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COMMON CAUSE

v.

UNION OF INDIA AND OTHERS

(Writ Petition (Civil) No. 1088 of 2017)

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NOVEMBER 28, 2017

**[R. K. AGRAWAL AND ABHAY MANOHAR SAPRE, JJ.]**

*Delhi Special Police Establishment Act, 1946 – s.4C – Appointment of respondent no.2 as Special Director of CBI – Challenged on the ground that no decision was taken by Selection Committee in its meeting regarding appointment of respondent no.2 on the post of Special Director of CBI and, therefore, order of appointment was illegal – Held: s.4C provides for procedure for appointment of Superintendent of Police – s.4C envisages that the appointment on the post of Superintendent of Police and above has to be made by the Selection Committee in consultation with the Director, CBI – There cannot be any doubt that if the statute provides for consultation with any person before making recommendation for appointment to any post, consultation with that person has to be made – The question of giving primacy to the opinion expressed by the person with whom the consultation has to be made depends upon various factors – If there is no Selection Committee and the appointing authority is required to consult with some other Constitutional/Statutory authority then the question of giving primacy to the opinion expressed by the person with whom the consultation is to be made exists – However, in cases, where a Selection Committee has been constituted which consists of high officials and consultation has to be made with another person of the Department for which recommendation for appointment is to be made, in that event, the consultation is only a process of discussion which has to be taken into consideration while making recommendation by the Selection Committee – It cannot be said to have a primacy – In the Minutes of the Meeting of the Selection Committee held on 21.10.2017, the Selection Committee had discussed the note submitted by the Director, CBI and also discussed the same with him – The Minutes show that the Director, CBI had furnished a secret/confidential letter enclosing an unsigned note*

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referring to respondent no.2 – The Committee had considered the note and the matter was also discussed with the Director, CBI – The Committee found that there were no findings in the papers that the person mentioned therein is the same person under consideration for appointment and there is nothing about the veracity of the contents of the document – The Committee further found the fact that the CBI itself moved the proposal on 06.07.2017 categorically mentioning that respondent no.2 is suitable to hold the post of Special Director, CBI – The Committee also held that no further verified material has been brought on record and the Committee decided to recommend the name of respondent no.2 for appointment as Special Director, CBI – The Committee has also kept in view the fact that the Vigilance Commission does not take cognizance of complaints received just on the verge of appointments or promotions unless they are proven misconducts – The decision taken by the Selection Committee was unanimous – Once there is consultation, the content of that consultation is beyond the scope of judicial review though lack of effective consultation could fall within the scope of judicial review – Further, even in the FIR filed by the CBI, the name of respondent no.2 was not mentioned at all – Thus, lodging of FIR will not come in the way of considering respondent no.2 for the post of Special Director, after taking into consideration his service record and work and experience – The Minutes of the Meeting (MoM) of the Selection Committee shows that the news items reported in the print and electronic media that no decision was taken with respect to the appointment on the post of Special Director, CBI in the meeting of the Selection Committee held on 21.10.2017 are factually incorrect – Likewise, the statement of the Professor of the University of London reported in the Indian Express appears to be based on the newspaper reports which have been found to be factually incorrect, and therefore, it has no substance – Appointment of Respondent No. 2 to the post of Special Director, CBI does not suffer from any illegality.

*Mahesh Chandra Gupta v. Union of India and Others* (2009) 8 SCC 273 : [2009] 10 SCR 921 – relied on.

*Vineet Narain and Others v. Union of India and Another* (1998) 1 SCC 226 : [1997] 6 Suppl. SCR 595; *Supreme Court Advocates-on-Record Association and Others v.*

- A *Union of India* (1993) 4 SCC 441 : [1993] 2 Suppl. SCR 659; *Centre for PIL and Another v. Union of India and Another* (2011) 4 SCC 1 : [2011] 4 SCR 445 – referred to.

Case Law Reference

- |   |                         |             |         |
|---|-------------------------|-------------|---------|
| B | [1997] 6 Suppl. SCR 595 | referred to | Para 3  |
|   | [1993] 2 Suppl. SCR 659 | referred to | Para 8  |
|   | [2011] 4 SCR 445        | referred to | Para 9  |
| C | [2009] 10 SCR 921       | relied on   | Para 17 |

CIVIL ORIGINAL JURISDICTION: Writ Petition (Civil) No. 1088 of 2017.

Under Article 32 of the Constitution of India.

- D Prashant Bhushan, Ms. Neha Rathi, Amiy Shukla, Pranav Sachdeva, Shakti V. Sharma, Advs. for the Petitioner.

K. K. Venugopal, AG, Tushar Mehta, ASG, R. Balasubramanian, Ms. Aarti Sharma, Santosh Kr. Vishwakarma, S. S. Shamshery, R. Bala, Rajat Nair, M. K. Maroria, Saurab Shamsheri, Ms. Tatini Basu, Advs.

- E for the Respondents.

The Order of the Court was delivered by

- F **R. K. AGRAWAL, J. 1.** By means of the present public interest litigation (PIL), the petitioner, Common Cause, a Registered Society, through its President Shri Kamal Kant Jaswal, questions the validity of the order dated 22.10.2017 issued by Secretariat of the Appointments Committee of the Cabinet, Department of Personnel and Training (DoPT) appointing Shri Rakesh Asthana – Respondent No. 2 herein as the Special Director, Central Bureau of Investigation (CBI) on the ground that the appointment has been made illegally, arbitrarily, *mala fide* and in violation of the principles of impeccable and institutional integrity.

- G 2. We have heard learned Shri Prashant Bhushan, learned counsel for the petitioner and Mr. K.K. Venugopal, learned Attorney General appearing for the Union of India.

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3. Shri Prashant Bhushan, learned counsel contended that this Court in *Vineet Narain and Others vs. Union of India and Another* (1998) 1 SCC 226 has laid down the procedure for appointment of Director, CBI which is as under:- A

“58.6. Recommendations for appointment of the Director, CBI shall be made by a Committee headed by the Central Vigilance Commissioner with the Home Secretary and Secretary (Personnel) as members. The views of the incumbent Director shall be considered by the Committee for making the best choice. The Committee shall draw up a panel of IPS officers on the basis of their seniority, integrity, experience in investigation and anti-corruption work. The final selection shall be made by the Appointments Committee of the Cabinet (ACC) from the panel recommended by the Selection Committee. If none among the panel is found suitable, the reasons thereof shall be recorded and the Committee asked to draw up a fresh panel.” B C

4. Learned counsel further contended that the CBI has been established under the Delhi Special Police Establishment Act, 1946 (in short ‘the DSPE Act’) and to give statutory effects to the directions given in *Vineet Narain (supra)*, the DSPE Act was amended in 2003 vide Central Vigilance Commission Act, 2003 to provide that the Director, CBI and officers above the post of Superintendent of Police shall be appointed by the Central Government on the recommendations of the Central Vigilance Commissioner, the Vigilance Commissioners and two Secretaries to the Government of India. D E

5. The DSPE Act was further amended by the Lokpal and Lokayuktas Act, 2013 to provide for a mechanism for the appointment of Director, CBI as well as for the appointment of officers to the post above the Superintendent of Police. As in the present petition, the selection and appointment of the Special Director, CBI is under challenge and not the selection and appointment of the Director, CBI, only Section 4C, as substituted by the Act of 2013, has to be considered. Section 4C of the DSPE Act provides for the procedure for appointment of Superintendent of Police and above reads as under:- F G

“4C. Appointment for posts of Superintendent of Police and above extension and curtailment of their tenure, etc.—

A (1) The Central Government shall appoint officers to the posts of the level of Superintendent of Police and above except Director, and also recommend the extension or curtailment of the tenure of such officers in the Delhi Special Police Establishment, on the recommendation of a Committee consisting of:-

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- a) The Central Vigilance Commissioner – Chairperson
  - b) Vigilance Commissioners - Members
  - c) Secretary to the Government of India in charge of the Ministry of Home - Member, and
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- d) Secretary to the Government of India in charge of the Department of Personnel - Member

Provided that the Committee shall consult the Director before submitting its recommendation to the Central Government.

D (2) On receipt of the recommendation under sub-Section (1), the Central Government shall pass such orders as it thinks fit to give effect to the said recommendation.”

E 6. Thus, the appointment on the post of Superintendent of Police and above has to be made by the Selection Committee in consultation with the Director, CBI. Shri Prashant Bhushan, relying upon the news reports dated 22.10.2017 in the India Today and reported on 23.10.2017 in ‘The Pioneer’ and the ‘The Hindu’ as also the newspaper report dated 24.10.2017 published in ‘The Pioneer’ submitted that no decision was taken by the Selection Committee in its meeting held on 21.10.2017 regarding the appointment of Shri Rakesh Asthana – Respondent No. 2

F on the post of Special Director, CBI, and therefore, the order dated 22.10.2017 issued by the Appointments Committee of the Cabinet (ACC) is wholly illegal and contrary to law.

G 7. Learned counsel for the petitioner, relying upon the diaries and other papers seized in the raid conducted in the premises of Sterling Biotech and Sandesara Group of Companies where on some pages of the diary, the name of Shri Rakesh Asthana – Respondent No. 2 herein finds place as also in the FIR dated 30.08.2017 filed by the CBI, in the column of details of known/suspected/unknown accused with full particulars, a mention has been made for “other unknown public servant

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and private persons”, contended that in any event Respondent No. 2 A  
could not have been recommended for appointment as Special Director,  
CBI as the matter is under investigation.

8. He relied upon a 9-Judges Bench decision of this Court in  
*Supreme Court Advocates-on-Record Association and Others vs. Union of India* (1993) 4 SCC 441 to submit that consultation is to be B  
effective and primacy has to be given to the views of the persons  
consulted.

9. Learned counsel for the petitioner further relied upon a decision  
of this Court in *Centre for PIL and Another vs. Union of India and Another* (2011) 4 SCC 1 in support of his submission that institution is C  
more important than an individual and the decision to recommend has  
got to be an informed decision keeping in mind that the institution has to  
perform an important function.

10. Learned counsel further contended that the son of Respondent  
No. 2, viz., Ankush Asthana has worked for 2 years, 11 months with M/ D  
s Sterling Biotech as Assistant Manager (papers and diaries of which  
Company had been seized) and the cocktail party of the wedding of the  
daughter of Respondent No. 2 was held in the farm house of M/s  
Sandesaran Group of Companies. He also relied upon a news reported  
in the Indian Express dated 21.11.2017 wherein a Professor of the E  
University of London had expressed doubt and concern about the working  
of the Vigilance Commission concerning CBI’s Additional Director’s  
recent effort to win promotion to bring home the point that the appointment  
of Shri Rakesh Asthana – Respondent No. 2 as Special Director could  
not have been made at all.

11. Learned Attorney General for India placed before us the F  
Minutes of the Selection Committee Meeting held on 21.10.2017 in the  
Office of the Central Vigilance Commissioner and submitted that the  
Selection Committee had considered the confidential letter dated  
21.10.2017 submitted by the Director, CBI and had discussed the same  
in the meeting. The Selection Committee had given good reasons for G  
not accepting the contents of the letter submitted by the Director, CBI  
and recommended Shri Rakesh Asthana for appointment as Special  
Director, CBI. He further submitted that the CBI itself had moved the  
proposal on 06.07.2017 for appointment of Shri Rakesh Asthana as a  
suitable candidate to hold the post of Special Director, CBI. According

A to him, Shri Rakesh Asthana was holding the post of Additional Director, CBI before being appointed as Special Director, CBI and had been supervising functions of 11 Zones, viz., STF Zone, MDMA Zone, Delhi Zone, Lucknow Zone, Patna Zone, EoZ-II Zone, Mumbai, EoZ-III Zone, Kolkata Zone, North East Zone, Chennai Zone & Chandigarh Zone. In the above capacity, he is supervising the investigation/trial of a number of scam cases including Augusta Westland Case, Ambulance Scam Case, Kingfisher Cases, Hassan Ali Khan Case, Moin Qureshi Case, J.P. Singh Bribery Case, Paramount Airways Case, Coal Scam Cases, AHD and Bitumen Scam Cases of Bihar and Jharkhand. He is also supervising a number of Special Crime cases which were registered on the orders of Courts or on the request of State Governments besides cases against Ministers/officials of Delhi Government. He thus submitted that no fault can be found in the recommendations made by the Selection Committee. Respondent No. 1 had rightly accepted the recommendation for appointment of Shri Rakesh Asthana as Special Director, CBI.

D 12. We have given our thoughtful consideration to the various pleas raised by learned counsel for the parties.

13. There cannot be any doubt that if the Statute provides for consultation with any person before making recommendation for appointment to any post, consultation with that person has to be made.

E The question of giving primacy to the opinion expressed by the person with whom the consultation has to be made depends upon various factors. If there is no Selection Committee and the appointing authority is required to consult with some other Constitutional/Statutory authority then the question of giving primacy to the opinion expressed by the person with whom the consultation is to be made exists.

F 14. However, in cases, where a Selection Committee has been constituted which consists of high officials and consultation has to be made with another person of the Department for which recommendation for appointment is to be made, in that event, the consultation is only a process of discussion which has to be taken into consideration while making recommendation by the Selection Committee. It cannot be said to have a primacy.

G 15. In the Minutes of the Meeting of the Selection Committee held on 21.10.2017, the Selection Committee had discussed the note submitted by the Director, CBI and also discussed the same with him as H would be clear from the Minutes reproduced hereinbelow:-

**"Item No. II: Induction of IPS officers as Special Director, CBI.**

The Agenda papers have been considered. The Director CBI has furnished a Secret/Confidential letter ID No. 30/2017/VC(CVC) 152/1552 dated 21.10.2017 in the meeting, enclosing an unsigned note on Sterling Biotech Ltd. and related entities. It is mentioned by the Director, CBI that the entries in the note refer, *inter alia*, to one Shri Rakesh Asthana. The Committee considered the note and the matter was also discussed with the Director, CBI. Keeping in view that there is no finding in these papers that the person mentioned therein is the same person under consideration for appointment and there is nothing about the veracity of the contents of the document and the further fact that the CBI itself moved the present proposal on 06.07.2017 wherein it has been categorically mentioned that Shri Rakesh Asthana IPS (GJ:1984) is suitable to hold the post of Special Director, CBI and no further verified material has been brought on record, the Committee decided to recommend him for appointment as Special Director, CBI. The Committee has also kept in view the fact that the Vigilance Commission does not take cognizance of complaints received just on the verge of appointments or promotions unless they are proved misconducts. The Committee has also noted the decisions of the Courts in respect of such documents."

16. From a perusal of the aforesaid Minutes, we find as under:-

(i) The Director, CBI had furnished a secret/confidential letter dated 21.10.2017 enclosing an unsigned note on M/s Sterling Biotech Ltd. and related entities and that the entries in the note referred, *inter alia*, to one Shri Rakesh Asthana.

(ii) The Committee had considered the note and the matter was also discussed with the Director, CBI.

(iii) The Committee found that there are no findings in the papers that the person mentioned therein is the same person under consideration for appointment and there is nothing about the veracity of the contents of the document.



A (iv) The Committee further found the fact that the CBI itself moved the present proposal on 06.07.2017 categorically mentioning that Shri Rakesh Asthana IPS (GJ:1984) is suitable to hold the post of Special Director, CBI.

B (v) The Committee also held that no further verified material has been brought on record and the Committee decided to recommend the name of Shri Rakesh Asthana for appointment as Special Director, CBI.

(vi) The Committee has also kept in view the fact that the Vigilance Commission does not take cognizance of complaints received just on the verge of appointments or promotions unless they are proven misconducts.

C (vii) The decision taken by the Selection Committee was unanimous.

D 17. Further, this Court, in *Mahesh Chandra Gupta vs. Union of India and Others* (2009) 8 SCC 273 has highlighted the fact that there is vital difference between judicial review and merit review. Once there is consultation, the content of that consultation is beyond the scope of judicial review though lack of effective consultation could fall within the scope of judicial review.

E 18. We cannot question the decision taken by the Selection Committee which is unanimous and before taking the decision, the Director, CBI, had participated in the discussions and it is based on relevant materials and considerations. Further, even in the FIR filed by the CBI, the name of Shri Rakesh Asthana has not been mentioned at all. Thus, lodging of FIR will not come in the way of considering Shri Rakesh Asthana for the post of Special Director, after taking into consideration his service record and work and experience. From the Minutes of the Meeting (MoM) of the Selection Committee, we find that the news items reported in the print and electronic media that no decision was taken with respect to the appointment on the post of Special Director, CBI in the meeting of the Selection Committee held on 21.10.2017 are factually incorrect. Likewise, the statement of the Professor of the University of London reported in the Indian Express appears to be based on the newspaper reports which have been found to be factually incorrect, and therefore, it has no substance.

G 19. In view of the foregoing discussion, we are of the considered opinion that the appointment of Shri Rakesh Asthana – Respondent No. 2

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COMMON CAUSE v. UNION OF INDIA AND OTHERS  
[R. K. AGRAWAL, J.]

163

herein to the post of Special Director, CBI does not suffer from any A  
illegality. The writ petition fails and is dismissed.

Devika Gujral

Writ Petition dismissed.