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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **DECIDED ON: 08.10.2015**

+ **W.P.(C) 8886/2011, C.M. NO.20086/2011**

**S K SHARMA**

..... Petitioner

Through : Ms. Rekha Palli, Sr. Advocate with Ms.  
Punam Singh, Ms. Ankita Patnaik, Ms. Garima  
Sachdeva and Ms. Shruti Munjal, Advocates.

versus

**UOI AND ORS**

..... Respondents

Through : Sh. Ankur Chhibber, Advocate, for  
Respondent Nos.1 to 3.

Sh. Ruchir Mishra, Advocate, for Respondent  
Nos.3 to 5.

Sh. Manoj. K. Singh with Sh. Vishal Gera and Ms.  
Vijaya Singh, Advocates.

**CORAM:**

**HON'BLE MR. JUSTICE S. RAVINDRA BHAT**

**HON'BLE MS. JUSTICE DEEPA SHARMA**

**S.RAVINDRA BHAT, J. (OPEN COURT)**

1. In these proceeding, the petitioner is aggrieved by the recording of his ACR for the period 01.04.2007 to 07.01.2008. He was at that time a Commandant in the Sashastra Seema Bal (SSB).

2. The petitioner's contention in brief are that whilst on duty and in the midst of posting at Gorakhpur (U.P.), apparently his wife had levelled allegations amounting to sexual harassment against this immediate superior – the fifth Respondent. It is primarily contended

that the petitioner was on leave for about a month between 08.06.2007 to 08.07.2007. He alleges that immediately after rejoining, he received a complaint from a Constable, regarding nabbing of a smuggler with gold and silver ornaments but that the matter had not proceeded further as the offenders were released. The petitioner complains that he started gathering information in order to investigate into the events. He also contends (a fact not denied) that on 03.09.2007, he received commendation from the fifth respondent. Apparently, while so, sometime in mid September-October 2007, the petitioner's wife submitted representations, alleging sexual harassment by the fifth respondent. It is further stated that on 08.10.2007, another incident occurred.

3. The pleadings - in the writ petition are replete with various factual details, which in the opinion of the Court are not relevant for the purposes of claim made. The sum and substance of these allegations lead to the relief of quashing of the letter dated 11.12.2008 indicating the ACR "poor" grading for the relevant period. The petitioner's representation against the adverse ACR grading was subsequently rejected on 07.09.2009.

4. In support of the allegations, the petitioner has placed on record a copy of the letter dated 02.10.2007 (which is part of Annexure R-4/7). He has also produced a copy of the letter written to the fifth respondent on 02.10.2007 where he alleged harassment by the said superior officer of his wife. Further reliance is also placed upon a letter written by his wife on 01.12.2007 where the allegations were again levelled against the respondents. The letter recounts the details

of the alleged harassment apart from the telephone numbers from which she claims to have been harassed - which were used to harass her. A complaint was made to the NHRC by the petitioner's wife on 02.01.2008. She complained to National Council for Women sometime in 2007.

5. After notice was issued, the respondents have appeared in the Court. The first two Respondents filed a common affidavit. The broad position of these respondents is of denial. It is contended that the allegations against the fifth respondent were baseless and found to be so, based on the result of an internal enquiry by IG-level officer. Responding to the allegation of bias by the fifth respondent, who recorded poor grading of petitioner's ACR for the concerned year, it is stated that the ACR gradings were confirmed by the reviewing and accepting authorities independently. Therefore, the official respondents contend that there is no truth in the allegations and that the relief claimed ought not to be granted. It was submitted in this context that the appraisal of the superior officers too was apparently objected to by the petitioner and that having regard to the exigencies of service, it would be impossible for a third party officer who had no occasion to deal with or consider the petitioner's service to record his ACRs.

6. The fifth respondent has filed a separate reply. He contends that the first occasion when the allegations were levelled was on 02.10.2007. Learned counsel highlights that even though the said letter – this is a matter of record cites an earlier complaint of 25.09.2007, a copy of such alleged letter has never seen the light of

the day. Learned counsel emphasises this aspect to highlight that the petitioner was aware of the circumstances that his appraisal was taken up prior to 02.10.2007 and was at the same time aware that he had filed self-appraisal report and documents. In order to cover up his inadequacies, contended learned counsel, the petitioner ensured that false allegations were levelled against his character and conduct. It is highlighted besides that when a Memo was issued on 25.09.2007 by the said fifth respondent, the Petitioner did not allege any misconduct or sexual harassment against his wife in the reply dated 26.09.2007 which is a matter of record.

7. Ms. Rekha Palli, learned senior counsel reiterated the submissions made in the writ petition. She argued that given the nature of the allegations and the fact that the fifth respondent was aware about pendency of complaints levelled against him. Though he might have initiated the process of recording ACR earlier, he should have recused himself and fairly kept out of it. Instead, he wrote the ACR with the poor grading, fully conscious that it would adversely affect the petitioner. The aggravating circumstance was that the ACR was recorded much later in 2008. Since there was every reasonable likelihood of bias, (and not a mere fear, but a real apprehension which was founded in reality as later events exemplified) the ACR grading in the present case was vitiated. It was further submitted that the acceptance by the higher authorities cannot sanctify the process because of the illegality which attached itself to the recording itself.

8. It is argued on behalf the respondents that the petition should not be entertained. Counsel for the official respondents submitted that

given the nature of the allegations, which could not be established, the complaint of bias and that the fifth respondent should not have written the petitioner's ACR is unsupported in law. It was argued, additionally, by the fifth respondent, that the ACR grading was valid. At the time when the process of recording ACR was initiated, there was no complaint against the fifth respondent. Furthermore, the honest and *bona fide* appraisal of the petitioner was confirmed by the accepting and reviewing authorities. Therefore, even if there was some initial infirmity in the hands of the fifth respondent, the fact that higher officials had occasion to deal with the petitioner and that they independently recorded an ACR which was consistent with his evaluation, only confirmed that it was correct.

#### *Analysis and Conclusions*

9. It can be seen from the above narration that what is controversy is the Petitioner's ACR grading for the relevant period. The his submission is that given the nature of allegations levelled by his wife in respect of the fifth respondent's conduct, he should not have proceeded to record the ACR - which he did and finalized on 06.11.2008. In this connection, it is submitted that by then the fifth respondent was aware of the fact that serious allegations had been levelled by the petitioner's wife repeatedly and that she had even approached the NHRC and NCW. Emphasizing that despite these, the recording of the ACR was proceeded with and that the subsequent action of the reviewing authority or the accepting authority in not disturbing the ACR recording cannot in any manner rescue the initial

taint. The respondents' submission is that the allegations of bias have no relevance because the process of initiation of ACRs took place before the complaint and that in any event the appraisal was considered and confirmed by higher authorities.

10. The rule against bias enunciated in the various judgments, is that an administrative order or decision is said to be vitiated by bias if the admitted facts and circumstances disclose real likelihood or possibility of bias. Bias has been termed as "pre-disposition or prejudice" and the test applied in all the cases is whether the allegations amount to real apprehension of bias or if there is a real danger bias. In the decision reported as *Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant*, 2001(1) SCC 182, the Supreme Court stated that while applying the test of bias, all the surrounding circumstances must and ought to be collated and a necessary conclusion should be drawn. The inescapable conclusion, in such cases ought to be that there is an existing and real danger of bias. In such an eventuality alone would the administrative action fail. The Court there had inferred bias on the basis of a chain of events and circumstances which point at ill will on the part of the higher authority, in the course of disciplinary proceedings.

11. Similarly, in *Badrinath -vs- Government of Tamil Nadu and Ors.*, (2000) 8 SCC 395, the Supreme Court had concluded in the context of the disciplinary proceedings the involvement of an officer who had displayed bias in the recording of confidential reports and other circumstances, constituted proof of bias. The Supreme Court's relevant observations in this regard, are extracted below:

*“The appellant had delivered a speech at a public function on 7.9.73 criticizing the 'time capsule' buried in the precincts of the Red Fort at Delhi and said that it was full of distortions of historical facts. The Government of Tamil Nadu started a disciplinary inquiry but later dropped the same on 25.8.77. However, on 24.8.77, a news item appeared in Indian Express stating that a Government spokesman charged the appellant as trying to 'sabotage the civil services from within'. The appellant issued notice to the press correspondent and it was ultimately revealed that the statement was made by the 3rd respondent, Sri V. Karthikeyan. The appellant applied for sanction to prosecute the 3rd respondent for defamation and sought permission on 28.12.77. The Government refused permission on 7.2.78. The appellant filed a writ petition in 1978 and the learned Single Judge dismissed the writ petition on 23.1.79 on the ground that the refusal to grant permission was justified. The appellant filed an appeal before the Division Bench in 1978 which was allowed on 20.12.84 holding that the refusal to grant sanction was not justified and ought to have been given in public interest. The State of Tamil Nadu filed appeal to the Supreme Court. This Court held in State of Tamil Nadu v. Badrinath, AIR (1987) SC 2381 that, no sanction was necessary inasmuch as the speech was not made by the appellant in discharge of his official functions. This Court held that appellant could go ahead with his suit already filed against Mr. V. Karthikeyan without seeking permission of Government.*

*Bias and Reasonable likelihood of bias:*

*It is in this background of the special facts that the question of likelihood of bias arises in this case. In the date of the meeting of the Joint Screening Committee on 30.8.79, Sri V. Karthikeyan was, as seen above, defending the writ appeal preferred by the appellant wherein the appellant was contending that the refusal of the State Government to sanction prosecution of Sri V. Karthikeyan was not justified.*

*Question arises whether, in such a situation, Sri V. Karthikeyan's presence vitiated the recommendations of the Committee and whether he should have 'recused' himself from the Committee, when it took up the case of the appellant for*

*promotion to super-time scale on 30.8.79?*

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*The above ruling is an authority also for a view that though the plea is not raised during the inquiry proceedings, if it is raised in the High Court, it is sufficient as it goes to the root of the question and is based on "admitted and uncontroverted facts" and does not require any further investigation of facts. Para 31 of the writ petition in the present case contains the allegations regarding the defamatory item published in the Indian Express and various other acts attributed to Sri Karthikeyan as evidence of his bias. This theme runs through the entire writ petition spanning more than 50 pages and in the written submissions filed in the Tribunal running into more than 60 pages.*

*In our view, Sri V. Karthikeyan must have 'recused' himself from the Committee. As he did not do so and as he participated in the decision making process and disqualified the appellant, the entire recommendation dated 30.8.79 of the Screening Committee must be treated as vitiated and invalid."*

12. In *Mahadevan v. D.C. Agarwal* 1993 Suppl. (4) SCC 4 the respondent was seeking promotion. He had filed a contempt case against certain senior officers of the State Bank of India for denying him promotion. But the Bank Constituted a Selection Committee in which the two persons against whom the contempt case was filed were members and the Committee did not find the respondent fit for promotion. It was held that the said two persons ought not to have been members of the Selection Committee and the Committee's decision was invalid. This Court observed after considering the records that the Committee which interviewed, comprised two of the persons against whom the respondent had filed contempt petition in the High Court. This, was according to the court, neither proper nor fair. Those officers occupying very high position in the Bank in all propriety should have withdrawn from

the Committee constituted for this purpose. We may not be understood as imputing any bias to them. But, in our opinion, the principle of fairness required that they should not have sat on the Board.

13. In the present case, no doubt the fifth respondent was entitled to and did initiate the process of recording the petitioner's ACR, being his superior officer. The initiation of the process- which is administrative- however, did not mean that the fifth respondent was compelled to go ahead and complete recording the ACR. The complaints of harassment were levelled against him almost contemporaneously. No one suggests that the fifth respondent was duty bound or compelled to write the ACR after he became aware that there was likelihood of his bias in the process of its recording. When the Court considers that the complaints to the NHRC and NCW were preferred within a couple of months of October, 2007, the fact that the fifth respondent had become aware of these developments is undeniable.

14. As in all cases where bias is alleged, the issue which the court has to address itself is as to whether there was likelihood of bias. The party alleging bias is not under an onus to prove bias; rather it is the *danger or likelihood of bias* of the public official concerned, in the circumstances of a given case. In one of the most celebrated cases, *R v Bow Street Metropolitan Stipendiary Magistrate & Ors, Ex parte Pinochet Ugarte (No 2)* [1999] 2 WLR 272 ["the *Pinochet* case"] discussed those tests. There, the House of Lords set aside its earlier decision when it was disclosed (after delivery of judgment), in the earlier appeal, that Lord Hoffmann, (one of the members of the Appellate Committee who heard the appeal), had some link with Amnesty International. That body was an intervener in the appeal; the judge was an unpaid director of the Amnesty International Charity Ltd ("AICL"), a

charity wholly controlled by Amnesty International. The House of Lords held that the relationship between Lord Hoffmann and Amnesty International through his directorship in AICL, led to his automatic disqualification from sitting on the hearing of the said appeal without the need to investigate whether there was a likelihood or suspicion of bias in the circumstances of that case. The Supreme Court in *Badrinath* (supra) and *D.C. Agarwal* and the other cases previously cited vividly summarized the applicable test in these cases- it is not one of proven bias; rather it is proof of reasonable likelihood of bias.

15. Applying the test of *reasonable likelihood of bias*, this court has no hesitation to say that given the nature of the allegations leveled against him, the fifth respondent, as a responsible officer should have desisted from completing the process of recording the ACR- which was actually recorded in late 2008. He could have sought guidance from his superior officers having become aware of the complaint by the petitioner's wife, against him. That his evaluation was confirmed by the higher authorities (who concurred with his views in this case) is cold comfort to the petitioner. In our opinion, if the initial action itself was tainted because of bias, the resultant illegality was incurable.

16. In view of the above discussion, the Court is of the opinion that the impugned ACRs recorded by the fifth respondent as well as the confirmation by the reviewing and accepting authority cannot be sustained. They are hereby quashed. During the hearing, it was suggested by learned counsel for the respondents that given the circumstances that the superior officers, i.e. the IG and the DIG have since retired, it would be in the larger interest of all concerned that the ACR itself is initiated by the next higher authority, i.e.

the concerned IG. The petitioner has no objection to this course of action suggested by the official respondents. A direction is issued accordingly to initiate the process for recording the petitioner's ACR for the relevant period by the IG. The same shall be accepted, reviewed as the case may be by the DG. The petitioner shall be apprised of the outcome within ten weeks from today. It is clarified that no view has been expressed on the merits of the complaint and the allegations levelled against the fifth respondent. The petition is partly allowed in the above terms. There shall be no order on costs.

**S. RAVINDRA BHAT  
(JUDGE)**

**DEEPA SHARMA  
(JUDGE)**

**OCTOBER 08, 2015  
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