

(2004) 05 SHI CK 0001

In the High Court Of Himachal Pradesh

Case No : Civil writ Petition No. 812 of 2003

Kali Dass Batish

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 25-05-2004

Acts Referred:

Administrative Tribunals Act, 1985 — Section 6(7), 8
Constitution of India, 1950 — Article 14, 16, 21, 226
Evidence Act, 1872 — Section 124

Citation : (2005) 1 ShimLC 452

Hon'ble Judges : V.K. Gupta, C.J.;Kuldip Chand Sood, J

Bench : Division Bench

Advocate : R.L. Sood and Ashwani Kaundal, for the Appellant; N.K. Thakur, Central Government, S.C. for the Respondents No. 1 to 4, B.C. Negi, for the Respondents No. 5 and 6 Rajiv Sharma and Surinder Sharma, for the Respondent No. 8, for the Respondent

Final Decision : Allowed

Judgement

V.K. Gupta, C.J.—Vide communication dated 16th February, 2001 sent by Secretary, Ministry of Personnel, Public Grievances and Pensions, Government of India, New Delhi to the Registrar General, Himachal Pradesh High Court, Shimla, names of eligible and willing persons including Members of the Bar were invited for filling up seven vacancies of Judicial Members in the Central Administrative Tribunal that were likely to arise between 1st July, 2001 and 31st December, 2001. The Petitioner who is a practicing Advocate at Shimla for the last about 27 years, pursuant to the aforesaid communication had his name sent/sponsored for consideration and for appointment as a Judicial Member in the Central Administrative Tribunal. It appears that a total 122 candidates had applied for the aforesaid seven posts of Judicial Members.

2. Department of Personnel and Training, Government of India, vide order No. A. 1013/54/90-AT dated 15th/23rd April, 1991 had decided about the constitution of a Selection Committee for selection of Vice Chairman and Members of the

Central Administrative Tribunal (CAT, for short). This Selection Committee was to comprise of a nominee of the Chief Justice of India, who would be a sitting Judge of the Supreme Court, Secretary to Government of India, in the Ministry of Law and Justice (Department of Legal Affairs), Secretary to the Government of India, in the Ministry of Personnel, and the Chairman of CAT. As per the said order it was stipulated that the Selection Committee shall recommend persons for appointment as Vice Chairman as well as Members from amongst the persons on the list of candidates prepared by the Ministry of Personnel and that the Central Government, after taking into consideration the recommendation of the Selection Committee, and after consultation with the Chief Justice of India, in accordance with the provisions of Section 6(7) of the Administrative Tribunals Act, 1985 (1985 Act, for short), draw up and prepare a list of persons for appointment as Vice Chairman and Members of the CAT.

3. Shri Justice G.B. Pattanaik, Judge of the Supreme Court (as he then was) was nominated by the Chief Justice of India to head the aforesaid Selection Committee. The Selection Committee met under the Chairmanship of Shri Justice G.B. Pattanaik on 18th July, 2001 and, inter alia, considered 121 names for the aforesaid seven vacancies of Judicial Members and recommended seven persons for appointment as Judicial Members, with equal number in the waiting list. Undoubtedly and admittedly in the list of seven recommendees for appointment, the name of the Petitioner figured at SI. No. 1 in order of merit. The name of Respondent No. 7 figured at SI. No. 6 in the said list of recommendees. In so far as the waiting list of recommendees was concerned, viz., the list of persons who were recommended to be in the waiting list, in the event of the recommendees in the select list not being appointed for any reason, names of Respondents No. 5 and 6 found their places at SI. Nos. 2 and 1, respectively, of the said waiting list.

4. Since all the recommended persons for the posts of Judicial Members happened to be Members of the Bar and did not belong to any organised service, verification of their antecedents was found and considered to be necessary by the Government and accordingly a reference was made to the Intelligence Bureau for verifying the antecedents of these persons. Apparently, the reports of the Intelligence Bureau (I.B., for short) did not favour the Petitioner as well as Respondent No. 7 and based upon such unfavourable reports, the Government decided that it was not desirable to propose the names of these two persons for appointment as Judicial Members of CAT from out of the select list and accordingly, in place of these two persons, the Government proposed to appoint Respondents No. 5 and 6, who were placed at SI. Nos. 2 and 1, respectively, in the waiting list as Judicial Members of the CAT. In the final analysis, therefore, the Government proposed to the Chief Justice of India seven names for their appointment as Judicial Members and this list of seven persons undoubtedly excluded the Petitioner, and Respondent No. 7 and this exclusion was only on the ground of unfavourable I.B. reports qua both of them. A waiting list of four persons was also proposed and in terms of Section 6(7) of 1985 Act the concurrence of Chief Justice of India was solicited to the proposal for

appointment of the aforesaid persons. Confidential Memorandum No. A, 11013/20/2001-AT dated 6th November, 2001 under the signatures of Shri A.K. Agarwal, Secretary (Personnel) accordingly, seeking the concurrence of the Chief Justice of India, made the following pertinent observations in paragraphs 15 and 16 and we quote:

15. As per the provisions of Section 6(7) of the Administrative Tribunals Act, 1985, the concurrence of the Hon''ble Chief Justice of India is solicited to the proposal for appointment of persons mentioned in previous paragraph as Judicial Members in the Central Administrative Tribunal.

16. If approved for appointment, the persons recommended for appointment as Judicial Member, will be appointed in accordance with Section 8 of the Administrative Tribunals Act, 1985.

5. The Chief Justice of India on 12th November, 2001 concurred with the proposal as was submitted to him vide the aforesaid memorandum dated 6th November, 2001 and it is in this background that whereas appointment orders of Respondents No. 5 and 6 came to be issued, the Petitioner and Respondent No. 7, despite their being placed at SI. Nos. 1 and 6 (in order of merit in the select list) were not appointed. The Petitioner has challenged the aforesaid action of the Respondents and has filed this petition under Article 226 of the Constitution of India seeking the following reliefs:

(i) That Respondent No. 1 be directed to produce the entire record regarding the selections made to the Central Administrative Tribunal for the year 2001-2002.

(ii) That a writ in the nature of mandamus be issued to Respondent No. 1 to appoint the Petitioner as Judicial Member in Central Administrative Tribunal in terms of the select list with all consequential benefits.

(iii) That the appointments of Respondents numbered 5 and 6 be quashed as the same have been made for extraneous considerations and against the rules.

(iv) That directions be issued to Respondents No. 1 and 2 to take stringent action against Respondents No. 3 and 4 for having misused their official position for extraneous considerations.

(v) That in case the Hon''ble Court is of the view that relief at serial No. iii should not be granted to the Petitioner, then in the alternative, an amount of rupees fifty lakhs be awarded by way of compensation on account of the vicarious liability of Respondent No. 1 for the illegal acts of its officials.

(vi) That any other relief that this Hon''ble Court deems fit and proper in the facts and circumstances of the present case may also be awarded in favour of the Petitioner and against the Respondents.

6. Why was the Petitioner not appointed as a Judicial Member of CAT, despite his name figuring at SI. No. 1, in order of merit in the select list as was drawn up by the Selection Committee headed by a sitting Judge of the Supreme Court and

comprising, inter alia, the Chairman of the CAT, who was a retired Chief Justice of the High Court? The answer to this question can be, and is found in para 1.7 of the reply-affidavit filed by Shri Budh Prakash, Director in the Ministry of Personnel, Public Grievances and Pensions on behalf of Respondents No. 1 to 4. In para 1.7 (supra), it has been stated that in so far as the Petitioner is concerned, in his case along with two other cases reports of I.B. were construed to be negative. For ready reference, we reproduce para 1.7 (supra) verbatim, which reads thus:

1.7 In the proposal to the Hon''ble Chief Justice of India, contents of the report of IB in respect of Shri K.D. Batish was inter-alia brought to the kind notice of the Lordship. The report of IB was also forwarded alongwith the appointment proposal. The Hon''ble Chief Justice of India was also apprised about the reasons and circumstances due to which the name of the Petitioner and the Respondent No. 7 were not recommended for appointment. The Hon''ble Chief Justice of India concurred in the proposal of the Department of Personnel and Training which did not include the name of Shri Batish and Respondent No. 7. In all, there were three persons in whose cases the IB reports were construed to be negative viz. Shri K.D. Batish and Shri Ram Kishore Prasad placed at S. Nos, (i) and (vi), respectively, in the main list of persons recommended by the Selection Committee for appointment as Judicial Members and Shri Dhuliram Pattanaik at S. No. (v) in the waiting list. Accordingly, S/Shri J.K. Kaushik and M.L. Chouhan, who were at S. No. 1 respectively, replaced Shri Batish and Prasad (i) and (ii) in the waiting list. The Hon''ble Chief Justice approved the proposal of the Department of Personnel and Training. (Emphasis supplied)

7. In so far as the requirement of obtaining I.B. report with respect to Petitioner and Ors. is concerned, in the same affidavit elsewhere Respondents No. 1 to 4 have mentioned as under:

1.3. As per decision taken in 1997, whenever a member of Bar is appointed in the Central Administrative Tribunal, his antecedents etc. are required to be verified through the Intelligence Bureau, 1.4. As all the 7 persons included in the panel for appointment as Judicial Members were Members of Bar, Orders of Minister of State for Personnel, Public Grievances and Pensions [hereinafter called MOS (PP)] was obtained before forwarding the names recommended by the Selection Committee to the Hon''ble Chief Justice of India.

1.5. With regard to the persons recommended for appointment as Judicial Members, the then MOS (PP) directed that IB verification be obtained first before submitting the proposal for her approval. Consequently, IB verification was sought.

1.6. In respect of Shri K.D. Batish, the noticeable features, emerging from the IB report were submitted to the then MOS(PP) for orders/approval. MOS (PP) directed for sending the I.B. report alongwith the Department's recommendation to the Hon''ble Chief Justice of India.

8. We have perused very carefully the entire reply-affidavit filed by Respondents No. 1 to 4 and find that except a passing reference made in para 1.7 (supra) about I.B. report with respect to the Petitioner being "construed as negative", there is no inkling, no indication, no mention as to what exactly had the I.B. report stated against the Petitioner and in what manner, under what circumstances, and on what basis, was it "construed as negative" qua the Petitioner.

9. On our directions Respondents No. 1 to 4 produced their original official records for our perusal and it is in the said official records that, after carefully going through various notings, that we could find as to what had I.B. reported about, or (actually) against the Petitioner.

We must here very clearly observe that we have not been shown the actual I.B. report, or the record but only the notings of the file of the Department of Personnel and Training (AT division) and it is from this file's notings that we have culled out the relevant extracts to find out as to what had the I.B. reported against the Petitioner and how was it construed as negative (if at all) by Respondents No. 1 to 4.

10. The noting of Shri Budh Parkash, Director (AT) dated 1st October, 2001 records that I.B. has furnished reports with respect to five persons, but in so far as the three persons, namely, the Petitioner, Shri K.V. Sachidanandan and Shri Dhuliram Pattanaik, the I.B. reports have not been received. This part of the noting reads thus:

Considering the foregoing facts, it would, perhaps, be desirable if approval, of MOS (PP) is solicited in respect of all the eleven persons about whom reports of the IB has been received. The cases of remaining three persons viz. Shri K.D. Batish, Shri KV Sachidanandan (both recommended for appointment) and Shri Dhuliram Pattanaik (wait listed) will be processed when the report from the IB is received in their cases.

On 8th October, 2001 Shri Pradeep K. Deb, Joint Secretary (AT and A) mentions a similar fact at the end of para 2 of his noting of the said date, which reads thus:

We are yet to receive comments from I.B. for Shri K.D. Batish and Shri K.V. Sachidanandan in the Recommended List and Shri Dhuliram Pattanaik in the Wait List.

11. It is in the noting dated 25th October, 2001 of Shri Budh Parkash, Director (AT) that the fact about the receipt of the I.B. report with respect to the Petitioner is indicated for the first time. The report of the I.B. has been actually reproduced verbatim in the aforesaid noting of Shri Budh Parkash dated 25th October, 2001. We quote the relevant extracts from this noting:

We have since received IB reports in respect of remaining three persons about whom a report was sought from the IB. They were Sh. K.D. Batish, Sh. K.V. Sachidanandan (from the main list) and Sh. Dhuliram Pattnaik (from the Waiting

list). The noticeable features, emerging from the IB reports in respect of these three persons, which may construe to be negative, are as under,

(i) Sh. K.D. Batish:

In the legal circles, he is considered to be an advocate of average calibre. It is learnt that he was allotted Justice R.L. Khurana's Court in June, 2000. Justice Khurana, however, was not happy with his presentation of cases and asked the Advocate-general to shift him to some other Court, which was done "...." "He was a contender for the Shimla AC seat on BJP ticket in 1982 and 1985. When he did not get the ticket, he worked against the party candidate and was expelled from the party in 1985 for anti-party activities but was re-inducted in the party in 1989 ...

As would be seen from the above,

(i) Remarks in the case of Sh. Batish about professional calibre are, perhaps, worth-ignoring as IB is hardly a body/institution expected to adjudge the caliber/competence of an advocate and the recommendation about suitability made by the Selection Committee certainly overrides what goes around in legal circles in this regard. A benefit of doubt can also be considered in his case as the dissatisfaction/unhappiness of Sh. Justice Khurana about his presentation of cases is, perhaps, counterbalanced by the recommendations of the Selection Committee which is headed by a sitting Judge of the Supreme Court and consists of Chairman CAT also who himself is a retired Chief Justice of a High Court....

Orders of Secy. (P)/MOS(PP) are solicited on ABC and D above. Approval of MOS(PP) is also solicited to the placement of S/Sh. M.L. Chouhan, A.K. Chaturvedi, D. Sankaran Kutty, K.N. Shrimal and P.S. Biju in the waiting list of Judicial Members below Sh. J.K. Kaushik (recommended for offer of appointment by MOS (PP) vice, Sh. R.K. Prasad). The above approvals will however, be subject to the concurrence of CJI and approval by ACC as proposed earlier at X on pp 1-22/n.

Submitted please.

Sd/- (Budh Prakash) Director (AT) Dated 25.10.2001

12. As would thus be seen the portion marked as "X" by us in the aforesaid note dated 25th October, 2001 of Shri Budh Prakash, Director (AT) appears to be the reproduction of the report of the I.B. which Shri Budh Prakash has culled out and reproduced verbatim in his note and the portion marked "Y" by us is the opinion/recommendation of Shri Budh Parkash with respect to the Petitioner, in the light of the said report. In the concluding part of the note-dated 25th October, 2001 Shri Budh Prakash himself refers to his opinion/recommendation as "A" (the portion marked as "Y" by us) and solicits the approval of the Secretary as well as Minister of State on the basis of the proposal made by him in his note at "A" (marked as "Y" by us).

13. We then have the note dated 29th October, 2001 of Shri Pradeep K. Deb, Joint Secretary (AT and A) and in so far as the Petitioner is concerned, paras 2 and 5 of this note are relevant for our purposes and we quote these two paragraphs, which read thus:

2. Shri Batish has been the Additional Advocate General of Himachal Pradesh. He also appear to be closely aligned with the BJP and was a contender for the Shimla AC seat in 1982 and 1985. He is presently the convener of the Advocates Association (reportedly a pro-RSS organisation) since 1992. Apart from his political affiliation, he appears to be of average calibre and Justice R.N. Khurana of H.P. High Court seems to have asked the Advocate General to shift him to some other Court. There is nothing adverse against his character or integrity.

5. In the case of Shri Batish there seems to be some specific instances of under-performance as an advocate and he also has strong political affiliations (sic). However, nothing adverse has come to notice about his integrity and this should also be considered while coming to a final decision. The case of Shri Sachidanandan is clear in the sense that a slow disposal of clients cases does not indicate lack of legal knowledge and his integrity has been certified by the IB. However, in the case of Shri Pattnaik the finding by IB are that his integrity is doubtful.

14. In para 6 of his note, the following recommendation is made by the Joint Secretary with respect to the Petitioner and it reads thus:

6. The following is therefore submitted for kind consideration:

(a) A decision on the appointment of Shri K.D. Batish may kindly be taken keeping in view his indifference performance as an advocate.

(b) Appointment may be offered to Shri K.V. Sachidanandan.

(c) Shri Dhuliram Pattanaik may not be appointed as a Judicial Member of CAT.

The Joint Secretary marks the file to the Secretary (P) and on 30th October, 2001 the Secretary records the following note:

Ref. para 6(a) Shri Batish need not be appointed since his performance was so poor that he was shifted to another Court.

15. The Secretary (P) marks this note for consideration by the Minister of State and on 31st October, 2001 the Minister of State records the following:

Send IB report along with our recommendation to CJI.

16. It is in the aforesaid background that the CJI while concurring with the recommendation of the Government approved the Government's proposal in which the Petitioner's name had been excluded and undoubtedly the Petitioner's exclusion was on the basis of the final decision taken by the Secretary in his note dated 30th October, 2001 in which he clearly opined, recommended and proposed that the Petitioner should not be appointed because his performance

was so poor that he was shifted to another Court.

(Emphasis supplied)

17. When we discovered the aforesaid facts in the course of proceedings of this case on 23rd March, 2004 and observed, in the course of that order that even though the reply-affidavit of Respondents No. 1 to 4 was silent with respect to specific details of the negative nature of the I.B. report in so far as the Petitioner was concerned, the record produced before us revealed that the I.B. had reported that the Petitioner was not performing well as an Advocate and because of his below average performance Justice R.L. Khurana, a Judge of this Court desired that the Advocate General shifts him from his Court and because of this desire of Justice Khurana, Petitioner who at the relevant time had been serving as the State's Additional Advocate General, was shifted from Justice Khurana's Court to some other Court by the Advocate General because of his poor performance. Our order dated 23rd March, 2004 then goes on to record as under:

...When this matter was being argued we asked Mr. M.S. Chandel, learned Advocate General who incidentally was present in the Court, whether he is aware of any such step having been taken by the Advocate General at the desire/direction of Justice Khurana. Mr. M.S. Chandel, learned Advocate General very frankly told us that as far as the office of Advocate General is concerned there is no record whatsoever which suggests that such an incident ever happened or that the Petitioner was ever shifted from Justice Khurana's Court to another Court because of his "poor performance" or for any other reason.

18. In the same order we had, by adopting an un-usual course of action, directed impleadment of Registrar General, H.P. High Court and asking her to file an affidavit informing us whether any such incident had ever happened.

19. In compliance with the aforesaid order the Registrar General, Himachal Pradesh High Court, Shimla, filed her affidavit on 1st April, 2004. This short affidavit being very relevant for our purposes need to be read as a whole and we quote:

AFFIDAVIT OF Mrs. ARUNA KAPOOR, REGISTRAR GENERAL, HIGH COURT OF HIMACHAL PRADESH, RESPONDENT No. 8, IN COMPLIANCE OF ORDER DATED 23.3.2004 PASSED BY THE HON"BLE COURT.

I, Aruna Kapoor, wife of Dr. H.L. Kapoor, aged 54 years, presently working as Registrar General, High Court of Himachal Pradesh, Shimla, do hereby solemnly affirm and declare as under:

1. That in obedience of orders dated 23.3.2004 passed in the aforesaid Writ Petition, I have brought this order to the notice of Hon"ble Mr. Justice R.L. Khurana and on the basis of instructions of His Lordship, I state on oath that at no stage the Hon"ble Judge desired the shifting of Petitioner Shri Kali Dass Batish from His Lordship's Court on account of alleged poor performance or for any other reason, either orally or in writing.

2. That there is no record available in the Registry of the High Court in regard to alleged incident of "poor performance" of Petitioner Shri Kali Dass Batish as also with regard to alleged observation of the Hon''ble Judge about shifting of Shri Kali Dass Batish from the Court of Hon''ble Mr. Justice R.L. Khurana.

I, the above named deponent, do hereby further solemnly affirm and declare that the contents of para 1 of my above affidavit are true and correct on the basis of information obtained by me from the Hon''ble Judge which I believed to be true and contents of para 2 of my affidavit are true and correct on the basis of information derived from official record.

Verified at Shimla, this 31st day of March, 2004.

Sd/- Deponent.

20. In the order dated 23rd March, 2004 since we had issued direction about the filing of the affidavit by the Registrar General and perhaps in anticipation of what might, be forth-coming in the said affidavit of the Registrar General, to be fair to Respondents No. 1 to 4 we had permitted Mr. Thakur, learned Sr. C.G.S.C. to get in touch with his clients and to find out whether with his clients there was any material available which could corroborate or establish the fact about the Petitioner being removed from Justice Khurana's Court to some other Court by order of the Advocate General, at the instance of Justice Khurana, because of his poor performance as an advocate.

On 1st April, 2004 when the matter was listed in the Court, even though we found that the Registrar General of this Court had filed the affidavit Mr. Thakur had not filed any supplementary affidavit. He sought more time and ultimately on 11th April, 2004 Respondent No. 4 Shri Balak Ram Chauhan, Deputy Superintendent of Police, Intelligence Bureau, Shimla, filed his supplementary affidavit. Paras 1 and 2 of that affidavit being relevant are reproduced as hereunder:

1. That I am placing on record the copies of the office order dated 16.06.2001 (Saturday) (Annexure R-4/1) issued by the office of Advocate General whereby Shri Kali Dass Batish was deputed to appear before the single Bench of Hon''ble Mr. Justice R.L. Khurana and office order dated 19.06.2001 (Tuesday) (issued by the office of Advocate General, dispatched on 20.06.2001) (Annexure R-4/2) whereby Sh. Kali Dass Batish was shifted from the single Bench of Hon''ble Mr. Justice R.L. Khurana. These copies were procured during the course of discreet and confidential inquiries. It is further submitted that since the secrecy is the essence of the organization of IB, the further information and the source of information cannot be divulged in view of privilege u/s 124 of the Evidence Act as disclosure of such information will adversely effect the public interest. It is further submitted that as per available input Sh. Kali Dass Batish was not subsequently deputed before the single Bench of Hon''ble Mr. Justice R.L. Khurana thereafter.

2. That I further solemnly affirm and declare that the contents of above affidavit of mine are correct and true to the best of my knowledge and legal advice received and no part of it is false and nothing material has been concealed therein.

21. Alongwith the supplementary affidavit Shri Balak Ram Chauhan, Respondent No. 4 filed copies of two Office Orders, one dated 16th June, 2001 and the other dated 20th June, 2001 issued by the Advocate General with a view to support the Respondents' stand that the Petitioner indeed has been shifted from Justice Khurana's Court to some other Court.

22. It shall not be out of place to mention and record here that since in the supplementary affidavit, or what is being referred to as "evidence by way of affidavit" filed by Respondent No. 4, it is mentioned that "since the secrecy is the essence of the organisation of I.B., the further information and the source of information cannot be divulged.....", we specifically, pointedly and categorically asked Mr. Thakur to produce before us the original record of the I.B. so that we atleast could, for ourselves, see and find out the material, or the record which could indicate or reveal the nature and the source of information forming the basis of the aforesaid allegation against the Petitioner and only after that we could decide whether to grant privilege to the Respondents about the production of any such record or not. Mr. Thakur very candidly, frankly and fairly stated before us that indeed no such record was in existence, no such record was available since these matters are not "recorded" or reduced into writing and that all these issues are handled on oral basis.

23. What therefore emerges, on a conspectus of the aforesaid factual backdrop of the entire case particularly based as it is on the official record maintained by Respondents No. 1 to 4 as well as the pleadings of the parties, those pleadings which originally stood filed by the parties and those which later on came to be filed through specific orders of this Court, such as the affidavit of the Registrar General, High Court and the Supplementary Affidavit (evidence by way of affidavit) of Respondent No. 4, is that the Petitioner even after being placed at Sr. No. 1, in order of merit, in the select list was not appointed only, and only on the ground that the IB had reported that his performance and calibre as a lawyer was so poor that he was removed from the Court of Justice R.L. Khurana to some other Court and that this removal was on the basis of an order passed, or direction issued by Justice Khurana himself or at his instance. The notings maintained by the Department of Personnel and Training, as have been reproduced in the body of this judgment, had clearly reflected that both Shri Budh Parkash Director (AT) and Shri Pradeep K. Dey, Joint Secretary (AT and A) had clearly indicated that these two officers were themselves of the opinion that it was not for the IB to assess the performance and calibre of the Petitioner as an Advocate, especially since a High Powered Selection Committee headed by no less a person than a serving Supreme Court, Judge and comprising, inter alia, a former Chief Justice who was the Chairman of the Central Administrative Tribunal

had already assessed the worth, calibre and performance of the Petitioner and on that basis it had placed him at Sr. No. 1 in order of merit in the select list. What is therefore of vital importance is that despite these notings, observations, suggestions and recommendations of the aforesaid two officers. Secretary (Personal) clinched the issue by deciding/proposing that the Petitioner "need not be appointed" since his performance was so poor that "he was shifted to another Court". We can, therefore, without any fear of contradiction safely hold, in categorical terms, unequivocally that the decision not to appoint the Petitioner was taken by the Respondents No. 1 to 4 only on the ground that his performance was poor and the only basis, the only material, the only reason for reaching this conclusion was the fact of his being "shifted to another Court". When we say that the Central Government (Respondents No. 1 to 4) had taken such a decision, we are saying so on the basis of the aforesaid recommendation of Secretary (P) and the order thereupon passed by the Minister of State recording in her note that the IB report alongwith "our recommendation" he sent to the Chief Justice of India. It is, therefore, crystal clear and thus conclusively stands established, beyond any doubt, that the only reason and the ground upon which the Petitioner had been denied the appointment, despite his being selected, was the fact of his being shifted to another Court which in turn was based on his poor performance.

24. Now, if the aforesaid fact of the Petitioner being shifted to another Court was indeed true and correct, perhaps this Court while exercising its jurisdiction of judicial review in a matter like the present one would have had a lot of constraints and limitations in reappreciating the contours of the controversy. We are saying so because of the inherent limitations imposed upon this Court in exercise of its writ jurisdiction under Article 226 of the Constitution while reviewing an executive action because this Court is always loathe to substitute its opinion to that of the executive in matters like this. And we are saying so in a given fact situation, on the basis of an assumption that the facts stated in such a fact situation were correct and true.

25. Unfortunately, however, the facts stated are untrue and incorrect. The very basis of the decision of the Respondents No. 1 to 4 viz., the fact of the Petitioner being shifted to another Court is knocked out inasmuch as, on scrutiny it has been found by us that this basis did not even exist. As has been noticed above, the affidavit of the Registrar General of the High Court (on its administrative side) and the statement of the learned Advocate General clearly establish, based on impeccable and unimpeachable official record, that the Petitioner was never shifted from Justice Khurana's Court to another Court either because of his alleged poor performance or on the basis of any order passed to that effect or for that purpose by Justice Khurana or for that matter by anyone else. This piece of evidence is enough to lead us to a conclusion that the very basis, the very edifice of the Respondents' contention totally stands obliterated/knocked out.

26. Faced with the aforesaid situation, and on the basis of our permission and

liberty granted for production of record, Respondents made a clumsy attempt to justify their untenable report by filing a Supplementary Affidavit, what they call as "evidence by way of affidavit." in which they attempted to establish two facts, again untenable. Firstly, they enclosed with the said affidavit two Office Orders, one dated June 16, 2001 and the other dated June 19, 2001, issued by the Advocate General, in furtherance of their aforesaid clumsy attempt to give an impression to this Court, with the support of the aforesaid two documents that the Petitioner, whereas was originally allocated Justice Khurana's Court vide Office Order dated June 16, 2001, was later on shifted vide order passed just three days later (on June 19, 2001) to the Court of Miss Justice Kamlesh Sharma. When we say that the aforesaid is a clumsy attempt on the part of the Respondents, we have very strong reasons in support of our said observation and our reasons are as under:

(1) First and foremost, very apparently from the very face of the Order dated June 16, 2001 or the order dated June 19, 2001, no one can be permitted to allege that either of these two orders reflects or reveals the intention, the ground or the reason as to why the Petitioner was shifted from one Court to another. The order dated June 19, 2001 does not at all indicate any reason as to why the Petitioner was shifted from the Single Bench Court of Justice Khurana to the Division Bench Court of Miss Justice Kamlesh Sharma. Only operative part of the order suggests that it was a simple routine departmental affair unconnected with any particular individual as such. For ready reference, the operative-part (the opening part) of the order reads:

in supersession of earlier order No. 1-8/2000-6027 dated 16.6.2001, the Law Officers of this department will henceforth appear in the Hon'ble Courts shown against their names.

(2) The second reason for our coming to the aforesaid conclusion is that the 19th June order does not pick out the Petitioner singularly as a solitary instance of shifting from one Court to another. This order on the contrary suggests a wholesale inter-change/shifting of Law Officers from various Courts/Benches to various other Courts/Benches. The Petitioner's name is only one of many such names.

(3) If we go by the traditions and the common practice prevalent in the Courts of our country, whereas in the first order dated June 16, 2001, the Petitioner was allocated Justice Khurana's Single Bench Court, his allocation to the Division Bench Court of Miss Justice Kamlesh Sharma vide second order dated June 19, 2001, if at all can be said to be an elevation in the sense that in hierarchical order the Petitioner was shifted from a lower Single Bench Court to a higher Division Bench Court. It may or may not be out of place here, yet it might bear relevance that almost, everyone at the Bar during the course of the hearing of this case recollected, including one of us (Justice K.C. Sood) that the necessity of issuing the second order dated June 19, 2001 had arisen because Shri M.C. Mandhotra, the then Additional Advocate General who had been allocated

Division Bench Court of Miss Justice Kamlesh Sharma vide order dated June 16, 2001, abruptly, all of a sudden stopped attending Courts and because compulsorily some alternative arrangement had to be made, the vacancy created by the departure of Shri Mandhotra was filled up by allocating the Division Bench Court of Miss Justice Kamlesh Sharma to the Petitioner who also was an Additional Advocate General at the relevant time, and thus competent to fill up the said vacancy by the sudden, abrupt, unexpected disappearance of Shri M.C. Mandhotra from the scene. The causation of the vacancy of Shri M.C. Mandhotra can also clearly be made out, from the very face of above-referred two Office Orders by the fact that Shri Mandhotra's name does not figure, in the Office Order dated June 19, 2001 which clearly means that Sh. M.C. Mandhotra had departed from the scene and because, of his departure the consequential vacancy had to be filled up by someone and it was the Petitioner who was chosen by the Advocate General to fill up that vacancy. The Petitioner therefore, was not shifted from Justice Khurana's Court on the basis of any complaint or order passed by Justice Khurana but because of the aforesaid fact. The fact also remains that the aforesaid two Office Orders of the Advocate General did not in any way advance or support the contention of Respondents No. 1 to 4 that the Petitioner was removed from Justice Khurana's Court to another Court on account of his poor performance or because of the order passed or direction issued by Justice Khurana.

(4) When therefore we had in an earlier part of this judgment referred as "clumsy" the attempt on the part of Respondents No. 1 to 4, what we had in mind was the simple fact that these two Office Orders did not at all in any manner support the aforesaid stand of Respondents No. 1 to 4.

27. On the factual matrix therefore, in conclusion, we have to categorically observe that despite opportunities granted, the Respondents could not place before us any material in support of their aforesaid contention that the Petitioner was shifted or removed from Justice Khurana's Court on account of his poor performance and/or because of any order passed by Justice Khurana to that effect. On the contrary actually, we have before us material, impeccable and unimpeachable in character, to establish beyond an iota of doubt that the Petitioner was never shifted from Justice Khurana's Court on the basis of his so-called or alleged poor performance or because of any order passed by Justice Khurana and that his shifting as is evidenced by the contents of Office Order dated June 19, 2001 was to fill up the vacancy caused by the sudden departure of Shri M.C. Mandhotra and that, this shifting could not put the Petitioner in any bad light or adversely reflect upon his performance as an Advocate. Rather, as observed earlier this shifting, if at all could be viewed as favourable to the Petitioner because, hierarchically speaking, from a lower Single Bench Court he was allocated a higher Division Bench Court.

28. May we now come back to the four notings extracted, and referred to, in the earlier part of this judgment, viz., the noting of the Director, Joint Secretary,

Secretary and the Minister of State. The pith and substance of these notings clearly, in unmistakable terms indicated that the Government even though had not consented to or acquiesced and agreed with the opinion of the IB about the alleged poor performance of the Petitioner as an Advocate and had explicitly, in unequivocal terms disregarded and over-ruled such opinion of the IB, yet it was on the basis of a single fact of the Petitioner being removed from Justice Khurana's Court that the Government either concurred with IB's assessment about the Petitioner's poor performance as an Advocate, or the Government itself formed such an opinion based, as it was, on this single fact. Once therefore, this single fact stands knocked out, the basis of the Government's aforesaid opinion gets totally obliterated. Nothing therefore, remained which could be termed as adverse to the Petitioner in so far as Petitioner's performance as an Advocate was concerned.

29. The Petitioner despite having been selected was not appointed. What therefore is Petitioner's right which can be said to have been violated? By now, it is a well settled principle of service jurisprudence as well as of Administrative Law that selection by itself, nay, inclusion of one's name in the select list by itself, does not create or confer any right of appointment upon the sejectee. One can have possibly no quarrel with this established proposition of law but then here, in this case we are entering into a different constitutional arena and that arena is based on nothing other than Article 14 of the Constitution. Article 14 strikes at Arbitrariness. It totally disapproves equals being treated as unequals as it disapproves the singling out of one person for hostile treatment.

30. As their Lordships of the Supreme Court in the celebrated judgment of Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, observed and we quote-

56. Now, the question immediately arises as to what is the requirement of Article 14: what is the content and reach of the great equalising principle enunciated in this article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a harrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. We must reiterate here what was pointed out by the majority in E.P. Royappa Vs. State of Tamil Nadu and Another, namely, that "from a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14.

Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as

philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied

How far natural justice is an essential element of procedure established by law.

31. Earlier the Constitution Bench of the Supreme Court in the case of E.P. Royappa Vs. State of Tamil Nadu and Another, dwelling at length on the applicability and scope and the binding nature of Article 14 of the Constitution with respect to the lack of arbitrariness and the adoption of fair play in the said connection observed as under:

85. The last two grounds of challenge may be taken up together for consideration. Though we have formulated the third ground of challenge, as a distinct and separate ground it is really in substance and effect merely an aspect of the second ground based on violation of Articles 14 and 16. Article 16 embodies the fundamental guarantee that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Though enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution, Article 16 is only an instance of the application of the concept of equality enshrined in Article 14. In other words, Article 14 is the genus while Article 16 is a species. Article 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalizing principle? It is a founding faith, to use the words of Bose, J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality.

Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former, Both are inhibited by Articles 14 and 16.

32. In the latter judgment, in the celebrated case of Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, basing their observations on the aforesaid two judgments of the Constitution Benches, their Lordships observed as under:

21. This rule also flows directly from the doctrine of equality embodied in Article 14. It is now well settled as a result of the decisions of this Court in E.P. Royappa Vs. State of Tamil Nadu and Another, and Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory: it must not be guided by an extraneous or irrelevant consideration, because that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected by Article 14 and it must characterize every State action, whether it be under authority of law or in exercise of executive power without making of law...

33. Applying the aforesaid well established principles emanating from Article 14 therefore, in the facts and circumstances of this case we have no doubt in our minds that the Petitioner was singled out for hostile, discriminatory treatment, though not necessarily at all for any extraneous consideration or on account of any malicious reason but only because of a palpably false, incorrect and totally baseless report of the IB. A wrong has been done to the Petitioner. The Petitioner has been unfairly dealt with. The Petitioner has been deprived of his right of appointment and when say so we base our said observation on the ground that the Petitioner, on account of his selection and his inclusion in the select list and placement at Sr. No. 1 in order of merit, applying the principle of equality before law, was entitled to be appointed as a Judicial Member, Central Administrative Tribunal as persons selected alongwith him actually had been appointed. Since all Ors. selected along with him, who all were placed lower in merit than the Petitioner had been appointed as Judicial Members of Central Administrative Tribunal, on that analogy the Petitioner had also a right of appointment and denial of this right, on a basis, on a ground which now has been declared to be non est by us, amounted to his being deprived of the right of equality. On the aforesaid reason therefore, the Petitioner needs a protection from this Court and that protection this Court can give by issuance of a mandamus to the Respondents so that injustice done to the Petitioner at least at this stage is

undone. That can be done by ordering the reconsideration of Petitioner's case, treating the aforesaid adverse I.B. Report against him as totally non-est. Of course, while, reconsidering the Petitioner's case, minus the aforesaid I.B. Report, the Respondents shall apply all requisite parameters in the process of reconsideration and the reconsideration shall be done in accordance with law, on the merits of the case and of course, subject to approval by the competent authority under the Administrative Tribunals Act, 1985. As far as this case is concerned, based on what we have indicated in this judgment, the only fact which was brought to our notice disentitling the Petitioner to be appointed, despite his selection, was the adverse IB report. No other fact adverse to the Petitioner was brought to our notice by the Respondents in this case, and it is on this basis that we are ordering the reconsideration of the Petitioner's case. We have, therefore, no hesitation in saying that in the process of reconsideration, the Respondents even though may initiate the said reconsideration on the basis of the Petitioner's selection by the Selection Committee, in the process of such reconsideration, of course, the Respondents shall be at liberty to take into account whatever other relevant, aspects the Respondents might consider germane, as far as the merits of the case go.

34. We must record at this stage the statement of Mr. R.L. Sood, learned Senior Counsel appearing for the Petitioner made at the Bar as well as the statement of the Petitioner himself that, if appointed as a Judicial Member of Central Administrative Tribunal, the Petitioner will not take up any controversy with respect to his past seniority nor shall he lay any claim to that effect and that, if appointed, the Petitioner would be satisfied if his seniority as a Judicial Member of Central Administrative Tribunal is reckoned prospectively from the date of actual appointment pursuant to the direction issued by this Court in this judgment.

35. In the result therefore, this writ petition is allowed. The action of the Respondents in not appointing the Petitioner as Judicial Member of Central Administrative Tribunal is quashed and set aside. By issuance of a writ of mandamus, the Respondents are directed, in the light of and on the basis of the observations made in this judgment, to reconsider afresh, as a special case, the Petitioner for his appointment as a Judicial Member, Central Administrative Tribunal on the basis of his selection by the Selection Committee. Of course, the Petitioner's case for appointment shall be considered, in supersession of all other cases, for and against a vacancy of a Judicial Member as is available at present or against the first available vacancy which might occur in future. Of course as and when appointed as a Judicial Member, Central Administrative Tribunal, the Petitioner's seniority shall be reckoned prospectively from the date of his appointment. If a vacancy is presently available, the consideration process shall be completed and taken to its logical conclusion within a period of two months from today but if no vacancy is available at present, as already directed, the Petitioner's case shall be considered as the first case against any vacancy that may arise in future and the consideration process in that eventuality shall be

completed and taken to its logical conclusion within a period of two months from the date the vacancy in future becomes available.

36. Before we conclude, we wish to place on record a word of caution. As we proceed to conclude, we feel that placing on record our word of caution would be relevant as far as future is concerned. By this we should not be construed to either impinge upon or interfere, with the functioning of the affairs of IB at all since we have no intention what so ever of doing that. Our concern is based solely on the consideration that in future no one should suffer, despite his selection on merit, merely because of some adverse report of the IB which is not supported by any corroborative material. We are quite sure and fully confident that everyone shall appreciate our deep concern about protecting this valuable right of the selected candidates. Yes, if adverse reports even against the selected candidates are received, these deserve full consideration because, no one can be allowed to canvass that persons with tainted past and doubtful future, even though selected on merit should be appointed on important posts in public life. Our word of caution only is that reports adverse against any such person should be examined and considered with utmost caution and, as far as possible, in any given situation/instance, the authorities concerned should/may insist upon being provided with corroborative supporting material. We shall be failing in our duty if we also do not take this opportunity of rendering a piece of advice to the IB Organisation that it should ensure in future that as far as possible, whenever adverse reports are sent these should be supported by corroborative material, of course, as far as possible. Our this piece of advice should be taken in the true spirit and in right perspective by the IB, because appreciably IB should understand that the career prospects of persons selected on merit cannot be allowed to be jeopardised by unconfirmed, uncorroborated adverse reports against them.

37. We accordingly, therefore, direct that copies of this judgment shall be sent to Cabinet Secretary, Government of India as well as Director of Intelligence Bureau for their information and appropriate action as would be deemed suitable in the facts and circumstances of this case.