

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 18.08.2016

DELIVERED ON: 22.12.2016

CORAM:

The HON'BLE MR.SANJAY KISHAN KAUL, CHIEF JUSTICE
AND

The HON'BLE MR.JUSTICE R.MAHADEVAN

W.P.Nos.4113, 4161 and 4584 of 2016

W.P.No.4113 of 2016:

T.K.S.Elangovan .. Petitioner

Vs.

1. The State of Tamil Nadu
rep. by its Chief Secretary to Government
Secretariat, Fort St. George
Chennai - 600 009.
2. The Tamil Nadu Public Service Commission
rep. by its Member Secretary
Frazer Bridge Road, V.O.C. Nagar
Park Town, Chennai - 600 003.
3. The Secretary to the Governor of Tamil Nadu
Raj Bhavan, Chennai - 600 022.
4. Dr.R.Pratap Kumar
5. V.Subbaiah
6. S.Muthuraj
7. M.Sethuraaman
8. A.V.Balusamy
9. M.Madasamy
- 10.V.Ramamurthy
- 11.Dr.P.Krishnakumar
- 12.A.Subramanian
- 13.N.B.Punniamoorthi
- 14.Dr.M.Rajaram, I.A.S.

.. Respondents

PRAYER: Petition under Article 226 of the Constitution of India for issuance of a writ of Declaration, declaring that the appointments made by the first respondent vide G.O.Ms.No.9, Personnel and Administrative Reforms (M)

Department, dated 31.1.2016, appointing respondents 4 to 14 as Members of the Tamil Nadu Public Service Commission are illegal, ab initio void and contrary to the law laid down by the Hon'ble Supreme Court and Constitutional provisions and, therefore, consequently to hold that respondents 4 to 14 have no authority to hold the posts of Members of the Tamil Nadu Public Service Commission and consequently to declare the post as vacant.

W.P.No.4161 of 2016:

Advocates' Forum for Social Justice
rep. by its President, K.Balu
No.156, Thambu Chetty Street
Chennai - 600 001.

.. Petitioner

Vs.

1. The State of Tamil Nadu Government
rep. by the Chief Secretary to Government
Secretariat, Chennai - 600 009.

2. The Tamil Nadu Public Service Commission
rep. by its Secretary
Frazer Bridge Road
Chennai - 600 001.

3. Dr.R.Pratap Kumar

4. V.Subbaiah

5. S.Muthuraj

6. M.Sethuraaman

7. A.V.Balusamy

8. M.Madasamy

9. V.Ramamurthy

10. Dr.P.Krishnakumar

11. A.Subramanian

12. N.B.Punniamoorthi

13. Dr.M.Rajaram, I.A.S.

.. Respondents

PRAYER: Petition under Article 226 of the Constitution of India for issuance of a writ of Declaration, declaring the appointment of respondents 3 to 13 as Members of the TNPSC made in G.O.(Ms.) No.9, Personnel and Administrative Reforms (M) Department, dated 31.1.2016 issued by the first respondent as illegal and against Constitutional mandates.

W.P.No.4584 of 2016:

Dr.K.Krishnasamy, M.D., M.L.A.,
Founder President, Puthiya Tamilagam Political Party
Member of Legislative Assembly Office
Main Road, Ottapidaram, Tuticorin District.

.. Petitioner

Vs.

1. The Chief Secretary
Government of Tamil Nadu
Secretariat, Chennai - 600 009.
 2. The Principal Secretary to
Government of Tamil Nadu
Personnel and Administrative Reforms Department
Chennai - 600 009.
 3. The Principal Secretary to His Excellency
Governor of Tamil Nadu
Governor's Secretariat
Raj Bhavan, Chennai - 600 022.
 4. The Secretary
Tamil Nadu Public Service Commission
Frazer Bridge Road
V.O.C. Nagar, Park Town
Chennai - 600 003.
 5. Dr.R.Pratap Kumar
 6. V.Subbaiah
 7. S.Muthuraj
 8. M.Sethuraaman
 9. A.V.Balusamy
 10. M.Madasamy
 11. V.Ramamurthy
 12. Dr.P.Krishnakumar
 13. A.Subramanian
 14. N.B.Punniamoorthy
 15. Dr.M.Rajaram, I.A.S.
- (Respondents 5 to 15 are at
C/O.TamilNadu Public Service
Commission, Frazer Bridge
Road, V.O.C. Nagar, Park
Town, Chennai 600 003.
- .. Respondents

PRAYER: Petition under Article 226 of the Constitution of India for issuance of a writ of Certiorarified Mandamus to call for the entire records in connection with the impugned Government Order in G.O.(Ms.) No.9, Personnel and Administrative Reforms (M) Department, dated 31.1.2016 on the file of the first respondent, to quash the same as unconstitutional, unfair and illegal and consequently direct respondents 1 to 4 to select and appoint persons having specialized knowledge in tune with Article 316 of the Constitution of India.

For Petitioner : Mr.P.Wilson, Senior Counsel
in W.P.No.4113 of 2016 for R.Neelakandan

For Petitioner : Mr.K.Balu
in W.P.No.4161 of 2016 for Mr.S.Sathiyavel

For Petitioner : Mr.N.Subramanian
in W.P.No.4584 of 2016 for Mr.S.S.Madhavan

For respondents 1 and 3 : Mr.A.L.Somayaji,
in W.P.No.4113 of 2016, Advocate General
respondents, for 1st assisted by
respondent in Mr.M.K.Subramanian,
W.P.No.4161 of 2016 and Government Pleader
for respondents 1 to 3
in W.P.No.4584 of 2016

For 2nd respondent in : Mr.R.Muthukumarasamy
W.P.Nos.4113 and 4161 of Senior Counsel
2016 and 4th respondent for Ms.C.N.G.Niraimathi
in W.P.No.4584 of 2016

For 4th respondent in : Mr.N.L.Rajah, Senior Counsel
W.P.No.4113 of 2016, 3rd for Mr.Chandrasekaran
respondent in
W.P.No.4161 of 2016 and
5th respondent in
W.P.No.4584 of 2016

For 5th respondent in : Mr.R.Krishnamurthy
W.P.No.4113 of 2016, 4th Senior Counsel
respondent in for Mr.S.Karthikei Balan
W.P.No.4161 of 2016 and
6th respondent in
W.P.No.4584 of 2016

For 6th respondent in : Mr.Yasodvaradan
W.P.No.4113 of 2016, 5th Senior Counsel
respondent in for M/s.V.Anand and
W.P.No.4161 of 2016 and M.Manimaran
7th respondent in
W.P.No.4584 of 2016

For 7th in W.P.No.4113 : Mr.AR.L.Sundaresan
of 2016, 6th respondent Senior Counsel
in W.P.No.4161 of 2016 for Mr.Alagu Narayanan
and 8th respondent in
W.P.No.4584 of 2016

For 8th respondent in : Mr.R.Krishnamurthy
W.P.No.4113 of 2016, 7th Senior Counsel
respondent in for Mr.N.Umapathy
W.P.No.4161 of 2016 and
9th respondent in
W.P.No.4584 of 2016

For 9th respondent in : Mr.AR.L.Sundaresan
W.P.No.4113 of 2016, 8th Senior Counsel
respondent in for Mr.Alagu Narayanan
W.P.No.4161 of 2016 and
10th respondent in
W.P.No.4584 of 2016

For 10th respondent in : Mr.N.L.Rajah, Senior Counsel
W.P.No.4113 of 2016, 9th for Mr.D.Kulasekaran
respondent in
W.P.No.4161 of 2016 and
11th respondent in
W.P.No.4584 of 2016

For 11th respondent in : Mr.R.Krishnamurthy
W.P.No.4113 of 2016, Senior Counsel
10th respondent in for Mr.N.Umapathy
W.P.No.4161 of 2016 and
12th respondent in
W.P.No.4584 of 2016

For 12th respondent in : Mr.N.L.Rajah
W.P.No.4113 of 2016, Senior Counsel
11th respondent in for Mr.P.Dinesh Kumar
W.P.No.4161 of 2016 and
13th respondent in
W.P.No.4584 of 2016

For 13th respondent in : Mr.AR.L.Sundaresan
W.P.No.4113 of 2016, Senior Counsel
12th respondent in for Mr.Alagu Narayanan
W.P.No.4161 of 2016 and
14th respondent in
W.P.No.4584 of 2016

For 14th respondent in : Mr.R.Krishnamurthy
W.P.No.4113 of 2016, Senior Counsel
13th respondent in for Mr.N.Umapathy
W.P.No.4161 of 2016 and
15th respondent in
W.P.No.4584 of 2016

C O M M O N O R D E R

THE HON'BLE CHIEF JUSTICE

The democratic polity requires an honest and efficient Civil Service. The roots of the Civil Service go back a long way stated to have arisen from the ancient Egyptian Civilization flourishing as early as 3,000 B.C.

1.2. Kautilya's Arthashastra in India is a treatise on the administrative apparatus. This is a reflection of the significance of a proper administration in any governance. It is also a reflection of the historical importance given to proper administration in our country. The Mughal regime did not lose the significance of this administrative apparatus, though they developed their own bureaucratic system which continued till the British time with the implementation of the Macaulay's Report requiring the best and the brightest for the Indian Civil Service in the background of what in his own words was "such high moral values, people of such calibre, the very backbone of this nation, which is her spiritual and cultural heritage". Macaulay's Report perceived the Indian Civil Service (ICS) recruitment not as a matter of favour, but a matter of right and the report said, "He who obtains such an appointment will owe it solely to his own abilities and industry".

1.3. The dawn of independence was expected to make significant changes in the administration in public service, but the ICS tradition survived and prospered in the early years.

1.4. The Indian Constitution makers provided for an independent judiciary with separation of executive from judicial functions. The Constitution also devised certain independent agencies to deal with particular matters and one such institution is the Union and State Public Service Commissions.

1.5. The Constitutional Law debates records this in the words of Late President, Hon'ble Dr.Rajendra Prasad, as under:

"Our Constitution has devised certain independent agencies to deal with particular matters. Thus, it has provided for Public Service Commission both for

the Union and for the States and placed such Commission on an independent footing so that they may discharge their duties without being influenced by the Executive. One of the things against which we have to guard is that there should be no room so far as it is humanly possible for jobbery, nepotism and favouritism. I think the provisions which we have introduced into our Constitution will be very helpful in this direction."

1.6. The historical perspective of the Public Service Commission came to be initially examined by the Hon'ble Supreme Court in *State of Mysore v. R.V. Bidap*, (1974) 3 SCC 337 by the Constitution Bench. It referred to the drafting prelude to the framing of the Constitution from a study by B. Shiva Rao with important speeches in the House, which were apposite and illuminating. It emphasized that to secure an efficient Civil Service, it will be instrumental to protect it from political and personnel influences and, thus, it would be an impartial and efficient instrument. Whatever be the political complexion of the powers that be, the "spoils system" will jettison. Shri H.V. Kamath eruditely says "If a Member of the Public Service Commission is under the impression that by serving and kowtowing to those in power he could get an office of profit under the Government of India or in the Government of a State, then I am sure he would not be able to discharge his functions impartially or with integrity."

1.7. We are in the present set of cases concerned with the appointment to this very high post and august office of a Member of the Tamil Nadu Public Service Commission on challenge being laid by the petitioners both to the merit of the candidates and the process of appointment.

THE FACTS

2.1. We do not consider it necessary to advert to the individual facts of each case. The substratum of the challenge is the same and are thus putting forth the necessary facts required for adjudication of the matter.

2.2. For the sake of convenience, the parties are referred to as per their rank in W.P.No.4113 of 2016.

2.3. The vacancies for the posts of Members of the Tamil Nadu Public Service Commission are stated to have arisen from the year 2013 when Members completed their tenures and demitted office and the last such Member to demit office was on 31.1.2016. Thus, for almost three years these posts remained vacant, which reached a number of eleven. It is the case of the petitioners that these posts were suddenly filled by G.O.(Ms.)

No.9, Personnel and Administrative Reforms (M) Department, dated 31.1.2016 (Sunday/non-working day), in anticipation of the election notification for the State Assembly Elections, which were ultimately held on 16.5.2016, the Model Code of Conduct having come into force with effect from 4.3.2016 and the notification having been issued by the Governor of Tamil Nadu on 22.4.2016 under Section 15 of the Representation of the People Act, 1951.

2.4. The petitioners claim that the Commission is sought to be packed by party loyalists having no eminence and not possessing the requisite merit and abilities to function in the capacity as Members of the Public Service Commission.

2.5. It has been pleaded that the post of the Member of the Commission, being a constitutional post in accordance with Article 316 of the Constitution of India with duties and responsibilities having been set down under Article 320 of the Constitution, there is great importance to the appointment of these posts as felt by the Constitution Makers. Some of the duties and responsibilities of the Public Service Commission are conduct of examinations for appointment to services of State, framing and operating schemes for joint recruitment for any service, apart from being consulted in matters relating to methods of recruitment, transfer, discipline, pension, etc.

2.6. The Office of the Member and Chairman are protected and sufficiently safeguarded so as to enable them to act fearlessly, i.e., without any fear or favour. Thus, what is expected is that these persons should have knowledge and experience in public administration, high degree of calibre, competency, outstanding ability and should inspire confidence in the minds of the public.

2.7. It is admitted in the petitions that there are no procedures laid down for appointment of the Chairman and the Members, but as to what kind of persons to adorn this post and the process to be followed has been elucidated in various judgments, including in State of Punjab v. Salil Sabhlok, (2013) 5 SCC 1. Suffice to say that the Supreme Court has opined that only persons with integrity and competence should be appointed and there is no absolute discretion vested in the State Government under Article 316 of the Constitution of India for appointment to these posts, as it is to be read in the context of purpose for such appointment discernible from the functions of the Public Service Commission enumerated in Article 320 of the Constitution of India. The Commission is expected to act with fairness, besides competence and maturity.

2.8. Insofar as the appointments were concerned, the persons so appointed were impleaded as respondents 4 to 14. In making such appointments, institutional integrity is alleged to have been violated by appointing largely people who are advocates by profession and supporters of the Ruling Party, former Municipal Councilors, Office bearers of the party. One of them is a Retired District Judge whose tenure was not extended beyond 58 years, while another was a Professor working in a Private Engineering College. One other Member so appointed was an Engineer in the Tamil Nadu Electricity Board and another was a Draughtsman.

2.9. It is alleged that none of these respondents have any administrative experience, apart from the fact that they do not comply with the institutional requirements of such high degree of calibre and competency and would be capable of political influence. The allegation thus is that the appointment to these posts have been treated as some kind of distribution of largesses in this form by the State Government and thus the government order was assailed and also a restraint is sought against the persons taking oath. The fact however remains that all these people actually did take oath on 2.2.2016.

COUNTER

3.1. The State Government and the persons appointed have strongly rebutted the allegations, justifying the appointment. It has been averred that the appointment was made by the Governor of Tamil Nadu on aid and advice by the State Government under Article 316(1) of the Constitution of India for a period of six years or till they attain the age of 62 years, whichever is earlier.

3.2. A plea, of course, was sought to be raised that the petitioners would have no locus, as they were not interested in appointment. We may note here itself that this would be a specious plea as the issue is one of public appointment and, admittedly, no process of inviting applications from the public at large has been followed where someone would have known that such appointments were going to be made.

3.3. It is the case of the respondents that the Members having taken charge could be removed from office only by following the procedure in accordance with Article 317 of the Constitution of India and the scope of judicial review in matters of appointment of Members of the Public Service Commission is limited. In this behalf, it was emphasized that the Hon'ble Supreme Court has already opined in Ashok Kumar Yadav v. State of Haryana, (1985) 4 SCC 417, that the High Court could not have undertaken an inquiry into the question whether the Chairman and the Members of the Public Service Commission

are men of integrity, calibre and qualification or not, as this would not make the appointment invalid so long as the constitutional and legal requirements in regard to appointment were fulfilled.

3.4. It has been emphasized that since eleven posts of Members of the Commission stood vacant as on 31.1.2016, the Governor of Tamil Nadu "after due deliberation and careful consideration" had appointed the Members. It has been claimed that these Members had knowledge and experience in public administration and competence which meets the constitutional, functional and institutional requirements of the Commission. The guidelines specified in Salil Sabhlok case, supra, are pleaded to have been complied with by adequate scrutiny.

3.5. On the specific merits of the candidates, it is stated as under:

- a) Six of candidates appointed as Members hold Law Degrees.
- b) Dr.R.Pratap Kumar/fourth respondent is stated to be well qualified person having Post Graduate Degree in Law and Management in addition to a Doctorate in Philosophy and he has served as Standing Counsel for Central Administrative Tribunal, Chennai.
- c) Mr.V.Subbaiah/fifth respondent has served as a Government Advocate, Additional Government Pleader and Special Government Pleader in the High Court for 15 years and as Law Officer of the Central Administrative Tribunal for two years.
- d) Mr.S.Muthuraj/sixth respondent has practiced as an Advocate in High Court of Madras and Subordinate Courts in matters relating to Service Law, Administrative Law and Labour Law and in addition to that he was Legal Advisor/Standing Counsel for Tamil Nadu State Marketing Corporation and Tamil Nadu Warehousing Corporation in the High Court.
- e) Mr.M.Sethuraaman/seventh respondent was serving as Special Public Prosecutor in District Sessions Court, Ramanathapuram, having Masters Degree in Social Work.
- f) Mr.A.V.Balusamy/eight respondent had 30 years bar experience in Civil, Criminal, Labour, Arbitration and Constitution matters and had also served as a District Public Prosecutor for Namakkal District for the years 2002-2006 and had also served as Legal Advisor to Public Sector Companies like United India Insurance, National Insurance Company, New India Assurance and Oriental Insurance.

- g) Mr.M.Madasamy/ninth respondent was stated to be a Member of the Legal Aid Committee in Tenkasi Court.
- h) Mr.V.Ramamurthy/tenth respondent had served in various judicial capacities and was permitted to retire on attaining the age of superannuation at 58 years on 28.2.2015.
- i) Dr.P.Krishnakumar/eleventh respondent was an Engineer having Masters Degree and a Doctorate in Management, possessing a qualification of a MCSD - Microsoft Certified Solution Developer with 13 years of academic experience.
- j) Mr.A.Subramanian/twelfth respondent has joined service as an Assistant Engineer in the year 1984 and reached the cadre of Chief Engineer in Tamil Nadu Electricity Generation and Distribution Corporation Limited, possessing ability in management of administration, technical, accounts and materials effectively.
- k) Mr.N.B.Punniamoorthi/thirteenth respondent was dealing with wide-ranging issues relating to the Tamil Nadu Transparency in Tenders Act, 1988, the Rules framed thereunder and other such connected matters.
- l) Dr.M.Rajaram/fourteenth respondent is stated to have held key positions in the Indian Administrative Service and has vast administrative experience.

3.6. The aforesaid materials are thus stated to be justifying the appointment of these persons as Members of the Tamil Nadu Public Service Commission.

3.7. It has been specifically stated that none of the appointees were holding any position in any political party as on the date of their appointment to the Commission and it is pleaded that suitability of appointment of candidates cannot be subject to judicial review in view of the decision of the Hon'ble Supreme Court in the Registrar General, Madras High Court v. R.Gandhi and others, (2014) 11 SCC 559.

3.8. It has been strongly contended that the Members having assumed office, the removal can only be by order of the President on the ground of misbehaviour, in view of the judicial pronouncements.

3.9. The right to make appointment to the State Public Service Commission under Article 316 of the Constitution of India is submitted to have been left to the State Government and keeping in mind the Doctrine of Separation of powers, which is a

part of the basic structure of the Constitution, the appointments having been made as per Article 316 of the Constitution, this Court ought not to interfere with the same, especially as there are no charges or allegations against any Member.

3.10. The defence of the Members (respondents 4 to 14) in their counter affidavits is in the same vein. The case of the 10th respondent, who held the post of a District Judge, is on slightly different footing and this we may notice that, as per his affidavit, he affirms that he was not compulsorily retired from that post, but that he retired from service only on attaining superannuation, which could not be treated as a stigma. No enquiry had been held against him.

3.11. In this context, we may note that the admitted factual position is that the tenth respondent did not express a wish not to continue beyond the age of 58 years, but the High Court took a decision not to continue his services beyond the age of 58 years to the age of 60 years, which was duly informed.

THE CONSTITUTIONAL SCHEME

4.1. Part XIV, Chapter II of the Constitution of India deals with the Public Service Commissions, commencing from Articles 315 to Article 323.

4.2. The appointment of Chairman and Members of the Public Service Commission is made under Article 316 of the Constitution of India and the relevant part is extracted hereunder:

"Article 316. Appointment and term of office of members.-

(1) The Chairman and other members of a Public Service Commission shall be appointed, in the case of the Union Commission or a Joint Commission, by the President, and in the case of a State Commission, by the Governor of the State:

Provided that as nearly as may be one-half of the members of every Public Service Commission shall be persons who at the dates of their respective appointments have held office for at least ten years either under the Government of India or under the Government of a State, and in computing the said period of ten years any period before the commencement of this Constitution during which a person has held office under the Crown in India or under the Government of an Indian State shall be included."

4.3. The removal and suspension of a member of the Public Service Commission is as per Article 317 of the Constitution of India and the relevant portion is as under:

"Article 317. Removal and suspension of a member of a Public Service Commission.-

(1) Subject to the provisions of clause (3), the Chairman or any other member of a Public Service Commission shall only be removed from his office by order of the President on the ground of misbehaviour after the Supreme Court, on reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed in that behalf under Article 145, reported that the Chairman or such other member, as the case may be, ought on any such ground to be removed."

4.4. The functions of the Public Service Commissions are set out in Article 320 of the Constitution of India, which reads as under:

"Article 320. Functions of Public Service Commissions.

(1) It shall be the duty of the Union and the State Public Service Commissions to conduct examinations for appointments to the services of the Union and the services of the State respectively.

(2) It shall also be the duty of the Union Public Service Commission, if requested by any two or more States so to do, to assist those States in framing and operating schemes of joint recruitment for any services for which candidates possessing special qualifications are required.

(3) The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted-

(a) on all matters relating to methods of recruitment to civil services and for civil posts;

(b) on the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers;

(c) on all disciplinary matters affecting a person serving under the Government of India or the Government of a State in a civil capacity, including memorials or petitions relating to such matters;

(d) on any claim by or in respect of a person who is serving or has served under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, that any costs incurred by him in defending legal proceedings instituted against him in respect of acts done or purporting to be done in the execution of his duty should be paid out of the Consolidated Fund of India, or, as the case may be, out of the Consolidated Fund of the State;

(e) on any claim for the award of a pension in respect of injuries sustained by a person while serving under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, and any question as to the amount of any such award,

and it shall be the duty of a Public Service Commission to advise on any matter so referred to them and on any other matter which the President, or, as the case may be, the Governor of the State, may refer to them:

Provided that the President as respects the all-India services and also as respects other services and posts in connection with the affairs of the Union, and the Governor, as respects other services and posts in connection with the affairs of a State, may make regulations specifying the matters in which either generally, or in any particular class of case or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted.

(4) Nothing in clause (3) shall require a Public Service Commission to be consulted as respects the manner in which any provision referred to in clause (4) of Article 16 may be made or as respects the manner in which effect may be given to the provisions of Article 335.

(5) All regulations made under the proviso to clause (3) by the President or the Governor of a State shall be laid for not less than fourteen days before each House of Parliament or the House or each House of the Legislature of the State, as the case may be, as soon as possible after they are made, and shall be subject to such modifications,

whether by way of repeal or amendment, as both Houses of Parliament or the House or both Houses of the Legislature of the State may make during the session in which they are so laid."

4.5. The aforesaid elucidates the importance of the functions to be performed by the Chairman and the Members of the Public Service Commission. They must have the calibre and qualification to advise the President or the Governor, as the case may be.

THE MATERIAL AND PROCESS OF APPOINTING

5.1. On notice being issued in the writ petitions, a direction was issued on 31.3.2016 calling for the records relating to the process of deliberations and selection, duly flagged, to be kept available. However, on 13.6.2016, the learned Advocate General expressed reservations qua the said observations in view of the judgment of the Supreme Court in Salil Sabhlok case, supra. He, however, submitted that he had no objection if the Court wants to peruse any bio-data submitted by the appointed persons which would be kept available.

5.2. The learned counsel for the petitioners endeavoured to persuade us to draw an adverse inference from the refusal to produce the deliberations and the selection process in view of the provision of Section 114 Illustration (g) of the Indian Evidence Act, 1872, as this material was evidence which could be and was not produced as it must have been unfavourable to the respondents.

5.3. It was submitted that such material is in the nature of public documents under Section 74 of the Indian Evidence Act, 1872 as they are documents forming the records of the acts of the Executive. No case was alleged to have been made out in terms of an exception to be carved out in terms of Section 124 of the Indian Evidence Act, 1872 of public interest being liable to suffer and no affidavit claiming privilege was filed.

5.4. On the other hand, the learned Advocate General strongly objected to any endeavour to unseat the persons already appointed by contending that the only methodology made available for such removal is Article 317 of the Constitution of India. He, thus, submitted that it was not a question of claiming privilege qua the material on the basis of which an opinion for appointment was formed, but a constitutional bar to the removal, once the appointment had been made. To buttress his submission, the learned Advocate General relied upon the judgment of the Division Bench of the Patna High Court in Ram Nagina Singh and others v. S.V.Sohni and others, AIR 1976 Patna 36, to contend that Article 163(3) of the Constitution of India, creating a bar

to any enquiry by the Court in respect of advice tendered by the Council of Ministers to the Governor, would stand in the way of any endeavour to call for records in respect of the advice. The Article does not create any privilege, but contemplates that the matter shall not be enquired into by the Courts.

5.5. The learned Advocate General referred to the judgment in Ashok Kumar Yadav case, supra, more specifically paragraphs (7) to (9), where condemnation of the Chairman and Members of the Haryana Public Service Commission by the Division Bench of the Punjab and Haryana High Court was examined. The Supreme Court negatived the view taken by the Division Bench that it could be opined that those Members were lacking integrity, calibre and qualification and alleging corrupt motive against them. The observations were found to be disparaging and not made with any factual basis. It was in that context, in paragraph (9), it was observed that even assuming for the sake of argument that they were men lacking integrity, calibre and qualification, it will not make their appointments invalid, so long as the constitutional and legal requirements were fulfilled. Since none of the constitutional provisions were violated in making the appointments, the said appointments were said to be in conformity with the constitutional and legal requirements.

5.6. We may observe here that we have had the benefit of seeing the bio-datas. We are not embarking on a comparison of the bio-datas with bio-datas of others because, really, no other bio-data exists, apart from the fact that we cannot do so. It appears that only specific bio-datas were called and the appointments were made.

5.7. It is an admitted position that there was nothing put in public domain to indicate that persons who were interested in this post could give material in support of their candidature and on our query, we were informed that the bio-datas may have been received from persons in normal course or may have been called for specifically from persons.

5.8. It was also confirmed on our query by the learned Advocate General that whatever discussions took place were oral and advice was made on the basis of discussions for appointment by the Governor and the only material was the bio-data. It is also evident from the material that the whole process of selection commenced on 30.1.2016 (Saturday) and concluded on 31.1.2016 (Sunday/non-working day), and within this time, the file was initiated, approved, character verification done and appointment made.

5.9. In the context of the issue raised, we can say that really the issue of production of material in the present case which led to formation of opinion is not of much relevance as there is no material.

5.10. The only factual aspect we would note here is, confirmed by the learned Advocate General, that the bio-data of the 10th respondent only refers to his career profile without mentioning that at the age 58 years, without his request, his services were not continued by the High Court, the effect of which we will examine later in the judgment.

ARGUMENTS ON BEHALF OF THE PETITIONERS

6.1. The main thrust of the argument of the learned Senior Counsel for the petitioners was based on the legal enunciation in *Salil Sabhlok* case, *supra*. The Members appointed, it was contended, were so appointed without any evaluation or study of the antecedents or background of the candidates. The bio-datas were called on one fine day and they were appointed. It is also his contention that the advocates appointed had no administrative experience at all, while, of course, in the case of the 10th respondent, the High Court itself has found him unsuitable for continuation in service beyond 58 years. The appointments were made of persons who did not have any background of administrative or supervisory experience.

6.2. It was contended that the constitutional right conferred under Article 316(1) of the Constitution of India came with corresponding constitutional duties of having a transparent and proper process for such appointment. If the process was flawed, then the appointment itself was not as per the constitutional process and, thus, there was no question of any removal from service as envisaged under Article 317 of the Constitution of India. There was no appointment as per the Constitution. It was urged before us that the Constitutional Debates also emphasize that the persons appointed were to be persons of integrity, calibre and persons capable of acting without any political allegiance or reproach. However, in the present case, the very minimal of even having a scrutiny and verification did not take place, as it was not even feasible to do so within a one-day window of time. This is apart from the fact that the tenth respondent suppressed material facts of the manner of his exit from his earlier office as District Judge.

6.3. The issue of appointment of the tenth respondent as an individual case requires a greater scrutiny as the learned Senior Counsel for the tenth respondent, relying on the judgment in *Bishwanath Prasad Singh v. State of Bihar*, (2001) 2 SCC 305 contended that the use of words "compulsory retirement" for the

judicial officers allowed to superannuate at the age of 58 years sought to give an impression that there was no retirement in ordinary course and, therefore, the procedure for compulsory retirement had to be followed. But this submission had been negatived. On this aspect, the learned counsel for the petitioners drew our attention to paragraph (12) of the said judgment for the contention that while opining so, the Supreme Court itself has observed that while the object of such "compulsory retirement" was not to punish or penalize the government servant, it was to weed out the worthless who have lost their utility for the administration by their insensitive, unintelligent or dubious conduct impeding the flow of administration or promoting stagnation. Thus, it was observed that the country needs speed, sensitivity, probity, non-irritative public relation and enthusiastic creativity which can be achieved by eliminating the dead wood, the paper-logged and callous.

6.4. This being the legal position, it was contended that how could a person who had been weeded out as "dead wood, paper-logged and callous" was fit to be appointed as a Member of the Public Service Commission. The plea, thus, was this fact was deliberately concealed as it can never be envisaged that such a person would under any process of scrutiny be so appointed. This view was in line with the observations in All Indian Judges' Association and others v. Union of India and others, (1993) 4 SCC 288, dealing with the manner of exercise to be carried out while considering whether to grant extension from 58 years to 60 years in judicial service.

6.5. A reference was also made to the judgment in N.Kannadasan v. Ajoy Khose and others, (2009) 7 SCC 1, in the case of a Judge of the High Court who had not been confirmed being appointed as the President of the State Consumer Disputes Redressal Commission. In that context, it was observed that if a person does not have qualification for continuing to hold the office of the Judge of High Court, it is difficult to conceive as to how despite such deficiency in qualification, he could be recommended for appointment to a statutory post, the eligibility criteria wherefor is, inter alia, a former Judge. Considering the qualification of "has been a Judge", it was observed that if a person made himself disqualified to hold the post of a judge, the Chief Justice should not consider his name at all for appointment to some other post like the President of the State Consumer Disputes Redressal Commission. It was, thus, opined that if a person was ineligible for being recommended for continuation to the Constitutional Post, that was the end of the matter and he could not have been recommended for a statutory post.

6.6. We may notice that while individual candidates were sought to be assailed as not holding the requisite merit, we have not considered it appropriate to go into the aspect of weighing each candidate's merit for the reasons we have set out hereinafter and, thus, we are of the view that a more elaborate discussion on the merit of each candidate is neither required nor desirable. Suffice to record the plea on behalf of the petitioners that the bio-datas of respondents 4 to 14 were called on one day and their appointment order was issued on the very next day.

ARGUMENTS OF THE LEARNED ADVOCATE GENERAL
AND THE APPOINTEES

7.1. The learned Advocate General sought to protect the right of the State Government to make appointment to the Commission as deemed proper. While putting forth the plea of a constitutional bar for production of records, the learned Advocate General, at least to the extent of the bio-datas, produced them fairly and also conceded that other than the bio-datas there was no written material which could show any deliberations. We have already noticed that the process was over within a day, as there was no application sought for prior to that and, thus, seeking of applications from the candidates who were to be appointed was followed by the appointment itself the next day.

7.2. It was the case of the learned Advocate General that the existence of bio-data would suffice for purposes of the oral deliberations, which had in turn resulted in the appointments being made. In addition, it was contended that even if the deliberated process could be said to be flawed, in view of the observations in *Ashok Kumar Yadav case, supra*, the appointments made could not be struck down and the observations perceived to be contrary in *Salil Sabhlok case, supra*, would thus have to be read as per incuriam.

7.3. The plea advanced was that all that was required was that the persons should be qualified to hold the post and the Court would not sit in judgment over the suitability of a candidate. Thus, eligibility was acceded as subject to judicial review, but not suitability.

7.4. The learned Advocate General also sought to emphasize that the factum of the appointees having taken charge put the matter in a different conspectus, as against a situation where the persons were prevented from taking over the office. While in the latter case it may be possible to prevent taking over of office, but once take over of office takes place, only Article 317 of the Constitution of India would apply.

RESPONSE OF THE PETITIONERS TO THE DEFENCES OF THE RESPONDENTS

8.1. On the other hand, the petitioners pleaded that even if the Court would not go into the material forming the opinion, the Court can at least probe whether there was any material or not which could have been the basis for the advise and whether the material was relevant for such advise. In the present case, it was pleaded that there was practically no advice, as the bio-data received one day was followed by the appointment the next day.

8.2. It was strongly pleaded on behalf of the petitioners that mere bio-data could not be the basis for appointment, as the high expectations of integrity and impartiality, merit, ability and suitability of candidates require a meticulous enquiry, which obviously did not occur. Thus, the process itself was vitiated and there was thus no appointment in the eyes of law. The judgment of the Division Bench of the Allahabad High Court in Sathish Kumar Singh v. Dr. Anil Kumar Yadav, Chairman, UPPSC Allahabad and others, MANU/UP/1944/2015, was relied upon for the said purpose, where the appointment of the Chairman was held to be invalid on account of process not being followed. This judgment received the imprimatur of the Supreme Court in Anil Kumar Yadav v. Satish Kumar Singh and others, etc. [S.L.P. (Civil) Nos. 32206-32207/2015, dated 27.11.2015], vide dismissal of the SLP after observing that it was a well reasoned order by the High Court. But something more was said. It was pleaded that the petitioner may be held ineligible for consideration in future process for selection, but that plea was negatived on the ground that the High Court had found fault with the process of appointment more than the appointment itself and thus if the petitioner therein offered himself as a candidate for appointment as Chairman in future process, his claim may also be considered on merits along with other eligible candidates.

8.3. Insofar as the judgments in Ashok Kumar Yadav case and Salil Sabhlok case, supra, are concerned, it was urged that in Ashok Kumar Yadhav case, it was the selection process carried out by the Public Service Commission which was in question and not the appointment of the Members. The observations qua the Members were made in that context. In Salil Sabhlok case, supra, it was appointment itself which was in question and thus the observations would definitely be more apposite and could hardly be categorized as per incuriam. Thus, the principle of sub silentio would really apply to the observations made in Ashok Kumar Yadhav case, supra, while Salil Sabhlok case would be a binding precedent.

8.4. On the endeavour of the learned Advocate General in the course of the arguments to compare the process of appointment of Judges of the High Courts and the Supreme Court and Members of the Commission and the parity therein, it was submitted that though both were constitutional posts, the process was completely different. Thus, the judgment of the Allahabad High Court in Sathish Kumar Singh case, supra, really followed the ratio in Salil Sabhlok case, supra. The facts in the said case were stated to be apposite in the present case, as even in the case before the Allahabad High Court, the whole process of selection was completed within one day, i.e., on 29.3.2013, and on the same day, the file was initiated, approved, character verification done and appointment made. This was stated to have so happened even in the present case. Also the observations of not having considered the competing candidates case, which formed a pool of available talent of candidates, is stated to apply here also where only the bio-data of the candidates to be appointed were called for.

8.5. The post of the Member of the Public Service Commission was one of a constitutional trustee requiring selection on the basis of merit, integrity, ability and suitability and should also possess institutional requirement of administrative experience. On this behalf, the observations made in Inderpreet Singh Kahlon and others v. State of Punjab, (2006) 11 SCC 356, were also referred to.

8.6. The learned counsel emphasized that some of the judgments referred to by the learned Advocate General pertain to appointment of Information Commissioners, Comptroller and Auditor General or Judges, while really the only judgment dealing with the issue of appointment to the post of Chairman or Member of the Public Service Commission was Salil Sabhlok case, supra.

8.7. The learned counsel contended that the eligibility criteria for appointment as Chairman laid down in Salil Sabhlok case, supra, would equally apply to the Member and culled out the requirements as under:

- (a) The Chairperson of the Public Service Commission must be a person of integrity and competence.
- (b) If the relevant factors are not taken into consideration by the State Government while appointing the Chairman, the Court can hold the selection as invalid and not in accordance with the Constitution.
- (c) The Chairperson should be beyond reproach and his appointment should inspire confidence

- among the people.
- (d) The quality of person can be ascertained only through the meaningful deliberative process by taking into account the constitutional functions and institutional requirement necessary for appointment.
- (e) An Advocate does not have administrative skills and cannot perform constitutional duties as contemplated under Article 320.

8.8. The learned counsel, while dealing with the issue of the persons already having been appointed, pleaded that if the process was flawed, there was no appointment in law. In any case, the writ petitions were filed prior to taking of charge and there was no statutory or constitutional oath prescribed for the Member of the Commission and no such oath is prescribed in the Tamil Nadu Public Service Commission Regulations, 1954. Thus, the protection of Article 317 of the Constitution of India, which is available for valid appointment cannot come to the aid of the appointees in the present case, where the appointment itself is ab initio void and non est, the process having not been followed. It is such a situation which is envisaged in the judgment of the Division Bench of the Allahabad High Court in Sathish Kumar Singh case, supra.

8.9. An unconstitutional appointment must be struck down by a Constitutional Court as observed in B.R.Kapur v. State of Tamil Nadu and another, (2001) 7 SCC 231.

8.10. The concluding argument referred to the significant aspect of the deliberative process and process of appointment being unsustainable and there being thus no appointment in the eyes of law.

ANALYSIS OF THE JUDGMENTS

(A) PROCESS OF SELECTION:

9. The appointment to the Public Service Commissions is not something which is troubling the judicial arena for the first time, but forms a part of various judicial opinions from time to time.

10.1. The historical perspective in respect of the Public Service Commissions has been dealt with by the Constitution Bench of the Supreme Court in R.V.Bidap case, supra, which we have already discussed.

10.2.1. One of the areas of concern has been the scope of scrutiny by the Court and in this behalf, the line of argument of the learned Advocate General was sought to be supported by

the judgment in Ashok Kumar Yadav case, supra. The fundamental issue therein was the wide condemnation in the Division Bench judgment of the High Court in respect of the Chairman and Members of the Haryana Public Service Commission as men lacking in integrity, calibre and qualification and alleging corrupt motives against them. Not only aspersions were cast on the members, but their appointment was sought to have been vitiated for caste consideration and political affiliation, with none of them satisfying the stringent test of "men of integrity, calibre and qualification". The Supreme Court took note of the fact that these members have not been impleaded as respondents and, thus, did not have an opportunity to defend themselves. There was also said to be no pleadings or evidence to substantiate the allegations in the petition. In the aforesaid context, Article 316 of the Constitution of India was examined for appointment and term of office of the Members of the Public Service Commission. The Supreme Court opined that the Division Bench was not justified in going into the question of validity of appointment, since that was not challenged nor any relief claimed in respect thereof. The validity of their appointments was, thus, held not capable of being questioned collaterally while considering the challenge to selections made by them.

10.2.2. Taking a cue from the appointment of a Judge, it was observed that in a litigation between two litigating parties, the appointment of a Judge cannot be called into question, which is an aspect of separate proceedings and, thus, the Supreme Court observed that the observations made in respect of appointment of Judges in *G.Rangaraju v. State of A.P.*, (1981) 3 SCC 132, would equally apply to the appointment of Chairman and Members of the State Public Service Commission.

10.2.3. The Supreme Court, however, considered it appropriate to emphasize the pivotal role of the Public Service Commission in appointments to be made and the kind of talent which should be drawn to the Commission, which performs important functions. It was in that context, it was observed in paragraph (30) as under:

"30. Before we part with this judgment we would like to point out that the Public Service Commission occupies a pivotal place of importance in the State and the integrity and efficiency of its administrative apparatus depends considerably on the quality of the selections made by the Public Service Commission. It is absolutely essential that the best and finest talent should be drawn in the administration and administrative services must be composed of men who are honest, upright and independent and who are not swayed by the political winds blowing in the country. The selection of

candidates for the administrative services must therefore be made strictly on merits, keeping in view various factors which go to make up a strong, efficient and people oriented administrator. This can be achieved only if the Chairman and members of the Public Service Commission are eminent men possessing a high degree of calibre, competence and integrity, who would inspire confidence in the public mind about the objectivity and impartiality of the selections to be made by them. We would therefore like to strongly impress upon every State Government to take care to see that its Public Service Commission is manned by competent, honest and independent persons of outstanding ability and high reputation who command the confidence of the people and who would not allow themselves to be deflected by any extraneous considerations from discharging their duty of making selections strictly on merit. Whilst making these observations we would like to make it clear that we do not for a moment wish to suggest that the Chairman and members of the Haryana Public Service Commission in the present case were lacking in calibre, competence or integrity."

10.3. In *Shri Kumar Padma Prasad v. Union of India*, (1992) 2 SCC 428, the task of the Hon'ble Supreme Court, in its own words, was "to perform the painful duty of determining the eligibility of a person who has been appointed a Judge of the High Court by the President of India and who is awaiting to enter upon his office". It was held that even a cursory look at the bio-data of the person in question was sufficient to conclude that he was not qualified for appointment as a Judge of the High Court on the admitted facts which have been on the official files all the time. The person was held not qualified.

10.4. In *Ram Ashray Yadav (Dr), Chairman, Bihar Public Service Commission, In R/o*, (2000) 4 SCC 309, what is expected of a Member of the Public Service Commission - his/her qualities and behaviour, were discussed. In the words of the then Chief Justice of India - Dr.A.S.Anand, this has been discussed as under:

"1. The Founding Fathers of the Indian Constitution relying upon the experience in other countries wherever democratic institutions exist, intended to secure an efficient civil service. This is the genesis for setting up autonomous and independent bodies like the Public Service Commission at the Centre and in the States. The values of independence, impartiality and integrity are the

basic determinants of the constitutional conception of Public Service Commissions and their role and functions.

2. The Constitution has made provisions to protect the civil service, as far as possible, from political or personal influence and give it that position of stability and security, which is vital to its successful working as an impartial and efficient instrument of the State.

3. To enable the Public Service Commissions to discharge their constitutional duties and obligations in full measure, the framers of the Constitution not only armed them with enhanced powers and increased functions, but also provided security of tenure for the Chairman and members. Strict judicial procedure contained in Article 317 (1) and the Rules framed thereunder by this Court and the requirement that the President must have the supporting report of the Supreme Court in order to suspend or remove the Chairman or member of a Public Service Commission are undoubtedly intended to also provide safeguard to the Chairman and members of the Commission against motivated or wrong charges of misbehaviour, in the larger interest of the administration of the civil services in the country.

4. Keeping in line with the high expectations of their office and need to observe absolute integrity and impartiality in the exercise of their powers and duties, the Chairman and members of the Public Service Commission are required to be selected on the basis of their merit, ability and suitability and they in turn are expected to be models themselves in their functioning. The character and conduct of the Chairman and members of the Commission, like Caesar's wife, must therefore be above board. They occupy a unique place and position and utmost objectivity in the performance of their duties and integrity and detachment are essential requirements expected from the Chairman and members of the Public Service Commissions.

5. The Chairman of the Public Service Commission is in the position of a constitutional trustee and the morals of a constitutional trustee have to be tested in a much stricter sense than the morals of

a common man in the marketplace. Most sensitive standard of behaviour is expected from such a constitutional trustee. His behaviour has to be exemplary, his actions transparent, his functioning has to be objective and in performance of all his duties he has to be fair, detached and impartial.

.....

34. The credibility of the institution of a Public Service Commission is founded upon the faith of the common man in its proper functioning. The faith would be eroded and confidence destroyed if it appears that the Chairman or the members of the Commission act subjectively and not objectively or that their actions are suspect. Society expects honesty, integrity and complete objectivity from the Chairman and members of the Commission. The Commission must act fairly, without any pressure or influence from any quarter, unbiased and impartially, so that the society does not lose confidence in the Commission. The high constitutional trustees, like the Chairman and members of the Public Service Commission must forever remain vigilant and conscious of these necessary adjuncts."

10.5. The decision in *Inderpreet Singh Kahlon* case, supra, emphasized the need for thorough and meticulous scrutiny regarding the antecedents before appointments are made to constitutional positions. Absolute transparency was thus required to be maintained and demonstrated, as the impact of the deeds and misdeeds of the constitutional authorities affect a large number of people for a very long period of time, making it imperative that only people of high integrity, merit, rectitude and honesty are appointed to these constitutional positions.

10.6. The decision in *State of Bihar v. Upendra Narayan Singh*, (2009) 5 SCC 65, expresses the anguish of the Supreme Court over the hope and expectation of the framers of the Constitution that every citizen will get equal opportunity in the matter of employment or appointment being belied for over four decades on account of the functioning of the Public Service Commission. It is in that context, it has been observed that these Commissions, which have been given the status of constitutional authorities and are supposed to be totally independent and impartial while discharging their functions in terms of Article 320 of the Constitution of India, have become victims of spoils system. The Supreme Court held as under:

"43. In the beginning, people with the distinction in different fields of administration and social life were appointed as Chairman and members of the Public Service Commissions but with the passage of time appointment to these high offices became personal prerogatives of the political head of the Government and men with questionable background have been appointed to these coveted positions. Such appointees have, instead of making selections for appointment to higher echelons of services on merit, indulged in exhibition of faithfulness to their mentors totally unmindful of their constitutional responsibility. This is one of several reasons why most meritorious in the academics opt for private employment and ventures."

10.7. The requirement of integrity, calibre and independence of the Public Service Commission Members was once again emphasized in *Mehar Singh Saini, In re*, (2010) 13 SCC 586. The Supreme Court held as under:

"6. Higher the public office, greater is the responsibility. The adverse impact of lack of probity in discharge of functions of the Commission can result in defects not only in the process of selection but also in the appointments to the public offices which, in turn, will affect effectiveness of administration of the State. Most of the democratic countries in the world have set up Public Service Commissions to make the matter of appointments free from nepotism and political patronage. For instance the Conseil d'Etat in France, which is composed of the cream of the French Civil Service, has acquired considerable veneration for its capacity to police intelligently the complex administration of the modern State. Justice J.C. Shah in his report on the excesses of the Emergency, struck by the 'unhealthy factors governing the relationship between Ministers and civil servants', recommended the adoption of droit administratif of the French model by the Government. He observed that the commitment of a public functionary should be to the duties of his office, their due performance with an emphasis on their ethical content and not to the ideologies, political or otherwise of the politicians, who administer the affairs of the State.

7. Great powers are vested in the Commission and therefore, it must ensure that there is no abuse of such powers. The principles of public

accountability and transparency in the functioning of an institution are essential for its proper governance. The necessity of sustenance of public confidence in the functioning of the Commission may be compared to the functions of judiciary in administration of justice which was spelt out by Lord Denning in *Metropolitan Properties Co. (FGC) Ltd. v. Lannon* [(1969) 1 QB 577 : (1968) 3 WLR 694 : (1968) 3 All ER 304 (CA)] in the following words: (QB p. 599 F)

'... Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased'.'

8. The conduct of the Chairman and members of the Commission, in discharge of their duties, has to be above board and beyond censure. The credibility of the institution of the Public Service Commission is founded upon faith of the common man on its proper functioning. Constant allegations of corruption and promotion of family interests at the cost of national interest resulting in invocation of constitutional mechanism for the removal of Chairman/members of the Commission erode public confidence in the Commission. Prof. Brown and Prof. Garner's observation in their treatise *French Administrative Law*, 3rd Edn. (1983) in this regard can be usefully referred to. They said:

'The standard of behaviour of an administration depends in the last resort upon the quality and traditions of the public officials who compose it rather than upon such sanctions as may be exercised through a system of judicial control.'

10.8. In *Centre for PIL v. Union of India*, (2011) 4 SCC 1, it was emphasized that the Courts must see whether relevant material and vital aspects having nexus to the object of the Central Vigilance Commission Act, 2003 were taken into account when the decision to recommend appointment was made. Such decision was thus to be an informed one and if relevant material is not or irrelevant material is taken into account, the process would be vitiated. It also emphasized that this would not mean that personal integrity is not relevant. The aspect of institutional integrity and institutional competence was emphasized.

10.9.1. An important judgment from the point of view of the petitioners laying a challenge to these appointments which has been sought to be distinguished by the learned Advocate General as obiter dicta in the context of the controversy in the present case is Salil Sabhlok case, supra. We may note at this stage itself that this is a judgment of a Bench of two Hon'ble Judges, while Ashok Kumar Yadav case (supra), is of a Bench of four Hon'ble Judges.

10.9.2. What is significant is that in the absence of procedure laid down for appointment as Chairman and Member of the Commission by the Governor, who is the appointing authority, the State Government was held to have no absolute discretion in selection and appointment of persons to the Commission. Integrity and competence parameters were once again emphasized. The discretion vested in the State Government under Article 316 of the Constitution of India was held to have an implied limitation for purposes for which the discretion had been vested and the purposes were held to be discernible from the functions of the Commission enumerated under Article 320 of the Constitution of India. Some of the observations apposite to the matter under discussion reflecting the view of the Hon'ble Judges is as under:

"46. I, therefore, hold that even though Article 316 does not specify the aforesaid qualities of the Chairman of a Public Service Commission, these qualities are amongst the implied relevant factors which have to be taken into consideration by the Government while determining the competency of the person to be selected and appointed as Chairman of the Public Service Commission under Article 316 of the Constitution. Accordingly, if these relevant factors are not taken into consideration by the State Government while selecting and appointing the Chairman of the Public Service Commission, the Court can hold the selection and appointment as not in accordance with the Constitution. To quote De Smith's Judicial Review, 6th Edn.:

'If the exercise of a discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account (expressly or impliedly), a court will normally hold that the power has not been validly exercised. (p. 280)

If the relevant factors are not specified (e.g. if the power is merely to grant or

refuse a licence, or to attach such conditions as the competent authority thinks fit), it is for the courts to determine whether the permissible considerations are impliedly restricted, and, if so, to what extent. (p. 282)'

In *Hochtief Gammon v. State of Orissa*, (1975) 2 SCC 649, A. Alagiriswami writing the judgment for a three-Judge Bench of this Court, explained this limitation on the power of the executive in the following words: (SCC p. 659, para 13)

'13. The executive have to reach their decisions by taking into account relevant considerations. They should not refuse to consider relevant matter nor should they take into account wholly irrelevant or extraneous consideration. They should not misdirect themselves on a point of law. Only such a decision will be lawful. The courts have power to see that the executive acts lawfully.'

.....

50. I have already held that besides express restrictions in a statute or the Constitution, there can be implied restrictions in a statute and the Constitution and the statutory or the constitutional authority cannot in breach of such implied restrictions exercise its discretionary power. Moreover, Article 226 of the Constitution vests in the High Court the power to issue to any person or authority, including in appropriate cases, any Government, within those territories, directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose. The power of the High Court under Article 226 of the Constitution is, thus, not confined to only writ of quo warranto but to other directions, orders or writs.

51. In *Dwarka Nath v. ITO*, AIR 1966 SC 81, K. Subba Rao, J. speaking for a three-Judge Bench, has explained the wide scope of the powers of the High Court under Article 226 of the Constitution thus: (AIR pp. 84-85, para 4)

'4. ... This article is couched in

comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression 'nature', for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of the Constitution with that of the English courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government to a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself. To say this is not to say that the High Courts can function arbitrarily under this article. Some limitations are implicit in the article and others may be evolved to direct the article through defined channels. This interpretation has been accepted by this Court in *T.C.Basappa v. T.Nagappa*, AIR 1954 SC 440 and *P.J.Irani v. State of Madras*, AIR 1961 SC 1731."

52. Therefore, I hold that the High Court should not normally, in exercise of its power under Article 226 of the Constitution, interfere with the discretion of the State Government in selecting and appointing the Chairman of the State Public Service Commission, but in an exceptional case if it is shown that relevant factors implied from the very nature of the duties entrusted to Public Service Commissions under Article 320 of the Constitution have not been considered by the State Government in

selecting and appointing the Chairman of the State Public Service Commission, the High Court can invoke its wide and extraordinary powers under Article 226 of the Constitution and quash the selection and appointment to ensure that the discretion of the State Government is exercised within the bounds of the Constitution.”

10.9.3. On the scope of judicial review and the finding that the person in question was unfit, it was observed as under:

“112. It is true that no parameters or guidelines have been laid down in Article 316 of the Constitution for selecting the Chairperson of the Public Service Commission and no law has been enacted on the subject with reference to Schedule VII List II Entry 41 of the Constitution. It is equally true that the State Government and the Governor have a wide discretion in the procedure to be followed. But, it is also true that *Mohinder Singh Gill v. Chief Election Commr.*, (1978) 1 SCC 405 refers to Lord Camden as having said that wide discretion is fraught with tyrannical potential even in high personages. Therefore, the jurisprudence of prudence demands a fairly high degree of circumspection in the selection and appointment to a constitutional position having important and significant ramifications.

113. Two factors that need to be jointly taken into account for the exercise of the power of judicial review are: the deliberative process and consideration of the institutional requirements.

114. As far as the deliberative process is concerned (or lack of effective consultation, as described in *Mahesh Chandra Gupta v. Union of India*, (2009) 8 SCC 273, it is quite apparent that the entire process of selection and appointment of Mr.Dhanda took place in about a day. There is nothing to show the need for a tearing hurry, though there was some urgency, in filling up the post following the demise of the then Chairperson of the Punjab Public Service Commission in the first week of May, 2011. But, it is important to ask, since the post was lying vacant for a couple of months, what was the urgency such that the appointment was required to be made without considering anybody other than Mr.Dhanda. There is

nothing to show that any consideration whatsoever was given to appointing a person with adequate administrative experience who could achieve the constitutional purpose for which the Public Service Commission was created. There is nothing to show that any background check was carried out to ascertain whether Mr.Dhanda had come in for any adverse notice, either in a judicial proceeding or any police inquiry. It must be remembered that the appointment of Mr.Dhanda was to a constitutional post and the basics of deliberation before making the selection and appointment were imperative. In this case, clearly, there was no deliberative process, and if any semblance of it did exist, it was irredeemably flawed. The in-built constitutional checks had, unfortunately, broken down."

10.9.4. The extent of judicial scrutiny in respect of suitability has also been discussed, given its own limitations, in the following words:

"119.1. First of all, none of the cited decisions dealt with the appointment to a constitutional position such as the one that we are concerned with. A constitutional position such as that of the Chairperson of a Public Service Commission cannot be equated with a purely administrative position—it would be rather facetious to do so. While the Chief Secretary and the Director General of Police are at the top of the ladder, yet they are essentially administrative functionaries. Their duties and responsibilities, however onerous, cannot be judged against the duties and responsibilities of an important constitutional authority or a constitutional trustee, whose very appointment is not only expected to inspire confidence in the aspirational Indian but also project the credibility of the institution to which he or she belongs. I am, therefore, unable to accept the view that the suitability of an appointee to the post of Chairperson of a Public Service Commission should be evaluated on the same yardstick as the appointment of a senior administrative functionary.

119.2. Secondly, it may be necessary for a State Government or the Chief Minister of a State to appoint a 'suitable' person as a Chief Secretary or the Director General of Police or perhaps to a statutory position, the connotation not being

derogatory or disparaging, but because both the State Government or the Chief Minister and the appointee share a similar vision of the administrative goals and requirements of the State. The underlying premise also is that the State Government or the Chief Minister has confidence that the appointee will deliver the goods, as it were, and both are administratively quite compatible with each other. If there is a loss of confidence or the compatibility comes to an end, the appointee may simply be shifted out to some other assignment, provided no legal or constitutional right of the appointee is violated.

120. The question of the Chief Minister or the State Government having 'confidence' (in the sense in which the word is used with reference to the Chief Secretary or the Director General of Police or any important statutory post) in the Chairperson of a State Public Service Commission simply does not arise, nor does the issue of compatibility. The Chairperson of a Public Service Commission does not function at the pleasure of the Chief Minister or the State Government. He or she has a fixed tenure of six years or till the age of sixty-two years, whichever is earlier. Security of tenure is provided through a mechanism in our Constitution. The Chairperson of a State Public Service Commission, even though appointed by the Governor, may be removed only by the President on the ground of misbehaviour after an inquiry by this Court, or on other specified grounds of insolvency, or being engaged in any other paid employment or being unfit to continue in office by reason of infirmity of mind or body. There is no question of the Chairperson of a Public Service Commission being shifted out if his views are not in sync with the views of the Chief Minister or the State Government.

....

125. There is, therefore, a great deal of solemnity attached to the post of the Chairperson of the Public Service Commission. The Chairperson takes the oath of allegiance to India and to the Constitution of India—not an oath of allegiance to the Chief Minister. An appointment to that position cannot be taken lightly or on considerations other than the public interest. Consequently, it is not possible to accept the contention that the Chief

Minister or the State Government is entitled to act only on the perceived suitability of the appointee, over everything else, while advising the Governor to appoint the Chairperson of the Public Service Commission. If such a view is accepted, it will destroy the very fabric of the Public Service Commission."

10.10.1. A comparatively recent view of the Division Bench of the Allahabad High Court is in *Satish Kumar Singh v. Dr. Anil Kumar Yadav*, Chairman, UPPSC Allahabad and others, *supra*. The State Government, in respect of the appointment to the post of the Chairperson of the Uttar Pradesh Public Service Commission of a person who is already Member, having taken oath, put forth the records of the selection process before the Bench.

10.10.2. Dr. D. Y. Chandrachud, the then Chief Justice, opined for the Bench as under discussing the factual aspects of how the appointment process took place:

"28. ...The entire process commencing from the preparation of the file note, the processing of the note in the department responsible for appointment, and by the Chief Secretary and the eventual nomination by the Chief Minister was completed in one day. There has been no evaluation of the credentials of the first respondent. There is no reference to integrity, competence, qualifications or experience. The nomination was rushed through in a day.

29. Significantly, the file indicates that as many as eighty three candidates had either expressed their willingness for appointment as Chairperson or as Members of the Commission by submitting their bio-datas or, they had been 'recommended'. An analysis of the tabulated statement of eighty-three names in the file indicates that as many as forty-one of the eighty-three candidates had doctoral degrees....

30. The file *ex facie* does not contain any evaluation of the candidates who had either intimated their willingness or in respect of whom, as it states, recommendations had been received. In the entire file note which was placed before the Chief Minister, there was absolutely no comparative evaluation of the merits, qualifications, administrative experience, competence or integrity

of the pool of candidates. The nomination made by the Chief Minister is completely silent in regard to any assessment of the pool of candidates for appointment to the post of Chairperson of the Commission. In fact, as we have noted, the entire process leading up to the preparation of the file note and the nomination of the name of the selected candidate was completed on one day, 29 March 2013. The file was then placed before the Governor who approved the proposal on 31 March 2013. There is absolutely no consideration in the file of matters relevant to the appointment to a constitutional office of the Chairperson of the Commission under Article 316 (1) of the Constitution. There is no reference to credentials, background, qualifications, experience, integrity or competence.

31.there is absolutely nothing in the file to indicate that there has been an application of mind to the factors emphasised in the decisions of the Supreme Court. We clarify that we are not in these proceedings expressing any view on whether any other candidate was eminently more suitable for appointment because that would overreach the power of judicial review. As the Supreme Court has emphasized, the object and purpose of judicial review is to determine as to whether the decision-making process has been fair, transparent, and in a manner consistent with Article 14 of the Constitution.

32. ...The receipt of the bio-data from the central office of the ruling political party in the State, the manner in which the process of nomination was rushed through and the imperatives which compelled the Officer on Special Duty to instruct the District Collector to complete the enquiry on one day which was a Sunday establish the manner in which the process of appointment has been subverted to choose a handpicked candidate. Far from being transparent and objective, the process has degenerated into the conferment of a largesse.

.....

37.The significance of the material which has come on the record of this Court, following the report of the Senior Superintendent of Police dated 24 July 2015 is that there was no consideration

whatsoever by the State, of relevant facts bearing on the character and antecedents of the first respondent before his appointment was notified. The issue in such cases is whether the State has applied its mind to relevant facts and material bearing on the suitability, competence and integrity of the candidate. The Chairperson of a Public Service Commission, as the Supreme Court has held, discharges an office of a constitutional trustee. The issue is one of institutional competence and institutional integrity. The State Government is duty bound before nominating a person for appointment to the Governor, to enquire into all relevant facts and circumstances which will have a bearing on the qualifications, experience, competence and integrity of the candidate.

.....

46. ...Where the deliberative process suffers from a clear constitutional infirmity of being arbitrary and the constitutional, institutional and functional requirements are not borne in mind in the process of appointment, the selection and appointment stand vitiated..... Where the integrity of the decision-making process is constitutionally flawed or the selection process is vitiated, the appointment would be contrary to the mandate of Article 14.

47. Though Article 316 does not lay down any formal qualifications, competence and integrity are implied conditions which must be fulfilled having due regard to the importance of the constitutional functions ascribed to the Public Service Commission by Article 320 of the Constitution. As the head of the Public Service Commission, the Chairperson acts as a constitutional trustee. A person who is selected for appointment to such a post must be without any blemish or taint and should not be appointed merely because he or she is eligible for the post. The Court has to emphasise institutional competence and institutional integrity. In determining whether the power of judicial review should be exercised, what is to be borne in mind is whether the deliberative process was fair and consistent with Article 14 and whether institutional requirements had been borne in mind. On both these facets, we find that the decision to

appoint the first respondent was clearly flawed and in breach of the constitutional requirements governing the proper discharge of the duty to appoint a person of competence and integrity under Article 316.

48. As we find from the record, relevant factors which would have a bearing on the ability of the first respondent to discharge his duties have been ignored. Relevant material having a bearing on the antecedents and character of the first respondent has not been borne in mind. There has been absolutely no application of mind to merits of other competing candidates who formed part of the available pool of candidates who had expressed their willingness for appointment. One name alone was hand picked. The process for nomination which was initiated on 29 March 2013 was completed on that day and the appointment was notified barely within a period of few days thereafter. The entire process of verification of antecedents and character was completed on a Sunday which was 31 March 2013. The process is thoroughly destructive of the rule of law and cannot be countenanced by a constitutional court. This falls within the parameters of an exceptional case, as laid down in both the judgments in Salil Sabhlok. The submission which has been urged by ASGI that this Court has to bear in mind the fact that the first respondent has continued to work as Chairperson for a period of about two years and more will not displace the patent arbitrariness. The appointment was ultra vires Article 316. Constitutional illegalities are not sanctified by the passage of time.

.....

51. We accordingly allow the writ petitions by issuing a declaration that the appointment of the the first respondent as Chairperson of the Uttar Pradesh Public Service Commission is ultra vires, arbitrary and in breach of the provisions of Article 316 (1) of the Constitution. The appointment shall accordingly stand quashed and set aside."

(emphasis supplied)

10.10.3. The aforesaid judgment has received the imprimatur of the Supreme Court vide order dated 27.11.2015 passed in

Special Leave to Appeal (Civil) Nos.32206-32207 of 2015. We may note that though leave was not granted and the SLP was dismissed, it was not just a dismissal in limine, but with certain observations as under:

"Heard.

We do not see any reason to interfere with the well reasoned order passed by the High Court. The special leave petitions are, therefore, dismissed. Mr.A.Sharan, learned senior counsel appearing for the petitioner, however, argued that the judgment under challenge may be understood to have held the petitioner ineligible for consideration in any future process of selection of a suitable candidate for appointment. We do not think so. The High Court has found fault with the process of appointment more than the appointment itself. We all the same make it clear that in case the petitioner offers himself as a candidate for appointment as Chairman of the Public Service Commission in any future process of selection, his claim may also be considered on merits along with all other eligible candidates."

10.11. A Division Bench of the Kerala High Court in Jomon Puthenpurackal v. State of Kerala and others, MANU/KE/0734/2005, sought to emphasize that Article 318 of the Constitution of India required regulations to be made only to determine the number of Members of the Commission and their conditions of service and the entire discretion regarding the other eligibility criteria was left to the Governor and the evaluation made by the Government in appointing either the Chairman or Members of the Public Service Commission is not guided or controlled by any regulation and in the absence of the same, it is not permissible for the Court to enter that area and evaluate the same. This judgment referred to by the learned Advocate General however, in our view, would not be good law in view of the discussion of the judgment in Salil Sabhlok case, supra.

10.12. We may note that the learned Advocate General referred to a decision of the Division Bench of the Andhra Pradesh High Court in Prabhunath Vasireddy v. The Union of India and others, MANU/AP/0622/2013, where observations were made regarding virtual prohibition of justiciability of the appointment of a Judge of High Court once made by reference to Articles 124(4) and (5) read with Article 217(1)(b) of the Constitution of India. This was to emphasize that appointments having been made cannot be set aside.

10.13. On the issue of appointment of Public Prosecutors, in *State of Punjab v. Brijeshwar Singh Chahal*, (2016) 6 SCC 1, a long line of decisions opining that arbitrariness has no place in a polity governed by Rule of Law and that Article 14 of the Constitution of India strikes at arbitrariness in every State Action were referred to and the legal proposition laid down in paragraph (41) is as under:

"41. To sum up, the following propositions are legally unexceptionable:

41.1. The Government and so also all public bodies are trustees of the power vested in them.

41.2. Discharge of the trust reposed in them in the best possible manner is their primary duty.

41.3. The power to engage, employ or recruit servants, agents, advisors and representatives must like any other power be exercised in a fair, reasonable, non-discriminatory and objective manner.

41.4. The duty to act in a fair, reasonable, non-discriminatory and objective manner is a facet of the Rule of Law in a constitutional democracy like ours.

41.5. An action that is arbitrary has no place in a polity governed by Rule of Law apart from being offensive to the equality clause guaranteed by Article 14 of the Constitution of India.

....

41.11. Appointments made in an arbitrary fashion, without any transparent method of selection or for political considerations will be amenable to judicial review and liable to be quashed."

(B) ELIGIBILITY AND SUITABILITY:

11. On the difference between eligibility and suitability, the learned Advocate General referred to the view of the Supreme Court in *Mahesh Chandra Gupta v. Union of India and others*, (2009) 8 SCC 273, wherein in the context of appointment of High Court Judges, the Supreme Court opined that the process of judging the fitness of a person to be appointed along with the process of consultation fall within the realm of suitability, while eligibility was of a threshold stage under Article 217(2) (b) of the Constitution. Eligibility was held to be an objective factor and was thus subject to judicial review, but as to who should be elevated, involving the aspect of suitability, was stated to be excluded from the purview of judicial review. The difference between judicial review and merit review was, thus, opined upon and it was observed that once there is consultation, the content of that consultation is beyond the scope of judicial review, though lack of effective consultation would fall within the scope of judicial review.

(C) CONSULTATION:

12.1. On the meaning of "consultation", reference was made to Ram Tawakya Singh v. State of Bihar, (2013) 16 SCC 206. Consultation was opined to be a process which requires meeting of minds between the parties involved in the process of consultation (a conference of two or more persons) on the material facts and points to evolve a correct or at least satisfactory solution. Naturally, for the conferring people to produce some mutual impact, the essentiality of each having for his/her consideration fully and identical facts necessary for the final decision was emphasized.

12.2. On the issue of appointment of the President of the State Consumer Disputes Redressal Commission, in N.Kannadasan v. Ajoy Khose, (2009) 7 SCC 1, the Supreme Court opined that where the High Court had placed for consideration certain materials against a person whose name was proposed by the State Government and no specific explanation was provided for non consideration of such material, then the appointment made in the light of such circumstances cannot be said to be an appointment made after due consultation. Thus, the ultimate appointment was vitiated because the mandatory statutory requirement of consultation had not been rendered effectively and meaningfully. This would be so even if the person was otherwise eligible.

(D) PRECEDENT:

13.1. The learned Advocate General while advancing his plea of Salil Sabhlok case, supra, having observations which were per incuriam and emphasizing that the ratio of the larger Bench of Four Judges in Ashok Kumar Yadav case, supra, must prevail, seeks to emphasize that the precedentiary value in a judgment must be culled out. In that context, the learned counsel for the petitioners emphasizing the precedentiary value of Salil Sabhlok case, supra, referred to the judgment in Fuerst Day Lawson Ltd. v. Jindal Exports Ltd., (2001) 6 SCC 356. The relevant portion of paragraph (23) reads as under:

"23. A prior decision of this court on identical facts and law binds the Court on the same points of law in a latter case. This is not an exceptional case by inadvertence or oversight of any judgment or statutory provisions running counter to the reason and result reached. Unless it is a glaring case of obtrusive omission, it is not desirable to depend on the principle of judgment 'per incuriam'. It is also not shown that some part of the decision based on a reasoning which was demonstrably wrong, hence the principle of per incuriam cannot be applied."

13.2. Similarly, in State of U.P. And another v. Synthetics and Chemicals Ltd. and another, (1991) 4 SCC 139, it was held as under:

"41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English Courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. 'A decision passed sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind' (Salmond on Jurisprudence 12th Edition, p.153). In Lancaster Motor Company (London) Ltd. v. Bremith Ltd., (1941) 1 KB 675, the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in Municipal Corporation of Delhi v. Gurnam Kaur, AIR 1989 SC 38. The Bench held that, 'precedents sub-silentio and without argument are of no moment'. The Courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decidendi. In Shama Rao v. State of Pondicherry AIR 1967 SC 1680 it was observed, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down there-in'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."

13.3. In Central Board of Dawoodi Bohra Community and another v. State of Maharashtra and another, (2005) 2 SCC 673, a Constitution Bench observed that per incuriam means a decision

rendered by ignorance of a previous binding decision, such as a decision of its own or of a Court of co-ordinate or higher jurisdiction or in ignorance of the terms of a statute or of a rule having the force of law. Thus, a ruling making a specific reference to an earlier binding precedent may or may not be correct, but cannot be said to be per incuriam.

(E) PERUSING THE RECORD OF GOVERNOR/PRESIDENT:

14.1. On the plea of the petitioners that the State Government had wrongfully withheld the material based on which the Governor had appointed the Members of the Public Service Commission from the Court, reference was made to the decision in *S.R.Bomma and others v. Union of India and others*, (1994) 3 SCC 1, where a Bench of 9 Judges of the Supreme Court opined that the material that led to the conclusion of the President/Governor may be scrutinized based on which the decision was reached, repelling the argument of the Union of India that the proclamation under Article 356(1) of the Constitution issued on the advice of the Council of Ministers given under Article 74(1) of the Constitution is not open to judicial review, as Article 74(2) of the Constitution bars enquiry into the question whether any, and if so, what advice was tendered by Ministers to the President. It opined that the object of Article 74(2) of the Constitution was not to exclude any material or documents from the scrutiny of the courts, but to provide that an order issued by or in the name of the President could not be questioned on the ground that it was either contrary to the advice tendered by the Ministers or was issued without obtaining any advice from the Ministers. Thus, the object was only to make a question whether the President had followed the advice of the Ministers or acted contrary thereto, non-justiciable. What advice, if any, was tendered by the Ministers to the President was thus to be beyond the scrutiny of the Court. It was, however, held that the Courts can probe as to whether there was any material on the basis of which the advice was given, and whether it was relevant for such advice and the President could have acted on it.

14.2. In *B.R.Kapur v. State of Tamil Nadu*, (2001) 7 SCC 231, it was held that the mere appointment by the Governor cannot validate a constitutional fraud and the Governor being a constitutional functionary cannot override the scheme of the Constitution. The following observations in *State of Rajasthan v. Union of India*, (1977) 3 SCC 592 by Bhagwati, J. (as he then was), were quoted with approval:

"But merely because a question has a political complexion, that by itself is no ground why the court should shrink from performing its duty under the Constitution, if it raises an issue of

constitutional determination. Every constitutional question concerns the allocation and exercise of governmental power and no constitutional question can, therefore, fail to be political... So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the court. Indeed it would be its constitutional obligation to do so. It is necessary to assert the clearest possible terms, particularly in the context of recent history, that the Constitution is *suprema lex*, the paramount law of the land and there is no department or branch of Government above or beyond it."

14.3. The observations in *Rameshwar Prasad v. Union of India*, (2006) 2 SCC 1 and *B.P.Singhal v. Union of India*, (2010) 6 SCC 331 are also to the same effect.

(F) COMPULSORY RETIREMENT:

15.1. The case of the tenth respondent invited certain judicial precedents to be cited, as he was in judicial service and on attaining the age of 58 years, his services were not extended to 60 years. As to what that implies and the consequences thereof have been subject matter of judicial opinion.

15.2. In *All India Judges' Association (II) v. Union of India*, (1993) 4 SCC 288, it was observed that compulsory retirement must be given to those judicial officers who are unfit and of doubtful integrity, reputation and utility. The benefit is to be given for extension not automatically, but to judicial officers, who, in the opinion of the respective High Courts, have a potential for continued useful service. Thus, it was not intended as a windfall for the indolent, the infirm and those of doubtful integrity, reputation and utility. The relevant portion reads as under:

"30. The benefit will be available to those who, in the opinion of the respective High Courts, have a potential for continued useful service. It is not intended as a windfall for the indolent, the infirm and those of doubtful integrity, reputation and utility."

It also noticed that there may be judicial officers who are not desirous of availing of the benefit of the enhanced superannuation age and may like to opt for retirement at 58 years. In such cases, the officer concerned is required to intimate in writing well in advance and in any case before he/she attains the age of 57 years and those not doing so were deemed to have exercised their option to continue in service

till they attain 60 years of age, subject to the liability of being retired compulsorily at the age of 58 years according to the procedure for compulsory retirement laid down in the Service Rules.

15.3. In *Bishwanath Prasad Singh v. State of Bihar*, (2001) 2 SCC 305, the object of compulsory retirement was held not to be to punish or penalize the government servant but to weed out the worthless who have lost their utility for the administration by their insensitive, unintelligent or dubious conduct impeding the flow of administration or promoting stagnation.

15.4. The admitted position is that in the bio-data submitted by the tenth respondent, there was no mention of having been sent out of service at 58 years nor was a process followed by the State Government to do any check of the bio-data. The consequence of this is set out in *M.Manohar Reddy v. Union of India*, (2013) 3 SCC 99 relied upon by the learned counsel for the petitioners, wherein it was held that willful suppression of material facts would vitiate the appointment and in such eventuality, it may be a case of fraud that would vitiate the consultative process and consequently, the appointment resulting from it.

OUR VIEW

16.1. It is said that cases are decided on their own facts. Those facts, however, have to be appreciated as per the legal position and, thus, we consider it appropriate to first begin by crystallizing our view on the legal position.

16.2. It is trite to say that from the very inception qualification of high moral values for the person recruited to the Administrative Service forming the very backbone of the nation was emphasized. It is the selection based on merits. If this is the principle, then persons who are Chairman or Members of the Public Service Commission have to be equally, if not more, of such competence and high moral values as they are the ones who are conducting the selection process for the Administrative Service Officers.

16.3. It is in this context that in the Constitutional debates the thinking of the makers was reflected in the words of Shri H.V.Kamath, extracted aforesaid, that such office was not obtainable as an office of profit under the Government of India, as it would affect the impartiality and integrity of the functions of the Service Commission.

16.4. It is with this thought process in mind that the exalted position of a constitutional appointment was conferred on the persons to be appointed to the Public Service Commission

setting out necessary protection for them under Article 316 of the Constitution of India to perform the important functions as set out in Article 320 of the Constitution of India.

16.5. In the present case, the appointments have been made. Thus, the crucial issue is the scope of scrutiny by the Court in view thereof. In this behalf, the observations in Ashok Kumar Yadav case, supra, in juxtaposition to what is set out in Salil Sabhlok case, supra, forms the fulcrum of the debate.

16.6. We have to keep in the mind the factual scenario in which the observations are made in the aforesaid two judgments as also other judgments dealing with the issue of such appointments. The factual matrix of Ashok Kumar Yadav case, supra, leaves no doubt that the Court was not seized of the issue of appointment to the State Public Service Commission, but to the recruitment process carried on by the Public Service Commission. In the process of analyzing that selection, the High Court had cast aspersions on the Members appointed to the Commission as not satisfying the stringent test of "men of integrity, calibre and qualification". These Members had not been impleaded as respondents and thus the Supreme Court opined that they could not have been condemned unheard, apart from the fact that validity of their appointment was not at all in question. It is in that context that a comparison was made of the appointment to the constitutional post of Chairman and Members of the Public Service Commission taking a cue from the appointment to the Higher Judiciary. The Supreme Court, however, did not refrain itself from succinctly setting out what kind of persons are expected to be appointed to the Public Service Commission. That the "best and finest should be drawn to the administrative service" was emphasized. It was observed that this could be achieved only if the Chairman and the Members of the Public Service Commission are eminent men possessing a high degree of calibre, competence and integrity, who would inspire confidence in the public mind about the objectivity and impartiality in the selection to be made by them.

16.7. A similar view was expressed in Ram Ashray Yadav (Dr), Chairman, Bihar Public Service Commission case, supra, emphasizing that the framers of the Constitution not only armed such Chairman and Members with enhanced powers and increased functions, but also provided security of tenure to them stating that they were in a position of a "Constitutional Trustee". The faith of the public and confidence in such Members was thus the bedrock of the system.

16.8. In Inderpreet Singh Kahlon case, supra, the prerequisite to be carried out before appointment to the constitutional position was emphasized requiring the need for a

thorough and meticulous scrutiny regarding the antecedents. Absolute transparency was thus the benchmark making it imperative that only people of high integrity, merit, rectitude and honesty are appointed to the constitutional positions.

16.9. In Upendra Narayan Singh case, supra, the Supreme Court lamented that with passage of time appointment to high offices had become personal prerogatives of the political head of the Government.

16.10. Mehar Singh Saini case, supra, emphatically states that the great powers vested in the Commission are to ensure that there is no abuse of such powers. The principles of public accountability and transparency in the functioning of an institution are essential for its proper governance, which had to be preceded by men of high integrity, merit, rectitude and honesty to be appointed to the posts.

17.1. In the conspectus of the aforesaid, the importance of the process of selection cannot be whittled down as such process is the bulwark against men/women being appointed to the Commission without requisite talent. No doubt, no specific procedure had been laid down in the Constitution, yet the State Government was held not to have an absolute discretion in selection and appointment of persons to the Commission in Salil Sabhlok case, supra. Emphasizing integrity and competence parameters, the discretion vested in the State Government under Article 316 of the Constitution of India was held to have an implied limitation for purposes for which discretion had been vested and purposes were held to be discernible from the functions of the Commission enumerated under Article 320 of the Constitution of India.

17.2. We are unable to appreciate the submission of the learned Advocate General that the observations made in Salil Sabhlok case, supra, should be read as obiter dicta in view of the observations made by the Larger Bench in Ashok Kumar Yadav case, supra. We had already pointed out the distinguishing facts in the context of which the observations were made in the two judgments - in Ashok Kumar Yadav case, supra, in the context of recruitment made by a duly appointed Public Service Commission, while in Salil Sabhlok case, supra, the discussion revolved upon the very appointment made and the process for making such appointment. Thus, for what is the process to be followed, one would have to look to the observations in Salil Sabhlok case, supra.

17.3. The Supreme Court referred to the observations in Mohinder Singh Gill case, supra, to emphasize that jurisprudence of prudence demanded a fairly high degree of circumspection in

the selection and appointment to a constitutional position having important and significant ramifications.

17.4. Salil Sabhlok case, supra, emphasized the crucial factor - the deliberative process and the consideration of the institutional requirements. In the facts of the said case, while dealing with the issue of deliberative process, it was found that the whole process for appointment of the Chairman took one day. [Interestingly, the position is the same in the present case, but not in respect of the Chairman, but eleven Members]. In that context, it was observed that there was nothing to show the need for a tearing hurry, though there was some urgency in filling up of the post [In the present case also, the posts were lying vacant for almost three years]. Since these vacancies arose over a three year period, a transparent procedure could have always been devised at the relevant time to get the best talent available. Nothing was found to show that any background check was carried out to ascertain whether the Chairman appointed had come in for any adverse notice in a judicial proceeding or any police enquiry. It was, thus, held that inbuilt constitutional checks had, unfortunately, broken down.

17.5. The Supreme Court while dealing with the extent of judicial scrutiny found that the appointment to the Public Service Commission could not be equated with an appointment to a purely administrative position and in the context of appointment of a Chief Secretary or a Director General of Police, it was held that while the question of Chief Minister of the State Government having confidence in such a person may be a requirement, this would not arise in the appointment of a Chairman or Member of the Public Service Commission, as the Commission does not function at the pleasure of the Chief Minister or the State Government, but has a fixed tenure and the oath of allegiance is to the Constitution of India and not to the Chief Minister.

18.1. In a recent judgment of the Allahabad High Court in Sathish Kumar Singh case, supra, once again the question was of appointment of a person as a Chairperson, who is already a Member, and it was found the entire process commencing from the preparation of the file note, processing of the note in the department responsible for appointment and by the Chief Secretary and the eventual nomination by the Chief Minister was completed in one day. One cannot really make out the significance why, but the fact remains that in Salil Sabhlok case, supra, Sathish Kumar Singh case, supra, and the present case, all the processes were completed within a day's time.

18.2. The Division Bench of the Allahabad High Court opined that there was no evaluation of the candidates who had either intimated their willingness or in respect of whom recommendations have been received. There was no comparative evaluation of merits, qualifications, administrative experience, competence or integrity of the pool of candidates. The process was completed in one day, on 29.3.2013, and the file was placed before the Governor, who approved the proposal on 31.3.2013. No character or antecedent verification was really done and the issue which arose for consideration was whether the State could have said to have applied its mind to the relevant facts, i.e., suitability, competence and integrity of the candidate. Thus, where the deliberative process suffered from constitutional infirmity of being arbitrary, the appointment had to be struck down.

18.3. This judgment received the imprimatur of the Supreme Court, albeit by dismissal of the SLP, but with reasons set out.

18.4. The learned Advocate General did seek to make a distinction between a person who is yet to assume office and who had assumed office in the context of the observations made in Salil Sabhlok case, supra, but then the Division Bench of the Allahabad High Court dealt with the appointment already made.

19. In our view, the crucial issue is that the removal of a person appointed to the Public Service Commission would require a constitutional process to be followed, but then where in the appointment the process itself has been greatly flawed, it could not be said that the appointment had been made as per the constitutional mandate. In the case on hand, the bio-data alone was examined.

20. We also find that there is force in the arguments advanced on behalf of the petitioners emphasizing the precedentiary value of Salil Sabhlok case, supra. Unless it was a glaring case of obtrusive omission, it was not desirable to depend on the principle of judgment per incuriam.

21. We have already pointed out the distinguishing factors in the two judgments and as to why on the issue of appointing process we seek to rely on the observations in Salil Sabhlok case, supra.

22.1. In the conspectus of the aforesaid legal principles if we analyze the facts of the present case, there is little doubt that "inbuilt constitutional checks had, unfortunately, broken down".

22.2. The vacancies which were sought to be filled in have arisen in the year 2013, with the last such Member demitting office on 31.1.2016. No anxiety was shown towards filling up these vacancies for almost three years when the posts remaining vacant slowly reached the number of eleven. It is on the anvil of the election notification, suddenly, these posts were filled in. However, that by itself will not be able to sustain the challenge. What is material is that there was really total absence of any process. No applications were actually called and there could not be any comparative assessment as only the chosen ones were asked to just submit their bio-data.

22.3. On our query, we were informed that nothing was put in public domain to indicate that persons who are interested in posts can give material in support of their candidature and the bio-datas were received from persons in normal course or may have been called for specifically from persons. No written notes was available and whatever transpired was oral. The advise to the Governor was made solely on one material, i.e., bio-data. This process began on 30.1.2016 (Saturday) and concluded on 31.1.2016 (Sunday/non-working day) and within this time, the file was initiated, approved, character verification done and appointment made, with the Members so appointed assuming office on 2.2.2016. Thus, the production of material became irrelevant in a sense because there was no material.

22.4. Is it feasible or possible that in 24 hours all antecedents verification, police reports, verification of the contents of the bio-data and all relevant material could have been done? Our answer to the same would be emphatically in the negative. If one may say, it is a physical impossibility and this would be quite apparent from one example which we will deal hereinafter of the tenth respondent, where there was lack of disclosure of material fact in the bio-data, which was never verified.

22.5. In our opinion, this appointing process or lack of it was on account of a misconception that the appointment to the post of Members of the Public Service Commission was part of the spoils system based on the patronage of the State Government and not requiring men who are "independent". This lack of process appears to have escaped the attention of the Governor himself while making the appointments.

22.6. In fact, the process runs contrary to the very objectives set forth aforesaid as to what kind of persons should be selected to the post, since the occasion to scrutinize and test their bio-data never arose in the absence of any process.

22.7. In view of the failure of the process, we would not like to comment on the merits and demerits of any candidate (except the tenth respondent), since the appointments fail on account of absence of process. It is not a case of removal of any person from the august office of the Member of the Public Service Commission, but all the appointments having no force of law in the absence of the process as enunciated in Salil Sabhlok case, supra.

22.8. The touchstone for appointment being high expectations of integrity, impartiality, merit, ability and suitability of the candidates, it requires a meticulous enquiry which obviously did not occur. Thus, the process itself was vitiated and there was no appointment in the eyes of law.

22.9. There cannot be any comparison with the appointments to the office of a Judge of the High Court where an elaborate process requires a discussion amongst the Collegium members consisting of the Chief Justice and two seniormost Judges of the High Court after obtaining requisite inputs and making recommendations. This is followed by the Intelligence Bureau (IB) verifying the antecedents and submitting its report and thereafter the State and the Central Governments giving their inputs, all of which material, including the opinion of Judges from that Court in the Hon'ble Supreme Court, are placed before the Collegium of the Supreme Court for taking a final call. This itself shows the elaborate exercise of verifying the antecedents and suitability of candidates before the appointment to office of a Judge of the High Court is made. It is not as if the Collegium of the High Court one fine day decides to make a recommendation for appointment of a Judge and the same day the Collegium of the Supreme Court approves the same and the appointment is made. This is what has happened in the present case. It is our view that the significance of the appointment to this august office of the Member of the Public Service Commission as envisaged by the Constitution makers seems to be repeatedly getting lost as lamented by the Supreme Court in Upendra Narayan Singh case, supra.

22.10. This is the third direct example, apart from many others, which we find here - Salil Sabhlok case, supra, Sathish Kumar Singh case, supra and the present one. It is time that a greater thought is given to such appointments and they are not treated as a part of the spoils system, with proper process being envisaged to ensure that men/women of integrity, calibre and qualification are appointed to the post. It is not even fair normally to comment on whether an appointed person meets this criteria when the process itself is so deeply flawed. The judicial pronouncements have opined, as discussed above,

that such posts are not to be filled in through a spoils system, but through a transparent nonpartisan method.

22.11. We may, however, opine that any future appointment must keep in mind the requirements set forth in the various judicial pronouncements referred to by us and culled out in the present judgment which can be broadly enumerated as under:

- (a) Integrity, calibre and qualification read into the Constitutional scheme;
- (b) An awareness in public domain to have a wider pool of talent;
- (c) A proper character and antecedent verification by a meticulous enquiry and scrutiny.
- (d) A meaningful and effective deliberative/consultative process; and
- (e) The Constitutional/functional and institutional requirements of the Public Service Commission to be kept in mind.

A violation of the aforesaid would be a failure of the requirement of the constitutional scheme and undermine the institutional integrity set forth as a prerequisite by the Hon'ble Supreme Court.

22.12. In view of the aforesaid, we are unhesitatingly of the view and conclude that the process of appointment of the eleven Members of the State Public Service Commission was deeply flawed without following any transparent process and defeating the very constitutional scheme for such appointment, the result of which is natural, i.e., all these appointments are quashed.

23.1. We would now like to turn to the appointment of the tenth respondent specifically in view of his case being on a slightly different footing.

23.2. The admitted position is that he was an officer in the Higher Judicial Service holding the rank of a District Judge and the High Court did not deem it fit to extend his tenure from 58 to 60 years. It is not a case where he himself was not desirous of seeking extension to 60 years. The records of the High Court show that the Administrative Committee resolved not to continue the services of the tenth respondent beyond the age of 58 years on 5.2.2015 and the Full Court approved the same on 9.2.2015. This decision was, in fact, preceded by another event, i.e., a letter received from the State Government dated 24.12.2014, on the earlier Law Secretary being recalled after three years on deputation communicated to the State Government on 10.12.2014, expressing a desire to have the services of the tenth respondent as Law Secretary. On 6.1.2015, the Administrative Committee resolved it was not feasible to dispense with the services of the tenth respondent and this was communicated to the State

Government on 19.1.2015. The important aspect is as to what is the effect thereof.

23.3. In Bishwanath Prasad Singh case, supra, it was observed that while the object of such "compulsory retirement" was not to punish or penalize the government servant, it was to weed out the worthless who have lost their utility for the administration by their insensitive, unintelligent or dubious conduct impeding the flow of administration or promoting stagnation. It was elimination of the dead wood, the paper-logged and callous. What more could be said!

23.4. Thus, if one may say so, the tenth respondent, having been eliminated as not fit for an extended tenure, could not have been found fit for appointment to the post of the august office of a Member of the State Public Service Commission. It is, of course, another matter that this relevant fact was not even disclosed by the tenth respondent and that itself shows the glaring failure of the process. It can never be envisaged that such a person on disclosure of these facts could have met the requirements of a proper scrutiny to be so appointed.

23.5. We may take note of the fact that in N.Kannadasan case, supra, a Judge of the High Court, who had not been confirmed, was appointed as the President of the State Consumer Disputes Redressal Commission and it was opined that if he was himself disqualified to hold the post of a Judge by non continuation of his tenure, he cannot hold any other post like the President of the State Consumer Disputes Redressal Commission nor could the Chief Justice of the High Court find him eligible or suitable for holding a statutory post. If this principle is transposed into the facts of the case of the tenth respondent, we have no hesitation in coming to the conclusion that by the very manner of his exit from the judiciary, he would be ineligible to hold any significant post specifically of the judicial nature, much less the constitutional post of a Member of the State Public Service Commission.

23.6. It could hardly be an appointment which could be said to be beyond reproach and would inspire confidence among the people. No deliberative process taking into account the constitutional functions and the institutional requirements necessary for appointment could have come to the conclusion that the tenth respondent was a member fit to be so appointed.

23.7. No doubt, as contended by the learned Advocate General, there was distinction between eligibility or suitability. However, the eligibility has to be tested at a threshold stage under Article 217(2)(b) of the Constitution. Could a person be treated as eligible for appointment to the

post of a Member of the State Public Service Commission when he has been found unfit to continue as a District Judge and weeded out of service. Our view would be that he was neither eligible nor suitable, as eligibility cannot be in vacuum.

23.8. We may also note that in the course of submissions an affidavit had been filed on behalf of the tenth respondent stating that he would not participate in any process of judicial selections, but that could just be an attempt to stick to the post while recusing himself from the process of judicial selections. Such a person could hardly be suitable or eligible even for making recruitment to any other post and ipso facto lacks the same on account of his exit from the judicial service, the effect of which has been discussed in the judicial pronouncements of the Supreme Court.

23.9. "It is not intended as a windfall for the indolent, the infirm and those of doubtful integrity, reputation and utility", as observed in All India Judges' Association (II) case, supra.

23.10. Thus, insofar as the tenth respondent is concerned, we are of the view that he would be unfit for appointment to the post of Member of the State Public Service Commission or for that matter any post retirement judicial post.

CONCLUSION

In view of the discussion aforesaid, we hold:

- (a) The appointment of the eleven members to the State Public Service Commission by G.O.(Ms.)No.9, Personnel and Administrative Reforms (M) Department, dated 31.1.2016, lacks the constitutional process and, thus, the said government order is quashed;
- (b) The aforesaid is not a reflection on the merits of ten of the candidates (respondents 4 to 9 and 11 to 14) who are selected, since the process was never gone into and their appointments were made without any process; and
- (b) The tenth respondent is held ineligible for the post of the Member of the State Public Service Commission, for that matter any other post retirement judicial post.

The writ petitions are, accordingly, allowed leaving the parties to bear their own costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To:

1. The Chief Secretary to Government
State of Tamil Nadu
Secretariat, Fort St. George
Chennai - 600 009.
2. The Member Secretary
Tamil Nadu Public Service Commission
Frazer Bridge Road, V.O.C. Nagar
Park Town, Chennai - 600 003.
3. The Principal Secretary to
Government of Tamil Nadu
Personnel and Administrative Reforms Department
Chennai - 600 009.
4. The Principal Secretary to His Excellency
Governor of Tamil Nadu
Governor's Secretariat
Raj Bhavan, Chennai - 600 022.

+6cc to Mr.N.Umapathi, Advocate sR.74862
+4cc to Mr.Manimaran, Advocate sr.74854, 74978
+4cc to Mr.D.Kulasekaran, Advocate sr.74941, 74942
+1cc to M/S.Pass Associates, Advocate Sr.74932
+2cc to Mr.Kulasekaran, Advocate Sr.74960, 74959
+1cc to the Government Pleader sr.74991, 74992
+1cc to Mr.D.Kulasekaran, Advocate sr.74943 [02/01/2017]

W.P.Nos.4113, 4161 and 4584 of 2016

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