

*Before S.S. Saron & S.P. Bangarh, JJ.*

**Brig. (Retd.) SURINDER SINGH SM, VSM—Petitioner**

*versus*

**UNION OF INDIA And ANOTHER—Respondents**

**CWP No.3249 of 2013**

February 22, 2013

*Constitution of India, 1950 - Art. 226, 227 - Armed Forces Tribunal Act, 2007 - Ss. 4, 27 & 34 - Petitioner was commissioned in the Indian Army and was removed from the Army after a court of inquiry found him guilty - Petitioner filed a petition in Hon'ble Delhi High Court against the order of his removal and demanded independent inquiry into role of senior commanders in Kargil Episode - The said petition was transferred to Tribunal (Resp no. 2) after the said Act was constituted with aid of its Section 34 - Petitioner demanded transfer of case on basis of apprehension of bias as he suspected Administrative Member to be a friend of one of members of original court of inquiry who found him guilty - Petitioner's application before Chairperson, Principal Bench of Armed Forces Tribunal under Section 27 of the Act was also dismissed - Hence, this petition before the Hon'ble High Court - Point to determine is whether Court should exercise jurisdiction under Art. 226 of the Constitution of India for judicial review for allegations of apprehension of bias made by the petitioner - Held, no - Writ petition dismissed.*

*Held, that to put it differently, it was observed, that 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.*

*Further held*, that therefore, keeping in view the limited jurisdiction of this Court in exercise of power of judicial review and also the decision taken by the Tribunal not to transfer the case; besides, the fact that there is no real likelihood of bias and only a reasonable suspicion is alleged and taking into consideration the human probabilities and ordinary course of human conduct, it would not in the facts and circumstances warrant any interference of this Court in exercise of its supervisory jurisdiction under Article 226 of the Constitution of India.

(Para 28)

Petition Dismissed

Sudershan Goel, Advocate, Ms. Ranjeeta Gill, Advocate and M.P. Goswami, Advocate, *for the petitioner*.

Gurpreet Singh, Advocate, Senior Panel Counsel for Union of India

**S.S. SARON, J.**

(1) The petitioner by way of this petition under Articles 226 and 227 of the Constitution of India seeks quashing of the order dated 10.12.2012 (Annexure P-13) passed by the Armed Forces Tribunal, Chandigarh Regional Bench at Chandimandir (for short - "the Tribunal") (respondent No.2) and the order dated 10.1.2013 (Annexure P-15) passed by the Armed Forces Tribunal, Principal Bench at New Delhi whereby the prayer of the petitioner for transfer of his case from the Bench of the Tribunal (respondent No.2) of which Lt. General (Retd.) N.S. Brar is a Member has been declined.

(2) The petitioner was commissioned in the Indian Army on 15.3.1970. It is submitted that he always maintained the ascending career graph, was wounded twice in active operations/war and is a recipient of Wound Medal. He has a meritorious and distinguished Army service and has been awarded Sena Medal for Gallantry, Vashist Seva Medal, Wound Medals twice and Commendation Card by the Chief of Army Staff. During the course of his service, he was promoted as Brigadier on 18.6.1998 and was posted as Commander 121 (Independent) Infantry Brigade Group popularly known as 'Kargil Brigade'. After detailed analysis and appreciation of the area, it is claimed by the petitioner that he informed and briefed Senior Commanders including the Chief of the Army Staff about the vulnerability

of the area and enhanced enemy threat in Kargil. He demanded additional resources, troops and sent proposal for the review of the priorities of existing defences. These included demands for additional resources and troops, besides, making available Air OP Helicopter at Kargil for Winter Air Surveillance at Kargil, Winter Mail Services and evacuation of casualties. These were, however, turned down by 3 Infantry Division. According to the petitioner, instead of paying serious attention to the reports (Annexures P-1 to P-4) sent by him on the enemies enhanced threat perception in the Kargil Sector and to prepare to meet the challenge, the Senior Commanders gave more importance to activities unconnected to the defensive role of the Army in Kargil Sector like the construction of Zoo at L.ch. The fighting troops, it is submitted, were deployed for catching wild animals and birds. Besides, the defence resources were used for making cages for animals and birds and their transportation, feeding and maintenance. The Kargil War commenced in May 1999 and when the War was in operation, the petitioner was removed from the Command of the Brigade in June 1999 and was posted/attached to various formations. On 6.8.1999 a Court of Inquiry was convened to investigate the circumstances under which contents of communication dated 25.8.1998; "Brief Chief of Army Staff" originated by 121 (I) Infantry Brigade group and any other classified documents were made available to unauthorized persons. It is submitted that Brig. (Retd.) Devinder Singh, Commander 70 Infantry Brigade who himself was guilty of leaking the contents of highly classified documents was one of the Member of the Court of Inquiry, which gave its report against the petitioner. The petitioner was removed from the Army with immediate effect with pension and gratuity by the Government of India on 29.5.2001. In the order of removal of the petitioner, besides, two other allegations, there were six allegations as are mentioned therein on the basis of the findings recorded by the Court of Inquiry of which Brig. (Retd.) Devinder Singh was a Member.

(3) The petitioner filed Civil Writ Petition (i.e. CWP No.4786 of 2002) in the Hon'ble Delhi High Court against the order of his removal from the Army service and for an independent inquiry into the role of Senior Commanders in the Kargil episode. The said writ petition was admitted and in the meanwhile, the Armed Forces Tribunal Act, 2007 (Act 55 of 2007) ("Act" - for short) was passed. In terms of Section 34 of the Act, all pending

cases of the Army personnel were transferred to the Armed Forces Tribunal constituted under Section 4 thereof. The writ petition of the petitioner pending in the Hon'ble Delhi High Court was transferred to the Tribunal (respondent No.2) and assigned TA No.273 of 2010. The Tribunal (respondent No.2), it is submitted, had two Benches sitting when the writ petition of the petitioner was transferred from Delhi High Court to the Tribunal (respondent No.2) as there were two Judicial Members and four Administrative Members of the Tribunal (respondent No.2). On transfer of the writ petition from Delhi as TA No.273 of 2010, the case of the petitioner was fixed on 13.7.2010 before a Bench comprising of Hon'ble Mr. Justice N.P. Gupta (Retd.) as Judicial Member and Lt. General (Retd.) A.S. Bahia as Administrative Member. Thereafter, other Administrative Members have been sitting along with Hon'ble Mr. Justice N.P. Gupta on different dates till his transfer. After transfer of Hon'ble Mr. Justice N.P. Gupta, different Administrative Members have been sitting with Hon'ble Mr. Justice (Retd.) Rajesh Chandra who joined the Tribunal (respondent No.2) in 2012. The details of the Benches where the case of the petitioner was fixed on various dates has been mentioned.

(4) It is submitted that the petitioner did not know Lt. General (Retd.) N.S. Brar now Administrative Member of the Tribunal (respondent No.2) till he met him at the marriage of the daughter of Brig. (Retd.) Devinder Singh. The petitioner was invited for the said marriage and Lt. Gen (Retd.) N.S. Brar also attended the same. Brig. (Retd.) Devinder Singh introduced Lt. General (Retd.) N.S. Brar as his close friend. Lt. General (Retd.) N.S. Brar, it is submitted, did not deny his close friendship and rather emphasized the strong bonds of Regimental Association and added that both of them were from the same Regiment.

(5) It is submitted that there had been no effective hearing of the case of the petitioner on any of the dates when the case of the petitioner came up before the Bench of which Lt. General (Retd.) N.S. Brar was a Member. The details of the proceedings have been mentioned which it is submitted were routine hearings. Neither the main case nor the miscellaneous applications were heard on merit or decided during the hearings by the Bench of which Lt. General (Retd.) N.S. Brar was a Member. It is submitted that on 29.10.2012 when the matter of miscellaneous application (MA No. 105 of 2011) for making available the pamphlet "Classification

and Handling of Classified Documents, 1966" was being heard, Lt. General (Retd.) N.S. Brar, Administrative Member was not allowing the counsel for the petitioner to complete his arguments. It is alleged that the said behaviour of Lt. General (Retd.) N.S. Brar, Administrative Member aroused fear and apprehension in the mind of the petitioner that because of the close friendship of Hon'ble Administrative Member Lt. General (Retd.) N.S. Brar with Brig. (Retd.) Devinder Singh with whom the petitioner has a clash of interest, the petitioner would not get a fair and just hearing nor justice from the Bench of which Lt. General (Retd.) N.S. Brar is a Member. Because of the said fear and apprehension, the petitioner instructed his counsel to orally request for the transfer of his case to some other Bench of the Tribunal (respondent No.2) of which Lt. General (Retd.) N.S. Brar, Administrative Member was not a member. The counsel on instructions from the petitioner accordingly made a request before the Tribunal (respondent No.2) for transfer of the case. The Tribunal (respondent No.2) reserved its decision for 10.12.2012 and on the said date vide impugned order (Annexure P-13) declined the request of the petitioner.

(6) Against the order dated 10.12.2012 (Annexure P-13), the petitioner filed an application (Annexure P-14) before the Chairperson, Principal Bench of the Armed Forces Tribunal at Delhi under Section 27 of the Act on the ground that Lt. General (Retd.) N.S. Brar, Administrative Member was a close friend of Brig. (Retd.) Devinder Singh and the latter has a clash of interest with the petitioner and he [Brig. (Retd.) Devinder Singh] was a Member of the Court of Inquiry indicting the petitioner for leaking classified documents. The findings of the Court of Inquiry was one of the major grounds taken by the Government of India for removal of the petitioner from service in terms of order dated 29.5.2001 (Annexure P-7) which is subject matter of challenge before the Tribunal (respondent No.2). It was submitted that the close friendship and regimental association of Lt. General (Retd.) N.S. Brar, Administrative Member with Brig. (Retd.) Devinder Singh raised reasonable belief in the mind of petitioner that the said close friendship had created bias in the mind of Lt. General (Retd.) N.S. Brar, Administrative Member against the petitioner which was manifest from the fact that on 29.11.2012, the said Hon'ble Member Lt. General (Retd.) N.S. Brar was not allowing the counsel for the petitioner to complete his arguments. This had induced the petitioner to instruct his counsel to seek

transfer of the case to another Bench of the Tribunal (respondent No.2) of which Lt. General (Retd.) N.S. Brar, Administrative Member was not a Member. The application (Annexure P-14) was fixed for hearing before the Principal Bench of Armed Forces Tribunal at New Delhi and the same was dismissed on 10.1.2013 (Annexure P-15) with the order: "Heard. There is no ground to transfer this case from Regional Bench, Chandigarh to other Bench. The present application is accordingly dismissed." The said order is also impugned in the present petition.

(7) Learned counsel for the petitioner has contended that the order dated 10.1.2013 (Annexure P-15) passed by the Principal Bench of Armed Forces Tribunal at New Delhi is a non-speaking order. The grounds taken in the application dated 9.1.2013 (Annexure P-14) have not been discussed nor any reason has been mentioned for dismissing the application of the petitioner to transfer the case to another Bench of the Tribunal (respondent No.2) of which Lt. General (Retd.) N.S. Brar, is not a Member. The Hon'ble Tribunal has not considered the judgment of the Hon'ble Supreme Court referred to in the application and attached with it nor mentioned any reason for not following the said judgment. It is contended that Lt. General (Retd.) N.S. Brar, Administrative Member of the Tribunal is a close friend of Brig. (Retd.) Devinder Singh and the latter was a Member of the Court of Inquiry constituted to consider the role and responsibility of the petitioner in leaking and making available the contents of classified documents to unauthorized persons. The said Court of Inquiry gave its findings against the petitioner which was one of the reasons for the removal of the petitioner from Army on 29.5.2001 which is under challenge before the Tribunal (respondent No.2). There being a clash of interest between the petitioner and Brig. (Retd.) Devinder Singh for leaking the contents of classified documents to unauthorized persons, it is submitted that it would be inexpedient for Lt. General (Retd.) N.S. Brar, Administrative Member to hear the matter as he is biased against the petitioner. It is submitted that the Court of Inquiry of which Brig. (Retd.) Devinder Singh was a Member gave its finding and opinion against the petitioner without even completing the inquiry holding him responsible for leaking classified documents whereas Brig. (Retd.) Devinder Singh has been himself guilty of retaining and leaking contents of most sensitive and highly classified documents and the petitioner has been wrongly held guilty of the said charge. A reference has been made

to extracts from the Book "Kargil : Blood on the Snow" by Major General (Retd.) Ashok Kalyan Verma published by Ajay Kumar Jain for Manohar Publishers and Distributors, New Delhi. On the basis of the extracts that are quoted, it is submitted that the same are based on the details provided by Brig. (Retd.) Devinder Singh, Commander 70 Brigade to the author during a meeting held in February 2001. The petitioner had demanded production of the 'after action report' pertaining to 121 (Independent) Infantry Brigade Group among other documents in miscellaneous application (MA No.152 of 2010) in reply to which the respondents claimed privilege. Therefore, according to the petitioner it was clear that the respondents who had claimed privilege for the production of 'after action report' of the formations/units claiming it to be confidential and highly classified, the contents of the same were made available by Brig. (Retd.) Devinder Singh to an unauthorized person even way back between 1999 to 2001. Thus, there was a serious clash of interest between the petitioner and Brig. (Retd.) Devinder Singh on the issue of leakage of classified documents. Another instance of clash of interest that the petitioner has with Brig. (Retd.) Devinder Singh is with regard to the area where major intrusions took place. The petitioner demanded the production of HQ3 Infantry Division Signal No. 0-2015 dated 20.4.1999 by the same miscellaneous application (MA No.152 of 2010) and for which privilege has been claimed. The said signal, it is submitted, would show that the area where major intrusions took place fell under the command of Brig. (Retd.) Devinder Singh and was not under the command of the petitioner at the time of intrusion. This is likely to shift the responsibility for intrusion from the petitioner to Brig. (Retd.) Devinder Singh. Lt. General (Retd.) N.S. Brar, Administrative Member being a friend of Brig. (Retd.) Devinder Singh, it is submitted, is therefore not likely to appreciate and adjudicate the matter impartially and objectively. The principle of fair and just decision requires that Lt. General (Retd.) N.S. Brar, Administrative Member should not hear the case wherein interest of the petitioner and Brig. (Retd.) Devinder Singh, a close friend of Lt. General (Retd.) N.S. Brar clash. The belief of the petitioner that Lt. General (Retd.) N.S. Brar, Administrative Member was biased against the petitioner, was confirmed on 29.11.2012 when Lt. General (Retd.) N.S. Brar, Administrative Member was not allowing the counsel for the petitioner to complete his arguments. It is submitted that there is one Judicial Member and there are three Administrative Members of the Tribunal (respondent No.2) and the

case can conveniently be transferred to a Bench of the Tribunal (respondent No.2) of which Lt. General (Retd.) N.S. Brar, Administrative Member is not a member.

(8) Learned Counsel for the petitioner places strong reliance on the case of *P.K. Ghosh, IAS versus J.G Rajput (1)*, wherein it has been held that it cannot be treated as unreasonable for a litigant to expect that his matter should not be heard by a particular Judge. If there is no compelling necessity, such as the absence of an alternative, it is appropriate that the Judge should recuse himself from the Bench hearing the matter. The step is required to be taken by the Judge not because he is likely to be influenced in any manner in doing justice in the cause but because his hearing the matter is likely to give rise to a reasonable apprehension in the mind of the litigant that the mind of the Judge, may be subconsciously, has been influenced by some extraneous factor in making the decision, particularly if it happens to be in favour of the opposite party. Therefore, it is submitted there is a reasonable fear and apprehension in the mind of the petitioner that in hearing of the case by Lt. General (Retd.) N.S. Brar, he would not get a fair treatment.

(9) In response, Sh. Gurpreet Singh, Advocate, Senior Panel Counsel for the Union of India has submitted that he was present before the Tribunal (respondent No.2) on various dates. It is submitted that the petitioner in fact has been taking unnecessary and unwarranted adjournments on each and every hearing with a view to delay the matter. On each date of hearing, it is submitted that some excuse is raised to postpone the hearing of the case. The present petition has been filed only as a ruse to further delay the case. It is submitted that the allegations of bias against Lt. General (Retd.) N.S. Brar, Administrative Member of the Tribunal are an after-thought and have been raised to further delay the hearing of the case. It is also submitted that this Court does not have the jurisdiction to entertain and try the petition against an order of the Tribunal constituted by or under any law relating to Armed Forces and that there is a specific bar created by Article 227 (4) of the Constitution of India against conferring on a High Court powers of superintendence over such a Tribunal. The High Court has, therefore, no powers to transfer the cases pending before the Tribunal.



(10) We have given our thoughtful consideration to the contentions of the learned counsel appearing for the parties. Insofar as the jurisdiction of this Court is concerned, it may be noticed that a Division Bench of this Court in the case *15165 Flight Lieutenant Onkar Singh Bawa v. Union of India and others*, CWP No.6927 of 2011 decided on 25.1.2013 inter alia observed as follows:-

“We are conscious of the fact that the statutory appeal against such an order is provided under Section 30 of the Armed Forces Tribunal Act, 2007 ( for short ‘the Act’), however, having regard to the Constitution Bench judgment of the Supreme Court in the case of “**L. Chandra Kumar etc. v. The Union of India and others**” AIR 1997 SC 1125 and also that of Delhi High Court in CWP No.13360 of 2009 titled as “**Colonel A.D. Nargolkar v. Union of India and Ors**” decided on 26.4.2011, following the aforesaid judgments in the context of this very Act, we are deciding this petition on merits.

Accordingly, we have heard learned counsel for the parties on merits of the writ petition.”

(11) This Court in exercise of its powers under Article 226 of the Constitution of India has power of judicial review over orders passed by the Armed Forces Tribunal. In *L. Chandra Kumar etc. versus The Union of India and others (2)*, it was held that power of judicial review is a basic and essential feature of the Constitution. Broadly speaking, it was held that judicial review in India comprises of three aspects; i) judicial review of legislative action, ii) judicial review of judicial decision and iii) judicial review of administrative action. The Judges of the Superior Courts have been entrusted with the task of upholding the Constitution and to this end have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress the constitutional limitations. Therefore, this Court going by the decision in *L. Chandra Kumar’s case (Supra)* has power of judicial review

in respect of the judicial decisions of the Tribunal, however, it would have no power of superintendence in respect of its administrative functioning in view of Article 227 (4) of the Constitution, which reads as under:-

“ Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any Court or Tribunal constituted by or under any law relating to the Armed Forces.”

(12) Therefore, respondent No.2 Tribunal being a Tribunal of the Armed Forces, this Court has limited jurisdiction of judicial review in respect of the decisions passed by it in exercise of its jurisdiction under Article 226 of the Constitution. In State of *West Bengal and Ors. versus Samar Kumar Sarkar (3)*, it was held by the Hon'ble Supreme Court that the power of superintendence conferred upon a High Court under Article 227 is not as extensive as power conferred upon it by Article 226 of the Constitution. Ordinarily, it is open to the High Court, in exercise of its power of superintendence, only to consider whether there is an error of jurisdiction in the decision of Court or Tribunal subject to its superintendence. The High Court in exercise of its power of superintendence under Article 227 can rectify an error but it cannot, under Article 227, withdraw a case from a Tribunal and dispose of the same. It was observed that it would have been proper if the High Court by exercising power under Article 227 directed the Administrative Tribunal to dispose of the matter expeditiously, instead of transferring the matter to itself. The said case was a case relating to the exercise of jurisdiction over an Administrative Tribunal to which the rigours of Article 227 (4) of the Constitution is inapplicable, whereas it is applicable in the case of an Armed Forces Tribunal. Therefore, insofar as superintendence over administration of the Tribunal (respondent No.2) is concerned, this Court has virtually no jurisdiction and its limited jurisdiction extends to that of judicial review of the decisions passed by it.

(13) A perusal of the impugned order dated 10.12.2012 (Annexure P-13) shows that it has been observed by the Tribunal (respondent No.2) that the case was taken up for hearing on 29.11.2012 and the rival arguments on the miscellaneous applications were heard for quite some time. Thereafter, the arguments were deferred for hearing in the afternoon session. On assembling for the afternoon session, the learned counsel for the petitioner

raised certain objections to the case being heard by the Bench of which Lt. General (Retd.) N.S. Brar was a member on the ground that he had a clash of interest in the case and he had attended the wedding of the daughter of Brig. Devinder Singh in December 2009. Brig. Devinder Singh was also a Brigade Commander in the Batalik Sector during the Kargil conflict and had been indicted for intrusions in his brigade sector and for his performance during the conflict. A prayer was accordingly made to transfer the matter to some other Bench. Learned counsel for the respondents, however, strongly objected to the contention of the learned counsel for the petitioner and stated that it was merely a ploy to avoid the matter being heard as it was ready for arguments. The Tribunal observed that attending weddings of kith and kin of relatives, friends, associates and acquaintances is a part of social obligations and the Hon'ble Members of the Tribunal failed to see as to how if one of them, namely Lt Gen N.S. Brar (Retd.) having attended the wedding of the daughter of Brig. Devinder Singh can be a ground for transferring the case to another Bench. It was further observed that Brig. Devinder Singh's case related to his role in the Kargil conflict was decided in his favour by the Principal Bench of the Tribunal in May 2010. Under the circumstances, the Hon'ble Members again failed to see any conflict of interest prejudicial to the petitioner. It was also observed from the record that the matter had been heard by another Bench in which Lt. General (Retd.) N.S. Brar was one of the members on 17.1.2011, 07.3.2011, 8.7.2011 and 9.12.2011. There was no objection on those dates and till the said date i.e. 10.12.2012. Therefore, no ground was found to transfer the case to another Bench and the prayer was accordingly dismissed. However, it was observed that should the petitioner feel so inclined, he may move an application before the Chairperson, Armed Forces Tribunal for seeking such transfer of the case by 10.1.2013.

(14) The petitioner filed an application (Annexure P-14) in terms of Section 27 of the Act seeking transfer of his case to any other Bench of the Tribunal at Chandigarh of which Lt. General (Retd.) N.S. Brar was not a member. Section 27 of the Act confers power on the Chairperson of the Armed Forces Tribunal to transfer cases from one Bench to another. The same reads as under:-

“27. Power of Chairperson to transfer cases from one Bench to another-- On the application of any of the parties and after notice to the parties concerned, and after hearing such of them as he may

desire to be heard, or on his own motion without such notice, the Chairperson may transfer any case pending before one Bench for disposal, to any other Bench.”

(15) The Chairperson of the Principal Bench of the Armed Forces Tribunal along with an Administrative Member vide impugned order dated 10.1.2013 (Annexure P-15) found no ground to transfer the case from the Tribunal (respondent No.2) to another Bench. The transfer application was accordingly dismissed. The said order though may be termed as administrative in form is nevertheless a quasi-judicial order and it can be said that the chairperson while passing the said order acted as a quasi-judicial authority having attributes of a quasi-judicial Tribunal. Keeping in view the limited jurisdiction of judicial review that this Court has in respect of decisions of the Armed Forces Tribunal it can be said that the fact that the Chairperson has not recorded reasons is in the facts and circumstances not of much consequence as the chairperson along with another member of the Principal Bench of the Armed Forces Tribunal at New Delhi has endorsed the order dated 10.12.2012 (Annexure P-13) of the Regional Bench of the Tribunal at Chandimandir, which contains reasons for not transferring the case to some other Bench of the Tribunal of which Lt. General (Retd.) N.S. Brar is not a member. Therefore, the order dated 10.1.2013 (Annexure P-15) passed by the Principal Bench of the Armed Forces Tribunal at New Delhi, which is impugned in this petition whereby no ground was found to transfer the case from the Regional Bench Chandigarh to another Bench and the transfer application was accordingly dismissed may even be said to be an administrative order relating only as to which of the Benches of the Tribunal is to hear the same. However, the same being a decision on allegations of bias having been made would be subject to judicial review which would be of a limited jurisdiction in terms of Article 226 of the Constitution.

(16) In respect of the scope of judicial review in terms of Article 22b of the Constitution the Hon'ble Supreme Court in *State of U.P. versus Johri Mal (4)*, observed that the scope and extent of power of the judicial review of the High Court contained in Article 226 of the Constitution of India would vary from case to case, the nature of the order, the relevant statute as also the other relevant factors including the nature of power exercised by the public authorities, namely, whether the power

is statutory, quasi-judicial or administrative. The power of judicial review is not intended to assume a supervisory role or don the robes of the omnipresent. The power is not intended either to review governance under the rule of law nor do the courts step into the areas exclusively reserved by the *suprema lex* to the other organs of the State. Decisions and actions which do not have adjudicative disposition may not strictly fall for consideration before a judicial review court. The limited scope of judicial review, succinctly put, is:

(i) Courts, while exercising the power of judicial review, do not sit in appeal over the decisions of administrative bodies.

(ii) A petition for a judicial review would lie only on certain well-defined grounds.

(iii) An order passed by an administrative authority exercising discretion vested in it, cannot be interfered in judicial review unless it is shown that exercise of discretion itself is perverse or illegal.

(iv) A mere wrong decision without anything more is not enough to attract the power of judicial review; the supervisory jurisdiction conferred on a court is limited to seeing that the Tribunal functions within the limits of its authority and that its decisions do not occasion miscarriage of justice.

(v) The courts cannot be called upon to undertake the government duties and functions. The Court shall not ordinarily interfere with a policy decision of the State. Social and economic belief of a judge should not be invoked as a substitute for the judgment of the legislative bodies. (See *Ira Munn v. State of Illinois*, 94 US 113).

(17) Therefore, in view of the extent of limited jurisdiction that this Court has, the allegation of bias against one of the members of the Tribunal namely Lt. General (Retd.) N.S. Brar is to be considered. The allegation of bias seeking transfer of the case from the Bench of which Lt. General (Retd.) N.S. Brar is a member has been made on the premise that the petitioner has a clash of interest with Brig. (Retd.) Devinder Singh and that Lt. General (Retd.) N.S. Brar, Administrative Member of the Tribunal has close association and friendship with him. It has been averred that during the course of hearing of one of the miscellaneous applications before the

Tribunal, Lt. General (Retd.) NS Brar, Administrative Member of the Tribunal was not allowing the counsel for the petitioner to complete the arguments and that his said behaviour had aroused fear and apprehension in the mind of the petitioner that he would not get a fair and just hearing and justice from the Bench of which Lt. General (Retd.) N.S. Brar was a member. It is on account of this fear and apprehension that the petitioner instructed his counsel to orally request for the transfer of his case to some other Bench of the Tribunal of which said Lt. General (Retd.) N.S. Brar, Administrative Member was not a member. The prayer has been rejected by the Tribunal (respondent No.2) vide impugned order dated 10.12.2012 (Annexure P13).

(18) As regards the allegation of bias it may be noticed that the Hon'ble Supreme Court in *International Airport Authority of India versus K.D. Bali (5)*, observed that to constitute bias there must be reasonableness of the apprehension of bias in the mind of the party. The purity of administration requires that the party to the proceedings should not have apprehension that the authority is biased and is likely to decide against the party. But it is not every suspicion felt by a party which must lead to the conclusion that the authority hearing the proceedings is biased. The apprehension must be judged from a healthy, reasonable and average point of view and not on mere apprehension of any whimsical person.

(19) In *Dr. G Sarana versus University of Lucknow and Others (6)*, the Hon'ble Supreme Court considered the case where the appellant in the said case after appearing for the post of Professor of Anthropology and being unsuccessful raised an allegation of bias against the selection of respondent No.8 therein. It was alleged that the said selected candidate had close relations with two experts of the Selection Committee. It was observed that what has to be seen in a case where there is an allegation of bias in respect of a member of an Administrative Board or Body is whether there is a reasonable ground for believing that he was likely to have been biased; in other words, whether there is substantial possibility of bias animating in the mind of the member against the aggrieved party. In deciding the question of bias, human probabilities and ordinary course of human conduct have to be taken into consideration.

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(5) AIR 1988 SC 1099

(6) AIR 1976 SC 2428

(20) In *A.K. Kraipak versus Union of India & Others (7)*, one member of the Selection Board was himself a candidate for selection though he had not taken part in deliberations of the Board at the time of his own selection but had taken part throughout while making selections of other candidates including his rival candidates. There was a conflict between interest and duty of such member and there was reasonable likelihood of bias. The selection list prepared by the Board was held to be vitiated. It was held that the real question is not whether a member of a Selection Board while exercising quasi-judicial powers or discharging quasi-judicial functions was biased, for it is difficult to prove the state of mind of a person. Therefore, what has to be seen is whether there is a reasonable ground for believing that he was likely to have been biased. In deciding the question of bias, human probabilities and ordinary course of human conduct have to be taken into consideration.

(21) In *P.D. Dinakaran (1) versus Judges Inquiry Committee (8)*, the petitioner in the said case was aggrieved against the inclusion of a Senior Advocate of the Supreme Court in the Committee constituted by the Chairman of the Council of States (Rajya Sabha) under Section 3(2) of the Judges (Inquiry) Act, 1968. The member of the Committee against whom bias was alleged it was stated had participated in a seminar organized by the Bar Association of India and made a speech opposing the elevation of the petitioner therein as a Judge of the Supreme Court and drafted the resolution against him. In respect of the allegation of bias it was inter alia observed that to disqualify a person from adjudicating on the ground of interest in the subject matter of lis, the test of real likelihood of 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, it was observed, that 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"

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(7) AIR 1970 SC 150

(8) (2011) 8 SCC 380

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. It was added 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.

(22) Therefore, as against 'reasonable suspicion' test, the test of 'real likelihood' is to be preferred and it is to be seen; besides, human probabilities and ordinary course of human conduct are to be taken into consideration in the said context as to whether there is material on record and other attending circumstances to hold that Lt. General (Retd.) N.S. Brar would not act fairly in deciding the matter. On mere apprehension that Lt. General (Retd.) N.S. Brar a Member of the Tribunal had attended the wedding of daughter of Brig. (Retd.) Devinder Singh with whom the petitioner it is alleged has a clash of interest and the said Member is said to have close regimental association and friendship would by itself not be sufficient to hold that the said Member would not act fairly or with reasonableness. Attending weddings, social functions of a friend and associate with whom the petitioner is said to have a clash of interest and in which the petitioner himself was also present cannot by itself be said to be such a circumstance to hold that the judicial decision to be reached at would be unfair or unjust. This would at the most be a mere suspicion. The petitioner is liable to show that there is real likelihood of bias in case the matter is decided by the Bench of which Lt. General (Retd.) N.S. Brar is a Member and not mere apprehension of suspicion. The facts and circumstances of the present case do not make out a case of real likelihood of bias. There is nothing to entertain a doubt that the Administrative Member concerned by his being a Regimental Associate and a friend of Brig. (Retd.) Devinder Singh would per se act in a bias manner against the petitioner.

(23) In *Chandra Kumar Chopra versus Union of India* (9), the appellant therein was a Major in the Army. A General Court Martial was convened against him for various charges that were levelled against him. At the commencement of trial of the Court Martial, the said appellant objected to some of the officers being members of the composition of court martial on the allegation that he had lodged a statutory complaint under



Section 27 of the Army Act 1950 before the Central Government regarding certain irregularities against the Commander of the Sub-Area and all the Presiding Officer had worked under the Convening Officer, namely, Brig Phoolka. Therefore, the composition of the Court Martial, it was alleged, was vitiated. The Presiding Officer and other members of the Court Martial adverted to Section 130 of the Army Act 1950 and Rule 44 of the Army Rules 1954 and eventually repelled the objection and proceeded with the trial. After a full length trial, the Court Martial found that all the charges levelled against the appellant therein had been proved and accordingly he was sentenced. As regards the allegation of bias, it was observed that Brig. J.S. Phoolka had convened the Court Martial under Section 109 of the Army Act. The statutory complaint submitted by the appellant therein pertained to certain irregularities committed by Commander 71, Sub-Area. It was noticed that in Court Martial, as soon as the Court had assembled, it read over the names of the Presiding Officer and other members to the accused and it was enquired if he had any objection to any of the members being party to the Tribunal in the said case. The appellant in the said case objected to the composition of the Tribunal basically on the ground of lodging of the statutory complaint. The question that was considered was whether a complaint made pertaining to irregularities committed by the Commanding Officer of the relevant Sub-Area would tantamount to composition of the Tribunal as a biased forum solely on the foundation that all members worked in the said Sub-Area. After considering the earlier case law it was held that it is discernible that mere suspicion or apprehension is not good enough to entertain a plea of bias. It cannot be a facet of one's imagination. It must be in accord with the prudence of a reasonable man. The circumstances brought on record would show that it can create an impression in the mind of a reasonable man that there is real likelihood of bias. It is not to be forgotten that in a democratic polity, justice in its conceptual eventuality and inherent quintessentially forms the bedrock of good governance. It was held that in a democratic system that is governed by the rule of law, fairness of action, propriety, reasonability, institutional impeccability and non-biased justice delivery system constitute the pillars on which its survival remains in continuum. Despite the sanctity attached to the necessity of a non-biased attitude of a member of a tribunal or a Court, and in spite of the principle that justice must not only be done but must seem to have been done, it is to be scrutinized on the basis of material

brought on record whether someone is making wild, irrelevant and imaginary allegations to frustrate a trial or the charge of bias is in consonance with the thinking of a reasonable man which can meet the test of real likelihood of bias. The principle cannot be attracted in vacuum. In the said case the Convening Officer had ceased to be the Commander. There was a general complaint against the irregularities about the Commander, the Convening Officer. The objection that was put forth by the appellant in Court Martial in the said case was that his complaint was pending with the Central Government. Nothing was brought on record that there was anything personal against any of the members who constituted the Court Martial. Thus, in the obtaining factual matrix, it was held to be extremely difficult to hold that there was real likelihood of bias because the prudence of reasonable man cannot so conceive and a right-minded man would discard it without any hesitation. The submission in this regard raised on behalf of the appellant therein was repelled.

(24) In the present case too, the clash of interest of the petitioner is said to be with Brig. (Retd.) Devinder Singh. Lt. General (Retd.) N.S. Brar is a senior to Brig. (Retd.) Devinder Singh. He is no longer in the same Regiment and both have retired. Besides, it is difficult to comprehend that Lt. General (Retd.) N. S. Brar while functioning as an Administrative Member of the Tribunal in discharge of his quasi-judicial function of such Tribunal dealing with the Armed Forces would act in a biased manner to the prejudice of the petitioner and that too on the premise that the petitioner has a clash of interest with Brig. (Retd.) Devinder Singh who had been in the same regiment of Lt. General (Retd.) N.S. Brar.

(25) In *Ashok Kumar Yadav & Others versus State of Haryana & Others (10)*, it was held that if a member of the Selection Committee which is constituted for purposes of selecting candidates on merit and one of the members is closely related to a candidate appearing for the selection, it would not be enough for such member to merely withdraw from participation in the interview of the candidate related to him, but he must withdraw altogether from the entire selection process and ask the authorities to nominate another person in his place on the Selection Committee because

otherwise all the selection made would be vitiated on account of reasonable likelihood of bias affecting the process of selection. However, the said principle which requires that a member of the Selection Committee whose close relative is appearing for selection should decline to become a member of the Selection Committee or withdraw from it leaving it to the appointing authority to nominate another person in his place, it was held, need not be applied in case of a Constitutional Authority like the Public Service Commission, whether Central or State. Therefore, for Constitutional Authorities and high ranking officials, the principle of complete withdrawal in a selection process by a member of the Committee when his relative was appearing was held to be inapplicable. The constitution of the Tribunal (respondent No.2) comprises of a former Judge of the High Court who has been a constitutional functionary and a former Lt. General. Therefore, keeping in view the high positions and ranks of the members constituting the Tribunal (respondent No.2) it is unlikely that there is any likelihood of bias or for that matter even a suspicion of bias. In the facts and circumstances we do not find any reason to hold that the Administrative Member against whom bias is alleged would act unjustly or unfairly when the case of the petitioner is taken up for consideration. In the circumstances, on mere suspicion it would be wholly inappropriate to interfere with the orders passed by the Regional Bench and Principal Bench of the Tribunal in declining to transfer the case from the Bench in which Lt. General (Retd.) N.S. Brar is a Member.

(26) In *Dr. G. Sarana (Supra) v. University of Lucknow (Supra)* the question of reasonableness of bias or real likelihood of bias was not gone into as despite the fact that the appellant in the said case knew all the relevant facts, he did not before appearing in the interview or at the time of interview raise even a little finger against the constitution of the selection committee. He seemed to have voluntarily appeared before the Selection Committee and taken a chance of favourable recommendation from it. Therefore, having done so, it was held that it was not then open to him to turn around and question the constitution of the Committee when the decision was unfavourable. Reliance was placed on *Manak Lal* versus *Dr. Prem Chand Singhvi (11)*, wherein it was held that the failure of the

appellant to take the identical plea at an earlier stage on the proceedings created an effective bar of waiver against him. Therefore, the doctrine of waiver was applied. In the present case, the petitioner had appeared before the Tribunal (respondent No.2) of which Lt. General (Retd.) NS Brar was a member. On the basis of record it has been observed by the Tribunal in its impugned order dated 10.12.2012 (Annexure P-13) that the matter was heard by other Benches in which Lt.General (Retd.) N.S.Brar was one of the members on 17.1.2011, 7.3.2011, 8.7.2011 and 9.12.2011 and there was no objection on those dates till the date of the impugned order. From this an inference of at least partial waiver can be drawn as the statements of learned Judges are to be considered as absolute verity and conclusive as to the manner of proceedings before it. However, the contention of the petitioner is that nothing substantial happened on those dates and it is during the course of hearing on 29.11.2012 when Lt. General (Retd.) N.S. Brar Administrative Member was not allowing his counsel to complete the arguments that the said conduct induced the petitioner to instruct his counsel to seek transfer of the case. In this regard it may appropriately be noticed that during the course of hearings, Judges do express their views and opinions which they may hold and at times even quite strongly. However, that would not always mean that the Judge expressing his view is biased or that he has prejudged the case. In fact for effective hearing of a case and to clear a point of ambiguity it is at times desirable to put across a counter view point so as to get clarifications with regard to the same. This would not on any account mean that the Presiding Officer or a Judge has an interest in the matter. A litigant, who forms an apprehension on such a ground cannot be said to be doing so with reasonableness. It is in fact quite frequently noticed that the view that a Judge may have had or perceived, on the submissions of an arguing lawyer and on close examination of the matter is held to be quite mistaken. However, in a case where during the course of hearing a Judge does not allow a counsel to make his submissions, unnecessarily impedes the flow of his arguments or does not allow an important particular issue to be raised, it can at the most be said that there has been no effective hearing but it would even then not per se mean that the Judge had a bias. Merely because Lt. General (Retired) N.S. Brar the Administrative Member of the Tribunal is said to have raised questions or

had not allowed the counsel for the petitioner to proceed with the arguments would not per se mean that he has a bias and that he ought to have recused himself from hearing the case. Besides, a litigant cannot be allowed to seek transfer of his case from a particular Member of the Tribunal or ask the said Member to recuse himself from hearing the case on mere unsubstantiated allegations of bias. Asking a Member of the Tribunal to recuse himself or ordering the transfer of a case on mere allegations of bias would not subserve the larger administrative interest of justice as it would allow a litigant to avoid a particular bench of the Tribunal and even ultimately proceed to secure a Judge of his choice. Therefore, a Judge or Member of the Tribunal is not obliged to recuse himself from hearing a case on mere allegations of bias, which are lacking in substance.

(27) Learned counsel for the petitioner has referred to the case of **P.K. Ghosh, IAS v. J.G. Rajput** (Supra). The ratio of the said case would, however, not apply to the present case. In the said case the respondent therein was an employce of the Ahmedabad Municipal Corporation. He filed a writ petition in the High Court of Gujarat challenging his suspension in which he was represented by a counsel who was later appointed a Judge of the High Court of Gujarat. The said respondent obtained a stay of his suspension and thereafter his counsel who had represented him was elevated to the Bench of the Gujarat High Court. The respondent was then represented by another counsel. A settlement was arrived at between the Ahmedabad Municipal Corporation and the respondent in the High Court. The Special Civil Application was permitted to be withdrawn by the High Court. The case of the Ahmedabad Municipal Corporation was that in terms of the settlement, the respondent therein was confirmed in service on a particular scale and was allotted a residential quarter. Thereafter, the said respondent filed a civil miscellaneous application for review of the final order which came up for hearing before the same Bench which had permitted withdrawal of the Special Civil Miscellaneous application. The review application was rejected on his satisfaction that the terms and conditions of the settlement had been complied with by the Municipal Corporation. The respondent was then served with a charge-sheet for theft of some municipal property. According to the Municipal Corporation, the said charge sheet was unconnected with the earlier dispute. However, the respondent filed another

civil miscellaneous application in the High Court wherein it was prayed that the inquiry pursuant to the said charge sheet be stayed and the appellants who were Municipal Commissioner and Deputy Municipal Commissioner of the Ahmedabad Municipal Corporation be punished for contempt of the Court. Besides, earlier special application be restored. This application was dismissed by the same Bench which had earlier disposed of the matter. The respondent did not accept that the controversy in the Special Civil Miscellaneous Application had concluded and he filed a contempt petition under the Contempt of Courts Act. This contempt petition came up for hearing before a Division Bench in which his earlier counsel who had represented him and had been elevated, was a Member. It was observed that Judge who was on the Bench had earlier appeared as an Advocate in the High Court on which the allegation of contempt of Court was made in the contempt petition. Therefore, in view of the said facts and the specific case of respondent therein in the contempt petition left no doubt that the appropriate course for the learned Judge in these circumstances was to recuse himself from hearing of the contempt matter on account of the stand taken by the respondent for whom he had appeared as a counsel in the Special Civil Application and in spite of objections taken by the Municipal Corporation to the hearing of the contempt petition it was heard by the same Bench. The said circumstances are inapplicable to the facts and circumstances of the present case inasmuch as it is not a case where the Member of the Tribunal had earlier represented either the petitioner or any one who may have a clash of interest with him.

(28) Therefore, keeping in view the limited jurisdiction of this Court in exercise of powers of judicial review and also the decision taken by the Tribunal not to transfer the case; besides, the fact that there is no real likelihood of bias and only a reasonable suspicion is alleged and taking into consideration the human probabilities and ordinary course of human conduct, it would not in the facts and circumstances warrant any interference of this Court in exercise of its supervisory jurisdiction under Article 226 of the Constitution of India.

(29) The writ petition is, accordingly, dismissed.