

(1971) 03 CAL CK 0002
In the Calcutta High Court
Case No : F.M.A. No. 197 of 1971

Union of India (UOI)

APPELLANT

Vs

Durgagati Bhattacharyya

RESPONDENT

Date of Decision : 19-03-1971

Acts Referred:

All India Services Act, 1951 — Section 3(1)
All India Services Manual Rules — Rule 7
Civil Procedure Code, 1908 (CPC) — Order 19 Rule 3
Constitution of India, 1950 — Article 123, 14, 15, 16, 163
Industrial Disputes Act, 1947 — Section 33(2)
Police Service (Regulation of Seniority) Rules, 1954 — Rule 3(2A)

Citation : 76 CWN 67 : (1973) 2 ILR (Cal) 1

Hon'ble Judges : P.K. Banerjee, J; Ghose, J

Bench : Division Bench

Advocate : Jagdish Swaroop, Solicitor-General, Noni Coomar Chakraborti, Somendra Chandra Basu and Mukul Gopal Mukherjee, for the Appellant; Sankardas Banerjee and D.N. Das for Respondent No. 1, B. Das, General for State, A.K. Basu, M.N. Roy and B. Basak, for the Respondent

Final Decision : Allowed

Judgement

Ghose, J.—This appeal is directed against the judgment and order dated January 21, 1971, passed by Sabyasachi Mukharji J. quashing the order dated November 27, 1970, appointing the Respondent No. 3 as the Inspector-General of Police, West Bengal. The v said order also directed the Union of India and the State of West Bengal to proceed to appoint the Inspector-General of Police, West Bengal, in accordance with law.

2. The Union of India, one of the Respondents in the proceeding under Article 226 of the Constitution, in the first Court has filed an appeal against the said judgment and order. The State of West Bengal and Prasad Kumar Basu also have jointly filed a separate appeal challenging the said judgment and order of the learned Judge. We propose to dispose of both the appeals by one judgment.

3. On February 1, 1936, the Petitioner was appointed to the service known as Indian Police by the Secretary of State for India. On February 26, 1938, the Petitioner was confirmed in the said service. On October 21, 1946, the then Government of India constituted a service known as the Indian Police Service. After serving in various capacities the Petitioner was confirmed in the senior scale of the Indian Police Service on or about August 15, 1947.

4. On January 26, 1950, the Constitution of India came into force and by virtue of Article 312(1) of the said Constitution the Indian Police Service came to be deemed to be one of the services created by Parliament under the said Article. The Petitioner was confirmed in the selection grade of the Indian Police Service on April 28, 1951. On November 9, 1953, the Petitioner was promoted to officiate, as a Deputy Inspector-General of Police. On February 18, 1960, the Petitioner was confirmed in the post of Deputy Inspector-General of Police. Between October 27, 1969 and December 1969, the Petitioner officiated as an Additional Inspector-General of Police and went on leave from December 23, 1969. On or about April 10, 1970, the Petitioner became the Additional Inspector-General of Police (Special) which was a special post.

5. Upon the retirement of his predecessor the Petitioner came to occupy the cadre post of Additional Inspector-General, of Police and was confirmed in the said post on November 26, 1970, with retrospective effect from October 1, 1970.

6. P.K. Basu was appointed in the provincial Police Service as a Deputy Superintendent of Police on or about February 10, 1938. In April 1944, P.K. Basu was promoted to act as Additional Superintendent of Police and was appointed permanently in the Indian Police Service on August 15, 1947. On February 24, 1956, P.K. Basu was appointed a Deputy Inspector-General of Police and was confirmed as such in March 1962. With effect from December 1, 1965, P.K. Basu was appointed to the post of Inspector-General of Police, Border Security Force. The said post is admittedly a non-cadre post. The Petitioner is due to retire in July 1971 and P.K. Basu is due to retire in August 1971. From December 1, 1965, until he took over the charge as the Inspector-General of Police, West Bengal, on December 1, 1970, P.K. Basu was the Inspector-General of Police, Border Security Force. In the Civil List published on July 1, 1957, containing a list of I.P.S. officers in order of seniority, the Petitioner Bhattacharyya has been placed 4th and P.K. Basu has been placed 7th in position. The said list was prepared and published in accordance with the provisions of the Indian Police Service (Regulations of Seniority) Rules, 1954, to ascertain the respective seniority of the officers in the cadre.

7. In June 1964, the Chief Minister of West Bengal forwarded a recommendation to the Government of India recommending the appointment of the Petitioner as the Inspector-General of Police, Assam. In May 1966, the Chief Minister of West Bengal again recommended the Petitioner for appointment in a post of Inspector-General of Police under the Union Government. In May 1968, the Petitioner was recommended for being appointed as the Inspector-General of Railway Protection

Force.

8. By a proclamation issued and published in the Calcutta Gazette on March 20, 1970, the President of India in exercise of the powers conferred by Article 356 of the Constitution assumed to himself as President all functions of the Government of West Bengal and all powers vested in or exercisable by the Governor of the said State. The President of India further, after assuming to himself the functions of the Government of West Bengal and all the powers vested in or exercisable by the Governor of West Bengal, made an order to the following effect, to wit:

In pursuance of Sub-clause (i) of Clause (c) of the Proclamation issued on this the 19th day of March 1970, by me under Article 356 of the Constitution of India, I hereby direct that all the functions of the Government of the State of West Bengal and all the powers vested in or exercisable by the Governor of that State under the Constitution or under any law in force, in that State which have been assumed by the President of India by virtue of Clause (a) of the said Proclamation shall subject to the superintendence, direction and control of the President of India be exercisable also by the Governor of the said State.

9. The said order was published in the Calcutta Gazette on March 20, 1970. In pursuance of the said proclamation the President of India commenced to govern the State of West Bengal.

10. By a D.O. letter dated August 27, 1970, addressed to the then Chief Secretary to the West Bengal Government, L.P. Singh, Secretary, Ministry of Home Affairs, New Delhi, suggested to the then Chief Secretary that in the context of law and order situation of the country, officers of proved integrity and competence should be appointed to the office of the Inspector-General of Police. Mr. Singh requested the State Government to give serious consideration to the suggestion.

11. In reply, Mr. Mullick, the then Chief Secretary to the Government of West Bengal, in a D.O. letter dated September 24, 1970, written to L.P. Singh Secretary, Ministry of Home Affairs, New Delhi, expressed the opinion that in the background of, law and order situation then prevailing in West Bengal, an officer with drive and initiative should be appointed, to the post: of Inspector-General of Police and suggested the name of Sri Gopal Dutt to be appointed as the I.G.P., West Bengal. Sri Gopal Dutt was then the Security Officer of the Prime Minister and was holding the rank of Inspector-General of Police.

12. On receipt of the aforesaid D.O. letter from the then Chief Secretary of West Bengal, L.P. Singh in a note suggested on September 29, 1970, that Sri P.K. Basu might be given an extension and appointed as the Inspector-General of Police, West Bengal. Sri Singh asked the department for the character rolls of all officers in the I.P.S. in between R.K. Gupta and S.C. Choudhury, the Commissioner of Police and the Joint Commissioner of Police, Calcutta. Sri Singh also called for the character rolls of Sairbasri B. Chatterjee, P.K. Basu and G.C. Dutt.

13. Thereupon B. Venkataraman on or about October 16, 1970, forwarded the character rolls of the said three officers as well as of the Petitioner and other officers in the gradation list of I.P.S. officers in between Commissioner of Police, R.K. Gupta and Joint Commissioner of Police, Sunil Choudhury to L.P. Singh. In forwarding the same Sri Venkataraman commented in his note as follows:

...I have left out the name of Sri Hooja. Among the four Sri P.K. Basu has the best roll and between Sri Bhattacharyya, Sri Basu and Sri Dutt he would be the last to retire, though the difference is just marginal. The rolls of these four officers are placed below.

14. The relevant comment in the note submitted by L.P. Singh to the Minister of State and the Minister of Home Affairs was as follows:

Of the officers at present serving under the West Bengal Government Sri D.G. Bhattacharyya is the seniormost. He is at present Additional I.G.P. He was passed over even for the post of Commissioner of Police and he is not certainly good enough for the post of I.G.P. He is to retire in a few months.

15. In his note L.P. Singh suggested that according to him P.K. Basu would be the best choice for the post of I.G.P., West Bengal. This note was placed before the Minister of State for Home Affairs as well as Minister in charge of Home Affairs and were signed by them.

16. The said note was signed by L.P. Singh on October 16, 1970. The Minister of State K.C. Pant signed the note on October 17, 1970 and the same was signed by the Prime Minister who was also the Home Minister on November 23, 1970.

17. On November 23, 1970, L.P. Singh wrote to the Chief Adviser, Governor of West Bengal. The said letter is set out hereunder:

My dear Ghosh,

I am writing to you with reference to S. Mullick's d.o. letter No. 190-CS/70 dated September 24, 1970 and the discussions I had with you on the subject when you were here last in the third week of November. The matter, however, came up in the course of the discussions which the Governor has had in New Delhi this week.

2. All aspects of the appointment of the next Inspector-General of Police have been fully considered and I am now desired to advise that Sri P.K. Basu should be appointed.

Yours sincerely, Sd, L.P. Singh.

Sri B.B. Ghosh,

Principal Adviser to the Governor of West Bengal,

Calcutta.

18. Upon receipt of the said letter on November 26, 1970, B.B. Ghosh forwarded

the same to the Chief Secretary. The Chief Secretary on the same date ordered the said letter to be processed. Thereafter on November 27, 1970, a note was put up by Chief Secretary before the Governor for according, his approval to the proposals to appoint P.K. Basu as the I.G.P. West Bengal, as advised by the Government of India. A draft notification was submitted along with the said note. The Governor approved the said proposal and endorsed his approval on the said note. On November 27, 1970, a notification appointing P.K. Basu as the I.G.P. West Bengal with effect from December 1, 1970, was published in the official gazette.

19. In the meantime, on October 28, 1970, the Petitioner Bhattacharyya made a representation to the Governor of West Bengal through I.G.P. and Chief Secretary expressing his surprise at rumours current in Calcutta and published in different newspapers that the Government was searching for a new I.G.P. in the place of S.M. Ghosh who was due to proceed on leave preparatory to retirement on December 1, 1970. In the said representation Bhattacharyya set out in detail his achievement's and attainments. Copies of the said representation were also sent to K.C. Pant, Minister of State for Home Affairs, B.B. Ghosh, Principal Adviser to the Governor of West Bengal M.M. Basu, Adviser, Home Department, L.P. Singh, Secretary, Home Department and P.N. Haksar, Secretary to the Prime Minister.

20. On November 2, 1970, the aforesaid representation of the Petitioner was forwarded by the then I.G.P. together, with, his recommendation in favour of the, Petitioner to the Home secretary, west Bengal. The Home Secretary on November, 12, 1970 ordered that the file might be sent to the Governor through the proper channel. On November 14, 1970, the then I.G.P. forwarded a further recommendation in favour of the Petitioner giving reasons for appointing the Petitioner as the L.G.P.

21. On October 30, 1970", the then I.G.P. recommended confirmation of the Petitioner as Additional Inspector-General of Police with effect from October 1, 1970. The said recommendation was supported amongst others by the Home Secretary, the Chief Secretary and Sri M.M. Basu, Adviser of the Home Department, on November 25, 1970. The said recommendation was accepted and order for confirmation was made by the Government on November 26, 1970. The Petitioner was confirmed in the permanent cadre post of Additional Inspector-General of Police with effect from October 1, 1970, as mentioned earlier.

22. The Petitioner saw the Governor on November 16, 1970. The Governor told, the Petitioner that in spite of certain adverse remarks appearing in the confidential character roll of the Petitioner, he, according to the Governor, was the most suitable officer for the post of I.G.P., West Bengal. On November 16, 1970, the Governor left for Delhi. In Delhi, the Governor had discussions with L.P. Singh as well as K.C. Pant and Sm. Indira Gandhi with regard to the appointment of I.G.P., West Bengal. Although in the discussions held at Delhi, with regard to the comparative merits of P.K. Basu and the Petitioner, everybody concerned was of the opinion that P.K. Basu was the most suitable candidate; the

final selection was, however, left to the Governor who was to select the most suitable candidate for the post in the background of the situation prevailing in West Bengal. The Governor, on his return from Delhi, intimated the aforesaid facts to the Principal Adviser as well as the Chief Secretary. After his return from Delhi the Governor at a meeting at Raj Bhavan informed the Chief Secretary as well as the Principal Adviser his final decision with regard to the choice for the post of I.G.P., West Bengal.

23. The Petitioner in his affidavit-in-reply to the main affidavit-in-opposition to the rule nisi has contended that the story of discussions held at Delhi between the Governor on the one hand and L.P. Singh and the Prime Minister on the other should not be believed inasmuch as the said case was not put forward in the affidavit filed for the first time on behalf of the State of West Bengal in opposition to the application for injunction for restraining the State of West Bengal from acting upon or giving any effect to the said impugned order of appointment dated November 27, 1970. It is also contended on behalf of the Petitioner that the discussions between the Governor and the Principal Adviser and the Chief Secretary at Raj Bhavan after the return of the Governor from Delhi was also not stated in the aforesaid affidavit and should not be accepted.

24. On behalf of the Appellant Union of India the Solicitor-General submitted that the only right the Petitioner had was the right to be considered for the post of the I.G.P. There was no doubt that the Petitioner's case was considered for the appointment of I.G.P. The said case was considered in any event right from the time that C. Venkataraman forwarded his notes to L.P. Singh containing the names of the Petitioner, P.K. Basu, B. Chatterjee and G.C. Dutt. Mr. Solicitor then submitted that the most relevant factor to be considered for the purpose of the appointment of I.G.P. was the confidential character rolls (hereinafter referred to as the C.C.R.) of the respective candidates. In the instant case, along with the C.C.R. the fact that the Petitioner was awarded the Police Medal was also considered. The authorities also considered that although the Petitioner was recommended for the award of the President's Medal for the Police and the Fire Services, the authorities in Delhi did not accept such recommendations and did not award the said medals to the Petitioner. Basu's C.C.R. was certainly better. Basu was awarded not only the Police Medal but also the President's Medal for Police and Fire Services.

25. Most of the entries in the C.C.R. of the Petitioner were of such general nature that the Petitioner's contention that he had documents in his possession to disprove them could not be accepted. In the circumstances, according to the Solicitor-General, it has to be held that all relevant matters were considered by the appointing authority, i.e. the Governor of West Bengal.

26. Next submission of the Solicitor-General was that Basu was not in fact holding an inferior post. Basu, according to Mr. Solicitor, was I.G., B.S.F. and was enjoying the emoluments enjoyable by the I.G.P., West Bengal. It is true that the Petitioner had been recommended for being appointed as I.G.P. outside the State

of West Bengal, viz. in Assam and Orissa, but the fact remained that such recommendations were never accepted by the authorities. The Petitioner in his representation to the State Government pointed out all facts that might be stated in his favour. The said representations were forwarded by the then I.G.P. along with his recommendation in favour of the Petitioner. All the relevant facts that could be stated for the Petitioner were stated in the recommendation of the then I.G.P.

27. In the instant case, although discussions were had at Delhi in the ministerial level as well as in Calcutta between the Governor, his Principal Adviser and the Chief Secretary, the Governor had independently of the advice given by the Central Government considered all the relevant matters and came to his own decision. The Central Government gave the advice by virtue of the power reserved by the President to himself to superintend, direct and control the Governor in the performance of his functions as the delegate of the President under and in terms of the aforesaid G.S.R. 491 dated March 19, 1970. It was, therefore, within the power of the Central Government to give direction or advice. It should be noted that under the aforesaid proclamation the President assumed to himself all executive powers of the State and suspended Articles 163 and 166(3) of the Constitution. The delegation of the powers assumed by the President to the Government was not absolute but subject to the superintendence, direction and control of the President. Thus under the power reserved, by the President, the President could, if he so desired, superintend or give direction or control the exercise of the powers by the delegate, i.e. the Governor. The delegator by delegation of his powers does not lose his own powers and can exercise the same at any time he desires. Mr. Solicitor relied on Godavari S. Parulekar and Ors v. State of Maharashtra AIR 1966 S.C. 1405 and Raja Bhairebendra Narayan Bhup Vs. The State of Assam, .

28. Nothing extraneous weighed with the Governor. There is no allegation in the petition or in any of the affidavits filed by the Petitioner that the Governor was ever actuated by malice or acted mala fide. The charge of malice or mala fide is levelled only against L.P. Singh. Mr. Solicitor also relied on the unreported decision of the Supreme Court in the case of Prakash Chand Sharma v. Oil and Natural Gas Commission Writ Petitioner No. 233 of 1966, unreported and the case of R.L. Butah Vs. Union of India (UOI) and Others, .

29. The office memorandum regarding preparations and maintenance of confidential reports dated October 31, 1961, although provided for, in para. 8 thereof, communication of adverse entries in C.C.Rs. to the employee concerned, the said memorandum contains only executive instructions and are not statutory rules. Breach of either para. 8 or para. 9 of the said memorandum and failure to communicate the adverse entries in the C.C.R. to the Petitioner would not make the entries null and void. Subsequently, on or about July 15, 1970, the Government of India in exercise of powers" conferred by Sub-section (1) of Section 3 of the All India Services Act, 1951, framed rules regarding confidential

reports and provided for communication of adverse entries in the C.C.Rs. to the employee concerned. The said rules also have provided for opportunities to be given to the employees to make representation against adverse remarks contained in their C.C.Rs. These rules are of course statutory rules, but they have come into force only on July 15, 1970. None of the adverse remarks in the C.C.R. of the Petitioner was entered after July 15, 1970. Thus the said rules do not apply to the instant case.

30. Mr. Solicitor then relied on the case of A.K. Kraipak and Others Vs. Union of India (UOI) and Others, and on S.G. Jaisinghani Vs. Union of India (UOI) and Others, . Relying on the aforesaid decisions Mr. Solicitor submitted that the Court should consider only whether the Governor acted fairly. In the instant case, the Governor considered, according to Mr. Solicitor, all the records, the representations made by the Petitioner together with the recommendation of the outgoing I.G.R. held discussions with the Principal Adviser and the Chief Secretary here held discussions with the Prime Minister, the Minister of State for Home Affairs and others at Delhi and then came to his own decision. The Central Government did not want to dictate to the Governor in the instant case and left the decision to be taken by the Governor. This was riot the case of exercising an executive act but was the case of taking an executive decision and Article 77 of the Constitution does not apply in the instant case. Mr. Solicitor relied on Dattatreya Moreshwar Pangarkar Vs. The State of Bombay and Others, Mr. Solicitor submitted that the President through the Central Government was entitled to give advice to the Governor and relied on of State of Punjab and Others Vs. Raghunath Dass, . Mr. Solicitor also relied on Ram Gopal Chaturvedi Vs. State of Madhya Pradesh, where the High Court's advice under Article 235 of the Constitution was accepted by the State Government.

31. The Advocate-General appearing on behalf of the State submitted that the post of I.G.P. was a selection post and had to be filled up on the basis of Rule 3(2A) of the Indian Police Service (Pay) Rules, 1954. The said rule provides that appointments to the selection grade and to posts carrying pay above the time scale of pay in the Indian Police Service shall be made by selection on merits with due regard to seniority. The said rule was enacted and incorporated by M.H.A. Notification No. 1/146/67-AIS(II)-(B) dated November 21, 1968. Therefore, in the instant case, the Petitioner cannot claim promotion as a matter of right. The promotion is subject to the tests provided for by the said Rule 3(2A) and has to be made, by selection on the basis pf merit and seniority. The Advocate-General relied on the case Dr. Jai Narain Misra Vs. State of Bihar and Others, . According to the Advocate-General there was no specific procedure for selection under Rule 3(2A). The mode and manner for such selection have been left to the appointing authority. In the instant case, the appointing authority took into consideration the salient factors relevant for the purpose and thereafter made the selection. The Court should not supplant the said selection by its own selection even if the Court is of the view that of the two the Petitioner should have been selected. The Advocate-General relied on the case of Sant Ram

Sharma Vs. State of Rajasthan and Another, . The Advocate-General submitted that according to the affidavit of N.C. Sen Gupta all the relevant facts had been considered, as for example, citation for awarding Police Medal to the Petitioner, recommendation for the same, grounds for recommendation, recommendation for awarding President's Police and Fire Services Medal, grounds for such recommendation, Petitioner's representations made on October 28, 1970, H.N. Sarkar's certificates in 1950, 1951 and 1952, S.M. Ghosh's recommendation dated November 2, 1970 and further recommendation dated November 14, 1970. In the aforesaid documents all that could be said for the Petitioner had been said. Mr. Advocate-General further relied on P.L. Lakhanpal Vs. Union of India (UOI) and Others, and submitted that the affidavit by the Governor was not necessary and N.C. Sen Gupta's affidavit should have been accepted by the learned Judge of the first instance. Further, the Advocate-General contended that even if out of several relevant matters one or two were not considered by the selecting authority, even then the order would not be vitiated and relied on State of Orissa Vs. Bidyabhushan Mohapatra, and State of Punjab and Another Vs. Hari Krishan Sharma, .

32. Mr. Sankardas Banerjee appearing on behalf of the Petitioner submitted that the following relevant matters were not considered by the selecting authority and as such, the selection was bad. On the relevant date, viz. November 27, 1970 when Sri P.K. Basu was appointed the I.G.P., the Petitioner was holding a higher rank of Additional. I.G.P. In fact, at that time P.K. Basu was holding the substantive rank of D.I.G. in the cadre of officers in the I.P.S. in West Bengal. The holding of the non-cadre post of I.G., B.S.F., was not a material consideration for the purpose of appointment of I.G.P. Mr. Banerjee then relied On Rule 7 of All India Services Manual (p. 526) providing for all appointments to cadre post to be made in the case of a State cadre by the State Government and submitted that the State Government was the only authority empowered to appoint the I.G.P. Although the State Government, viz. the Governor, the delegate of the President under the President's Rule of the State is alleged to have selected the I.G.E., there is no record of consideration by the Governor of comparative merits of the candidates. The decision was made on the basis of the advice that had come from New Delhi by the letter dated November 24, 1970, of Sri L.P. Singh. That was an extraneous and irrelevant matter and influenced materially the Governor in making the selection. Therefore, the selection on that ground is indeed selection on an extraneous ground and must be set aside. Mr. Banerjee relied on the case of Short v. Poole Corporation (1926) 1 Ch. 66 (91).

33. Further, according to Mr. Banerjee, the Appellant has failed to satisfy the Court that matters that ought to have been considered were considered. The name of the Petitioner was not mentioned in the letter dated September 24, 1970, written by the Chief, Secretary of West Bengal to the Home Secretary at New Delhi. The head of the Secretariat in West Bengal did not send the name of Mr. Bhattacharyya and thus did not discharge the duty cast upon him in accordance with the provisions of law but exercised the duty with "an evil eye

and an unequal hand". This must have been deliberately done to prejudice the Petitioner. Sri L.P. Singh's letter dated September 29, 1970, shows that L.P. Singh asked for C.C.Rs. of officers in between R. Gupta and Sunil Choudhury only. In his note of September 29, 1970, L.P. Singh did not apply his mind to consideration of the case of the Petitioner at all. Although the Petitioner was superseded by Sri P.K. Sen when Sen was appointed Commissioner of Police over the heads of the Petitioner and one Mr. Maswood, subsequently the Petitioner was allowed to officiate as Additional I.G. and was appointed as. Additional I.G. (Special) on April 10, 1970. The said post was senior to the post of the Commissioner of Police. The said facts were riot considered at all. The appointing authority also did not consider the effect of adverse remarks in the C.C.Rs. in view of the promotions granted to the Petitioner all through right up to the post of Additional I.G. Because of the said promotions the adverse entries in the C.C.R. were washed away and wiped out. The appointing authority failed to appreciate the same. Mr. Banerjee relied on the *The State of Punjab Vs. Dewan Chuni Lal*, . Mr. Banerjee further submitted that there was no difference between the duties of I.G.P. and Additional I.G.P. If the Petitioner was appointed Additional I.G.P. he could be appointed the I.G.P. and this fact was not considered.

34. In, promotion the substantive rank has to be considered and Additional I.G.P. was a rank superior to that of D.I.G. That was the substantive rank of Sri P.K. Basu at the relevant time *G.R. Baqual Vs. State of Jammu and Kashmir*, . Mr. Banerjee said that seniority and merit both should be considered at the same time and unless an officer is found to be devoid of merit promotion Should be granted on the basis of seniority. Mr. Banerjee referred to *Santram Sharma v. State of Rajasthan and Ors. Supra*. Mr. Banerjee commented upon the case of discussion having been held at Delhi and at Raj Bhavan at Calcutta by the Governor. Sri L.P. Singh did not say anything about the said discussions at Delhi in the affidavit filed by him. What facts were considered in those discussions by the authorities concerned have not been said either by L.P. Singh in his affidavit. Mr Singh was the best person who could depose to those facts, but the said facts are conspicuous by their absence in his affidavit. Therefore, the Court should hold that there was no such discussion at Delhi. No affidavit has been filed by Sri" B.B. Ghosh, the Chief Adviser. Sri Venkataraman in his affidavit said that Basu was on the relevant, date holding a higher post arid that was a wrong premise upon which the authorities acted.

35. The Central Government, according, to Mr. Banerjee, imposed its decision on the Governor and the Governor did not apply his mind. The Governor simply parsed, order under the direction of Delhi. This he could not do. Mr. Banerjee relied on *A.K. Kraipak and Ors. v. Union of India Supra*. Mr. Banerjee contended that the Governor was acting in a quasi-judicial capacity. Mr. Banerjee relied on. *Board of High School and Intermediate Education, U.P., Allahabad Vs. Ghanshyam Das Gupta and Others*, and *Lal Chand Pargal and Others Vs. Director NES and Others*, and submitted that this being the order by a quasi-judicial

authority, there should, have been a speaking order setting out the grounds for making such order. In the absence of such grounds the order is bad and must be struck down. Lastly, Mr. Banerjee submitted that the power of the President to issue a proclamation under Article 356 and thereafter to act subsequent thereto was a personal right and power of the President. The President could not delegate the said power nor could allow others to exercise that function. These were the exclusive powers of the President and he should have acted himself and not on the advice of Ministers. Mr. Banerjee relied on *Jayantilal Amrit Lal Shodhan Vs. F.N. Rana and Others*, . This was an executive power of the President and not the executive function of the Union. Article 53 deals with the Union's power only and not that of the President. Article 77 also deals with the Union's power. Satisfaction in Articles 352 and 356 is the President's satisfaction and of nobody else.

36. In exercise of power conferred by Article 356 of the Constitution the President issued the said Proclamation on March 9, 1970. Under the Proclamation power was assumed by the President of India and not by the Union of India. In that respect there is a distinction between Article 353 and Article 356. The superintendence, direction and control mentioned in the Order dated March 19, 1970, must be construed to be the superintendence etc. of the President and not of the Union Government. Therefore, the Central Government or the Prime Minister or the Home Minister or anybody of the Central Government could not exercise such superintendence, direction or control. Mr. Banerjee relied on *J.P. Mitter v. H.K. Bose* 74 C.W.N. 977. Thus the advice given by the Central Government was an extraneous matter on the basis of which alone the Governor selected P.K. Basu. The said selection thus is bad and must be struck down. Mr. Banerjee further relied on passages of Setalbad Lectures (pp. 11, 18, 26, 31 and 32) delivered by P.B. Mukharji J. and submitted that the Constitution had divided the two kinds of executive powers and functions, (i) that of the Union Government and (ii) that of the President. Under the order of delegation being G.S.R. No. 491 dated March 19, 1970, two persons could act the President or the Governor. The records do not show that the President had ever anything to do with the selection or the advice. Only a proposal and a draft notification were sent to the Governor. No other document was sent to the Governor for approval. Therefore, the Governor did not consider any other matter and based his decision only on the advice dated November 24. Mr. Banerjee commented upon the contradictions in the affidavits filed at different stages of proceeding on behalf of the Appellants and submitted that the affidavit of N.C. Sen Gupta should be rejected. The Governor was not exempted from affirming an affidavit under Article 361 of the Constitution. Nothing prevented the Governor if he chose to support his appointment and disclose before the Court the matters which he considered for making the appointment. The Governor has not chosen to do so. Mr. Banerjee relied on the cases of *Prabhu Vs. State of U.P.*, *A.N. Nagoor v. State of Mysore* AIR 1964 Mys. 229 as well as *Anand Swaroop Bhatnagar Vs. State*, and submitted that the material facts to be considered and principles followed

have not been considered nor followed in making this selection and the selection, therefore, must be struck down. Mr. Banerjee further relied on Bachhittar Singh Vs. The State of Punjab, for the proposition that the adverse remarks made in the C.C.R. against the Petitioner were of no effect until they were communicated to the Petitioner. Mr. Banerjee also relied on Nripendra N. Majumdar Vs. N.M. Bardhan and Others, and R.L. Butail v. Union of India Supra. In the representation it was stated specifically by the Petitioner that there was no communication of adverse remarks. Even then the Petitioner was not asked to show cause against the said adverse remarks.

37. It appears that although in the beginning the name of the Petitioner was not included in the letter written by the Chief Secretary of West Bengal on September 24, 1970, or in the Note of Sri L.P. Singh on September 29, 1970, the said name was mentioned in the Note submitted by Sri Venkataraman, the Joint Secretary, to the Home Secretary mentioning therein the fact that the Petitioner was senior to P.K. Basu. Sri Venkataraman also remarked in his said Note that the record of Sri Basu appeared to be better than that of the Petitioner. Sri Venkataraman in his said Note referred to the C.C.Rs. and placed the C.C.Rs. of inter alia the Petitioner and P.K. Basu before L.P. Singh. L.P. Singh in his Note submitted before the Minister of State for Home Affairs and the Prime Minister, who was also holding the portfolio for Home Affairs at the time, expressed the opinion that the Petitioner was not good enough for the post of I.G.P., West Bengal. Thereafter, the matter was discussed fully in Delhi in the presence of the Governor of West Bengal by the Prime Minister, the Minister of State for Home Affairs as well as L.P. Singh. The President did not himself make any appointment nor took any decision. The Central Government also did not make any appointment. L.P. Singh, from the facts recited above, it seems, forwarded the advice of the Central Government to the Government of West Bengal by his D.O. dated November 24, 1970. How thereafter the matters moved, decision was arrived at and appointment made have been recited above.

38. Sri Venkataraman has stated in his affidavit "affirmed on January 3, 1971, that N.C. Sen Gupta had told him that the Governor had considered the representation made by the Petitioner and had rejected the same thereafter : See para. 14 of Venkataraman's affidavit affirmed on January 3, 1971.

39. Sri N.C. Sen Gupta has stated in his affidavit affirmed on January 6, 1971, that the relevant records in the matter were placed before the Governor of West Bengal and he made the decision after due consideration of all the relevant records, materials, suggestions and representations. The said deponent has further stated that on return from Delhi on November 24, 1970, the Governor had told him that the Governor had given the matter his most anxious consideration and had come to the conclusion that P.K. Basu was the fittest person for the post of I.G.P., West Bengal. The averments have been made by Sen Gupta on the basis of information received by him from the Governor.

40. It is true that some of the averments made in the affidavit-in-opposition

verified by N.C. Sen Gupta and filed on January 6, 1971, were made for the first time in the said affidavit. The said allegations were not made in any of the affidavits filed on behalf of the State earlier either as the ground for the stay of the operation of the order of injunction or in reply to the affidavit-in Opposition. Some of the said averments are with regard to the alleged representation made by the Petitioner to the Governor after the Petitioner had come to know of the selection finally of P.K. Basu as I.G.P., the taking into consideration of various recommendations made by the out-going I.G.P., D.O. letters of the Chief Minister or of the Chief Secretary. The fact of the alleged discussion at the Prime Minister's level or with L.P. Singh were also not alleged in the affidavit-in-opposition filed by N. Nanda on December 4, 1970, or the affidavit in support of the application for stay of the order of injunction affirmed by N.C Sen Gupta and filed on December 17, 1970. That is certainly one of the factors to be taken into consideration in assessing the truth thereof, but that by itself in our view cannot entitle us to reject the said affidavit. It is difficult for the Court to accept as correct some of the allegations made in the said affidavit, e.g. the allegation as to representation made by the Petitioner on the basis of which the Petitioner was confirmed as Additional I.G.P. But the allegations with regard to the discussion by the Governor held at the Prime Minister's level in Delhi and L.P. Singh are corroborated by the statements of the Petitioner himself. The Petitioner himself has stated that the Governor had rang up the Petitioner at his residence from Delhi and informed the Petitioner that although the Governor was still of the opinion that the Petitioner was the fittest person to be appointed as I.G.P., there was opposition to the proposal in Delhi. That shows that discussions were going on in Delhi with regard to the selection of I.G.P.

41. The D.O. letter dated November 24, 1970, of L.P. Singh addressed to the Principal Adviser forwarding the advice of the Central Government mentions that discussions were had between L.P. Singh and the Principal Adviser as well as the Governor and the authorities in Delhi with regard to the selection of I.G.P. In that view of the matter we are of the opinion that discussions had been going on in Delhi with regard to the selection of I.G.P.

42. The affidavit evidence of N.C. Sen Gupta with regard to the meeting and discussions by and between the Governor, the Chief Secretary and the Principal Adviser for selecting the I.G.P., after the Governor had returned from Delhi, cannot be rejected only on the ground that the said facts were not stated in earlier affidavits mentioned hereinabove. Under the provisions of Order 19, Rule 3 of the CPC it was open to the Petitioner to call for the production of N.C. Sen Gupta for the purpose of cross-examining him with a view to arrive at the truth of the statements made in his affidavit. The Petitioner did not demand in the Court of the first instance for the production of N.C. Sen Gupta. While making his submissions before us, Mr. Banerjee suggested that N.C. Sen Gupta should be called for cross-examination to test the truth of the statements made by him in his affidavit. The matter was not, however, pursued by Mr. Banerjee in the form of an application.

43. Rule 14 of the Rules of this Court relating to application under Article 226 of the Constitution provides as follows:

14. Every petition shall be verified by the solemn affirmation made by the Petitioner or a person or persons having cognizance of the facts stated and shall state clearly by reference to the paragraphs of the petition whether the statements are based on knowledge, information and belief or on records. Where a statement is based on information, the source of information should be disclosed and where the statements are based on records, sufficient particulars should be given to identify the records.

44. In view of the aforesaid Rule facts not within the knowledge of the deponent but knowledge whereof is derived from some other person may be stated in the affidavit.

45. In *The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others*, the Supreme Court was of the opinion that the affidavits should be modelled on the lines of the Order 19, Rule 3 of the CPC and that where an averment is not based on personal knowledge, the source of information" should be clearly disclosed.

46. The material facts which have been averred in the affidavit-in-opposition of Nirmal Chandra Sen Gupta affirmed on January 6, 1971, have been verified as based on information received from the Governor of West Bengal. The said verification is such as was commended by the Supreme Court in the aforesaid case.

47. It is settled law that no employee under the Government is entitled to be promoted as a matter of right. The only right that an employee of the Government has is the right to be considered for promotion to a higher post. It has been held by the Supreme Court that Article 16 together with Articles 14 and 15 of the Constitution form part of constitutional code of guarantee and supplement each other : *The General Manager, Southern Railway Vs. Rangachari*, and *C.A. Rajendran Vs. Union of India (UOI) and Others*, Article 16 in that sense is only incidental to the application of the concept of equality enshrined in Article 14 of the Constitution. It makes the doctrine applicable to employment and promotion. The words of Article 16 are wide enough to cover and in fact cover employment as well as matters in regard to employment, e.g. salary, increments, terms as to leave, gratuity, pension, age of superannuation and promotion to selection post : *Kishori Mohanlal Bakshi Vs. Union of India*, and *All India S.M. and All India Station Masters" and Assistant Station Masters" Association, Delhi and Others Vs. General Manager, Central Railway and Others*, .

48. From the cases cited at the Bar to which we shall presently refer it seems to us that the principles which have been formulated by the Courts with regard to the exercise of discretion vested in an authority are as follows:

In general, the discretion must be exercised only by the authority to which it is

committed, that authority must genuinely apprise itself to the matter before it, it must not act under the dictation of another body, it must act in good faith, must have regard to all relevant considerations and must disregard all irrelevant considerations. It must not seek to promote" purposes alien to the matter or to the spirit of the power under which it acts. It certainly must not act arbitrarily or capriciously for an authority if it exercises its power capriciously or on irrelevant grounds shall be deemed not to have exercised the power at all. If the exercise by an authority of a discretionary power has been influenced by considerations that the authority cannot lawfully take into account or by disregard of relevant considerations, the Court must hold that the power has not been validly "exercised unless the jurisdiction of the Court to interfere has been excluded. It is, of course, immaterial that an authority may have considered irrelevant matters in arriving at its decision if it has not allowed itself to be influenced by those matters. Such influence by extraneous matters will be shown if the order made is invalid *ex facie* or if the authority has set them out as reasons for its order or has otherwise admitted their influence. Otherwise the Court will enquire into the matter from the surrounding circumstances in order to determine whether such things can be inferred. If the influence of irrelevant factors is established it does not appear to be necessary to prove that they were the sole or even the dominant influence. It would be enough to show that they are influence of substance.

49. There is no mode of forcing a person who has a discretionary power to exercise his discretion in a particular manner. The Court will only see as to whether a discretion has been exercised according to law.

50. In the case strongly relied upon by Mr. Banerjee, viz. that of *Kraipak and Ors. v. Union of India* Supra the Supreme Court in considering the validity of selection made by a selection board proceeded on the assumption that the selection board was exercising administrative function. It has been held, there is no duty to invoke judicial process unless there is a duty to act judicially. But that does not authorise or empower the person to act unfairly on the ground that there is no duty to act judicially : See *Nakkuda Ali v. M.F. de S. Jayaratna* (1951) A.C. 66. The Supreme Court has again observed in the case of *Jaisinghani v. Union of India* Supra that in our country, which is governed by the rule of law, discretion conferred upon the executive authority should be confined within clearly defined limits. The rule of law in this respect implies that decision should be made by the authorities on known principles and the citizen should know where he stands. To allow even an administrative authority to arrive at a decision in exercise of discretion vested in him by statute without any rule of law is the negation of the rule of law itself. India which aspires to be a welfare State is bound by the rule of law. The rule of law will lose its flow and be dried up in myriad of executive functions and activities unless an eternal vigil is kept over such executive activities so that the authorities perform their functions and discharge their duties fairly and justly. The plea of administrative inconvenience or expediency cannot be allowed to affect a citizen's liberty, property, livelihood or career.

51. From the facts narrated above it is clear that the Petitioner was considered by the appointing authority before the order for appointment of the I.G.P., West Bengal, was made on November 27, 1970. But the question still remains as to whether the appointing authority omitted to consider facts relevant in coming to the decision or based his decision on irrelevant or extraneous matters. From the facts recited above it is clear that the Central Government and the Governor took into consideration the facts that P.K. Basu was the recipient of not only Police Medal but also the President's Police and Fire Services Medal, the highest award that can be awarded to a Police officer. It also weighed with the Governor that the recommendation for awarding the aforesaid medals to the Petitioner was not accepted by the Central authorities and the said medals were not awarded to the Petitioner. The Governor took into consideration the C.C.Rs. of the Petitioner as well as P.K. Basu. In the character roll of P.K. Basu eulogies in superlative terms have been recorded in his favour. In the character roll of the Petitioner various disparaging remarks have been recorded. According to the Petitioner, save and except the remarks for the year 1954-55, no other remark was communicated to him. The Petitioner has stated that he made representations against the remarks of 1954-55 and proved that the said remarks were unjustified. Be that as it may, nonetheless the said remarks were not expunged from the character roll but are still now there. The character rolls of officers are certainly material and relevant matters to be considered for the purpose of making selection in the selection posts of the cadre to which they belong. It is submitted that the subsequent promotions of the Petitioner to superior posts including the post of Additional I.G. had the effect of nullifying the said adverse remarks on the basis of the decision in *state of Punjab v. Dewan Chunilal Supra*.

52. In the said case, the Respondent was dismissed on charges of inefficiency and dishonesty. Such charges were based on reports of superior officers made, inter alia, prior to the year 1944. In 1944, the Respondent Dewan Chunilal was allowed to cross the efficiency bar. The said reports for the years 1941 and 1942 did not refer to any specific complaint or charge but contained vague suspicion regarding his behaviour. The Respondent, a Sub-Inspector of Police was called upon to answer a charge framed on October 12, 1949, regarding his inefficiency and lack of probity from 1941 to 1948. It was held, inter alia, by the Supreme Court that the charges regarding his behaviour in 1941 and 1942, in the confidential reports prior to 1944 when the Respondent was allowed to cross the efficiency bar should not have been considered. On the facts of the said case the Supreme Court held that reasonable opportunity was not given to the Respondent to show cause inasmuch as the enquiring authority failed to call witnesses sought to be called by the Respondent and thus the enquiry failed to conform to the principle of fair play and natural justice. The said case was decided on Article 311 of the Constitution. The facts of the said case are totally different. At the most, it may be said that the Governor erred in appreciating the legal effect of the subsequent promotions granted to the Petitioner. But that error cannot vitiate the selection. In any event, the Supreme Court has said in a

similar case in *Prakash Chand Sharma v. Oil and Natural Gas Commission* Supra where the confidential remarks which were not communicated to the employee were considered and stood in the way of the promotion of the employee, as follows:

It was not disputed that the instruction as to confidential reports have not been properly observed in this case. It is not suggested that the departmental promotion committee acted mala fide. If the adverse remarks were so in the confidential reports it was the duty of the departmental promotion committee to take note of them and come to a decision on a consideration of them. The committee could not be expected to make investigation about the confidential reports.

In our opinion the aforesaid observations also apply to the instant case, because the objections in taking into consideration the confidential remarks made in the instant case seem to be on identical grounds as those which were taken by the Petitioner in the aforesaid case before the Supreme Court.

53. In any event, the fact remains that so far as the remarks of 1954-55 are concerned the same were communicated to the Petitioner. The appointing authority could not be unfair or unreasonable in taking into consideration the said remarks. The aforesaid case of *Prakash Chand Sharma* Supra is sought to be distinguished by Mr. Banerjee on the ground that there was no charge of mala fide in the said case. In the instant case, there is of course a charge of mala fide but it has been levelled against L.P. Singh. The reason given for the said mala fide was L.P. Singh's annoyance with the Petitioner for his activities as the President of the West Bengal Branch of I.P.S. Association in making endeavours for increase in salary and other emoluments of officers of the rank of D.I.G. The said allegation has been denied by Mr. L.P. Singh in his affidavit. Further, the said allegation seems to be belied by the extract of the speech delivered by the Petitioner as quoted in the affidavit, of L.P. Singh. In any event, it was held in *Barium Chemicals Ltd. v. Company Law Board* Supra by Shelat J. following the observations in *S. Pratap Singh Vs. The State of Punjab*, that the allegations as to bad faith or oblique motive or purpose cannot be accepted in the absence of clear proof thereof. We respectfully agree with the said observation. There is no proof of bad faith or oblique motive on the part of anybody who had anything to do with the selection of I.G.P. S.S. Mukharji J. has rejected the said plea of malice and mala fide on the part of L.P. Singh. With respect, we agree with the aforesaid view of S.S. Mukharji J.

54. Mr. Banerjee on the basis of (1925) A.C. 603 (34) submitted that there was no application of the mind of either the Central Government or the Governor to the relevant matters in issue for the purpose of selection of I.G.P. That by itself would amount to mala fide. We are unable to accept the said contention of Mr. Banerjee. It is clear that the question of selecting of I.G.P. was in the mind of Home Ministry at Delhi as well as the Governor of West Bengal in Calcutta from October 1970 and various discussions were going on between the authorities in

November 1970 as recited earlier. Mr. Banerjee then submitted that if there was no malice in fact the selection made on irrelevant matters would amount to malice in law. We are unable to accept the said contention. We come across the concept of malice in law in Tort. The said principles do not apply here.

55. It is, clear also on the showing of the Petitioner himself that the Governor before he had left for Delhi on November 16, 1970, had seen the Petitioner and expressed his view about the Petitioner. In the case of *Jaisinghani v. Union of India* Supra it has been observed by the Supreme Court that the rules of natural justice should not be taken to be engrafted, in principles, of fundamental rights of citizens. The only aim of the principle of natural justice being adhered to is for the purpose of securing justice and to prevent miscarriage of justice. The said rules can only apply in cases which are not covered by any express law. If an order is passed by the administrative authority bona fide the said order cannot be challenged on the ground that the principle of natural justice has been violated. In the instant case, as in the case of *Jaisinghani* Supra there is no rule laying down the procedure to be followed in the matter of selecting an officer or in matter of granting promotion to an officer. Therefore, unless an order of promotion or selection of a candidate in a selection post is proved to have been passed arbitrarily, capriciously or on extraneous grounds, the said order cannot be struck down by Courts. From the facts stated above we cannot say that the consideration of the C.C.Rs. had vitiated the said order of November 27, 1970. It is true that the Petitioner was confirmed as Additional I.G. on November 26, 1970, but it should also be noted that the proposal for making the said confirmation originated in the beginning of November 1970 but was put in abeyance until November 25, 1970. Then the file containing the said proposal from the department moved on November 25, 1970 and the confirmation was made by the Governor on November 26, 1970. From the records it is clear that by that time although no formal order was passed final decision was taken on the appointment of I.G.P. It is true that Additional I.G.'s power and duties are almost the same as those of I.G., but it must be noted that Additional I.G. is subordinate in rank to the I.G. and has to be content, with the duties and acts and performing functions as would be allotted to him by the I.G.P. In any event, it is to be held that the post of I.G. being number one in the cadre is a superior post.

56. It would be necessary to consider now whether the advice given by the Central Government contained in the D.O. letter dated November 20, 1970 of L.P. Singh was extraneous or irrelevant matter. It has been urged by Mr. Banerjee that the power under Article 356 belongs exclusively to the President and the President has to exercise that power independently of, the Council of Ministers and the Ministers have nothing to do with the same. To decide as to the existence, of the emergency to issue proclamation under Article 356 of the Constitution has placed implicit trust in the President and has left the matter an him. The Constitution in that sense made these powers of the President exercisable independent of the Council of Ministers. The said powers if do not belong to the President exclusively would be exercised at the option of the party

in power in Parliament and would fetter democratic freedom of the State if and when the party in power at the Centre is not the party in power at a State. The President is the Chief Executive of the Union of India and the executive power of the Union is vested in him under Articles 52 and 53. Article 53 also vests in the President the supreme command of the Defence Forces of the Union. The contention of Mr. Banerjee is that the President represents the unity of the Nation and therefore certain powers enabling him, if necessary, to override the Council of Ministers are given to the President. It should be noted that in *Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab*, : *Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab*, the Supreme Court held that the Constitution of India had adopted the English system of a Parliamentary Executive. The President and the Governor were constitutional heads of the Executive and the real executive power was vested in the Council of Ministers. In *Jayantilal Amratlal Shodhan v. F.N. Rana* Supra it was held that the functions which did not fall strictly within the legislative or judicial field fell in residuary class of functions and had to be regarded as executive functions. In the said case the Supreme Court held that there were two kinds of executive functions, one, the executive functions of the Union, the other, the executive functions vested in the President. The Supreme Court in this connection mentioned Articles 268-279, 356 and 360.

57. But the said case is no authority for the proposition that in the performance of the executive functions vested in the President, not being the functions of the Union, by the Constitution, the President could act unaided by the advice of the Council of Ministers. Article 74(1) provides for a Council of Ministers to aid and advise the President in the exercise of his functions. Article 163(1) makes the same provision for a Council of Ministers to advise the Governor with certain exceptions. The exceptions are the cases where the Governor does not act as the constitutional head of the State but as the person responsible to the President. Under Article 356 the President has to be satisfied before issuing the proclamation. It is stated that this satisfaction must be the satisfaction of the President.

Mr. Banerjee relied on *J.P. Mitter's* case Supra. Mr. Banerjee also relied on the case of *B.K. Sardarilal v. Union of India* Supra Court Notes of January 15 and February 1, 1971. But a similar provision about the President's satisfaction in Article 123 was considered by the Supreme Court in *Rustom Cavasjee Cooper Vs. Union of India (UOI)*, . In this connection regard should be had to the contrasts of language used in Articles 74 and 163 of the Constitution. In the case of the Governor there are certain special circumstances in which the Governor can exercise his discretion of powers even independently of the advice of his Council of Ministers. Reference in this case may also be made to Article 239 of the Constitution. There is no such express provision in the Constitution applicable to the President.

58. It should be noted that the proclamation that may be issued by the President

under Article 356 is reviewable by Parliament and has to be laid before each House of Parliament. Parliament, of course, acts and decides in the manner as the majority party in Parliament desires. The proclamation at the most may not be placed before Parliament for two months. After that period unless approved by Parliament it would automatically lapse even prior to the expiry of these two months mentioned in Article 356(3) the proclamation may be laid before Parliament even on the day following that of its issue and revoked by Parliament if the proclamation be issued contrary to the advice of the Council of Ministers. For, under parliamentary form of Government, as in our country, the majority party in Parliament forms the Ministry at the Centre and controls the proceedings in Parliament. Then again, for the purpose of legislation in the State where the President has assumed powers of the State Government under proclamation under Article 356 the President has to go to Parliament for legislation. Parliament may legislate for the State itself or may confer upon the President the power of the Legislature of the State to make laws. If the President acts contrary to the advice of the Council of Ministers in a case under Article 356, Parliament will certainly not either legislate for the State or confer upon the President such powers of legislation. Then again under Article 359 any order passed in pursuance of a proclamation of emergency suspending, the enforcement of the rights conferred by Pt. III of the Constitution has to be laid before each House of Parliament. All these things, in our opinion, go to show that Parliament is the supreme body in our Constitution and the majority party of Parliament which forms the Government really rules the country. The President in exercise of his powers under Article 356 has to act on the advice of the Council of Ministers under Article 74(1). So far as Article 356 is concerned it is governed by Article 74 of the Constitution.

59. It is clear, therefore, that the Constitution in our country has established a parliamentary form of Government. In any event, in acting under Article 356 the President has to act on the advice of the Council of Ministers. Therefore, in administering the State after the proclamation under Article 356 the President has to act on the advice of the Council of Ministers. In the aforesaid order of delegation dated March 19, 1970, quoted above, the President could either select the officer himself on the advice of the Council of Ministers or the Governor could select the officer. The President could superintend, direct or control the Governor's exercise of the said functions; Such control could be exercised prior to the selection by the Governor or even after the selection was made by the Governor. Such superintendence, direction and control could only be exercised by the President on the advice of his Council of Ministers.

60. In the instant case, the Home Minister's or the Prime Minister's opinion, as evidenced in the Note, was not submitted to the President. The said opinion in the form of advice was forwarded to the Governor. The question is whether that the advice was an extraneous or irrelevant matter. Under the Constitution the Council of Ministers or the Central Government cannot advise the Governor of a State under President's Rule. There is no constitutional provision for doing that.

But they can advise the President who is the ultimate repository of the executive power of the State under the President's Rule. Even after the Governor had selected a person for the post of I.G.P. that selection could be set aside or altered by the President on the advice of Ministers. In that view of the matter, the advice of Prime Minister and Home Minister, as forwarded by the said D.O., cannot be said to be an irrelevant or an extraneous matter. The consideration of the said advice by the Governor did not, therefore, vitiate the selection made by the Governor. *Short v. Poole Corporation Supra*, therefore, is of no assistance to Mr. Banerjee. In that case the impugned order was passed on an extraneous consideration.

61. In *Santram Sharma v. State of Rajasthan Supra* it was laid down by the Supreme Court that the three posts of Inspector-General of Police, Additional Inspector-General of Police and Deputy Inspector-General of Police in Rajasthan were selection posts and outside the junior or senior time scales of pay. Promotion to these posts could not be claimed automatically only on the basis of the position held by an officer in the gradation list of Indian Police Service. Promotion to such posts in the selection grades was to be based primarily on merit and not on seniority alone. The Supreme Court observed that

the principle is that when the claim of officers to selection posts is under consideration, the seniority should not be regarded except where the merit of the officers is judged to be equal and no other criterion is, therefore, available.

In the aforesaid case it was also decided by the Supreme Court that the only right of an officer to promotion in a selection post was the right to be considered for such promotion. Nothing more, nothing less. The Supreme Court observed:

if the State of Rajasthan had considered the case of the Petitioner along with other eligible candidates before appointments to the selection posts, there would be no breach of the provisions of the Articles 14 and 16 of the Constitution because everyone who was eligible in view of the condition of service and was entitled to consideration was actually considered before promotion to these selection posts were actually made. It should be noted that since the decision of the said case of *Santram Sharma v. State of Rajasthan Supra* by the Supreme Court, Rule 3(2A) of the Indian Police Service (Regulation of Pay) Rules have come into force laying down the principle for promotion to selection posts as enunciated in the said case. In the instant case, it should be noted that the cases of all the eligible candidates including the Petitioner was considered before P.K. Basu was promoted to the post of Inspector-General of Police.

62. In *A.K. Kraipak and Ors. v. Union of India and Ors. Supra* it was held by the Supreme Court that in ever expanding jurisdiction of the administrative bodies in a welfare State like India the difference between an administrative power and quasi-judicial power, thin as it is, is being gradually obliterated. The essential requirements of a judicial function is nothing more than to act justly and fairly as opposed to acting arbitrarily or capriciously. Exercise of administrative power also

in the present context demands that the authority must act fairly and justly. In the said case, the list of officers prepared for selection to the posts in the Indian Forest Service made by a Selection Board was found to be vitiated inasmuch as one of the candidates for such selection was himself a member of the Selection Board and took part in selecting his rival candidates for the purpose of including their names in the selection list although he did not participate when his selection was considered by the Board as reasonably likely to be affected by bias in selecting, the rival candidates. Thus the recommendation of the Union Public Service Commission, on the basis of which such selection list was prepared by the aforesaid Selection Board, was also found to be vitiated.

63. In the case of Board of High School and Intermediate Education, U.P., Allahabad v. Ghanashyamdas Gupta and Ors. Supra it was held by the Supreme Court that where a statutory authority does any act in the performance of its statutory duty or power that may affect prejudicially a person, then the act will be a quasi-judicial act although there are not two parties before the authority provided that the authority is required by the statute to act judicially. That requirement of the statute for the authority to act judicially may not be expressed in express words but may be inferred from express provisions of the statute and the nature of the rights affected, the manner in which the act is to be performed by this authority, the objective tests, if any, to be adopted. Thus the Examination Committee of the Board of High Schools and Intermediate Education, U.P., appointed u/s 13 of the U.P. Intermediate Education. (Act II of 1921) in the exercise of its powers under Rule 1 of chap. VI of the Regulations framed u/s 15 of the Act in dealing with the examinees using unfair means in examination halls was held to be acting quasi-judicially in the circumstances as set out in the statute.

64. In the instant case, the aforesaid tests are not satisfied and the selecting authority was acting in administrative capacity, only.

65. In the case of Lalchand Pargal and Ors. v. Director N.E.S. and Ors. Supra it was held that Rule 25(2) of the Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956, provided for generally that promotion should be made on the basis of merit and ability and seniority under the rule was to be considered only where merit or ability was more or less equal. It was held in the said case that the principle of natural justice was not applicable to matters of promotion unless the rule for such promotion required it to be observed. There was no question, according to the said decision, of giving a reasonable opportunity to the Government servant concerned of being heard before promotion was refused to him unless the withholding of promotion was by way of penalty. The concept of equality enshrined in Article 16 of the Constitution of India could not be attracted where promotion was made on the basis of merit. The said observations apply on all fours to the instant case.

66. In the case of Commissioner of Police, Bombay Vs. Gordhandas Bhanji, the rules framed u/s 22 of the City of Bombay Police Act came to be considered by

the Supreme Court and it was held that under the relevant rules including Rule 250 which authorised the cancellation of cinema licence already issued, the only person who was vested with authority to grant licence for building to be used for the purpose of public amusement was the Commissioner of Police and it was he only who was under Rule 250 vested with the absolute discretion at any time to cancel or suspend such licence. In the said case, it was held that the order of cancellation of licence already issued was not made by the Commissioner of Police himself and as such, there was no valid order of cancellation. According to Mr. Banerjee, in the instant case, the Central Home Minister took the decision with regard to the appointment of I.G.P., West Bengal and the Governor of West Bengal merely rubber stamped the aforesaid decision. The Central Ministry had or have no power under the Constitution to take any such decision and as such, the decision as well as the order of appointment is bad. We are unable to accept the said contentions of Mr. Banerjee. The facts in the instant case clearly show that the Governor himself took the ultimate decision.

67. In the case of *A.N. Nagoor v. State of Mysore and Anr.* Supra the order promoting a Commercial Tax Officer, whose name appeared below that of the Petitioner in the seniority list published, to the cadre of inspecting Officer of Commercial Taxes in supersession of the Petitioner was struck down on the ground that the Petitioner's case was not considered at all. That, however, is not the case here.

68. In the case of *Anand Swaroop Bhatnagar v. State* Supra the Petitioner was reverted from the post of Assistant Conservator of Forests to the post of Ranger Grade II which was a post junior to the post of Sub-Divisional Forest Officers. Prior to his promotion to the post of Assistant Conservator of Forests the Petitioner was acting as Sub-Divisional Forest Officer. At the time of reversion, officers junior to the Petitioner were acting as Sub-Divisional Forest Officers, Thus the reversion of the Petitioner to the post of Ranger Grade II, a post lower than the post of Sub-Divisional Forest Officers, was struck down as being violative of the provisions of Article 16 of the Constitution.

69. In the case of *G.R. Baqual v. State of Jammu and Kashmir* Supra it was held by the Supreme Court that in matters of promotion and seniority substantive posts of officers have to be considered. Seniority cannot be determined with reference to posts held by any officer on deputation by selection. The Appellant in the said case was the juniormost Superintendent in the Civil Secretariat of Jammu and Kashmir. He was selected subsequently on deputation as P.A. to the Chairman, Legislative, Council of the State. The said selection was naturally dependent upon the personal volition of the Chairman of the Council. The post of P.A. to the Chairman, Legislative Council, was equivalent to the post of an Under-Secretary under Jammu and Kashmir Secretariat (Regulations and Conditions of Services) Rules, 1959. Subsequently, other Superintendents who were senior to the Appellant were appointed as Under-Secretaries and thereafter promoted as Deputy Secretaries. The Appellant's appeal was dismissed on the ground that in

substantive rank other persons who had been promoted as Deputy Secretaries were senior to him. Thus, according to Mr. Banerjee, the Petitioner was in a higher substantive rank of Additional I.G. and was the only person to be considered for the post of I.G.P. The said submission does not commend to us. We are of the view that being a cadre officer in the I.P.S. and especially in the selection grade thereof Sri Basu was eligible to be considered for and appointed in the post of I.G.P.

70. In the case of *Bachhitter Singh v. State of Punjab* Supra it was held that departmental enquiry against a Government servant was a quasi-judicial proceeding and the order finding him guilty of any charge in any such proceedings could not be an administrative order. The instant case is not a case of enquiry into the conduct of an officer on the basis of any charge-sheet. The ratio of that case has no application here.

71. It was held in the case of *Testeels Ltd. Vs. N.M. Desai and Another*, by the Full Bench of the Gujarat High Court that an Administrative Officer exercising quasi-judicial function was bound to give reasons in support of the order which he makes. It was, however, held that while hearing and disposing of an application by the employer under the proviso of Section 33(2b) of the Industrial Disputes Act for discharging its employee during the pendency of an industrial dispute, the Conciliation Officer exercises quasi-judicial function. But, that case to our mind has no bearing on the question as to whether the appointing authority in promoting an employee exercises judicial or quasi-judicial function.

72. In this proceeding we are not called upon to exercise the power of selection. In other words, we are not the appellate authority as against the order of selection. Therefore, we cannot supplant the decision of the Governor by our decision. We can only set aside or quash the decision if the decision be arbitrary or capricious. The Governor in our opinion had considered the relevant matters and was not called upon to formally go into the merits of respective candidates.

73. Be that as it may, from the records aforesaid we are unable to come to the conclusion that the selection or the appointment made by the Governor was arbitrary or capricious. In that view of the matter this appeal must be allowed.

74. The appeal is allowed and the judgment and order of the learned Judge of the Court of first instance are set aside. In the facts and circumstances of this case we make no orders as to costs.

Banerjee J.

75. I agree with what has been said by my Lord S.C. Ghose J. but I shall only add a few words of my own. It has been argued by the Solicitor-General on behalf of the Union of India followed by the Advocate-General and Mr. Kanhaya Lal Mishra on behalf of the State and Sri P.K. Basu that the Union Government can tender the advice to the Governor and the said advice cannot be said to be extraneous matter for the purpose of selection of personnel for the post of

Inspector-General of Police. Mr. Sankardas Banerjee argued, as has been held by Sabyasachi Mukharji J., that the said advice would be extraneous. Mr. Sankardas Banerjee argues that in the Constitution itself there is a distinction between the powers of the President and the power of the Union. The powers of the President cannot be delegated though those of the Union can be under Article 258(1) of the Constitution of India. The power of the President must, therefore, be exercised in his discretion by the President himself and not by anybody else. It is argued by Mr. Banerjee that in this present case the President has not exercised the power.

76. It is not the case of the Appellants that the President had made the Order. The case of the Appellants is that the Governor considered the case of the eligible candidates and in doing so also considered the advice tendered by the Union Government. It is also the case of the Appellants that the Governor had consultation that the Prime Minister, Home Minister, Home Secretary of the Union Government as well as the Principal Adviser and the Chief Secretary of the State in the matter of selection of personnel for the post of I.G. It has been argued by Mr. Banerjee that the proclamation under Article 356 can only be made by the President in consideration of the report of the Governor or otherwise. In issuing the proclamation under Article 356 the President has to exercise the power in his own discretion and need not consult the Council of Ministers at all Mr. Banerjee referred to Article 53(1) and Article 77 and contended that those Articles are in respect of matters regarding the executive action of the Union of India and do not apply in respect of the power of the President. Mr. Banerjee referred to Articles 123, 268-279 and 356-360 and argued that these are Presidential powers and can be exercised by the President in his own discretion without being advised or aided by the Council of Ministers. Mr. Solicitor-General as well as Mr. Kanhaya Lal Mishra relied on the case reported in *Rai Sahib. Ram Jawaya Kapur and Ors. v. State of Punjab* Supra Mr. Mishra further argued that under Article 74 of the Constitution of India it does not appear that the President can act without the advice of the Council of Ministers. Article 163 gives some discretion to the Governor which is not given to the President, Articles 239 to 244, Schedule VI, give discretionary power to the Governor. It is further argued that the advice is given by the Central Government as it is felt in their opinion that Sri P.K. Basu is a fit person. In any case, the decision was left to the Governor and the Governor decided on consideration of relevant matters along with the advice given.

77. The first question, therefore, is whether the President exercises the power under Article 356 is bound by the advice of the Council of Ministers. It will appear from Article 356 that if the Governor of a State makes a report that constitutional machinery has broken down or otherwise the President is satisfied oh it, the proclamation under Article 356 can be issued. In Article 356(3) the said proclamation must be laid before Parliament and unless revoked earlier this would continue upto two months and if it is to be continued beyond two months there must be a resolution of Parliament. In a parliamentary system of Government the Council of Ministers are responsible to Parliament. If the order is

to be placed before Parliament, it cannot be denied that Parliament has power to pass a resolution revoking the proclamation. It appears to me that if a constitutional machinery fails in a State under Article 356 of the Constitution of India, administration of the State may be taken over by the President who must act under the advice of the Council of Ministers. In view of the judgment of the Supreme Court in *Rai Sahib Ram Jawaya Kapur v. State of Punjab* Supra that ours is a Constitutional President, it cannot be said that in issuing a proclamation under Article 356 the President acts on his own discretion unguided by the advice given by the Council of Ministers. It was further stated that after the President assumed the power under Article 356 a further notification was made under Article 356 (1)(c) of the Constitution of India being G.S.R. 490 by which the President had delegated these powers to the Governor. In this case, from the records it is found that Sri L.P. Singh's Note dated October 16, 1970, was placed before the Minister for Home Affairs as well as the Prime Minister who is also the Home Minister, who signed the same on 23rd and thereafter the advice contained in the letter dated October 24, 1970, was communicated to the State Government. Mr. Banerjee, however, contends that the Prime Minister's approval does not matter because this was never placed before the President. Under Article 77(3) of the Constitution of India the rules of business are framed. It has not been stated that the said order was not passed in accordance with the rules of business. In the absence of that challenge, which is a new point before this Court not taken in the Court below, no materials are forthcoming and we are, therefore, bound to presume that official acts were done in due course of law. Be that as it may, it is not the case that the President or for that matter the Central Government had passed the impugned order. The order was passed by the Governor. The case of the Appellant is that the advice was extraneous. Under the President's rule as this State is being governed by the President who must act under the advice of the Council of Ministers. In my opinion, the advice given to the Governor is not extraneous at all. They could have passed the order themselves. Without passing the order, if they have given the advice and the Governor was free to exercise his power, it cannot be said that the advice was extraneous matter. Mr. Banerjee relied on *Jayantilal Amratlal Shodhan v. F.N. Rana and Ors.* Supra (656) in particular in para. 12 which is in the following terms:

An argument advanced at the Bar which proceeded upon an erroneous premise about the file in which Article 258(1) operates may however be noticed. That clause enables the President to entrust to the State the functions which are vested in the Union and which are exercisable by the President on behalf of the Union; it does not authorise the President to entrust to any other person or body the powers and functions with which he is by the express provisions of the Constitution as the President invested. The power to promulgate Ordinances under Article 123; to suspend the provisions of Articles 268 to 279 during an emergency; to declare failure of the constitutional machinery in States under Article 356; to declare a financial emergency under Article 360; to make rules regulating the recruitment and conditions of service of persons appointed to

posts and services in connection with the affairs of the Union under Article 309 to enumerate a few out of the various powers are not powers of the Union Government; these are powers vested in the President by the Constitution and are incapable of being delegated or entrusted to any other body or authority under Article 258(1). The plea that the very nature of these powers is such that they could not be intended to be entrusted under Article 258(1) to the State or officer of the State and therefore that clause must have a limited content, proceeds upon an obvious fallacy. Those powers cannot be delegated under Article 258(1) because they are not the powers, of the Union and not because of their special character. There is a vast array of other powers exercisable by the President to mention only a few appointment of Judges; Article 124 and Article 217, appointment of Committees of Official Languages Act : Article 344, Appointment of Commissions to investigate conditions of backward classes; Article 340, appointment of Special Officer for Scheduled Castes and Tribes; Article 338, exercise of his pleasure to terminate employment; Article 310, declaration that in the interest of the security of the State it is not expedient to give to a public servant sought to be dismissed an opportunity contemplated by Article 311(2) these are executive powers of the President and may not be delegated or entrusted to another body or officer because they do not fall within Article 258.

It will appear from the above passage that while discussing the scope of the power under Article 258 it has been held that Articles 123, 268-279, 356 and 360 etc. has been vested in the President and is incapable of being delegated to any other body or authority under Article 358. In the said case it has not been decided, in my opinion, that the power under those Articles can be exercised by the President in his own discretion. It has not also been decided that the President in exercise of those powers cannot be aided or advised by the Council of Ministers. In a subsequent case, however, the Supreme Court was dealing with the scope of the power under Article 123 and it was held that to promulgate under Article 123 the President must be advised by the Council of Ministers, viz. the Bank Nationalization case Supra (587), the Supreme Court while, considering whether in promulgating an Ordinance under Article 123 the President must be guided by the advice of the Council of Ministers; the Supreme Court held as follows:

Under the Constitution, the President, being the constitutional head, normally acts in all matters including the promulgation of an Ordinance on the advice of his Council of Ministers Whether in a given case the President may decline to be guided by the advice of his Council of Ministers is a matter which need not detain us. The Ordinance is promulgated in the name of the President and in a constitutional sense on his satisfaction; it is in truth promulgated on the advice of his Council of Ministers and on their satisfaction. The President is under the Constitution not the repository of the legislative power of the Union, but with a view to meet extra-ordinary situations demanding immediate enactment of laws provision is made in the Constitution investing the President with power to

legislate by promulgating Ordinances. (Para. 21)

Mr. Banerjee sought to refer to the provision of Article 359 and argued that in a matter coming under Article 359 the President must also act under the President's power and Article 77(2) has no application. Here again Mr. Banerjee is not right. In view of the Supreme Court decision in *K. Anandan Nambiar and Another Vs. Chief Secretary, Government of Madras and Others*, wherein it has been held in a matter of emergency and in the matter of Article 359 that Article 77(2) is applicable. The Supreme Court held as follows:

It now remains to consider the other grounds on which Mr. Chatterjee has challenged the validity of the impugned order of detention. The first contention raised by Mr. Chatterjee is that the Presidential order itself is invalid. This order, has been issued in accordance with the provisions of Article 77(2) of the Constitution. Mr. Chatterjee, however, contends that the Order issued by the President by virtue of the power conferred on him by Article 359(1) is not an executive action of the Government of India and as such, Article 77 would not apply. We are not impressed by this argument. In our opinion, Article 77(2) which refers to orders and other instruments made and executed in the name of the President is wide enough to include the present Order. (Para. 22)

If the, power of issuing a proclamation by the President was delegated to the Governor of the State that itself would be wholly illegal, but that is the case here. It will, therefore, appear from the above two decisions that in the matter of Article 123 the President must be guided by the advice of the Council of Ministers. In the matter of Article 359 also Article 77(2) is made applicable. It has also been so held in *Rai Sahib Ram Jawaya Kapur and Ors. v. The State of Punjab* Supra. The Supreme Court held as follows:

In India, as in England the executive has to act subject to the control of the Legislature; but in what way is this control exercised by the Legislature? Under Article 53(1) of our Constitution, the executive power of the Union is vested in the President, but under Article 75 there is to be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. The President has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Minister or the Cabinet.

The same provisions obtain in regard to the Government of States. The Governor or the Rajpramukh, as the case may be, occupies the position of the head of the executive in the State, but it is virtually the Council of Ministers in each State that carries on the executive Government. In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the Council of Ministers consisting; as it does of the members of the Legislature is, like the British Cabinet, "a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part."

The Cabinet enjoying, as it does, a majority in the Legislature concentrates in

itself the virtual control of both legislative and executive functions; and as the Ministers constituting the Cabinet are presumably agreed on fundamentals and act on the principle of collective responsibility, the most important questions of policy are all formulated by them.

I, therefore, hold that in the matter of the exercise of powers under Article 356 the President must be guided by the advice given by the Council of Ministers.

78. The next point which has been urged by Mr. Banerjee is whether in the matter of promotion the Governor could have acted as quasi-judicial body or not. Mr. Banerjee relied on *A.K. Kraipak v. Union of India* Supra (154) in which the decision was made on the assumption that the order was an administrative order still the Supreme Court has said that the administrative order must also be fair and just. If it is found in a case that the order was not fair and just, the order may be set aside. The Supreme Court in that case did not hold that the proceeding of the selection committee was a quasi-judicial proceeding. On the other hand in *Union of India (UOI) Vs. Col. J.N. Sinha and Another*, the Supreme Court has made it clear and distinguished the case and said as follows:

In *A.K. Kraipak and Others Vs. Union of India (UOI) and Others*, , a committee consisting of Chief Conservator of Forests, Kashmir and others was appointed to recommend names of the officers from Kashmir Forest Service for being selected for the Indian Forest Service. The Chief Conservator of Forests, Kashmir, was one of the candidates for selection. Further, it was established therein that some of the officers who competed with him had earlier challenged his seniority and consequently his right to be the Chief Conservator and that dispute was pending. Under those circumstances this Court held that there was contravention of the principles of natural justice.

In the matter of promotion no one has any legal right to be promoted, but persons eligible must be considered and the consideration must be fair and just. Rule 3(2A) of I.P.S. (Cadre) Rules does not lay down the procedure for such consideration and the Rule cannot be read that in doing so the authorities must act in a quasi Judicial manner. If it is found that the eligible persons are considered and the considerations were fair and Just this Court will not go into the merits of the different candidates and substitute its own view about it. In this case, as my Lord has already held that there is no doubt that the Petitioner's case was considered and we cannot say that this was not considered fairly and Justly. It is not possible, in my opinion, to hold that in the matter of promotion, in which nobody has the right to be promoted, the appointing authority must act in a quasi-judicial manner. Mr. Banerjee referred to *Testeels Ltd. v. N.M. Desai* Supra in support of his contention and to *Commissioner of Police v. Gordhandas* Supra (17). In this case, however, in the appointment to selection post nobody has a right to be promoted only the merit-cum-seniority is to be considered. If it is found that the Petitioner's case was considered, the Court has no power to interfere unless it is unjust or unfair. It has been already held in *Santram Sharma v. State of Rajasthan* Supra that the Petitioner has no right to be promoted to the

selection post. The next question is whether in the matter of promotion adverse remark in the C.C.R., if considered, will vitiate the order. It appears that the C.C.R. is considered for the purpose of promotion and the C.C.R. in this case were maintained under an executive instruction and there is no statutory rule at the relevant time. It has been held in R.L. Butail's case Supra that non-supply of adverse remarks of general nature will not vitiate the order of promotion. It is also held that if a censure or warning is given, the Petitioner must have a copy of the adverse remarks and must have a reasonable opportunity of representation. In this case it appears that there was no case of warning or censure but only a general remark about the. Respondent No. 1 working as an officer by his superior officer. Therefore, in my opinion, the non-communication of the adverse remark of general nature does not nullify the order of promotion: Mr. Banerjee further contended that the Petitioner's appointment as confirmation as Additional Inspector-General was not considered before the appointment was made. It appears that from the records as produced that the Petitioner was confirmed by the Governor on November 26, 1970 and the Governor himself on November 27, 1970, made the order appointing the Respondent No. 3 as I.G. In the meantime, as is clear from the affidavit of the Petitioner himself that the Petitioner had interview with the Governor and he made a representation regarding his appointment as I.G. In view of this it cannot be said that the Governor did not know regarding the appointment of the Respondent as Additional Inspector-General or he did not apply his mind.

79. In the result, the appeal succeeds and the order appealed against is set aside. There will be no order as to costs.