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G. JAYALAL

v.

UNION OF INDIA AND OTHERS
(Civil Appeal No. 4665 of 2013)

MAY 29, 2013

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[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

Service Law:

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Selection – Panel not indicating preference – Effect of – Post of Director General, All India Radio – Committee recommending a panel of three persons with name of appellant at Sl. No. 1 – When asked, Selection Committee, subsequently, shortlisted the candidates and made

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recommendation in order of preference – Name of fourth respondent shown at sl. No. 1 – Held: The panel sent earlier does not specifically state that the recommendations were in order of merit or in order of preference as determined by the Board — On the contrary, it is suggestive of the fact that the

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Board has placed the names in the same order as sent by the department for consideration – The subsequent recommendation was made in order of preference by deliberation – Even after three members were substituted, it would not have made any difference as majority of the earlier

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Members were there and they had given preference in favour of fourth respondent — Therefore, there is no flaw in the three Members participating in the short-listing of the names and giving preference — There is no element of legal malice.

Selection – Recommendation in order of preference –

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The term 'preference' – Connotation of.

Advertisements were issued to fill up the posts of Director General in All India Radio and Doordarshan on 20.10.2010 and 20.12.2010 respectively. The Committee

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constituted to make the recommendations for appointment to the said two posts forwarded three names for the post of Director General, Doordarshan and names of two persons, viz. the appellant and the fourth respondent, for the post of Director General, All India Radio. On receipt of the recommendations, a letter dated 21.3.2011 was circulated by the Officer on Special Duty in Prasar Bharati to all the Members of the Selection Committee stating therein that since the names recommended were not put in any particular order of preference, the same be put in the order of preference. Thereafter, the majority of the members of the Selection Committee placed the fourth respondent in order of preference at No. 1 for the post of Director General, All India Radio. The recommendations were sent to Government of India as per letter dated 21.3.2011.

The appellant preferred an O.A. before the Tribunal seeking quashment of the recommendations dated 21.3.2011 and also sought for issuance of a direction to the respondents to act as per the recommendations dated 15.3.2011 contending that therein he was placed at No. 1 in order of preference for appointment to the post of Director General, All India Radio. The Tribunal as well as the High Court did not accept the case of the appellant.

Dismissing the appeal, the Court

HELD: 1.1. Conceptual preference, fundamentally, would mean that all aspects, namely, merit, suitability, fitness, etc. being equal, preference is given regard being had to some other higher qualifications or experience, etc. [para 12] [878-G]

Secretary, A.P. Public Service Commission v. Y.V.V.R. Srinivasulu and Others 2003 (3) SCR 742 = 2003 (5) SCC 341 - referred to

A 1.2. In the case at hand, it is not disputed that both
the candidates were eligible. If the minutes of the meeting
are minutely studied, it is perceptible that three
departmental candidates were interviewed for the post of
B Director General, All India Radio. The names of the
appellant and the fourth respondent were placed at serial
Nos. 1 and 2 respectively. When the Committee gave its
recommendations, it also placed them in the same
seriatim. The language used in paragraph 4 of the
minutes states that taking into account the consideration
C of overall merit and experience and with due regard to the
assessment of suitability, the Board decided to forward
the recommendations to the Government of India. But it
does not specifically state that the recommendations
were in order of merit or in order of preference as
D determined by the Board. On the contrary, it is suggestive
of the fact that the Board has placed the names in the
same order as sent by the department for consideration.
[para 13] [879-D-G]

E 1.3. It cannot be said that any wrongful act has been
done to inflict any legal injury on the appellant. It is
difficult to hold that any act has been done to disregard
or defeat his legal rights. What has been stated by the
OSD is basically requiring the Board to short-list the
names in order of preference. The Members of the Board
F could have reiterated that they had earlier recommended
the names in accordance with preference. They did not
say that the recommendations already made were in
order of preference but gave the preference initially by
circulation and when it was set aside by the tribunal,
G thereafter, by deliberation. Thus, there is no element of
legal malice. [para 16] [881-A-C]

H *State of A.P. and Others v. Goverdhanlal Pitti* 2003
(2) SCR 908 = 2003 (4) SCC 739; *West Bengal State
Electricity Board v. Dilip Kumar Ray* 2006 (9) Suppl.

SCR 554 = 2007 (14) SCC 568 and *Kalabharati Advertising v. Hemant Vimalnath Narichania and Other* 2010 (10) SCR 971 = 2010 (9) SCC 437 - referred to A

1.4. There is no dispute from any quarter that three Members had to be substituted because some had retired and the tenure of some had expired. There is no cavil that three Members, who have been appointed, have been validly appointed. By efflux of time, some of the Members of the Board were substituted and different Members were inducted. The tribunal thought it appropriate to remit the matter to the Board to reconsider the matter after due deliberation. Keeping in view the minutes of the meeting, it is manifest that the Board has gone through the whole deliberations by the recommending authority and expressed the view. Thus, it was not necessary to hold a further interview to find out the preference as the minutes were absolutely clear that no preference was given. Therefore, there is no flaw in the three Members participating in the short-listing of the names and giving preference. That apart, the majority of the earlier Members were there and they had given preference in favour of the fourth respondent and, therefore, factually, it would not have made any difference. [para 17 and 19] [881-E; 882-E-H; 883-A-B] B C D E

Case Law Reference:

1987 (1) SCR 1054	held inapplicable	para 9	F
2003 (3) SCR 742	referred to	para 12	
2003 (2) SCR 908	referred to	para 14	
2006 (9) Suppl. SCR 554	referred to	para 15	G
2010 (10) SCR 971	referred to	para 15	

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4665 of 2013. H

A From the Judgment and Order dated 17.02.2012 of the High Court of Delhi at New Delhi in Civil Writ Petition No. 61 of 2012.

M.N. Krishnamani, Sanjai Kumar Pathak for the Appellant.

B Paras Kuhad, ASG, Vikas Singh, Swati Vijaywargiya, Jitin Chaturvedi, Rekha Pandey, D.S. Mahra, Rajeev Sharma, Sahil Bhaiaik, Uddyam Mukherjee, Sanket, Deepika Kalia, M.C. Dhingra, Rajesh Srivastava for the Respondents.

C The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. In this appeal, the pregnability of the order dated 17.2.2012 passed by the High Court of Delhi in WP (C) No. 61 of 2012 affirming the order dated 30.11.2011 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (for short "the Tribunal") in O.A. No. 1290 of 2011 is called in question.

2. The facts, as have been exposted, are that advertisements were issued to fill up the posts of Director General in All India Radio and Doordarshan on 20.10.2010 and 20.12.2010 respectively. A Committee headed by the Chairperson, Prasar Bharati Board, was constituted to make the recommendations for appointment to the aforesaid two posts. Names of nine persons including that of the appellant and the fourth respondent herein were recommended to be interviewed by the Selection Committee. The recommendations of the Selection Committee were forwarded to the Government of India vide letter dated 16.3.2011 by the Member (Personnel), Prasar Bharati. The Committee forwarded three names for the post of Director General, Doordarshan and names of two persons, that of the appellant and the fourth respondent, for the post of Director General, All India Radio. On receipt of the recommendations, a letter dated 21.3.2011 was circulated by the Officer on Special Duty in Prasar Bharati to all the Members of the Selection Committee. It was mentioned in the letter that

in the special meeting held on 15.3.2011, the Selection Board, after interviewing the candidates and taking into account all the relevant factors, had decided to recommend a panel of candidates for the two posts but as the names recommended were not put in any particular order of preference by the Selection Board, the Government had desired that the names in the panel be put in the order of preference. After receipt of the letter, it was decided by the Board to short-list the candidates in order of preference by way of circulation. Thereafter, each Member of the Selection Committee gave his recommendation by way of separate endorsement. Eight Members of the Selection Committee, that constituted of nine Members, placed the fourth respondent at serial No. 1 and the appellant at serial No. 2 in order of preference for the post of Director General, All India Radio. Five out of nine Members of the Committee placed Shri Tripurari Sharan at serial No. 1, Shri Ram Subhag Singh at serial No. 2, and Shri L.D. Mandloi at serial No. 3 in the said order of preference for the post of Director General, Doordarshan. It is evident from the record that the majority of the members of the Selection Committee placed the fourth respondent in order of preference at No. 1 for the post of Director General, All India Radio and Shri Tripurari Sharan for the post of Director General, Doordarshan. Be it noted, the name of the appellant was also recommended for the post of Director General, Doordarshan. The aforesaid recommendations of the Selection Committee indicating preference were sent to the Government of India as per letter dated 21.3.2011 by the Joint Secretary (B), Ministry of Information and Broadcasting.

3. At that stage, the appellant preferred O.A. No. 1290 of 2011 before the tribunal seeking quashment of the recommendations dated 21.3.2011 and also sought for issuance of a direction to the respondents to act as per the recommendations dated 15.3.2011. Such a prayer was made as the stand of the appellant was that he was placed at No. 1 in order of preference for appointment to the post of Director

- A General, All India Radio. The tribunal did not accept the contentions raised by the appellant pertaining to placing of names in order of preference. The plea of mala fide pertaining to the act of any authority in the Government in changing the decision of the Selection Committee was also not accepted.
- B However, the tribunal opined that the order of preference that has been decided on 21.3.2011 could not have been so decided by circulation and a meeting of Prasar Bharati Board (Selection Committee) was required to be held for the said purpose and the decision was required to be taken after due deliberations and consultations amongst the Members of the Board.
- C Being of this view, the tribunal directed the respondents to convene a meeting of the Board to determine the order of merit of the candidates. It was further observed by the tribunal that if the outcome of the meeting would result in the endorsement of the earlier view, nothing more was required to be done.
- D In pursuance of the order passed by the tribunal, a meeting of the Board was convened and the decision that was taken by circulation was reiterated.

4. Being dissatisfied with the said confirmation, the appellant approached the High Court as the tribunal had foreclosed the issue by stating that if there would be confirmation or endorsement of the earlier view, nothing more was required to be done. Be it noted, by the time the tribunal decided the Original Application, the tenure of three Members had come to an end either by virtue of retirement or expiry of the term. It was urged before the High Court that since three new Members of the Board had not interviewed the candidates, they were not in a position to take an informed view with respect to the merits of the candidates. The High Court declined to enter into the said arena by holding that if the appellant is aggrieved by the decision taken in the meeting of the Board convened pursuant to the direction of the tribunal, it was open to file an application before the tribunal. The High Court adverted to the singular issue whether the Selection Committee, in its meeting held on 15.3.2011, had placed the appellant

herein, in order of preference, for the post of Director General, All India Radio, or not. After perusing the minutes of the meeting, the High Court opined that the recommendations could not be interpreted to mean that the person whose name was shown at No. 1 ranked first in order of merit. The allegation that someone in the Government was instrumental in influencing the Members of the Selection Committee to change the recommendation as decided in the meeting on 15.3.2011 to deprive the appellant of a legitimate claim was not accepted. The High Court proceeded to deal with the allegation of mala fide and opined that as no particulars were given about any Governmental authority showing any favour to any particular candidate, the said allegations were not acceptable. The plea of legal malice to the effect that the Government directed Prasar Bharati Board to act in a particular manner was repelled by the High Court as the same was not based on any material. Being of this view, the High Court dismissed the writ petition.

5. We have heard Mr. M.N. Krishnamani, learned senior counsel for the appellant, Mr. Paras Kuhad, learned Additional Solicitor General, Mr. Vikas Singh, learned senior counsel for the fifth respondent, Mr. M.C. Dhingra, learned counsel for the fourth respondent, Mr. Rajeev Sharma and Mr. Rajesh Srivastava, learned counsel for the respondents.

6. Mr. Krishnamani, learned senior counsel appearing for the appellant, has basically raised three contentions, namely, (i) on a perusal of the recommendations of the Selection Committee, it is clearly demonstrable that it had sent the names in order of preference, regard being had to the seniority, merit and suitability, but the same was changed by the Board which had no authority to do so; (ii) after the tribunal had quashed the decision taken by way of circulation, the matter was directed to be reconsidered by proper deliberation but three Members of the Selection Committee who had not interviewed the candidates had been replaced and hence, the decision of the Board is vitiated; and (iii) the Government has indirectly

A influenced the decision by a proposal and the same tantamounts to legal malice which makes the selection vulnerable in law.

B 7. Mr. Paras Kuhad, learned Additional Solicitor General, has submitted that the recommendations did not indicate any preference based on merit and, therefore, the presumption in that regard is absolutely erroneous. It is urged by him that the Officer on Special Duty had clarified the position before the tribunal that as per his understanding, there was no preference and there was no interference by the Government requiring the Committee to do any act in any particular manner and hence, there is nothing to suggest any legal malice. He has produced the proceedings of selection before this Court.

D 8. Mr. Dhingra, learned counsel appearing for the fourth respondent, has submitted that the order passed by the High Court is absolutely impregnable and defensible and does not warrant any interference by this Court.

E 9. Mr. Vikas Singh, learned senior counsel appearing for the fifth respondent, the Director General, Doordarshan, submitted that there was no recommendation by preference and further non-availability of the three Members due to their retirement or expiry of tenure and constitution of the Board by inducting three new Members would not vitiate the selection. For the aforesaid purpose, he has placed reliance on Section 4(2) of the Prasar Bharati (Broadcasting Corporation of India) Act, 1990 (for short "the Act") and commended us to the decision in *B.K. Srinivasan and Others v. State of Karnataka and Others*¹.

G 10. To appreciate the aforesaid submissions, we shall refer to the minutes of the meeting dated 15.3.2011. The relevant part of the minutes reads as under: -

"2. The Board interviewed the following officers (who

H 1. (1987) 1 SCC 658.

responded to the intimation in respect of the interview) for the post of Director General, All India Radio: - A

- i. Shri G. Jayalal
- ii. Shri L.D. Mandloi
- iii. Shri Ashok Jailkhani

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3. The Board interviewed the following officers (who responded to the intimation in respect of the interview) for the post of Director General, Doordarshan: - C

EXTERNAL CANDIDATES

- (i) Shri Sunil Kumar Singh
- (ii) Shri Ram Subhag Singh
- (iii) Shri Anil Kumar Aggarwal
- (iv) Shri Manoj Kumar Panda
- (v) Shri Jagmohan Singh Raju
- (vi) Shri Tripurari Sharan

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DEPARTMENTAL CANDIDATES

- (i) Shri G. Jayalal
- (ii) Shri L.D. Mandloi
- (iii) Shri Ashok Jailkhani

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4. Taking into account the considerations of overall merit and experience and with due regard to an assessment of suitability, the Board decided to forward recommendations to the Government of India, as given below: - G

For the post of Director General, Doordarshan

- 1. Sh. L.D. Mandloi

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- A 2. Sh. Tripurari Sharan
 3. Sh. Ramsubhag Singh

For the post of Director General, All India Radio

- B 1. Sh. G. Jayalal
 2. Sh. L.D. Mandloi”

C 11. It has been contended that it was a recommendation in order of preference. On a perusal of the file, it is perceptible that after the recommendations were sent, the OSD circulated a letter stating that the Board had not sent the names in order of merit or preference and, therefore, it was necessary that the names should be short-listed in order of preference. It is also evident from the record that each of the Members of the
 D Selection Committee gave his recommendation separately on the proposed decision circulated by the OSD. No Member of the Selection Committee, while giving his recommendation, stated that in the meeting held on 15.3.2011, the Board had recommended the names in order of merit. It is also noticeable
 E that one of the Members, namely, Dr. George Verghese, who had recommended the appellant to be placed at No. 1, had also not mentioned that the names had already been placed in order of preference of merit. We have only referred to the same to indicate that the Members of the Board had
 F understood the minutes in that perspective.

G 12. At this juncture, we think it appropriate to advert to when preference is given on the basis of merit and suitability. Conceptual preference, fundamentally, would mean that all aspects, namely, merit, suitability, fitness, etc. being equal,
 preference is given regard being had to some other higher qualifications or experience, etc. In this regard, we may refer with profit to the dictum in *Secretary, A.P. Public Service Commission v. Y.V.V.R. Srinivasulu and Others*² wherein a

H 2. (2003) 5 SCC 341.

two-Judge Bench stated about the preference. Though the principle was laid down in the context of a particular rule, yet we reproduce the same with profit: - A

“Whenever, a selection is to be made on the basis of merit performance involving competition, and possession of any additional qualification or factor is also envisaged to accord preference, it cannot be for the purpose of putting them as a whole lot ahead of others, dehors their intrinsic worth or proven inter se merit and suitability, duly assessed by the competent authority. Preference, in the context of all such competitive scheme of selection would only mean that other things being qualitatively and quantitatively equal, those with the additional qualification have to be preferred.” B C

13. In the case at hand, it is not disputed that both the candidates were eligible. If the minutes of the meeting which we have reproduced hereinbefore are minutely studied, it is perceptible that three departmental candidates were interviewed for the post of Director General, All India Radio. The names of the appellant and the fourth respondent were placed at serial Nos. 1 and 2 respectively. When the Committee recommended, it also placed them in the same seriatim. The language used in paragraph 4 of the minutes states that taking into account the consideration of overall merit and experience and with due regard to the assessment of suitability, the Board decided to forward the recommendations to the Government of India. But it does not specifically state that the recommendations were in order of merit or in order of preference as determined by the Board. On the contrary, it is suggestive of the fact that the Board has placed the names in the same order as sent by the department for consideration. Thus, the submission of Mr. Krishnamani that the names were sent in order of merit or preference does not merit acceptance. D E F G

14. The next limb of argument is that there was interference by the Government to take the decision in a particular manner. The said aspect is linked with legal malice and hence, it is H

A necessary to deal with both the aspects in a singular compartment. The High Court has referred to the facts in detail after referring to the affidavit filed by the Officer on Special Duty. In the letter circulated on 21.3.2011 by the Officer on Special Duty, he had only suggested that the Board was required to

B short-list the candidates in order of preference. The decision in entirety was left to the Board. No suggestion was given. Mr. Krishnamani has very fairly stated that the appellant does not intend to allege any kind of personal mala fide but legal malice as the suggestion had been given for short-listing the

C candidates which was absolutely unnecessary. In essence, the submission of the learned senior counsel is that the action of the authorities is not bonafide in law. In this context, we may refer with profit to the decision in *State of A.P. and Others v. Goverdhanlal Pitti*³ wherein this Court has ruled thus: -

D ““Legal malice” or “malice in law” means “something done without lawful excuse”. In other words, “it is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and

E others”. (See *Words and Phrases Legally Defined*, 3rd Edn., London Butterworths, 1989.)”

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F “Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. If at all it is malice in legal sense, it can be described as an act which is taken with an oblique or indirect object.”

G 15. Similar view has been expressed in *West Bengal State Electricity Board v. Dilip Kumar Ray*⁴ and *Kalabharati Advertising v. Hemant Vimalnath Narichania and Others*⁵.

3. (2003) 4 SCC 739.

4. (2007) 14 SCC 568.

H 5. (2010) 9 SCC 437.

16. Tested on the anvil of the aforesaid principles of law, it cannot be said that any wrongful act has been done to inflict any legal injury on the appellant. It is difficult to hold that any act has been done to disregard or defeat his legal rights. What has been stated by the OSD is basically requiring the Board to short-list the names in order of preference. The Members of the Board could have reiterated that they had earlier recommended the names in accordance with preference. They, we are inclined to think correctly, did not say that the recommendations already made were in order of preference but gave the preference initially by circulation and when it was set aside by the tribunal, thereafter, by deliberation. Thus, the submission pertaining to legal malice, being sans substratum, stands repelled.

17. The last plank of argument of the learned senior counsel is that the inclusion of three new Members who had not interviewed the candidates would vitiate the decision of the Board. The High Court has not dealt with it and opined that if the said decision was required to be assailed, it was open to the appellant to knock at the doors of the tribunal. There is no dispute from any quarter that three Members had to be substituted because some had retired and the tenure of some had expired. Section 4 of the Act deals with appointment of Chairman and other Members. Sub-sections (1) and (2) of Section 4 read thus: -

"4. Appointment of Chairman and other Members. -

(1) The Chairman and the other Members, except the *ex officio* Members, the nominated Member and the elected Members shall be appointed by the President of India on the recommendation of a committee consisting of-

(a) the Chairman of the Council of States, who shall be the Chairman of the Committee;

(b) the Chairman of the Press Council of India established

A under section 4 of the Press Council Act, 1978 (37 of 1978); and

(c) one nominee of the President of India.

B (2) No appointment of Member shall be invalidated merely by reason of any vacancy in, or any defect in the constitution of, the committee appointed under sub-section (1)."

C 18. Regulation 5 of the Prasar Bharati (Broadcasting Corporation of India) Director General (Akashvani) and Director General (Doordarshan) (Recruitment) Regulations, 2001 reads as follows: -

D "5. Appointing Authority : The appointment to the post specified in column 1 of the Schedule shall be made by the Corporation, after consultation with the Recruitment Board established under sub-section (1) of Section 10 of the Act."

E 19. There is no cavil that three Members, who have been appointed, have been validly appointed. Though Mr. Vikas Singh, learned senior counsel, has drawn inspiration from the concept of principle of "Ganga" clause as enshrined in *B.K. Srinivasan* (supra), yet the same need not be adverted to as neither the appointment of the Member of the Board nor their holding the office as Member is called in question. The issue is slightly different. By efflux of time, some of the Members of the Board were substituted and different Members were inducted. The tribunal thought it appropriate to remit the matter to the Board to reconsider the matter after due deliberation.

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G Keeping in view the minutes of the meeting, it is manifest that the Board has gone through the whole deliberations by the recommending authority, as we find from the records, and expressed the view. Thus, it was not necessary to hold a further interview to find out the preference as the minutes were

H absolutely clear as day that no preference was given. Therefore,

we do not find any flaw in the three Members participating in the short-listing of the names and giving preference. That apart, the majority of the earlier Members were there and they had given preference in favour of the fourth respondent and, therefore, factually, it would not have made any difference. Thus analysed, we perceive no merit in this contention. A B

20. In view of the aforesaid premised reasons, the appeal is devoid of any substance and, accordingly, stands dismissed without any order as to costs.

R.P. Appeal dismissed. C