnel management and understanding of establishment matters.

iii) When the vacancy in the post of Chairman occurs, simultaneously with the obtaining of a panel of Central Government officers from the Establishment Officer, Department of Personnel and Training, action may be taken to consider eligible Port Officers serving as Deputy Chairman in Major Port Trusts. For this purpose, all Deputy Chairmen (Port Officers), irrespective of their pay scales, may be considered eligible for consideration provided that they have put in a minimum 2 years of service as Deputy Chairman and they can have a minimum tenure of two years after being appointed as Chairman.

iv) The suitability of Port Officers working as Deputy Chairman for a post of Chairman will be evaluated by a Committee constituted by the Department of Surface Transport for the purpose. The selection Committee will consist of Secretary (SFT), Additional Secretary (Ports), Chairman, IPA, one Port Chairman to be selected in rotation and one more member to be nominated from one of the professional management institutes or PFSSB members. The Committee may also interview the Deputy Chairman if considered necessary. They will arrange the panel for eligibility of Deputy Chairman according to various categories of Chairman post.

v) A Chairman in a lower category Port Trust may be considered for appointment as Chairman in a higher category provided he has put in a minimum of two years of service in the lower category and will have a minimum tenure of two years if appointed in the higher category.

B) Appointment to the post of Deputy Chairman.

For this purpose the posts of Deputy Chairman at various ports may be categorised as:

a) Category I : Posts having present pay scale of Rs.3600-100-4000. b) Category II : Posts having present pay scale of Rs.2550-100-3450. c) Category III : Posts having present pay scale of Rs.2450-100-3350. Inserted vide MOST letter No.A12022/21/86PEI dated 15th July 1996.

ii) A Deputy Chairman in a lower category (Category II or Category III) may be considered for appointment as a Deputy Chairman in a higher category provided he has put in 2 years of service in the lower category and will have a minimum tenure of 2 years if appointed in the higher category.

iii) As a general principle, all Heads of Departments in the three pay scales

immediately lower to that of Deputy Chairman may be considered as coming within the zone of selection for the purpose of these guidelines, the pay scales prevailing in all ports will be taken into account in deciding which are the three scales falling within the zone of consideration.

iv) While considering the eligibilities of various officers, incumbents of certain highly specialised posts such as Chief Medical Officers and Chief Law Officers may not be considered.

v) Heads of Departments before becoming eligible for consideration for the post of Deputy Chairman should have a minimum of five years of service as Heads of Departments and if selected should have a minimum tenure of two years as Deputy Chairman.

vi) The evaluation of suitability of such officers for elevation to the post of Deputy Chairman/higher category of Deputy Chairman and their consideration for these posts will be in accordance with the manner outlined in para (a) (iv) of this letter for the post of Deputy Chairman, a panel of names valid for the year will be prepared on the basis of evaluation of CRs and interviews. The panel will be valid for one year and as and when vacancies arise the officers on the panel will be considered Along with officers in the panel obtained from Deptt. of Personnel before making a recommendation to A.C.C.

The above guidelines may please be brought to the notice of all concerned. In order to enable this department to draw up the panel of Port Officers to be considered for the posts of Chairman and Deputy Chairman, in the middle of November each year Port Trusts may forward the names of eligible Deputy Chairman/Heads of Departments who are willing to be considered for the post of Chairman/Deputy Chairman Along with their up to-date biodata, performance reviews and ACRs for consideration of this Department.

3. Receipt of this letter may please be acknowledged.

Sd/

(P.M. ABRAHAM)

ADDL. SECRETARY TO THE

GOVT. OF INDIA.

8. The policy refers to three categories of posts. It also refers to the qualification one must possess before one is considered for being appointed as Chairman of a Port. The period fixed as two years tenure to act as Chairman is also challenged. The first respondent has to consider the case of the Port Officers of the Central Government depending upon the suitability. The policy speaks of a method for preparing a panel of Central Government Officers and for finding out the suitability of Port Officers. As noticed above, the post of Chairman JNPT fell vacant on 25.9.1995. No steps were taken to fill up the vacancy though the petitioner was asked to act as the Chairman. The petitioner approached the

Secretary, Ministry of Surface Transport and on the representation made by the petitioner the Secretary had made a note thereon on the 19th of October 1995 in the following terms:

"Given by Dr. Jose Paul Chairman in charge. Pl. examine from all angles whether he is eligible to be considered for the post of Chairman JNPT or if he not eligible, whether for any other major as its Chairman."

inspire of such a direction by the Secretary, nothing was done by the first respondent to consider the case of the Port Officers. In paragraph 5 of the writ petition, the petitioner has stated :

"In the meanwhile, the Petitioner learnt that the Ministry of Surface Transport obtained a panel of Indian Administrative Service Officers from the Establishment Officer of the Department of Personnel which consisted of three names and that the name of Shri VM Lal, an IAS officer of Maharashtra cadre of 1970 batch was placed as No. 1 in the list so supplied by the Establishment Officer. When this panel with the name of Shri VM Lal was submitted to the Minister for Surface Transport for approval, the same was returned by the Minister asking the Ministry to submit the second panel consisting of those port officers who are already working as Dy. Chairmen for his consideration. The Petitioner could learn further that the Hon''ble Minister appeared to have clearly suggested that the country's most modern and hitech major port, namely JN Port, would need a professional port manager and that the Ministry should prepare the panel of port officers and submit the same for approval by the Minister so that one of the port officers could be recommended for securing the approval of the Appointments Committee of the Cabinet. The petitioner further learnt that on the basis of the directive given by the Hon''ble Minister, the Ministry of Surface Transport had written in the second half of November 1995 that the Ministry of Surface Transport was considering the names of suitable port officers for appointment as Chairman, JNPT and that it would take some time for the Ministry to finalise its recommendations and as soon as the recommendations are finalised the name of a suitable port officer would be intimated."

In answer to this in the counter affidavit the first respondent has stated:

"There was never any suggestion from the Hon''ble Minister that JNPT would need a professional Port Manager. The Minister had only recorded that the Govt. may initiate action to consider port officers for the post of Chairman, JNPT as per the guidelines issued by the Ministry. Accordingly, action was initiated by the Government to constitute a selection committee which is required to consider the candidature of all the eligible port officers serving as Dy. Chairman and thereafter prepare a panel of officers considered suitable for appointment as Chairman. This panel will then be considered by the Ministry along with the panel of Central Government officers received from the Deptt. of Personnel & Training. As the whole exercise will necessarily involve some time, it was decided to explain the position to the Deptt. of Personnel & Training. Accordingly, the DOP&T

was informed that the Ministry was in the process of finalising a panel of suitable names for the post of Chairman, JNPT and as soon as the panel is finalised, a suitable recommendation would be sent based on this panel and the panel of officers received from DOP&T."

The averments in paragraph 5 of the writ petition are not at all met by the first respondent.

9. On 31.10.1995 the incumbent working as Secretary, Ministry of Surface Transport retired from service.

10. It is clear that towards the end of 1995 the Ministry of Surface Transport had obtained a panel of Indian Administrative Service Officers from the Establishment Officer of the Department of Personnel wherein the name of Shri V.M. Lal was placed as No. 1. On the 23rd of January 1996 the petitioner met the Minister of Surface Transport and explained the position. On 24th of January 1996 the Establishment Officer, Department of Personnel had sent a wireless message to the Chief Secretary, Government of Maharashtra, in the following terms :

"TO THE CHIEF SECY. GOVT. OF MAHARASHTRA BOMBAY FM. J.A. CHOWDHURY E.O. AND ADDITIONAL SECY. DEPT. OF PERSONNEL AND TRG NEW DELHI. == NO. 1/4/95 EO(SM.i) 230196 UNC == SHARI V.M. LAL, IAS (MH:70) HAS BEEN APPROVED FOR APPOINTMENT AS CHAIRMAN JAWAHARLAL NEHRU PORT TRUST UNDER THE MINISTRY OF SUR FACE TRANSPORT IN THE SCALE OF PAY OF RS. 59006700 (.) GRATEFUL IF HE IS RELIEVED IMMEDIATELY TO TAKE UP HIS NEW ASSIGNMENT AT THE CENTRE(.) == THI.. 1145/24 ST BY R.P. SINGH DELIVERED ON 24JAN96 13.22 HRS."

On that day the Ministry of Surface Transport sent a letter to the Establishment Officers and Addl. Secretary Department of Personnel and Training stating:

To,

The Estt. Officer & Addl. Secretary,

Deptt. Of Personnel & Training,

North Block,

New Delhi.

Subject : Appointment to the post of Chairman, Jawaharlal Nehru Port Trust Regarding

Sir,

Kindly refer to your Office letter No. 1/4/95/EC/SM.I dated 23.1.1996 regarding appointment of Shri V.M. Lal, IAS (Mh:70)ss as Chairman, Jawaharlal Nehru Port Trust. In this connection, I am directed to inform you that as per clause (a) of Sub-Section (1) of Section 3 of the Major Port Trust Act, 1963, a notification is to be issued by the Central Government for appointing an Officer

as Chairman of a Port Trust. The Ministry of Surface Transport is to issue this notification under the provisions of the said Act. You are, Therefore, requested not to relieve Shri V.M. Lal until this Notification is issued by the Ministry.

Yours faithfully,

Sd/

(P. KALYANASUNDARAM)

Under Secretary to the Govt.

of India

Copy to the Chief Secretary, Govt. of Maharashtra, Bombay with reference to E.O. Office Wireless Message No. 1.4.95/EO(SM.I) dated 23.1.1996 for similar action."

11. When specific averments have been made by the petitioner in paragraphs 9 and 10 of the writ petition, the first respondent without giving any details sought to give an Explanation. In paragraphs 9 and 10 the petitioner had stated :

"9. While the Petitioner was making genuine efforts to make the Ministry agree to evaluate his claims for appointment as Chair man, Jawaharlal Nehru Port Trust, it was reliably learnt that the former Secretary, Surface Transport had forwarded the name of Shri V.M. Lal, IAS officer of Maharashtra Cadre for appointment as Chairman JNPT without the approval of the then Minister for Surface Transport and a parallel move was made by certain vested interests in the Department of Personnel and in the Prime Minister's office to get the above mentioned proposal approved by the Appointments Committee of the Cabinet. This was apparently on the plea that the post of Chairman, JNPT is a post reserved for the Indian Administrative Service Officers, that the post is equated to a Joint Secretary to the Govt. of India and that the Ministry of Surface Transport has been intentionally delaying regular appointment to the post of Chairman, JNPT and, Therefore, an Officer of the Indian Administrative Service recommended by the Civil Services Board may be appointed as Chairman, Jawaharlal Nehru Port Trust. It is, Therefore, learnt that while the Petitioner was making efforts to get his claim evaluated by the Committee, the parallel move initiated by vested interests had gone to such an extent as to get the clearance of the Appointments Committee of the Cabinet without the recommendation of the concerned Minister for Surface Transport. The Petitioner found to his shock and dismay that another Officer from a different stream of Service was being considered for appointment even before his claims are duly evaluated by a Selection Committee.

10. The Petitioner then met the Minister for Surface Transport in the evening of 23rd January 1996 and represented against these moves since the process of selection and empanelment of Port officers in accordance with the guidelines issued by the Ministry of Surface Transport had not been completed in

accordance with the directions of the Hon''ble Minister, and the panel containing the names of Port Officers were yet to be submitted for consideration as required under the guidelines. In the circumstances, the Petitioner submitted before the Minister that no notification appointing any person as Chairman, JNPT under the relevant provisions of the Major Port Trusts Act may be issued until the petitioner's claims are properly evaluated by the Selection Committee constituted for the purpose. The Hon''ble Minister issued necessary directions to the Ministry of Surface Transport that the establishment officer and the Additional Secretary in the Department of Personnel & Training to be informed immediately by an urgent communication with a copy to the Chief Secretary, Government of Maharashtra that Shri V.M. Lal should not be relieved from his present post until a notification under the provisions of the Major Port Trusts Act is issued regarding his appointment as Chairman, Jawaharlal Nehru Port Trust by the Ministry of ,Surface Transport in due course. Copies of the communication received from Shri J.A. Choudhary, Establishment officer in the Department of Personnel & Training, and a reply by the Ministry of Surface Transport dated 24th January 1996 to the Chief Secretary, Government of Maharashtra on the subject are produced and marked as Annexure I & J. These copies were handed over to the Petitioner in person during his visit to Delhi at that time."

In reply to para 9 in the counter affidavit, it is stated :

"Para 9 as stated is wrong and denied. it is not correct to say that the former Secretary (SFT) had forwarded the name of Shri V.M. Lal for the appointment as Chairman, JNPT and this did not have the approval of the Minister. It is a figment of imagination on the part of petitioner that certain vested interests in the Government plotted against him to get the approval of the Competent authority for appointing Shri V. M. Lal as Chairman, JNPT. It is, however, a fact that orders of the Competent authority were received approving the appointment of Shri V.M. Lal as Chairman, JNPT on 23rd January 1996."

13. It is inexplicable as to how could the first respondent say when it is admitted that the Ministry of Surface Transport did not approve the name of Shri V.M. Lal that it is, however, a fact that the orders of the Competent Authority were received approving the appointment of Shri V.M. Lal as Chairman, JNPT on 23.1.1996. No material has been filed or placed before this Court. No details are given in the counter. If the Competent Authority had approved the name of Mr. V.M. Lal then it is a clear admission of violation of the policy dated 22.12.1987.

14. It is a little disturbing to note that in para 10 of the counter the first respondent had contradicted itself to what is stated in paragraph 9 of the counter.

15. If the appointment of Shri V.M. Lal was made by the Competent Authority the same can be dealt with by the same very Competent Authority but it is stated in paragraph 10 of the counter :

"As the Respondent No. 1 was considering separately the preparatory corporation of a panel of port officers for the post of Chairman, it decided to defer the decision

on the posting of Shri V.M. Lal until the panel was made available and accordingly a reply was sent to the Deptt. of Personnel, Govt. of India."

16. The first respondent had decided that it was not necessary to give details as to when first respondent started the process of considering the preparation of a panel of Port Officers and it was decided to defer the decision of the post of Shri V.M. Lal. The first respondent had proceeded to deal with the matter on the premise that it was not answerable to anybody under the constitution. No file was produced by the first respondent before Court to substantiate its case. Therefore, the inference that from 25.9.1995 up to 24.1.1996 the case of Port Officers was not considered is irresistible.

17. On 9.2.1996 the officer appointed to take over as a Secretary, Ministry of Surface Transport took over charge. On the 12th of February 1996 the petitioner met the Secretary and requested him that his claims may be directed to be considered as per the policy dated 22.12.1987. It is not disputed that the Selection Committee met under the Chairmanship of Mr. S. Sundar, Secretary, Ministry of Surface Transport on 23.2.1996. The Hon'ble Minister, Surface Transport had directed the Selection Committee to meet again and consider, the claims of all eligible Port Officers for empanelment. It is the specific case of the petitioner that Shri K. Nalinakshan, JNPT had mentioned in the Confidential Report something prejudicing the rights of the petitioner and he had sent the same on coming to know that the Selection Committee was going to meet on 23.2.1996. The said officer (Chairman JNPT Shri K. Nalinakshan) had acted in an arbitrary fashion. The relevant files were not produced by the first respondent. The answer to the case of the petitioner is that the said officer has not been impleaded as a party to the writ petition and, Therefore, the allegations against him cannot be gone into in this case. The first respondent has completely misunderstood the legal position. The complaint by the petitioner was that the Chairman while recording the ACR had acted without any basis. The records will show the actual position. The officer in these circumstances need not have been impleaded as a party. Respondent No. 1 ought to have shown the record, in case the stand of the petitioner was not correct. It was not done. The petitioner had recounted the facts in this way:

"There is material evidence to prove the prejudice, bias and unfair treatment shown to the Petitioner by the former Chairman, Shri K. Nalinakshan. The Petitioner had prepared his self-assessment for the period 1994-95 and submitted to Shri K. Nalinakshan on 10th July 1995 when he was holding the Office of Chairman, JNPT. He could have completed his appraisal and sent the Performance Report of the Petitioner to the Ministry for review and acceptance within one month. The normal period for review of the report is one month and in fairness, one would expect that he would send the report by 10th August 1995. However, Shri Nalinakshan appears to have assessed the report on 22nd September 1995 and sent it to the Ministry for review and acceptance, i.e., after a period of 2 months and 10 days. There is evidence to suggest that the date given as 22nd

September 1995 has been deliberately predated as Shri Nalinakshan wanted to wait and see whether he would get extension or not and in the event of his not getting extension and the Petitioner taking over charge he could suitably manipulate the assessment of the Petitioner's performance so as to damage the Petitioner's career prospects. When the Petitioner took over as Acting Chairman, JN Port, the Petitioner enquired with the Private Secretary to the Chairman whether the Petitioner's ACR for 1994-95 was assessed by the former Chairman and sent to the Ministry for review or not. The PS to Chairman confirmed that it was still to be assessed and remained with the former Chairman. The former Chairman after handing over charge of the office of the Chairman JNPT came after a few days and remained in the Raheja Centre office of the JN Port in the Bombay city and wanted the Private Secretary to the Chairman to assist him in clearing pending files and other official business. The Private Secretary to the Chairman informed me that the former Chairman required Secretarial assistance and accordingly the PS took the Petitioner's permission to assist the former Chairman in clearance of the pending work. It would now become clear that Shri K. Nalinakshan did not make the assessment of the Petitioner's ACRs before the 25th of September, 1995 i.e. the date on which he handed over charge. That he actually made his assessment presumably on 3rd or 4th October, 1995. That he back dated the assessment date as 22nd September, 1995. That he prepared the forwarding letter to the Ministry forwarding the ACR of the Petitioner as 22nd September 1995. All these exercises were carried out with a view to making it appear that he had completed the Petitioner's assessment of the ACR before he handed over charge. But the ACRs were sent by Speed Post to the Joint Secretary (Ports) and the Registration receipt clearly indicated that the Report was sent on 4th October, 1995. The Private Secretary to the then Chairman who is also the Private Secretary to the Petitioner confirmed that it was written on 3rd October, 1995 and dispatched on 4th October, 1995. A copy of the forwarding letter written by the former Chairman to the Joint Secretary (Ports) of the Ministry of Surface Transport with the dated remarks of the Private Secretary and a copy of the postal receipt dated 4th October 1995, are given as Annexure L & M."

18. The grading given by Shri K. Nalinakshan was set aside. The Accepting Authority gave the grading very good. These facts are not at all disputed in the counter affidavit.

19. The first respondent again sought to appoint Shri V.M. Lal. That was again stopped. These facts are also not controverted. It is interesting to note what the first respondent had stated in the counter with reference to this :

"The averments made in this para are denied as there was nothing on record to say that the then Cabinet Secretary directed that issue of the notification be kept pending. However it was the decision of the Respondent No. 1 to defer the implementation of the appointment of Shri V.M. Lal till the claims of the port officers are fully examined by the duly constituted Selection Committee."

20. The petitioner's performance was assessed for the year 1995-96 ended on 31.3.1996. The Hon'ble Minister, Surface Transport had given the grading "excellent".

21. The general election in the country were over in May 1996. On the 1st of June 1996 the new Government took charge. Mr. T.G. Venkataraman assumed charge as Minister for Surface Transport. It appears that the Ministry had submitted some proposals to the Minister and they are :

"(a) the post of Chairman, JN Port should be upgraded to that of an Additional Secretary to the Government of India.

(b) that the Petitioner was not senior enough to be considered for appointment as Chairman, JNPT.

(c) In the event of the Government not agreeing to upgrade the post to that of an additional Secretary to the Government of India, the case of Shri V.M. Lal to be considered for appointment as Chairman, JNPT in the rank of a Joint Secretary to the Government of India."

The petitioner has stated that Minister for Surface Transport appears to have agreed to consider the upgradation of post but he was not in favor of considering Mr. V.M. Lal for being appointed as the Chairman, JNPT. The reply by the respondent is :

"It is a fact that the Minister for Surface Transport had agreed for processing the case for upgradation of the post of Chairman, JNPT from Jt. Secretary level to Addl. Secretary level. Naturally, the question considering Shri V. M. Lal for the post who is a Jt. Secretary level officer, did not arise. The Minister had also agreed that the petitioner may be considered for the post of Chairman only for the vacancies that were likely to arise in Category III ports."

22. If what is stated by first respondent is true there was no need for the consideration of the case of the petitioner because the fact that the petitioner was well suited for being appointed as Chairman for category 3 was not subject matter of any dispute at all.

23. While considering these matters, what happened on 7.5.1996 has to be noticed. On that day, it is common ground that a group of IAS Officers, christened as Core Group of Secretaries of infrastructure had recommended:

"Ministry of Surface Transport would submit a proposal indicating the procedure that may be adopted to develop one of the major ports as for example, the JNPT as a model port with facilities and services comparable to the best ports in the world to act as a demonstration for changing the working of the Indian ports."

24. According to the petitioner, he met the Hon'ble Minister and the Cabinet Secretary and it did not bring about any desired result.

25. On 2.9.1996 the Secretariat of the A.C.C. sent the following communication

to all concerned :

"No.1/10/96EO(SM.1) Government of India Secretariat of the Appointments Committee of the Cabinet Ministry of Personnel, Public grievances and Pensions Department of Personnel and Training.

...

New Delhi, the 2nd September,1996

The Appointment Committee of the Cabinet has approved the appointment of Shri R. Vasudevan, IAS (mi:64), as Chairman, Jawaharlal Nehru Port Trust, in the rank and pay of secretary to the Government of India.

2. The aforesaid appointment of Shri R. Vasudevan will take effect from the date on which he assumes charge of the post."

26. On the 14th of October 1996 the Govt. of India, Ministry of Surface Transport, Ports Wing, issued the following Notification u/s 3 of the Major Port Trusts Act, 1963 :

"NOTIFICATION

In exercise of the powers conferred by Clause (a) of Subsection (1) of Section 3 of the Major Port Trusts Act, 1963 (38 of 1963), the Central Government appoints Shri R. Vasudevan, IAS (MH:64) as Chairman, Jawaharlal Nehru Port Trust in the rank and pay of Secretary to the Govt. of India w.e.f. 04.09.1996."

27. Mr. C.S. Vaidyanathan, the learned senior counsel for the petitioner submitted that Mr. K. Nalinakshan, the Chairman, JNPT had acted in an arbitrary fashion and the Selection Committee while considering the case of the petitioner on 8.5.1996 had not acted in accordance with the principles of fair play and justice and had acted on extraneous considerations. Their decision as such is vitiated and is violative of Articles 14 and 16 of the Constitution of India. The learned senior counsel relied upon the judgment of the Supreme Court in *Amar Kant Choudhary Vs. State of Bihar and Others*, . The facts as noticed by the Supreme Court are thus :

"The appellant was directly recruited and appointed as a Deputy Superintendent of Police in the Police Department of the State of Bihar in the year 1964. In 1973 he was eligible to be considered for appointment as a member of the Indian Police Service under the provisions of the Indian Police Service (Recruitment) Rules, 1954 (hereinafter referred to as "the Rules") read with the Indian Police Service (Appointment by Promotion) Regulations, 1955 (hereinafter referred to as "the Regulations") framed under sub-rule (1) of Rule 9 of the Rules. His case was placed before the Committee constituted under Regulation 4 of the Regulations for the purpose of preparation of the list of suitable officers for promotion to the Indian Police Service Cadre of the State of Bihar in 1973, 1974, 1975 and 1976. In the year 1973, 1974 and 1975, he could not be included in the select list as he was junior to those who were included in the select list. In

the year 1976 his name was not included in the select list as there was an adverse entry in his confidential roll of 197374. the reasons given by the Committee for superseding the appellant based on the confidential roll were these:

"Delayed disposal of pending papers and supervision notes. Inadequate control over office, judgment, initiative, sense of responsibility and management reported to be just fair. Censured by State Government order dated 20th October, 1975".

28. The Selection Committee must have allowed itself to be forwarded to act on the confidential report sent by Mr. K. Nalinakshan. Dealing with the similar situation, the Supreme Court observed in that case:

The true legal position governing such cases is laid down by this court in *Gurdial Singh Fijji Vs. State of Punjab and Others*, , which was a case arising under the Indian Administrative Service (Appointment by Promotion) Regulation, 1955 Regulations applicable to the Indian Police Service. In the above case Chandrachud C.J. has observed thus: (atp 162627 of AIR):

"The principle is well settled that in accordance with the rules of natural justice, an adverse report in a confidential roll cannot be acted upon to deny promotional opportunities unless it is communicated to the person concerned so that he has an opportunity to improve his work and conduct or to explain the circumstances leading to the report. Such an opportunity is not an empty formality, its object, partially, being to enable the superior authorities to decide on a consideration of the explanation offered by the person concerned, whether the adverse report is justified. Unfortunately, for one reason or another, not arising out of any fault on the part of the appellant, though the adverse report was communicated to him, the government has not been able to consider his Explanation and decide whether the report was justified".

29. The first respondent had not placed the relevant materials before this Court. We are not in a position to assess the situation. We cannot speculate in the absence of proper pleadings and necessary materials whether the case of the petitioner was considered in the light of all relevant facts.

30. It is not disputed by the first respondent that the policy issued on 22.12.1987 is applicable to the appointment in question. Dealing with the scope of a policy of a like nature, the Supreme Court of India had held in *Dr. Amarjit Singh Ahluwalia Vs. The State of Punjab and Others*, :

"The sweep of Articles 14 and 16 is wide and pervasive. These two articles embody the principle of rationality and they are intended to strike against arbitrary and discriminatory action taken by the `State". Where the State Government departs from a principle of seniority laid down by it, albeit by administrative instructions, and the departure is without reason and arbitrary, it would directly infringe the guarantee of equality under Articles 14 and 16. It is

interesting to notice that in the United States it is now well settled that an executive agency must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. vide the judgment of Mr. Justice Frankfurter in *Vitaralli Vs. Seaton* (1959) 359 US 535 : 3 Law Ed 1012. This view is of course not based on the equality clause of the United States Constitution and it is evolved as a rule of administrative law. But the principle is the same, namely, that arbitrariness should be eliminated in State action. If, Therefore, we find that the order dated 4th December, 1967 gave an artificial date from which the continuous service of respondents Nos 3 to 19 shall be deemed to have commenced, though in fact and in truth their continuous service commenced from different dates and it was thus in contravention of the principle of seniority laid down in clause (2) (ii) of the memorandum dated 25th October, 1965, it would have to be held to be void as being violative of Articles 14 and 16."

The principles were reiterated by the Supreme Court in *Narendra Kumar Maheshwari Vs. Union of India (UOI) and Others*, . The Supreme Court observed:

"Shri Ganesh submitted that the CCI is duty bound to act in accordance with the guidelines which lay down the principles regulating the sanction of capital issues. This is especially so because the guidelines had been published. It was submitted that the investing public is, Therefore, entitled to proceed on the basis that the CCI would act in conformity with the guidelines and would enforce them while sanctioning a particular capital issue. It was submitted that it is not permissible to deviate from the guidelines. In this connection, reliance was placed by him as well as by Shri Haksar, appearing for the petitioner in T.C. No. 161 of 1988, upon the observations of this Court in *Ramana Dayaram Shetty Vs. International Airport Authority of India* where this Court observed that it must be taken to be the law that where the government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or license or granting other forms of largesse, the government could not act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norm which is not arbitrary, irrational or in irrelevant. We accept the position that the power of discretion of the government in the matter of grant of largesse including award of jobs, contracts, quotas, licences etc. must be confirmed and structured by rational, relevant and non discriminatory standard or norm and if the government departed from such standard or norm in any particular case or cases, the action of the government would be liable to be struck down, unless it could be shown by the government that the departure was not arbitrary but was based on some valid principle which in itself was not irrational, irrelevant, unreasonable or discriminatory. Shri Haksar drew our attention to the observations of this Court in the case of *Motilal Padampat Sugar Mills Co.(P) Ltd. Vs. State of Uttar Pradesh* where this reiterated that claim of change of policy would not be sufficient to exonerate the government from the liability; the government would have to show what precisely was the changed policy and also its reason and justification so that the

court could judge for itself which way the public interest lay and what the equity of the case demanded. It was contended by Shri Haksar that there were departures from the guidelines and there was no indication as to why such departures had been made.

The Supreme Court further observed :

"It may, however, be stated that being not statutory in character, these guidelines are not enforceable. See the observations of this Court in *G.J. Fernandez Vs. State of Mysore* (Also see *R. Abdullah Rowther Vs. State Transport Appellate Tribunal, Dy. Asstt. Iron & Steel Controller Vs. L. Manekchand, Proprietor, Andhra Industrial Works Vs. CCI, K.M. Shanmugam Vs. S.R.V.S. Pvt. Ltd.*). A policy is not law. A statement of policy is not a prescription of binding criterion. In this connection, reference may be made to the observations of *Stagnate Investments Ltd. Vs. Norwich Corpn.* Also the observations in *British Oxygen Co. Vs. Board of Trade*. See also *Foulest Administrative Law*, 6th edn. at pp. 181184. In *R. v. Secretary of State, ex parte Khan* the court held that a circular or self made rule can become enforceable on the application of persons if it was shown that it had created legitimate expectation in their minds that the authority would abide by such a policy/guideline. However, the doctrine of legitimate expectation applies only when a person had been given reason to believe that the State will abide by the certain policy or guidelines on the basis of which such applicant might have been led to take certain actions. This doctrine is akin to the doctrine of promissory estoppel. See also the observations of Lord Wilberforce in *IRC Vs. National Federation*. However, it has to be borne in mind that the guidelines on which the petitioners have relied are not statutory in character. These guidelines are not judicially enforceable. The competent authority might depart from these guidelines where the proper exercise of his discretion so warrants. In the present case, the statute provided that rules can be made by the Central Government only. Furthermore, according to Section 6(2) of the Act, the competent authority has the power and jurisdiction to condone any deviation from even the statutory requirements prescribed u/s 3 and 4 of the Act. In *Regina V. Preston Supplementary* it had been held that the Act should be administered with as little technicality as possible. Judicial review of these matters, though can always be made where there was arbitrariness and mala fide and where the purpose of an authority in exercising its statutory power and that of legislature in conferring the powers are demonstrably at variance, should be exercised cautiously and soberly.

We would also like to refer to one more aspect of the enforce ability of the guidelines by persons in the position of the petitioners in these cases. Guidelines are issued by Governments and statutory authorities in various types of situations. Where such guidelines are intended to clarify or implement the conditions are requirements precedent to the exercise of certain rights conferred in favor of citizens or persons and a deviation there from directly affects the rights so vested the persons whose rights are affected have a clear right to approach

the court for relief. Sometimes guidelines control the choice of persons competing with one another for the grant of benefits, largesse or favours and, if the guidelines are departed from without rhyme or reason, an arbitrary discrimination may result which may call for judicial review. In some other instances (as in the *Ramana Shetty* case), the guidelines may prescribe certain standards or norms for the grant of certain benefits and a relaxation of, or departure from, the norms may affect persons, not directly but indirectly, in the sense that though they did not seek the benefit or privilege as they were not eligible for it on the basis of the announced norms, they might also have entered the fray had the relaxed guidelines been made known. In other words, they would have been potential competitors in case any relaxation or departure were to be made. In a case of the present type, however, the guidelines operate in a totally different field. The guidelines do not affect or regulate the right of any person other than the company applying for consent. The manner of application of these guidelines, whether strict or lax, does not either directly or indirectly, affect the rights or potential rights of any others or deprive them, directly or indirectly, of any advantages or benefits to which they were or would have been entitled. In this context, there is only a very limited scope for judicial review on the ground that the guidelines have not been followed or have been deviated from. Any member of the public can perhaps claim that such of the guidelines as impose controls intended to safeguard the interests of members of the public investing in such public issues should be strictly enforced and not departed from; departure therefrom will take away the protection provided to them. The scope for such challenge will necessarily be very narrow and restricted and will depend to a considerable extent on the nature and extent of the deviation. For instance, if debentures were issued which provide no security at all or if the debt-equity ratio is 6000:1 (as alleged) as against the permissible 2:1 (or thereabouts) a court may be persuaded to interfere. A court, however, would be reluctant to interfere simply because one or more of the guidelines have not been adhered to even where there are substantial deviations, unless such deviations are, by nature and extent such as to prejudice the interests of the public which it is their avowed object to protect. Per contra, the court would be inclined to perhaps overlook or ignore such deviations, if the object of the statute or public interest warrant, justify or necessitate such deviations in a particular case. This is because guidelines, by their very nature, do not fall into the category of legislation, direct, subordinate or ancillary. They have only an advisory role to play and non-adherence to or deviation from them is necessarily and implicitly permissible if the circumstances of any particular fact or law situation warrants the same. Judicial control takes over only where the deviation either involves arbitrariness or discrimination or is so fundamental as to undermine a basic public purpose which the guidelines and the statute under which they are issued are intended to achieve."

31. The answer by the first respondent to the case of the petitioner is that the post had been upgraded and, Therefore, the petitioner cannot claim to be

considered for being appointed to that post. We have already adverted to the recommendation of the Core Group on 7.5.1996. The Core Group had not said that the post of Chairman, JNPT should be upgraded to that of Addl. Secretary. Whatever the nature of the recommendation by the Core Group it had not said that the policy issued on 22.12.1987 should be given a go by and no officer other than Central Government Officers should be considered for appointment. In a democratic polity like ours everything is to be done in accordance with law. It is not the case of the first respondent that the policy dated 22.12.1987 could be ignored and once upgradation is done the policy need not be followed. In paragraph 24 of the writ petition the petitioner had clearly stated that the Core Group did not recommend that the post of Chairman, JNPT should be upgraded to that of Addl. Secretary. If it is so, it has not been explained as to how did the first respondent agree to the appointment of Mr. V.M. Lal, who was a Joint Secretary. The stand taken in the counter is :

"The upgradation of the JNPT was recommended by the Respondent No. 1 considering the importance of JNPT as India's one of the largest container handling ports and given the need to develop it further to become a model port in India."

The petitioner has referred to in paragraph 25 of the writ petition to the communication sent by the Hon'ble Minister of State for Personnel, Public Grievances, Pension & Parliamentary Affairs wherein it is stated that the case of the petitioner has to be considered. Para 25 reads as under :

"The Minister of State for Personnel, Public Grievances, Pension & Parliamentary Affairs, Government of India when he learnt that a proposal had been submitted by the Ministry of Surface Transport to upgrade the post of Chairman, JN Port to that of an Additional Secretary, apparently pointed out in his letter some time in the third week of July, 1996 to the Minister for Surface Transport that when the JN Port is upgraded as a World Class Port, the present Deputy Chairman of JN Port who held a Doctorate Degree in Port Management from the UK and had visited 35 seaports in 15 countries of the World and is recognised as an international expert in port management would be an eminently suitable person for being posted as its Chairman. The Hon'ble Minister is also understood to have pointed out that the post of Chairman, JN Port had been operated at the level of a Joint Secretary/ Additional Secretary/ Secretary to the Government of India in the past seven years so as to accommodate officers of different seniorities who were appointed at different times as Chairman of the Port Trust. In the circumstances, he wondered why the Ministry of Surface Transport should ask for upgradation of the post of Chairman, JN Port from Joint Secretary to Additional Secretary particularly when there was an officer available in the Port Trust in the cadre of a Deputy Chairman with an excellent career record."

The reply by the first respondent to this is :

"This para is a matter of record."

Thus, the facts as set out by the petitioner are not disputed.

32. In paragraph 26 of the writ petition the petitioner has relied upon the report of the Hon''ble Minister of the Surface Transport and the petitioner submitted his report on 4.8.1996 :

"By the end of July, 1996 the Hon''ble Minister for Surface Transport responded to the communication from the Ministry of Personnel stating that the Ministry of Surface Transport was getting the entire proposal examined in the light of the observations made by the Ministry of Personnel. The Petitioner, Therefore, felt that the time was opportune for him to call on the Secretary to explain to him, in person and submit a representation detailing the full background of the case as the Secretary, Ministry of Surface Transport had been holding office only from February, 1996 and perhaps would not have been fully conversant with the facts of the case. Accordingly, the Petitioner fixed up an appointment with the Secretary at 5.30 p.m. on Monday, the 5th August, 1996. The Petitioner met the Secretary, Ministry of Surface Transport in his chamber in New Delhi and explained to him the full background and gave a representation dated 4th August, 1996 Annexure N to the Secretary in person and explained to him the merit of his case and why his case could be considered for appointment as Chairman, JN Port as that was the only vacancy in a higher category port than category III at that time and that the Petitioner has already been working as Deputy Chairman for the last two years and as Acting Chairman for the last one year and his performance during the last one year should provide additional justification for his appointment as Chairman, JN Port on a regular basis."

The reply by the first respondent is :

"The averments made in the para under reply are wrong and denied. As already stated the fact that the petitioner has already been working as Dy. Chairman in JNPT for the two years and as Acting Chairman for one year does not confer on him any right to be appointed as the Chairman, JNPT. His claim was duly considered by a selection committee and he was not found suitable for holding the post of the Chairman in Category I ports."

In paragraph 27 of the writ petition the petitioner has referred to his meeting by the Hon''ble Minister:

"The petitioner also called on the Hon''ble Minister for Surface Transport on the 22nd August, 1996 after the Port Chairmen's Conference at New Delhi and apprised him of the full background particularly in view of the observations made by the Minister for Personnel. The petitioner gained an impression that the Hon''ble Minister of Surface Transport was favourably inclined to recommending the case of the Petitioner for appointment as Chairman, Jawaharlal Nehru Port Trust in the light of the observations made by the Minister for Personnel and suggested that the Petitioner could again meet the Secretary to secure his support as well. The Petitioner informed the Hon''ble Minister that he had already met the Secretary on 5th August, 1996 and had given a representation and a

copy of that representation was informally made available to the Hon"ble Minister for his perusal."

33. In paragraph 27 of the counter the first respondent had stated that the petitioner was given full opportunity to represent his case. The case of the petitioner that he had met the Cabinet Secretary to explain his position is not denied by the first respondent.

34. While taking decision to upgrade the post of the Chairman, JNPT, the first respondent according to the petitioner, had not followed the norms prescribed. On 3.1.1984 the Ministry of Finance had issued office Memorandum which reads as under:

No.F.&(1)-E(Coord)/84 Government of India Ministry of Finance (Department of Expenditure) New Delhi, the 3rd January, 1984. OFFICE MEMORANDUM Subject: Economy in non-Plan expenditure of Government.

The undersigned is directed to refer to the various measures for economy in Central Government expenditure prescribed in this Ministry's communication cited in the margin and to say that Government have decided as follows :-

i) OM.No.F.14(4)-E(Coord)/77 dated 27th May 1977 ii) OM.No.F.7(29)-E(Coord)/79 dated 6th July 1979 iii) OM.No.F.7(18)-E(Coord)/79 dated 7th Sept.1979 iv) OM.No.F.7(17)-E(Coord)/79 dated 1st Sept. 1979 v) OM.No.F.7(17)-E(Coord)/81 dated 12th June 1981 vi) Finance Secretary's D.O. No. F.14(6)-E(Coord)/88 dated 26th November 1988. There is yet another office Memorandum issued by the Ministry of Finance which is found at page 80 of the type set. The same is as under :-

No. F.7(1)-E-(Coord)/ Government of India Ministry of Finance (Department of Expenditure) E(Coord) Branch. "Subject: Ban on creation of posts Guidelines for processing of cases.

The undersigned is directed to refer to this Ministry's Office Memoranda of even number dated 3rd January, 1984 and 13th January, 1984 in terms of which no new posts can be created till 30th September, 1984, except in the most exceptional circumstances and vacancies are not to be filled for the period, except where recruitment action has been taken. Classifications are being sought by various Ministries/Departments regarding the type of cases in which the aforesaid ban orders could be relaxed and the procedure for processing of various kinds of cases.

2. Besides keeping in view the spirit of the ban orders issued vide his Ministry's Office Memoranda No. 7(2)E(Coord)79 dated 6th July 1979 and No. 7(18)E(Coord)/79 dated 7th September 1979, the proposals regarding creation of various kinds of posts ought to be examined more closely and where creation of posts is considered to be absolutely necessary in most exceptional circumstances, the proposals may be got approved at the appropriate level in the Administrative Ministry and submitted for orders through the Financial Adviser

concerned for approval as under:

.TB.45" 3.5" Sl. Category of Posts Authority to which proposals No. are to be put up. ----- 1 2 3

----- 1 (a) Posts on the plan side Group "A" posts-Finance Ministry. (b) Posts for new organi Group "B", "C"-Secy.(Exp) sations & "D" posts. Posts carrying pay-Cabinet exceeding Rs.8000/- p.m. 2 (a) Operational Posts in All proposals to be submitted the Posts & Tele for approval of Finance graphs Civil Aviation, Ministry. India Meteorological Deptt. (b) Posts required for fulfilling statutory requirements. (c) Operational and Technical Staff directly connected with security and vigilance functions. (d) Posts required as a result or reorganisation of the structure of the organisation after detailed study resulting in substantial saving. 3) Proposals relating to All proposals to be creation of other posts submitted to the Cabinet (including no-plan posts indicating matching savings after obtaining Finance Minister's approval.

----- Note. All proposals for upgradation of existing posts are treated as proposals for creation of new posts in a new pay scale.

3. It has also since been decided that the ban orders on filling up of vacancies would not apply to :

(a) Cases where advanced recruitment action has been taken, leading to the finalisation to the panel or issue of offer of appointments, before the date of issue of the aforementioned ban orders of 3rd January, 1984;

(b) vacancies to be filled up on compassionate grounds or by appointment of handicapped persons in accordance with the procedure laid down by the Department of Personnel & A.R. and subject to the percentage quota laid down in the relevant orders and

(c) regularisation of casual labour in accordance with the Department of Personnel and A.R."s orders on the subject.

4. While forwarding proposals for creation of various posts, the most exceptional circumstances in justification of the proposals should be set out unambiguously and approvals obtained in the Administrative Ministry at a level appropriate to the level at which approval in the Ministry of Finance is necessary.

5. Ministry of Home Affairs, etc. are requested to take a note of the above instructions for necessary action both in regard to the proposals for creation of posts in the Ministries/Department as also for proposals relating to creation of posts in the attached and subordinate offices.

Sd/(R.C.Puri)

Deputy Secretary` to the

Govt. of India.

35. It is clear from this that all the proposals for upgradation are treated as proposals for creation of posts. This is only to highlight the point that when the Government desires to upgrade a post it has to be considered in all seriousness as if a new post is created.

36. There is yet another office Memorandum which is found at page 82 which reads as under:-

No. F.7(1)-E(Coord)/86 Government of India Ministry of Finance (Department of Expenditure) OFFICE MEMORANDUM Subject: Ban on creation of posts/filling up of vacancies modification of Guidelines.

The undersigned is directed to refer to this Ministry's communication cited in the margin on the subject mentioned above.

1. OM.No.7(1)-E(Coord)/84 dated 3.1.1984 2. OM.No.7(1)-E(Coord)/84 dated 13.1.1984 3. OM.No.7(1)-E(Coord)/84 dated 31.1.1984 4. OM.No.7(1)-E(Coord)/84 dated 20.6.1984 5. OM.No.7(1)-E(Coord)/84 dated 31.7.1984 6. OM.No.7(1)-E(Coord)/84 dated 12.9.1984 7. OM.No.7(1)-E(Coord)/85 dated 2.4.1984 2. Representation have been received from various Staff Association corporation requesting for lifting of the ban orders. Similar requests have also been received from various Ministries/Departments. The question regarding continuance or otherwise of the ban orders on creation/filling up of posts has been considered and it has been decided that the existing guidelines may be modified to the extent indicated below:

(I) Vacancies both Plan and non Plan arising due to promotion, retirement or death, may be filled up. It may, however, be done after the posts which have been found to be surplus, as a result of the review by the Cabinet Secretary's Committee, have been abolished.

(II) While creating any new assets such as purchase of vehicles, establishment of new organisations, etc. staff required for running such assets should also be provided. The number of posts that can be made available by redeployment from existing strength should be taken into account in deciding on the staff requirement.

(III) As regards creation of posts under Plan scheme the staff component should be considered as a part of the entire Plan scheme at the formulation stage. While approving a Plan scheme by the Ministries/Departments under the delegated powers by EFC/PIB no piecemeal decision should be taken in respect of approval of the scheme alone leaving aside the staff component. In other words, whenever a scheme is approved, the necessary staff for execution of such schemes may also be provided for. However, while taking such decision, a condition should be imposed that the precise timing of filling up of such posts should be indicated with reference to the various phases of completion of the project or scheme.

There is no modification in the existing guidelines, subject to (II) above,

regarding creation of non Plan posts. Such proposals for creation of non Plan posts will continue to be considered at the level of the Finance Minister/Cabinet.

4. The Ministry of Home Affairs etc. are requested to issue suitable instructions to all Departments, attached offices and subordinate offices under them and all Union Territory Administrations to bring to their notice the modifications mentioned above. The Ministries concerned may also inform the autonomous organisations under them regarding the above mentioned modifications.

Sd/ (V.P.VARMA)

Joint Secretary to the

Govt. of India."

On 3.5.1993 the Ministry of Finance had issued another office Memorandum which reads as under :

No.7(7)E (Coord)/93 Government of India Ministry of Finance Department of Expenditure New Delhi, the 3rd May, 1993. OFFICE MEMORANDUM Subject: Economy in administrative expenditure of the Government Ban on creation of posts/filling up of vacancies Guidelines for processing of cases.

The undersigned is directed to refer to this Ministry's O.M. No. F.7(1)E.Coord/84 dated the 20th June, 1984 as amended from time to time on the subject indicated above and to state that instructions already exist for ban on creation/filling up of posts and the procedure for relaxation thereof in exceptional circumstances. Some doubts which arose in this regard were also clarified from time to time. Further clarifications are, however, being sought by various Ministries/Departments etc. regarding the following two points. The matter has been considered in this Ministry and the correct position is clarified below against each point:-

POINTS CLARIFICATIONS (a) Whenever higher level posts are abolished, it will be necessary to abolish junior level posts are personal/ supporting staff of also to be abolished that higher level post(s) as a simultaneously. In addition to consequence thereof. such abolition, it will also be desirable to have a work study conducted to determine what other restructuring and abolition of lower level posts would be required as a result of abolition of the higher post(s). If a post is held in abeyance (b) If a post is vacant or remains unfilled for a or held in abeyance for period one year or more, it some time, whether the would be deemed to be abolished. post can be filled up Integrated Finance of each or revived, as the Ministry Department may monitor case may be, by the abolition of such posts and administrative Deptt./ ensure that abolition orders Ministry. are issued within one month of the post remaining unfilled/held in abeyance for the period of one year. If the post is required subsequently, the prescribed procedure for creation of new posts will have to be followed, i.e. as briefly set out below:- PLAN POSTS Approval of Finance Minister GROUP "A" POSTS will be

required. GROUP "B", "C" & "D" May be created with the approval POSTS of the Secretary of the administrative Ministry/ Department provided:- (i) The expenditure on establishment is within 10% of the project cost; (ii) The posts to be created are in conformity with the prescribed norms; and (iii) Group "A" post(s), if necessary, have been approved by the Finance Minister. NON-PLAN POSTS May be created with the (i) GROUP "A" POSTS OF approval of Cabinet after AND ABOVE THE LEVEL obtaining the approval OF JOINT SECRETARIES of Finance Minister. (RS.5900-6700) May be created with the (ii) GROUP "A" POSTS approval of Finance Minister. BELOW THE LEVEL OF JOINT SECRETARY AND Creation/filling up of posts GROUP "B", "C" & "D" both Plan and Non-Plan is to be POSTS. done after the posts which have been found surplus as a result of review, have been abolished. For creation of Non-Plan posts matching savings are required, which should be by surrender of posts in the same group or of posts in the immediate line of promotion. Posts which are found justified on the basis of workload and functional justification can only be created. 2. All Ministries and Departments are requested to kindly note the above clarifications for strict compliance, particularly in view of the need for adopting austerity measures for containing Government expenditure in the present economic scenario. They may also issue instructions to their attached and subordinate offices (including U.T. Admn.) and monitor compliance. Autonomous Bodies under the control of Ministries/Departments may also be asked to follow these clarifications mutates mutants.

3. Hindi version is enclosed.

sd/ (D. Swarup)

Joint Secretary to the Govt. of India"

37. In paragraph 30 of the writ petition the petitioner has stated that the first respondent has acted contrary to the office Memorandum. The same reads as under :

"The Petitioner firmly believes that in the appointment of Shri R. Vasudevan in the rank of a Secretary to the Government of India two levels higher than that of the present operating level of a Joint Secretary to the Government of India, all the norms regarding upgradation of the post and the process of consultation with the Minister for Surface Transport, Minister of Personnel and Minister of Finance as required under the rules have been totally ignored. The vested interests in the bureaucracy went to such an extent to ignore the Minister of Surface Transport, Minister of Personnel and Minister of Finance in upgrading the post of the Chairman, JNPT to that of a Secretary to the Government of India only to deny the Petitioner of his rightful opportunity of promotion and appointment. It may be seen that the Hon"ble Minister for Surface Transport got himself reconciled to operating the post of Chairman, JNPT at the present level of a Joint Secretary to the Government of India so that the Petitioner could be appointed as Chairman, JN Port. The action of the Respondents No. 2 to 4 is so

blatant and glaring that when the Ministry of Personnel had not agreed even to upgrade the post to that of an Additional Secretary to the Government of India without even consulting the Ministry of Surface Transport, a decision seems to have been taken by the Cabinet Secretariat and the Prime Minister's office to operate the post of Chairman, Jawaharlal Nehru Port Trust, to that of a Secretary to the Government of India. This is in sharp contract to what the Cabinet Secretary had indicated to the Petitioner when he called on him in the afternoon of 30th August, 1996. In the cabinet system of Government, the Minister decides the policy and the civil servants execute such policy decisions. It is respectfully submitted that it is unfortunate to see that some powerful bureaucrats have exploited the proximity of the Prime Minister in subverting the very concept of democracy and the cabinet system of Government where the Secretaries, Cabinet Secretary and the Principal Secretary should also remain as key Advisers and nothing more and the decision making power rests only with the Minister and the Prime Minister. The appointment to the post of Chairman, JN Port is approved by the Appointments Committee of the Cabinet which consists of the Minister for Surface Transport, Minister for Home Affairs and the Prime Minister as the Chairman. The advice to the Appointments Committee in the matter of selection of personnel is provided by the Minister of Personnel. The present case illustrates how the powerful bureaucrats with their vested interests have subverted the cabinet system and managed to get the post upgraded to two levels higher without even the approval of the concerned Minister for Surface Transport, nor that of the Minister for Personnel whose advice was also not sought for. As the upgradation of the post involved financial implication, the Finance Ministry should have been consulted in accordance with the Government directions. True copies of such Circular/Orders dated 3rd January, 1984, 28th May, 1986 and 3rd May, 1993 in this regard are annexed hereto as Annexure Q1 (collectively). Such norms and directions of Cabinet approval have also been given a go by in this appointment."

The first respondent in paragraph 30 of the reply gives a every curious Explanation. The same is as under:

"The averments made in the para under reply are wrong and denied. The upgradation of the post of Chairman to the level of Addl. Secretary/ Secretary has nothing to do with the consideration of the petitioner to the post of Chairman as he was not found fit by the Selection Committee to hold the post of Chairman in a Category I Port. It is not correct to say that the Ministry of Personnel has not agreed to the upgradation of the post. In fact it is the Deptt. of Personnel which communicated to the first respondent the decision of the Appointments Committee of the Cabinet to appoint the fifth respondent as Chairman, JNPT in the rank of Secretary to the Government of India. There is no truth in the allegation that the proper procedures have not been followed while making the appointment. In respect of appointments to the posts of the level of Addl. Secretary, Special Secretary and Secretary to the Government of India, the Cabinet Secretary, keeping in view the approval suitability list of Officers fit to

hold the categories of posts shall submit recommendations to the Competent Authority. The instructions of Ministry of Finance regarding the creation of posts as quoted by the petitioner do not apply to the Board level posts in Autonomous Bodies. The decision as to the level at which a Board level post has to be operated can be decided by the Appointments Committee of the Cabinet."

38. If what is stated in paragraph 30 to be correct, it would only mean that the first respondent had acted in flagrant violation of the principles enshrined in Articles 14 and 16 of the Constitution of India. If the first respondent wanted to upgrade the post that cannot oust the Port Officers from being considered. Upgradation cannot be resorted to as a ruse to exclude completely the Port Officers from being considered to the post of Chairman. What the first respondent wanted to do was to have a Selection Committee just to say that the petitioner was not suitable and then decide upon upgradation. The first respondent had not disclosed the decision of the Core Group which was taken on 7.5.1996. The first respondent had not given details as to what was the need for the first respondent at that time to constitute a Core Group and what were the circumstances under which the first respondent had come to the conclusion that a Core Group should be constituted to decide about the matter. The first respondent it gives us the impression, is of the view that it was no duty to the Court to place all facts. If the first respondent had decided to upgrade the post it was a futile exercise to constitute a Selection Committee for the purpose of considering the claims of Port Officers because no Port Officer was an IAS officer. As could be seen from para 30 of the counter, the intention of the first respondent at the relevant time was crystal clear. It is stated :

"The upgradation of the post of Chairman to the level of Addl. Secretary/ Secretary has nothing to do with the consideration of the petitioner to the post of Chairman as he was not found fit by the Selection Committee to hold the post of Chairman in a Category I post."

The first respondent has not been consistent in its stand. If the first respondent intended to constitute the Selection Committee in accordance with the policy dated 22.12.1987 the question of upgradation would be wholly irrelevant. The first respondent had acted in an arbitrary fashion and that is in violation of Articles 14 and 16 of the Constitution of India. The first respondent had deliberately excluded the Port Officers from being considered for the post of Chairman, JNPT. The first respondent had proceeded on the assumption that the policy would prohibit the first respondent from appointing any officer from Administrative Service as the Chairman, JNPT. What the policy required was simultaneously the Central Government Officers and the Port Officers could be considered for the post of Chairman. As per the policy, if on a consideration of the panel of officers of the Central Government and the Port Officers if the Selection Committee considered any officer from the Central Government more suitable there would have been no violation of the policy. And there was absolutely no need applying the so called principle of upgradation. All eligible

officers are to be considered by the first respondent and on an analysis of the circumstances of this case the resultant position is that the first respondent acted in violation of the Fundamental Rights of the petitioner. The first respondent had acted unreasonably in not following the policy and had acted illegally. The first respondent had acted irrationally in projecting the theory of upgradation and had appointed the 5th respondent without following the procedure prescribed. It is asserted in reply to the Grounds (XIV) :

"A set procedure has been prescribed for appointment to the post of Chairman of Port Trusts and this procedure has been duly followed."

39. Dr. A.M. Singhvi, the learned senior counsel for the first respondent submitted that the petitioner cannot have of any grievance against non selection to a selection post, the argument on behalf of the petitioner was on the premise that non selection and upgradation are connected and intertwined while they are disparate and different. The petitioner was called for an interview, he was found not fit. The first respondent had decided to have a Secretary level officer as the Chairman. According to the learned senior counsel, with reference to the records which are produced on 15.6.1996, upgradation was decided. This is found in flag "D". Flag "J" refers to what happened on 4.7.1996. Flag "A" refers to the note by the Secretary made on 12.8.1996. Flag "F" refers to 16.8.1996. Flag "H" refers to the notification from the Transport Ministry to Personnel Ministry on 27.8.1996. It is long time after the appointment. The submission of Dr. A.M. Singhvi, the learned senior counsel, was that all the above items have been approved by the Ministry of Surface Transport. According to the learned senior counsel the vacancy had arisen in September 1995 and the A.C.Rs up to September 1995 alone would be relevant and the A.C.Rs for the subsequent period would not be relevant. The learned senior counsel submitted that it is well settled that a government servant can only make a claim to be considered for appointment and once his case has been considered by an appropriate Selection Committee the person aggrieved cannot invite this Court to examine the process of selection.

40. The learned senior counsel submitted that the decision regarding upgradation was a separate issue and whether it is right or wrong cannot be agitated by the petitioner before this Court. The learned senior counsel submitted whether the Port in Mumbai should be created as Category I or not cannot be subject matter of any debate at the instance of the petitioner. The learned senior counsel further submitted that from 2.4.1985 to 31.12.1989 officers of Secretary level were functioning as Chairman. From 1.10.1990 to 30.9.1992 officers holding the post was drawing the salary of Secretary to the Government of India. From 4.3.1993 to 24.9.1995 a Joint Secretary was occupying the post. From 24.9.1995 up to 3.9.1996 the petitioner was acting as Chairman. On 4.9.1996 the 5th respondent took charge.

41. The learned senior counsel submitted that the petitioner has not made out the case of malafides and the allegations made in the petition, do not satisfy the

requirements of law as laid down by Supreme Court in Express Newspapers Pvt. Ltd. and Others Vs. Union of India (UOI) and Others, and Shivajirao Nilangekar Patil Vs. Dr Mahesh Madhav Gosavi and Others, .

42. The learned senior counsel submitted that the case of the petitioner relating to the upgradation being illegal because the approval of the appropriate authority had not been obtained, inasmuch as the Prime Minister and the Finance Minister were not consulted is not correct. The learned senior counsel submitted that the first respondent had only reverted to the original position, pay scale of the post was not upgraded but the incumbent would receive his due pay depending upon his post he was holding in substantive capacity at the relevant time. According to the learned senior counsel the ACC had approved the upgradation. The learned senior counsel would submit that assuming there has been violation it is not justiciable. The learned senior counsel relied upon the judgment of the Supreme Court in Union of India and Others Vs. S.L. Abbas, . The learned senior counsel sought to distinguish the cases cited by the learned senior counsel for petitioner reported in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, , B.S. Minhas Vs. Indian Statistical Institute and Others, , Dr. Jai Narain Misra Vs. State of Bihar and Others, and State Bank of India and others Vs. Mohd. Mynuddin, .

43. The learned senior counsel for the petitioner has referred to the judgments of the Supreme Court in Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road Transport Corporation and Another, , State of Bombay (now Maharashtra) (in C.A. No. 37 of 1957); (2) Firestone Tyre and Rubber Co., (in C.A. No. 38 of 1957) Vs. K.P. Krishan and others, State of Assam and Others Vs. Banshidhar Shewbhagavan and Company, and AIR 1973 S.C. 2170 (wrongly given)

44. The matter was argued at length. In our view, the questions that would arise for consideration are:

- i) Whether the first respondent was bound to follow the policy dated 22.12.1987.
- ii) Whether the case of upgradation projected by the first respondent can be accepted.
- iii) Whether the 5th respondent had been appointed in accordance with law.

45. The vacancy in the post of Chairman, JNPT arose on 25.9.1995. The first respondent was bound to act in accordance with the policy dated 22.12.1987 and consider the case of Port Officers and Central Government Officers. The first respondent ought to have acted in accordance with the spirit of the Constitution and the principles underlying Articles 14 and 16 of the Constitution of India. The first respondent had not appreciated the way in which Shri K. Nalinakshan, the Chairman JNPT, who sent the C.R. about the petitioner to the Government in its proper perspective. The Ministry of Surface Transport had directed the Selection Committee to reconsider the matter and before the Selection Committee could

meet on 8.5.1996 the Government of India had constituted the Core Group of Secretaries to consider the matter. As we had adverted to above, in the counter facts have not been stated relating to the constitution of the Core Group. If the decision taken by the Core Group as understood by the first respondent to be correct, the meeting of the Selection Committee convened for 8.5.1996 should have been cancelled because in view of upgradation no Port Officer could be considered for selection for being appointed as Chairman. That was not done.

46. When the petitioner has come forward with the case that upgradation is not in accordance with the office Memorandum issued by the Ministry of Finance there has been an abrupt change in the stand of the first respondent that what was done was not real upgradation but the incumbent would receive salary depending upon his substantive position in the Central Government. The fact that the first respondent made an attempt to appoint Shri V.M. Lal, Joint Secretary to the Govt. of Maharashtra category as the Chairman JNPT is not disputed and his appointment was sought.

47. The 5th respondent had been appointed even without having any selection and without considering the claims of all eligible IAS officers also. If what is done by the first respondent is correct then the fundamental under Articles 14 & 16 would become a mere rope of sand. The learned senior counsel for the first respondent Dr. A.M. Singhvi submitted that the petitioner cannot have of any grievance when the Appointment Committee of the Cabinet had duly considered the appointment of the 5th respondent.

48. We have given our careful consideration to the materials placed on record and very able and subtle arguments of learned senior counsel for the parties. The learned counsel for the 5th respondent sought to rely upon the case projected by the first respondent and it is not necessary to deal with his arguments separately. Time was when Rex was Lex. We now seek to say Lex is Rex. The first respondent is neither Lex nor Rex. The first respondent has to act in accordance with the parameters of the Constitution of India. Even so, there had been times when judicial review had been said to be founded on the principle that Courts are the mere handmaidens of public officials to facilitate the work of bodies charged with acting in public interest. This aspect was adverted to by Chief Justice Parkar in 1962, as referred to in Donoughmore Report in Retrospect by G.T. Williams were published in 1982 (60) Pub. Admn. 273 in England. 51. The learned author P.P. Creig in Public Law and Democracy and U.K. and U.S.A. expressed the view that the standard applied by the Courts in judicial review must ultimately be justified by constitutional principles which govern the proper exercise of public power in any democracy. It has all become common to say that the reign of rule of law is a principle of great importance. It acts as a constraint upon exercise of all power. The Court's role is to project individuals rights against abuse of official power.

49. The learned author De Smith in his book Judicial Review of Administrative Action had stated the principles succinctly:

"The scope of the rule of law is broad. It has managed to justify albeit not always explicitly a great deal of the specific content of judicial review, such as the requirements that laws as enacted by Parliament be faithfully executed by officials; that orders of courts should be obeyed; that individuals wishing to enforce the law should have reasonable access to the courts; that no person should be condemned unheard, and that power should not be arbitrarily exercised. In addition, the rule of law embraces some internal qualities of all public law: that it should be certain, that is, ascertainable in advance so as to be predictable and not retrospective in its operation; and that it be applied equally, without unjustifiable differentiation."

50. It is now well established that it is for the Courts to articulate the constitutional principles as rules and standards of good public administration. The standards applied by Court to expatiate the constitutional principles are open textured. And the Courts are aware that while doing so they have to take into account the circumstances of the case, breadth and depth of the power conferred upon the decision making authority, the conditions on exercise of power, the fairness to the parties involved. The Courts also have to keep in mind the articulation by Lord Goff in *Caswell and another Vs. Dairy Produce Quota Tribunal for England and Wales* 1990 (2) A.C. 738 : 1992 AER 434 explaining the working of the minds of Courts in exercising discretion how and what manner it could be exercised by Courts. The learned Judge explained that applications for judicial review could occur in many different circumstances and the need for finality may be greater in context than the other. The learned Judge observed that there is an interest in good administration independent by hardship or prejudice to the rights of third parties and that the harms suffered by the applicant by reason of the decision which has been impugned is a matter which can be taken into account when deciding whether or not to exercise discretion. Sir John Woodroffe stressed that the Courts needed to approach the question of discretion with a proper awareness of the needs of public administration. The learned Judge observed that this involved being concerned with substance rather than form () the legitimate interests of individual citizens. In *R v Panel on Takeovers and Mergers, ex parte Guinness plc* 1989 (1) AER 509 the Court of Appeal had to consider the scope of judicial review. The facts as noticed in the head note of the report are :

"In the course of a contested takeover by two public companies, A and G, for a third public company, D, the purchase of a block of 3% of D's shares by a Swiss company, P, was investigated by the Panel on Takeovers and Mergers at the request of A. The panel decided not to take the matter any further when it received an assurance from G's finance director that G and P were not acting in concert. G's bid for D was successful but following the takeover the Department of Trade and Industry (the DTI) decided to investigate G's affairs and the panel decided to reopen its investigation into whether P had acted in concert with G during the takeover of D, contrary to the City Code on Takeovers and Mergers. The panel subsequently advised G that it would proceed to investigate the concert party issue without waiting for the outcome of the DTI inquiry,

particularly since a copy of a letter purportedly from P to a director of G had come to light, the contents of which, if correct, showed that P had acted in concert with G. The panel also advised G that the two stage investigation, which would not be disciplinary in nature, would (i) decide whether there had been a concert party and (ii) if so, consider the consequences. G objected, seeking an adjournment of the hearing until the DTI inspectors' report had been published and any resulting criminal or civil proceedings concluded. The panel nevertheless continued its inquiries and also received confirmation from the DTI of P's letter to G. At a preliminary hearing of the panel held to determine from the DTI of P's letter to G. At a preliminary hearing of the panel held to determine whether there should be an adjournment G again sought an adjournment on the grounds (i) that the panel's speedy and informal procedures, though appropriate in the context of a current bid, were ill adapted to an inquiry after a takeover, which was to be equated with disciplinary proceedings, and (ii) that essential witnesses from Switzerland regarding P's letter to G should be called for examination. The panel refused the adjournment and further refused to vacate the date for the hearing of the concert party issue, because of its concern for the former shareholders in D to whom G would be liable for any breach of the code, and because of the fact that the panel had received no information from G which cast doubt on the strong evidence in favor of a concert party. Immediately before the hearing of the concert party issue the panel executive delivered to G the final version of its submissions to the panel, which contained a new and significant addition, namely a letter from the solicitors of P's Swiss bank amounting to an admission that P's purchase of shares in D had been a concert party operation. At that hearing G again sought an adjournment to enable it to respond to the executive's final submissions but that was refused by the panel. Without exercising its right of appeal to the panel's appeal committee, G then applied for judicial review of the panel's decisions refusing adjournments. The Divisional Court dismissed the application and G appealed to the Court of Appeal."

The Court of Appeal posited :

"The test of whether particular acts or decisions of a body, such as the Panel on Takeovers and Mergers, whose constitution, functions and powers were sui generis should be subject to judicial review was whether, considering the matter in the round, something had gone wrong with that body's procedure such as to cause real injustice and require the intervention of the court. However, a decision whether to adjourn a hearing was essentially a matter for the exercise of judicial discretion by the court or tribunal seised of the matter and, furthermore, where a right of appeal from the decision making body existed but was not exercised, the court would only grant relief by way of judicial review in exceptional circumstances. Accordingly, although the panel's decision to refuse to adjourn the hearing of the concert party issue even for a short period was open to criticism, the panel's conduct of the investigation as a whole had been fair and had not caused injustice to G. It followed that the court would not intervene and that G's appeal would Therefore be dismissed."

The Court proceeded to observe :

"However, the present appeal calls for a further review and, in particular, consideration of whether the separate grounds for granting relief (illegality, irrationality, procedural impropriety and, possibly, proportionality) are appropriate in all situations. Illegality would certainly apply if the panel acted in breach of the general law, but it is more difficult to apply in the context of an alleged misinterpretation of its own rules by a body which under the scheme is both legislator and interpreter. Irrationality, at least in the sense of failing to take account of relevant factors or taking account of irrelevant factors is a difficult concept in the context of a body which is itself charged with the duty of making a judgment on what is and what is not relevant, although clearly a theoretical scenario could be constructed in which the panel acted on the basis of considerations which on any view must have been irrelevant or ignored something which on any view must have been relevant. And similar problems arise with procedural impropriety in the narrow sense of failing to follow accepted procedures, given the nature of the panel and of its functions and the lack of any statutory or other guidance as to its procedures which are intended to be of its own devising. Similarly, in the broad sense of breach of the rules of natural justice, what is or is not fair may depend on underlying value judgments by the panel as to the time scale which is appropriate for decision, the consequences of delay and matters of that kind. Approaching the problem on the basis of separate grounds for relief may at once bring several interlocking and mutually inconsistent considerations into play. Were the underlying judgments tainted by illegality or irrationality? If not, accepting those judgments, was the action unfair? If the underlying judgments were so tainted, was the action unfair on the basis of judgments which might reasonably have been made? The permutations, if not endless, are considerable and confusing.

It may be that the rule view is that, in the context of a body whose constitution, functions and powers are *sui generis*, the court should review the panel's acts and omissions more in the round than might otherwise be the case and, whilst basing its decision on familiar concepts, should eschew any formal categorisation. It was Lord Diplock who in *Council of Civil Service Unions Vs. Minister for the Civil Service* (1984) 3 All ER 935 : (1985) AC 374 formulated the currently accepted categorisations in an attempt to rid the courts of shackles bred of the technicalities surrounding the old prerogative writs. But he added that further development on a case by case basis might add further grounds (see 1984 3 all ER 935 : 1985 AC 374). In the context of the present appeal he might have considered an innominate ground formed of an amalgam of his own grounds with perhaps added elements, reflecting the unique nature of the panel, its powers and duties and the environment in which it operates, for he would surely have joined in deploring any use of his own categorisation as a fetter on the continuous development of the new "public law court". In relation to such an innominate ground the ultimate question would, as always, be whether something had gone wrong of a nature and degree which required the intervention of

the court and, if so, what form that intervention should take."

51. We are aware of the caution given by Sir Thomas Bingham M.R. in his lecture "Should Public Law Remedies be Discretionary" that is an important element of rule of law "that the rights and obligations of citizens should depend on clear rules publicly stated and not on the whims, prejudices or predilections of the individual (Judge)". The learned Judge recognised that the discretion of the Court may be wide but he emphasised that its exercise should be tightly controlled by the application of clear principles. The learned Judge defined the discretion to mean:

"An issue falls within a judge's discretion if, being governed by no rule of law, its resolution depends on the individual judge's assessment (within such boundaries as have been laid down) of what is fair and just to do in the particular case. He has no discretion in making his findings of fact. He has no discretion in his rulings on the law. But when, having made any necessary finding of fact and any necessary ruling of law, he has to choose between different courses of action, orders, penalties or remedies he then exercises a discretion. It is only when he reaches the stage of asking himself what is the fair and just thing to do or order in the instant case that he embarks on an exercise of discretion."

52. The learned Author, De Smith in the 5th Edition has noticed that empirical research suggests a heightened awareness of the potential impact of judicial review among officials and politicians has altered the ways in which some types of decisions are taken. In our country officials and politicians have shown remarkable respect for the rule of law. They are fully conscious of the constitutional parameters within which they have to function and they remarkably maintain the balance between the public interest and the Fundamental Rights of the citizens.

53. 31 years ago in *Bradbury Vs. Engfield*, 1967 (1) WL R 1311 the Court of Appeal in England observed:

"There can be situations where the Court has to stand firm and even if administrative chaos may result, still uphold the law and ensure that it is obeyed."

54. By now it is settled that a decision can be treated illegal if it contravenes or exceeds the terms of the power which authorises the making of the decision, if it pertains on objection other than that for which the power to make the decision was conferred.

55. In the counter affidavit the first respondent has projected a case that it had acted in accordance with law and what has been done by it is beyond the pale of judicial review. The decision by the ACC is final and conclusive and this Court cannot go into the correctness of its decision. The submission overlooks the doctrine that in our system that justice must not only be done but must manifestly be seen to be done. But the first respondent had mixed up doing

justice with seeing that justice is done. We have no hesitation in rejecting the submission on behalf of the first respondent.

56. In our view the submission made on behalf of the first respondent is wholly unacceptable. The decision of the Government is subject to judicial review. And that is the basic structure of our constitution. The Fundamental Rights under Articles 14 and 16 of the Constitution of India would constitute an epitome of the complete protection to the citizens from the arbitrary action of the State. The Judicial Committee of the Privy Council dealing with the Ceylon Independence Act, 1947 observed (Ibralebbe and another Vs. Reginam 1964 A.C. 900 : 1964 (1) AER 251):

"The role of judiciary in a democratic set up is to function without any control from outside."

After referring to the provisions dealing with the judicature and the Judges, the Judicial Committee observed :

"These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature. The constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had laid for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by, the executive or the legislature".

The Judicial Committee expressed the view :

"There exists a separate power in the judicature which under the Constitution as it stands cannot be usurped or infringed by the executive or the legislature."

57. The Judicial Committee made a very pithy observation by stating that it must be borne in mind while dealing with the constitutional cases, "what is done one if it be allowed, may be done again and in lesser crises and less serious circumstances. And thus, judicial power may be eroded. Such an erosion is contrary to the clear intention of the constitution."

58. The first respondent ought to have acted, keeping in mind the sweep, scope and ambit of Articles 14 and 16 of the Constitution of India. Any action not supported by reasons and not in consonance with the provisions of the Constitution could be characterised as illegal and arbitrary. The first respondent ought to have placed all facts culminating in the decision to upgrade the post. An officer who is competent and who, as a matter of fact, has the necessary qualification to hold the post as an acting Chairman cannot be lightly deprived of his legitimate rights to be considered in the way in which it has been done by the first respondent. The answer by the first respondent with all vehemence is that a conscious decision have been taken, we are of the view that if this is sufficient in

law to meet the challenge under Article 14 of the Constitution of India. We shudder to think of the evanescence of seeking rule of law fading into thin air. What Lord Larking said in *Proprietary Articles Trade Association Vs. Attorney General for Canada* 1931 A.C. 310 is relevant :

"Their Lordships entertain no doubt that time alone will not validate an act which when challenged is found to be ultra vires; nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment. "

59. The Judicial Committee in *Attorney General of Australia Vs. The Queen* 1957 A.C. 288 while considering the question whether certain sections of the Conciliation and Arbitration Act, 1904¹⁹⁵² were ultra virus inasmuch as the Commonwealth Court of Conciliation and Arbitration had been invested with the executive powers referred to the point had observed :

"Whatever the reason may be, just as there was a patent invalidity in the original Act which for a number of years went unchallenged, so far a greater number of years an invalidity which to their Lordship as to the majority of the High Court has the majority of the High Court has been convincingly demonstrated, has been disregarded. Such clear conviction must find expression in the appropriate judgment."

60. The first respondent cannot project the case that for a long number of years only officers of the rank of Secretaries to the Government were holding the post of Chairman and the first respondent had acted in accordance with the practice. If that is accepted then the protection given to the citizens would be beyond the penumbra of Article 14 of the Constitution. Then the declaration made by John Adams, one of the great Presidents of the United States of America that we have Government of laws and not men which the citizens of this country have been enjoying since 1947 encapsulating the distinguishing character of our political society which is enshrined in our constitution would be stripped off its vigour and strength. The famous words of Justice Homes in *Wisconsin Vs. Illinois* 281 US 179 have always to be borne in mind:

"For those in authority to defy the law of the land is profoundly subversive not only on our Constitutional system but all the pre supposition of a democratic society. They State must yield to an authority that is paramount to the State."

61. Therefore, the whole process of upgradation now trotted out by the first respondent is without any substance and it had not been done in accordance with the principles enshrined in the Constitution.

62. We are of the view that the claim of the petitioner had not been considered in accordance with the policy. The decision of the Core Group of Secretaries of 7.5.1996 is contrary to the policy and the first respondent has no power to take such a view and the case of upgradation put forth by the first respondent is only for the purpose of this case. The claim of the first respondent that the

upgradation was approved by the ACC would not cure the illegality and the upgradation was without jurisdiction and it is instance of an arbitrary exercise of power.

63. This takes us to the next question about the appointment of 5th respondent as decided by the Appointment Committee of the Cabinet. We are of the view that the first respondent had not acted in accordance with law the consideration of the 5th respondent by ACC is no consideration in the eyes of law. Therefore, it is wholly void and that would obviate the need to go into the process adopted by the ACC in selecting the 5th respondent. It is not disputed that no committee was formed to select the officers for being considered for appointment as Chairman. As pointed out by the Supreme Court the selection of the 5th respondent was from a hat, and that is wholly an arbitrary exercise of power.

64. Accordingly, we are of the view that the appointment of the 5th respondent can not be sustained and the first respondent is directed to reconsider the matter in the light of the observations made by us. It is made clear that in view of the fact that vacancy had arisen on 25.9.1995 the claims of the Central Government Officers and the Port Officers shall be considered by the first respondent in accordance with law without the fetter of two years tenure period.

65. We have come to understand that the 5th respondent has now been appointed as the Secretary, Surface Transport Ministry. In the selection process there should not be any bias and, Therefore, we direct that with reference to the selection the 5th respondent shall not take part in any of the proceedings and he shall have no part to play in the process of selection. The first respondent shall complete the process of selection and issue appropriate orders on or before the 31st of March 1999. The writ petition stands allowed with costs quantified at Rs. 10,000/.