

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.16314 of 2015

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Commercial Taxes Bar Association having its office at Commercial Taxes Building, Collectorate, Patna- 1 through its General Secretary Sri Anil Kumar Pandey son of Sri Jitendra Nath Pandey, resident of 207, Capital Tower, Block-A, Frazer Road, P.S. Gandhi Maidan Town and District- Patna

.... Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Old Secretariat, Patna
2. The Under Secretary, Government of Bihar, Commercial Taxes Department, Patna
3. The Commercial Taxes Department, Government of Bihar, New Secretariat, Vikash Bhawan, Patna- 15 through the Commissioner of Commercial Taxes
4. The Commissioner of Commercial Taxes cum Principal Secretary, Commercial Taxes Department, Vikash Bhawan, Patna- 15
5. The Commercial Taxes Tribunal, Bihar, Kautilya Bhawan, Collectorate, North Gandhi Maidan, Patna- 1 through its Chairman
6. Sri Krishna Nand Rai, Member (Accounts), Commercial Taxes Tribunal, Bihar Kautilya Bhawan, Collectorate, North Gandhi Maidan, Collectorate, Patna- 1

.... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. R.K. Agrawal, Advocate Mr. Rabindra Prasad, Advocate
For the Respondent/s	:	Mr. Lalit Kishore (PAAG-1)
For respondent No.6:	:	Mr. Abhinav Srivastava, Advocate

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CORAM: HONOURABLE THE ACTING CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE SUDHIR SINGH
CAV JUDGMENT

(Per: HONOURABLE THE ACTING CHIEF JUSTICE)

Date: 10-02-2017

The challenge in the present petition is to the notification dated 3rd of September, 2015 (Annexure-5) issued by Commercial Taxes Department by which respondent No.6 was appointed as Member (Accounts) of Commercial Taxes Tribunal in exercise of the powers conferred under Section 9(3) of the Bihar Value Added Tax Act, 2005 (hereinafter referred to as the Act).

2. The Commercial Taxes Tribunal consist of 3 members. The Chairperson of the Tribunal shall be a retired High



Court Judge, not exceeding the age of sixty-five years or a judicial officer of the rank of District Judge under Section 9(2) of the Act. One of the two other members shall be a member of Commercial Taxes Department, not below the rank of Joint Commissioner under Section 9(3). In respect of the third member, the eligibility conditions are as under:-

“(3) One of the other two members shall be an officer of the Commercial Taxes Department of the State Government not below the rank of Joint Commissioner and the third member shall be a person –

(a) who has, for at least ten years, been in the practice of accountancy as a Chartered Accountant under the Chartered Accountant Act, 1949 or as a registered Accountant under any law formerly in force or partly as a registered Accountant and partly as a Chartered Accountant; or

(b) who is or has been an officer of the Indian Audit and Accountant Service not below the rank of Deputy Accountant-General; or

(c) who is a Government servant, whether serving or retired having experience of at least four years in the administration of accounts or financial management in the State Government or Public Sector Undertaking.”

3. The controversy is as to whether respondent No.6 is eligible to be a member of the Commercial Taxes Tribunal as he is said to have no experience in “administration of accounts and financial Management” as contemplated in Section 9(3)(c) of the Act in the category of serving as retired Government servant. The respondent No.6 on the date of appointment had ceased to be a member of Commercial Taxes Department as he attained



superannuation on 31st of August, 2015.

4. In the counter affidavit filed, reference is made to a notice inviting applications for the post of Member (Accounts) in the Commercial Taxes Tribunal, Bihar. It was pointed out that not only respondent No.6, but 9 other persons also applied for the said post. The Committee, under the Chairmanship of Member, Board of Revenue, with other members interviewed all the short-listed eligible candidates on 15th of July, 2015 and following the procedure prescribed, the respondent No.6 was appointed as Member (Accounts) of the Commercial Taxes Tribunal, Bihar on 3rd of September, 2015. It is pointed out that taxation is an inseparable part of the Government Finance and, thus, an officer, who has experience in administration of commercial taxes at various levels is eligible as he has the experience in the administration of accounts and financial Management. It is pointed out that there is no bar in Section 9(3) of the Act prohibiting the appointment of a second officer from the Department. It was stated as under:-

“Further, the Act never precludes that the 3rd member should not be appointed as member (Accounts) from the Officers of the Commercial Taxes Department”. Had the legislature intended so it would have said so in so many words instead of leaving it open to interpretation and meaning it by inference or implication.”

5. In another supplementary counter affidavit, the detailed personal information of respondent No.6 was appended with



the affidavit at Annexure-A. A perusal thereof shows that he was appointed as a member of Bihar Finance Service (Trainee) Hqr, Patna and worked there from 21st March, 1987 to 26th of October, 1987. He later worked at Trainee Hqr, Hajipur Circle, Hajipur, from 30th October, 1987 to 5th of July, 2008. It is thereafter, he has discharged responsibilities in the Department of Commercial Taxes at various levels.

6. The argument of learned counsel for the petitioner is that the second member is also a former member of the Commercial Taxes Department. Therefore, it will not be fair discharge of functioning of the Commercial Taxes Tribunal which is a final adjudicatory authority on the questions of fact under the Act as the Tribunal would have bias towards state revenue. It is contended that since Section 9(3) contemplates appointment of only one officer of the Commercial Taxes Department, therefore, by implication, the appointment of another officer from the Commercial Taxes Department is prohibited. It is argued that if the Statute provides that things have to be done in a particular manner, other manners are excluded. Therefore, the appointment of another member from the Commercial Taxes Department is contrary to the spirit of Sub-section (3) of Section 9 of the Act.

7. We have called for the record of the candidates who applied for appointment as Member (Accounts). The summary of the experience of all the eligible candidates reads as under:-



	Name of Applicant	Qualification	Working Experience
1.	Sri Alok Mondal	B.Com (Hons.) LLB, MBM (Finance) Cost & Works A/c, P.G Diploma in Treasury and forex management	Since 1981 Working In Bharat Coking Coal Ltd. At present General Manager (Finance)
2.	Sri Santosh Kr. Singh	B.Sc (Agriculture) Post Graduate	Since 1989 Bihar Finance Service. At present Joint Commissioner, Commercial Taxes Department, Bihar, Patna.
3.	Sri Santosh Kr. Sinha	B.Sc.	Since 1987 Bihar Finance Service. At present Additional Commissioner, Commercial Taxes Department, Bihar, Patna.
4.	Sri Krishna Nand Roy	B.A. (Hons) M.A. (English)	Since 1987 Bihar Finance Service. At present Additional Commissioner, Commercial Taxes Department, Bihar, Patna.
5.	Sri Anup Kumar	B.Sc, C.A., C.S. Inter	Different private & Public sector at present working in Sasamusa Sugar Works Ltd. Gopalganj
6.	Musharraf Hussain	B. Com, CMA (Earlier C.W.A.)	From 1995 to 2003 in Private Firm, since Feb. 2004 BSNL. At present Account Officer, circle office, Patna (BSNL)

8. A perusal of summary of the particulars of the candidates as reproduced above shows that only one candidate is qualified Chartered Accountant whereas one candidate is a Commerce graduate LL.B. and M.B.M. (Finance) Cost and Works. Three candidates are the members of Bihar Finance Service and had the experience in the Commercial Taxes Department.

9. We have also perused the application form submitted by the Respondent No.6, where he has given 28 years of practical experience in Column-14 of the application form under the heading “No. of years of Practical experience”. As against the column of “No. of clientele”, he has mentioned that Regd. Dealers under different Acts administered by Commercial Taxes Department and against the column of “Name of Important clients to whom services



have been provided”, the names of M/s. TISCO, TELCO, JINPLATE, ISWP, ACC AND HLL are mentioned.

10. With this background, we have heard learned counsel for the parties. It is argued on behalf of learned counsel for the petitioner that a retired official of the Commercial Taxes Department cannot be said to have expertise in administration of accounts or financial management as he is the officer who has dealt with the VAT Returns, but is not a man of accounts or financial management. Still further, appointment of one serving and one retired officer from the Commercial Taxes Department tilt the balance in favour of the State as two of the members of the Tribunal would have allegiance towards the State and, thus, it cannot be expected that they will discharge their functions fairly and reasonably.

11. As per the State Government, respondent No.6 has been appointed in exercise of the powers conferred under Sub-clause (c) of Section 9(3) of the Act which contemplates appointment of a serving or a retired Government servant who has experience of at least four years in administration of accounts or financial Management. The expression “administration of Account or financial Management” has not been defined under the Act. Therefore, the State Government has competence to consider whether the experience of a candidate satisfies the parameters of Sub-clause (c) as to whether he has experience of at least four years



in administration of accounts or financial management.

12. The member of the Tribunal, even if they are Government servants, or a retired Government servant, cannot be presumed to owe their allegiance to the State Government while working as member of the Tribunal. As a member of the Tribunal, they are expected to discharge their duties to implement the provisions of the Act and the Rules made thereunder. A Constitution Bench judgment reported as AIR 1961 SC 93, The Samarth Transport Co. (P) Ltd. V. The Regional Transport Authority, Nagpur & Ors. held that a statutory Tribunal is expected to discharge its functions fairly and without bias even in a case where the interests of the Government are involved. It was a case where Regional Transport Authority, consisting of Government officials, was discharging statutory functions, The Court held as under:

“10. The record in this case is not indicative of promptitude or efficiency in the matter of discharge of the statutory functions by the Regional Transport Authority. The various dates, the reasons given for putting off the disposal of the petitions for renewal from time to time and the timing and the manner of the final disposal are such as may legitimately give rise to the allegation that the Regional Transport Authority was not, to say the least, fair and impartial in the discharge of its duties. A statutory tribunal is expected to discharge its functions fairly and without bias even in a case where the interests of the Government are involved. Considering the facts and circumstances of this case, we cannot say that the complaint of the petitioner that the adjournments were not for the reasons mentioned in the orders but were only to give time to enable the Government to approve the scheme, may not be wholly unjustified.”



13. In another judgment reported as Gullappalli Nageswararao & Ors. v. State of A.P.,AIR 1959 SC 1376, the question examined was the “official bias” of an authority which is inherent in a statutory duty imposed on it and “personal bias” of the said authority in favour of, or against, one of the parties. It was a case where Chief Minister of the Government had supported the policy of nationalization. It was held that he was not disqualified from deciding the dispute, even if the Government has initiated the policy of nationalization. The Court held as under:-

7. In the instant case the relevant provisions of the Act do not sanction any dereliction of the principles of natural justice. Under the Act a statutory authority, called the Transport Undertaking, is created and specified statutory functions are conferred on it. The said Undertaking prepares a scheme providing for road transport service in relation to an area to be run or operated by the said Undertaking. Any person affected by the Scheme is required to file objections before the State Government and the State Government, after receiving the objections and representations, gives a personal hearing to the objectors as well as to the Undertaking and approves or modifies the scheme as the case may be. The provisions of the Act, therefore, do not authorise the Government to initiate the scheme and thereafter constitute itself a judge in its own cause. The entire scheme of the Act visualises, in case of conflict between the Undertaking and the operators of private buses, that the State Government should sit in judgment and resolve the conflict. The Act, therefore, does not authorise the State Government to act in derogation of the principles of natural justice.”

14. In another Constitution Bench Judgment reported as Registrar, Coop. Societies v. Dharam Chand, AIR 1961 SC 1743,



the objection raised was that Registrar of the Co-operative Societies, being the head of the Department, should not have made inspection or appointed such persons who might have made inspection of the Bank. The Court observed as under:

“5. The next contention is that the Registrar being the administrative head of the Department is in control of all the cooperative societies in Ajmer, including the Bank. It is said that because of that administrative control which the Registrar exercises through his subordinates in the Department, he is interested to see that the blame is put on the Managing Committee and that his Department is freed from all blame. In particular our attention has been drawn to Section 17 which enjoins that the Registrar shall audit or cause to be audited by some person authorized by him the accounts of every registered society once at least in every year. It is said that under this provision the Registrar has been appointing chartered accountants to audit the accounts of the Bank and that nothing wrong was discovered in the annual audits till the paid manager Nandlal absconded and the defalcations came to light. We fail to appreciate how this general supervision of the Registrar over all cooperative societies can be said to amount to a bias in him so as to disentitle him to act as a Judge or arbitrator under Rule 18. It is not the respondent's case that the Registrar is in any way responsible for the day to day working of the Bank. All that he is concerned with is to see that the accounts of the Bank are audited yearly, and if necessary, to make inspection of the Bank, if so authorized by the Act and the Rules. That, however, does not mean that the Registrar is bound to shield the auditors or his subordinates who might have made the inspection of the Bank and would so conduct the proceedings as to put the blame on the members of the Managing Committee. Even if some blame attaches to the auditors appointed by the Registrar or to his subordinates who might have inspected the Bank, their fault would be that they failed to detect the embezzlement till the paid manager absconded. That, however, does not mean that the Registrar was at any time a party to the fraud which resulted in the embezzlement. Even the Judicial



Commissioner recognizes that the Registrar has no personal interest in the matter and that he would but for the bias found by the Judicial Commissioner have been a most proper person to decide the dispute. Therefore even if we bear in mind the fact that the Registrar is the administrative head of the Department, we see nothing inherent in the situation which shows any official bias whatsoever in him so far as adjudication of this dispute is concerned. We have no reason to suppose that if any of his subordinates or the auditors appointed by him are in any way found to be connected with the fraud he would not put the responsibility where it should lie. We are therefore of opinion that the Judicial Commissioner was wrong in the view that there was anything inherent in the situation which made the Registrar a biased person who could not act as a judge or an arbitrator in this case.”

15. In another recent judgment reported as *N.K. Bajpai v. Union of India*, (2012) 4 SCC 653, the Court held that if there is real danger of bias, only then the decision would attract judicial chastisement, but not otherwise:

“48. Bias must be shown to be present. Probability of bias, possibility of bias and reasonable suspicion that bias might have affected the decision are terms of different connotations. They broadly fall under two categories i.e. suspicion of bias and likelihood of bias. Likelihood of bias would be the possibility of bias and bias which can be shown to be present, while suspicion of bias would be the probability or reasonable suspicion of bias. The former lead to vitiation of action, while the latter could hardly be the foundation for further examination of action with reference to the facts and circumstances of a given case. The correct test would be to examine whether there appears to be a real danger of bias or whether there is only a probability or even a preponderance of probability of such bias, in the circumstances of a given case. If it falls in the prior category, the decision would attract judicial chastisement but it falls in the latter, it would hardly affect the decision, much less adversely.



57. The word “bias” in popular English parlance stands included within the attributes and broader purview of the word “malice”, which in general connotation means and implies “spite” or “ill will”. It is also now a well-settled proposition that existence of the element of “bias” is to be inferred as per the standard and comprehension of a reasonable man. The bias may also be malicious act having some element of intention without just cause or excuse. In case of malice or ill will, it may be an actual act conveying negativity but the element of bias could be apparent or reasonably seen without any negative result and could form part of a general public perception.”

16. In the case reported as *P.D. Dinakaran (1) v. Judges Inquiry Committee And Others*, (2011) 8 SCC 380, the Supreme Court examined as to when the vice of bias can be raised against a person and has held as under:

41. In this case, we are concerned with the application of first of the two principles of natural justice recognised by the traditional English Law i.e. nemo debet esse judex in propria causa. This principle consists of the rule against bias or interest and is based on three maxims: (i) No man shall be a judge in his own cause; (ii) Justice should not only be done, but manifestly and undoubtedly be seen to be done; and (iii) Judges, like Caesar’s wife should be above suspicion. The first requirement of natural justice is that the Judge should be impartial and neutral and must be free from bias. He is supposed to be indifferent to the parties to the controversy. He cannot act as Judge of a cause in which he himself has some interest either pecuniary or otherwise as it affords the strongest proof against neutrality. He must be in a position to act judicially and to decide the matter objectively. A Judge must be of sterner stuff. His mental equipoise must always remain firm and undetected. He should not allow his personal prejudice to go into the decision making. The object is not merely that the scales be held even; it is also that they



may not appear to be inclined. If the Judge is subject to bias in favour of or against either party to the dispute or is in a position that a bias can be assumed, he is disqualified to act as a Judge, and the proceedings will be vitiated. This rule applies to the judicial and administrative authorities required to act judicially or quasi-judicially.

62. In India, the courts have, by and large, applied the “real likelihood test” for deciding whether a particular decision of the judicial or quasi-judicial body is vitiated due to bias. In *Manak Lal v. Dr. Prem Chand Singhvi*, AIR 1957 SC 425, it was observed: (AIR p. 429, para 4)

“5. ... every member of a tribunal that [sits to] try issues in judicial or quasi-judicial proceedings must be able to act judicially; and it is of the essence of judicial decisions and judicial administration that Judges should be able to act impartially, objectively and without any bias. In such cases the test is not whether in fact a bias has affected the judgment; the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal. It is in this sense that it is often said that justice must not only be done but must also appear to be done.”

71. The principles which emerge from the aforesaid decisions are that no man can be a judge in his own cause and justice should not only be done, but manifestly be seen to be done. Scales should not only be held even but they must not be seen to be inclined. A person having interest in the subject-matter of cause is precluded from acting as a Judge. To disqualify a person from adjudicating on the ground of interest in the subject-matter of lis, the test of real likelihood of the bias is to be applied. In other words, one has to enquire as to whether there is real danger of bias on the part of the person against whom such apprehension is expressed in the sense that he might favour or disfavour a party. In each case, the court has to consider whether a fair-minded and informed



person, having considered all the facts would reasonably apprehend that the Judge would not act impartially. To put it differently, the test would be whether a reasonably intelligent man fully apprised of all the facts would have a serious apprehension of bias. In cases of non-pecuniary bias, the “real likelihood” test has been preferred over the “reasonable suspicion” test and the courts have consistently held that in deciding the question of bias one has to take into consideration human probabilities and ordinary course of human conduct. We may add that real likelihood of bias should appear not only from the materials ascertained by the complaining party, but also from such other facts which it could have readily ascertained and easily verified by making reasonable inquiries.”

17. The present is not a case of pecuniary bias. What is argued is likelihood bias as the Member appellant was earlier working with the Commercial Taxes Department. Mere fact that at one point of time, the officer was working with the Commercial Taxes Department, cannot be a reasonable suspicion to disqualify him for appointment. He has no interest, either pecuniary or otherwise, which may afford strongest proof against his neutrality. Therefore, mere fact that he was serving the State Government, he will have a natural bias towards the State is too wide a proposition to be accepted. In view of the development of law as to when non-pecuniary bias will vitiate an action, though he will have a natural bias towards the State is not justified.

18. Therefore, on the basis of mere fact that the members were the officers of the Commercial Taxes Department, it



is not reasonable to infer that they will be prejudiced in favour of the Revenue.

19. The expressions “administration of Accounts” or “financial Management” are not defined under the Act. Therefore, such expressions have to be given ordinary meaning to such words. The argument that Clause (c) has to be read *ejusdem generis* to Clause (a) and (b) of Section 3 to contend that the member has to be qualified Chartered Accountant or having fair knowledge of accounts is not a legitimate inference. Though the one post is popularly called as the Member (Accounts), the experience of a candidate of working in Commercial Taxes Department would be helpful in discharge of the appeals by the Tribunals in the matter of Commercial Taxes. The experience which he has gained while working in the Commercial Taxes Department is in the field of Applied Accounts, therefore, it cannot be said that he does not have experience in administration of accounts. The assessment undertaken by the candidates gives him insight of the financial management given by the assesseees. Therefore, it cannot be said that respondent No.6, appointed as Member (Accounts) is ineligible for appointment as a member in view of the fact that he has no experience of administration of accounts or financial management. Still further, only one candidate is a Chartered Accountant whereas another candidate is a Commerce and Law Graduate and has done M.B.M. in Finance. The three candidates are the members of Bihar Finance Service and have



worked in the Commercial Taxes Department. Therefore, the State had to choose out of the limited choice available. Thus, respondent No.6 cannot be said to be wholly ineligible candidate and a wrong choice to discharge the duties as Member (Accounts).

20. Consequently, we do not find any merit in the present writ application.

21. The present writ petition is accordingly dismissed.

(Hemant Gupta, ACJ)

Sudhir Singh, J I agree.

(Sudhir Singh, J)

K.C.jha/-

AFR/NAFR	AFR
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