LETTERS PATENT APPEAL

Before Mehar Singh, C.J., and A. N. Grover, J.

J. L. MAIR,—*Appellant*

versus

THE STATE OF PUNJAB AND ANOTHER,—*Respondents*

Letters Patent Appeal No. 92 of 1966

January 30, 1967.

Constitution of India (1950)—*Article* 320—*Advice of Public Service Commission—Whether binding on the State Government—Authority having power to make an order making it on the advice of an Advisory Body without applying its mind—Such order—Whether* mala fide—*Allegation of* mala fide—*Particulars as to—Whether must be stated in the petition.*

Held, that there is no doubt that the advice of an advisory body like the Public Service Commission is not binding and the absence of such an advice does not invalidate the action taken where such advice is expected to be had before action is taken. According to Article 320(3)(b) of the Constitution the State Public Service Commission has to be consulted in making appointments and on the suitability of candidates promoted and giving of an advice on such matter is a constitutional duty which the Public Service Commission performs. Its advice, therefore, is not utterly meaningless and constitutes a very relevant consideration in the matter of appointments or promotions. Even if this provision is not enforceable in a Court, the advice given under it is entitled to due respect and forms an eminently relevant consideration for the State Government in promoting or continuing the promotion of an officer. It is at least one of the very relevant considerations in that respect. If after considering the advice and the other relevant materials the State Government takes a decision, it cannot be said that the decision is *mala fide.*

Held, that an authority having power to make an order, when it makes it without applying its own mind to it and merely on the advice of an Advisory Body, the order is *mala fide.* However, the question whether in a given case the authority having power to make the order or take the action has or has not taken the decision by applying its own mind and come to its own conclusion, or whether it has merely proceeded to a decision or action mechanically following the advice of an Advisory Body, must always be one of fact. It would depend upon the facts and circumstances of each particular case.

Held, that when *mala fide* is alleged, the particulars and details of facts on which it is based or the reasons upon the basis of which it is urged have to be stated in the petition so as to enable the authority concerned to have an opportunity to give a proper reply to any such allegation.

Letters Patent Appeal under Clause 10 *of the Letters Patent against the order of the Hon'ble Mr. Justice R. S. Narula, dated the 22nd December,* 1965, *dismissing the writ petition No.* 713 *of* 1965.

D. S. NEHRA, ADVOCATE, for the Appellant.

K. L. SACHDEVA, ADVOCATE, for ADVOCATE-GENERAL, for the Respondents.

ORDER

MEHAR SINGH, *C. J.*—The appellant, J. L. Mair joined as Sub-Divisional Officer in the Irrigation Department of the Punjab Government at Nangal in March, 1953. He was a temporary engineer. On September 8, 1960, the Punjab Government made certain promotions, including of temporary engineers and Sub-Divisional Officers, to officiate as Executive Engineers (Annexure 'N'), but the appellant was not among the promoted officers, and Note 1 to the order said that he 'has not been promoted as X.E.N. as he has not yet passed D.P.E. (Departmental Promotion Examination)'. The appellant pointed out that he had in fact passed the examination. On November 25, 1960, he received a telegram, copy Annexure 'A', ininforming him that he was to join as Executive Engineer at Ambala in a leave vacancy, and subsequently on February 24, 1961, a notification, copy Annexure A—I, appointing him officiating Executive Engineer was duly issued. On February 3, 1962, he received a telegram, copy Annexure 'C', reverting him to the post of Sub-Divisional Officer. He made various representations to the higher authorities but to no result. On March 15, 1965, he then filed a petition under Article 226 of the Constitution questioning the legality and validity of the order of reversion on the grounds (a) that the order of reversion in his case has been reduction in rank resulting in punishment to him inasmuch as his status, seniority and position in the substantive rank have been reduced in consequence, and a large number of persons junior to him have not only been retained as Executive Engineers but, since his reduction, about one hundred persons junior to him have also been promoted as Executive Engineers, (b) that the order of reversion is thus in violation of Article 311 of the Constitution as the provisions of the same were not complied with when he was abruptly reverted, and (c) that he not having been informed of the grounds of reversion, the order is thus arbitrary and *mala fide*.

In the return by the State of Punjab, it was stated that in 1960 the question of promotion of the appellant was considered and he was promoted for a period of six months in an officiating capacity as Executive Engineer provisionally in anticipation of the approval of the Punjab Public Service Commission, but the Commission did not approve his promotion on the basis of his record of service, so that he had to be reverted. It was also pointed out that the reports on his work and conduct for the years 1955 to 1958 and 1961 have been adverse to him. It was denied that his reversion has been as a measure of punishment as he was reverted on account of unsuitability for promotion to the rank of officiating Executive Engineer. It was also pointed out that he was considered for promotion to the rank of officiating Executive Engineer on each and every occasion when the officers junior to him were considered, but on the basis of his record of service both the Punjab Government and the Punjab Public Service Commission did not approve his case for promotion. Obviously the allegations about *mala fide* and making of the order arbitrarily were denied.

The petition came for hearing before Narula, J., when reliance on the side of the appellant was placed on *P. C. Wadhwa* v. *Union of India* (1), that the promotion of appellant as officiating Executive Engineer having been made by the Government in spite of adverse remarks in his annual reports, the same could not be made a ground for his reversion, but the learned Judge points out in his order that *Wadhwa's case* is not parallel to the facts of the present case. The learned Judge further points out that reversion, with juniors allowed to continue in a higher rank in an officiating capacity, on the ground of unsuitability is not by way of punishment and carries with it no stigma attracting Article 311. The learned Judge has also pointed out that the reason given by the State Government in its return is reasonable as the Government is normally to follow the advice of the Public Service Commission. So, on December 22, 1965, the learned Judge dismissed the petition of the appellant. This is an appeal under clause 10 of the Letters Patent from the order of the learned Judge.

The learned counsel for the appellant has advanced two arguments in this appeal (i) that as the name of the appellant has been removed from the 'may be tried list' of Sub-Divisional Officers, so this is a case of penalty accompanying reversion, and a case of reduction in rank as laid down by their Lordships of the Supreme Court in *Parshotam Lal Dhingra* v. *Union of India* (2), and (ii) that the

(1) A.I.R. 1964 S.C. 423.
(2) A.I.R. 1958 S.C. 36.

order of reversion is *mala fide* inasmush as the State Government has made that order merely mechanically following the advice of the Punjab Public Service Commission without applying its own mind to the matter, and in this respect reliance is placed on the judgement of Durga Das Basu, J, in *Ram Chandra Chaudhuri* v. *Secretary to Government of West Bengal,* (3) *and Ishwar Chandra Mohanty* v. *State of Orissa* (4), in which a Division Bench of Orissa High Court followed *Ram Chandra Chaudhuri's case.* In spite of the name of the appellant having been removed from the 'may be tried list' of Sub-Divisional Officers for promotion, it has categorically been stated in the return of the State Government that on each and every occasion when the question of promotion arose, the case of the appellant was considered along with others in his position, but he has not been promoted on the basis of his record of service. So in fact the removal of the name of the appellant from that list has had no effect at all. This argument, therefore, does not prevail. In so far as the second argument is concerned, it was not urged before the learned Single Judge, and the two cases relied upon at this stage were never placed before him.

In *Ram Chandra Chaudhuri's case*, the petitioner was reverted from the post of officiating Assistant Commissioner of Police to his substantive post as Inspector of Police, after he had officiated for a little over five years. He had been selected to officiate as Assistant Commissioner of Police by the Departmental Service Selection Board and had passed the Departmental Examination. After review of the service record of the petitioner the learned Judge was of the opinion that it was remarkable. He found as a fact that the State Government had reverted the petitioner mechanically because of the advice of the Public Service Commission that the petitioner was not fit for the post of Assistant Commissioner of Police. The learned Judge also remarked that the petitioner in that case having been tried, in an officiating capacity, as an Assistant Commissioner of Police for a period of over five years, the State Government did not refer the case back to the Public Service Commission saying that his service during that period had been found suitable and he deserved to remain in that post. Having considered all these matters, the learned Judge, as pointed out, came to a conclusion that the State Government did not apply its own mind in reaching the decision in regard to the reversion of the petitioner, but mererly mechanically followed the advice of the Public Service Commission. On such conclusion the learned Judge

(3) A.I.R. 1964 Cal. 265.
(4) A.I.R. 1966 Orissa 173.

found that the decision of the State Government was *mala fide* observing—"When an authority is vested with a power but he is required to consult an advisory body before taking its decision, the responsibility for the decision or the final action that emerges is that of the authority who is entrusted with the power" : *Commissioner of Police v. Gordhandas* (5) and it cannot simply act on the advice given by the advisory body, without applying its own mind. The principle was referred to in connection with preventive detention to hold that even though the authority empowered to issue the order acts on the report of the Police [*L.J.J.D. Souza* v. *State of Bombay* (6)], or on the advice of the Advisory Board constituted under the Preventive Detention Act [*Puranlal Lakhanpal* v. *Union of India* (7)], the responsibility for the relevant order remains with the authority who issues it. As was observed in the case of *Puran Lal* the object of associating an Advisory Body with the statutory authority is only to provide a safeguard against an abuse of unguided power and not to substitute the discretion of the advisory body with that of the statutory authority; if he fails to apply his mind and to exercise his discretion, the order will be vitiated by *mala fides*." Earlier to this the learned Judge observed—"It is common place to state that *mala fide* does not necessarily involve a malicious intention. It is enough if the aggrieved party establishes:

(i) that the authority making the impugned order did not apply its mind at all to the matter in question [*L.J.J.D. Souza* v. *State of Bombay* (6)], or

(ii) that the impugned order was made for a purpose or upon a ground other than what is mentioned in the face of the order : [*Puranlal-Lakhanpal* v. *Union of India* (7)]. These principles have been applied by the Supreme Court in a case of reversion of a Government servant in the case of *Sukhbans* v. *State of Punjab* (8) ...."

The order of reversion in the case was in the end quashed by a writ of *certiorari* by the learned Judge. This case, as already stated, was followed by a Division Bench of the Orissa High Court in *Ishwar Chandra Mohanty's case*. The learned Chief Justice, who delivered the judgment of the Bench, found as a fact that the petitioner who was officiating as an Assistant Labour Commissioner had

(5) (1952) S.C.R. 135 (147).
(6) (1956) S.C.R. 382 (387).
(7) A.I.R. 1958 S.C. 163(169).
(8) A.I.R. 1962 S.C. 1711.

a good record of service, though the Public Service Commission had in its advice pointed to certain adverse remarks recorded in his character roll and had directed that the same be duly communicated to him. But the learned Chief Justice further pointed out that on an earlier occasion when an opportunity arose for the petitioner in that case to officiate as an Assistant Labour Commissioner, the appointment had been approved by the Public Service Commission. On the facts it was found that, in the face of such record of the petitioner, the State Government had merely mechanically acted on the advice of the Public Service Commission in reverting the petitioner to a lower post without applying its own mind to the case and thus without giving its own decision on the matter.

It is, as pointed out in those two cases, settled on the authority of their Lordships of the Supreme Court that an authority having the power to make an order, when it makes it without applying its own mind to it and merely on the advice of an Advisory Body, the order is *mala fide*. However, the question whether in a given case the authority having power to make the order or take the action has or has not taken the decision by applying its own mind and come to its own conclusion, or whether it has merely proceeded to a decision or action mechanically following the advice of an Advisory Body, must always be one of fact. It would depend upon the facts and circumstances of each particular case. In *Ram Chandra Chaudhuri and Ishwar Chandra Mohanty's* cases the learned Judges found, in each case, as a fact that the State Government did not apply its own mind and did not give its own decision in the matter of the reversion of the particular petitioner concerned, but that it acted merely to revert him mechanically following the advice of the Public Service Commission. So what has to be seen in the present case is, are the facts and circumstances of the case such that a similar conclusion is available from the same? The appellant in the present case had earned adverse remarks in the years 1955 to 1958; he was given a chance to officiate in a higher post on and from November 25, 1960, provisionally and in anticipation of the approval of the same by the Punjab Public Service Commission. On the advice of the Public Service Commission, based on his pervious record, that he was not suitable for promotion, he was reverted on February 3, 1962. And in between, in the year 1961, he had again earned adverse remarks. It was in these circumstances that the State Government proceeded to accept the advice of the Punjab Public Service Commission and to revert the appellant to his substantive post. First before his officiating appointment as a promotion he had earned adverse remarks for number of years, secondly, the promotion was

provisional and in anticipation of the approval of the Punjab Public Service Commission, thirdly, even after his promotion in this manner he earned adverse remarks in 1961, and lastly, on his record of service the Punjab Public Service Commission advised that his was not a case fit for promotion. The State Government had all this before it and proceeded to make the impugned order. It is immediately apparent that on facts this case has no parallel with the two cases upon which reliance has been placed on behalf of the appellant. In his petition the appellant said that the impugned order is arbitrary and *mala fide* because he was not informed of the grounds on which it has proceeded. In the return of the State Government, as pointed out, reference is made to the adverse remarks against the appellant in the years as stated and the opinion of the Punjab Public Service Commission in regard to his fitness for promotion and it is said that the decision was taken in view of that material. The appellant filed a reply to the counter affidavit of the State Government and even in that he did not say that the State Government had made the impugned order without applying its mind to the facts and circumstances of the case and just following mechanically the advice of the Punjab Public Service Commission. No doubt he did say in that reply that the plea regarding the adverse remarks is an afterthought and the order is *mala fide*, but he never said that it is *mala fide* because the State Government did not take its own decision and did not apply its own mind to the facts and circumstances of the case but proceeded to revert him merely following the advice of the Punjab Service Commission. It has become almost a fashion to dub an order or action taken by an authority as *mala fide*, but merely to say that an order or action taken is *mala fide* has no meaning. When *mala fide* is alleged, the particulars and details of facts on which it is based or the reasons upon the basis of which it is urged have to be stated in the petition so as to enable the authority concerned to have an opportunity to give a proper reply to any such allegation. In the case of *mala fide* on the ground of bais, the facts and cicumstances leading to the conclusion of bias alleged must be stated, and in the case of *mala fide* on the ground that the decision is not of the authority making it but it is mere acceptance of the advice of an advisory body, it has to be alleged to be so, while in the case of an allegation of *mala fide* on the ground other than that appears on the face of the order, it has to be stated what that ground is and how it is said that although one ground is stated in the order but quite another is the real basis of it. These are illustrative matters in regard to allegations of *mala fide*, and whenever *mala fide* is alleged the grounds as the basis of it and the facts and circumstances on which the same are based must be clearly alleged

so as to enable the authority whose order is impugned to be able to give a proper and appropriate reply to the same. As I have said, mere reference to the expression *'mala fides'* in the petition has no meaning. It has meaning only when it is supported by facts and circumstances alleged and the ground or grounds on which the allegation is made. Otherwise it would be condemning the authority concerned without giving it an opportunity to meet the real allegation in this respect. Obviously enough that would not consist with the principles of natural justice. In the present case at no stage has the appellant ever averred that the order made by the State Government in his case was not a decision of it on consideration of the relevant aspects of the case but that it has been a mere acceptance of the advice of the Punjab Public Service Commission, and nothing more. This matter was not even argued before the learned Single Judge. It is only at this stage, in this appeal, in view of the two cases already referred to, that this argument is for the first time urged. It is neither supported by the facts of the case nor is it just and appropriate that it should be accepted when the State Government have had no adequate opportunity to give a reply to any such matter at the proper stage, that is to say in its return to the petition.

No doubt the advice of an advisory body as a Public Service Commission is not binding and no doubt further that it is settled that the absence of such an advice does not invalidate the action taken where such advice is expected to be had before action is taken but according to Article 320(3)(b) of the Constitution a State Public Service Commission has to be consulted in making appointments and on the suitability of candidates promoted. It is a constitutional duty which a Public Service Commission performs. Even if its advice is not binding and the absence of its advice does not invalidate an order where it is expected to be consulted, its advice is not utterly meaningless and besides the consideration relevant in the matter of appointments or promotions. Even if it is considered as a provision not enforceable in a Court, but advice given under it is entitled to due respect and it is an eminently relevant consideration for the State Government in promoting or continuing the promotion of an officer. It is at least one of the very relevant considerations in that respect. If after considering the advice and the other relevant materials the State Government takes a decision, it cannot be said that the decision in *mala fide*. I do not understand the learned Judges in the two cases, already referred to, to take the view that once the State Government, has in the case of a doubtful record of service of a Government servant provisionally or

temporarily promoted him to a higher post, it is precluded from reverting the officer to his substantive post after it has before it the advice of the Public Service Commission in that respect which it considers along with the record of service of the officer. If this was the view it would mean that in cases in which favouritism is intended to be shown and an effort is made to bye-pass the Public Service Commission, the State Government may first just promote an officer temporarily or on officiating basis and then proceed to disregard the advice of the Public Service Commission on the ground that it is at that stage helpless to make a change in its previous order. This I do not take to be the ratio of the decisions of the learned Judges, nor the object underlying the provisions regarding the consultation in such matters of the State Public Service Commission.

In the result this appeal fails and is dismissed, but, in the circumstances of the case, the parties are left to their own costs.

A. N. Grover, *J.*—I agree.

K.S.K.

CIVIL MISCELLANEOUS

Before D. K. Mahajan and R. S. Narula, JJ.

SAVTANTAR KUMAR MALHOTRA,—*Petitioner.*

versus

THE VICE-CHANCELLOR, PANJAB, UNIVERSITY AND OTHERS,—*Respondents.*

Civil Writ No. 1592 of 1966.

January 31, 1967.

Panjab University Calendar, 1966, *Vol. III—Chapter XV, Rules* 1 *and* 2 *at page* 83—*Proceedings for determination of age of a candidate—Whether* quasi-judicial—*Rule* 2—*Whether capable of being enforced in Court—University—Whether can correct age if case does not fall within any clause of rule* 2.

Held, that the duty which the Panjab University is required to perform under rule 2 of Chapter XV of the University Calendar, Volume III, cannot be called judicial or even *quasi-judicial.* The scope of the matters to be decided by the