PATNA HIGH COURT

N.P. Mathur

Vs

State of Bihar

Civil Writ Jurisdiction Case No. 2037 of 1970

(U.N. Sinha, C.J., N.L. Untwalia and S.N.P. Singh, JJ.)

28.06.1971

JUDGMENT

U.N. Sinha, C.J.

1. This writ application has been filed by five members of the Indian Administrative Service, under Articles 226 and 227 of the Constitution of India. The Original prayer was for a writ, order or direction quashing a notification passed by the Government of Bihar, dated the 26th November 1970, a copy of which has been given as Annexure-
2. The notification had declared that Sri Ram Sevak Mandal, Posted as Additional Chief Secretary to the Government, was appointed to work as the Chief Secretary to the Government of Bihar. (The notification as given in Annexure-2 runs thus:

> "Sarkar ke apar mukhya sachib ke rup me padsthapit Sri Ram Sevak Mandal. Bha. Pr. Se. (sic) Bihar sarkar ke mukhya sachib ke rup me karya karane ke liye niyukt kiye jate hain.")

2. It will be convenient to quote the original prayer made in the writ application in its entirety at this stage.

> "It is, therefore, most humbly prayed that your Lordships may be graciously pleased to issue a rule and writ on the respondents to show cause why an appropriate writ, order or direction should not be issued quashing the impugned order at Annexure-2 and further be pleased to direct respondent Nos.1, 2 and 5 to forbear from giving effect to the said order (Annexure-2) and be pleased to direct respondent No.4 to forbear from holding the post of Chief Secretary to the Government of Bihar, and be pleased to issue a writ of mandamus directing respondent Nos.1, 2 and 5 to fill up the post of Chief Secretary to the Government of Bihar by an assessment of the merit and seniority of these petitioners and other senior officers of the Service eligible for such promotion to the post of Chief Secretary to the Government of Bihar, in accordance with the law, and upon return of the

writ and the rule, on hearing the counsel of the petitioners and such cause as may be shown be pleased to make the rule and the writ absolute."

3. The State of Bihar has been impleaded as respondent No.1, Sri Daroga Prasad Roy, the then Chief Minister, Bihar, has been impleaded as respondent No.2 and Secretary to the Government of Bihar, Appointment Department, has been impleaded as respondent No.5 (Several members of the Indian Administrative Service, who had originally been impleaded as respondents Nos.6 to 27 have been expunged from the record and the description of Sri Daroga Prasad Roy has been changed from Chief Minister, Bihar, to ex-Chief Minister, Bihar.).

4. The writ application was filed on 18th December 1970 and on 4th January 1971 a supplementary petition was filed on behalf of the petitioners making an additional prayer to the effect that an order incorporated in Annexure-10, dated the 28th December 1970 be also quashed. The substance of the order incorporated in Annexure-10 is to the effect that Sri Ram Sevak Mandal, then posted as the Additional Chief Secretary, was appointed to work as the Chief Secretary from 23rd June 1970 to 25th November 1970, in addition to his duties. (The order as given in Annexure-10 is reproduced below:

"Sarkar ke tatkalin apar mukhya sachiv ke roop me padasthit Shri Ram Sewak Mandal, Bha, Pra. Se apne kartabyon ke atirikt dinank 23rd June, 1970 se 25 November, 1970 tak mukhya sachiv ke roop me karya karne ke liye niyukt kiye jate hain.")

Thus petition has now become part of the original writ application.

5. The relevant facts, on which this case is based, are to be found in certain paragraphs of the original writ application and they are reproduced below:

"3. That under the Statutory Rules, the cadre of the Service, in the State of Bihar, consists of a number of senior posts, which includes, amongst others, the posts of Member, Board of Revenue, Chief Secretary to Government, Development Commissioner and Commissioner of Divisions. The time scales of pay sanctioned for the members of the Service, under the Statutory Rules are:-

Junior scale Rs.400-1,000.
Senior scale Rs.900-1,800.

For officers in the senior scale there is a Selection Grade, namely, Rs.1,800-100-2,000. The posts of Member, Board of Revenue, Chief Secretary to Government, Development Commissioner and Commissioners of Divisions are higher in status to those in the selection grade senior scale, and carry super-time scale pay as indicated hereinafter.

4. That apart from the time-scale posts (including selection grade) and the super-time scale posts mentioned above, the Bihar cadre of service provides for a Central deputation reserve, from which officers are deputed to Senior posts under the Government of India, such as secretaries, Additional Secretaries and Joint Secretaries to the Government of India.

5. That the pay of the Bihar cadre posts of the service in super time scales, including such posts under the Government of India, was changed from time to time, and the pay sanctioned for each category of such posts, as it obtained at different points of time is indicated below:

Name of posts	**Sanctioned pay upto 31-8-65**	**Sanctioned pay**
1	2	3
A. Senior posts under the Government of India.	For ICS Officers	For ICS Officers
Secretary to the Government of India.	Rs.4000/-	Rs.4000/-
	For IAS Officers	For IAS Officers
	Rs.3000/-	Rs.3500/-
Additional Secretary to Government of India.	For ICS Officers	For ICS Officers
	Rs.3500/-	Rs.3500/-
	For IAS Officers	For IAS Officers
	Rs.2750/-	Rs.3000/-
Joint Secretary to Government of India.	For ICS Officers	For ICS Officers
	Rs.3000/-	Rs.3000/-
	For IAS Officers	For IAS Officers
	Rs.2250/-	Rs.2500-125/2-2
B. Senior posts in Bihar		
Member, Board of Revenue, Bihar.	For ICS Officers	For ICS Officers
	Rs.3500/-	Rs.3500/-
	For IAS Officers	For IAS Officers
	Rs.2500/-	Rs.2750/-
Chief Secretary to Government of Bihar.	For ICS Officers	For ICS Officers
	Rs.3000/-	Rs.3000/-
	For IAS Officers	For IAS Officers
	Rs.2500/-	Rs.3000/-
Development Commissioner, Bihar.	For ICS Officers	For ICS Officers
	Rs.3000/-	Rs.3000/-
	For IAS Officers	For IAS Officers
	Rs.2250/-	Rs.2500-125/2-2

Commissioners of Divisions, Bihar.	For ICS Officers	For ICS Officers
	Rs.3000/-	Rs.3000/-
	For IAS Officers	For IAS Officers
	Rs.2250/-	Rs.2500-125/2-2

6. That under Appointment Department's letter No.17222 dated 27-11-1967, the designation of the cadre post of Development Commissioner was changed to that of Development Commissioner and Principal Secretary to Government and its pay which was in the scale of Rs.2,500-125/2-2,750, which is the same as that of a Divisional Commissioner was raised with effect from 1-3-1968 to a fixed pay of Rs.2,750/-, which is the pay admissible to an IAS Member of the Board of Revenue. Thus, both the posts of Member, Board of Revenue and Development Commissioner cum Principal Secretary are a stage higher both in status and pay than the posts of Commissioners of Divisions.

7. That the rank, status and pay of the post of Chief Secretary to the Government of Bihar, when held by an I.C.S. Officer, had all along remained the same as that of a Divisional Commissioner, right up to 1-3-1970, when only, it was raised to the status of a Secretary to the Government of India with a pay of Rs.4,000/- for I.C.S. Officers. The Post of Chief Secretary, Bihar, had all along been held by I.C.S. Officers who used to draw Rs.3,000/-in this post, i.e., the same pay as was admissible to a Commissioner of a Division. On the other hand, the status and pay of the post of Chief Secretary to the Government of Bihar, when held by an I.A.S. Officer was made equivalent to that of Member Board of Revenue with the pay of Rs.2,500/- as per I.A.S. (Pay) Rules, 1954. This was further raised to Rs.3,000/- with effect from 1-9-1965 and once again to Rs.3,500/- with effect from 1-3-1970. The position as from 1-3-1970 is that whether the post of Chief Secretary is held by an I.C.S. Officer or an I.A.S. Officer, the status of the post of the Chief Secretary is the highest in the Bihar cadre of the Service, and equivalent to that of a secretary to Government of India with a pay of Rupees 4,000/- if held by an I.C.S. Officer and of Rs.3,500/-, if held by an I.A.S. Officer."

6. Then, it is stated in the writ application that Sri N.P. Mathur, petitioner No.1, after entering service was assigned 1943 as the year of allotment, and he was promoted from senior scale to Selection Grade with effect from 1st March 1962. He started to officiate continuously in the rank of Divisional Commissioner from 13th November 1962. It is stated that since 4th June 1970 he is posted as Development Commissioner of the Government of Bihar and is drawing a fixed pay of Rs.2,750 per month. His position in the gradation list of the members of the Indian Administrative Service is 16. Sri J.S. Bali, petitioner No.2, after entering service was assigned 1943 as the year of allotment. He was promoted to the Selection Grade on 1st March 1962 and he is continuously officiating in the Divisional Commissioner's rank from 9th July 1963. He was appointed Additional Member, Board of Revenue, and Land Reforms Commissioner from 3rd June 1970. At the time he was drawing Rs.2,750 per month and his position in the gradation list was 17. Sri N.D.J. Rao, petitioner No.3, has been assigned 1945 as the year of allotment and he had been promoted to the Selection Grade from 1st March 1962. In September 1962 he had been promoted to the super-time scale as Managing Director of a public Sector undertaking of the

Government of Bihar and at present he is officiating in the post of Education Commissioner to the Government of Bihar in the Divisional Commissioner's pay scale from 19th February 1966 and was drawing a pay of Rs.2,750 per month. His position in the gradation list is 22. Sri B.S. Mukherjee had been assigned 1946 as his year of allotment in the service and he had been promoted to the Selection Grade from 5th June 1962. He was holding the rank of the Commissioner of a Division from 4th August 1965 and was drawing Rupees 2,750 per month. His position in the gradation list is 28. Sri Saran Singh, petitioner No.5, was assigned 1948 as the year of allotment in service and he was promoted to the Selection Grade on 6th June 1964. He was promoted to the super-time scale from 11th March 1966 and he is at present holding the post of Agriculture Production Commissioner drawing Rs.2,750 per month. His position in the gradation list is 31. Shri R.S. Mandal, respondent No.4 was assigned 1948 as the year of allotment in the service and he was promoted to the Selection Grade from 24th September 1964. He was promoted to the super time scale with effect from 6th December 1965. While drawing pay at Rs.2,625 per month in the Divisional Commissioner's super time scale, he was appointed as Additional Chief Secretary to the Government of Bihar with effect from 7th June 1969. His position in the gradation list is 34.

7. According to the petitioners, as the post of Chief Secretary, when held by an I.C.S. Officer, carried the same pay as that of a Divisional Commissioner, till 1st March 1970, any appointment of a junior in the rank of a Commissioner of a Division as the Chief Secretary did not involve any element of supersession and the post of Chief Secretary had been held by an I.C.S. Officer till 1st April 1969. Sri S.N. Singh was the first I.A.S. Officer to be appointed as the Chief Secretary to the Government of Bihar on 2nd April 1969 carrying a pay of Rs.3,000 per month. At that time, there were three I.C.S. Officers senior to Sri Singh in the state cadre of the service, namely, Sri K. Raman, Sri S.V. Sohoni and Sri P.P. Agarwal. Sri K. Raman was drawing a pay of Rupees 3,500 as Member, Board of Revenue, Bihar. Sri Sohoni and Sri Agarwal were holding posts of Additional Member, Board of Revenue, and Additional Member-cum-Land Reforms Commissioner respectively in the Divisional Commissioner's scale of pay for I.C.S. Officers, namely, Rs.3,000 per month, but they were drawing a pay of Rs.3,500 per month, which was the pay sanctioned for I.C.S. Officers working as Additional Secretary to the Government of India. Sri Sohoni and Sri Agarwal were allowed to draw pay of Rs.3,500/- per month so long as Sri S.N. Singh functioned as Chief Secretary, Bihar. When Sri S.N. Singh proceeded on leave preparatory to retirement, the status of the post of Chief Secretary was upgraded and brought on par with the Post of a Secretary to the Government of India, carrying the same pay, namely, Rs.3,500 per month for I.A.S. Officers and Rs.4.000 per month for I.C.S. Officers.

8. At this stage, it will be more convenient to quote a few more paragraphs of the writ application which are the main allegations made by the petitioners in this case.

> "17. That after Shri S.N. Singh proceeded on leave preparatory to retirement in June 1970, the Council of Ministers of the State of Bihar decided at a meeting held on 17-6-1970 that the Chief Minister be authorized to take a decision in the matter of appointing an officer of the Service to the vacant post of Chief Secretary, Bihar.

18. That for over five months the Chief Minister, respondent No.2, did not take any decision in terms of the aforesaid resolution of the Council of Ministers dated 17-6-1970 and all on a sudden the impugned Notification dated 26-11-1970 (Annexure-2) was issued appointing Respondent

No.4, in utter disregard of the merit and seniority of these petitioners. These petitioners are all seniors to the said Respondent No.4 by as many as 18 places in the case of petitioner No.1, 17 places in the case of petitioner No.2, 12 places in the case of petitioner No.3, 6 places in the case of petitioner No.4 and 3 places in the case of petitioner No.5.

19. That in appointing Respondent No.4 by promotion to the higher post of Chief Secretary to the Government of Bihar neither the Council of Ministers nor the Chief Minister on behalf of respondent No.1 applied their mind to assessing the relative merits and seniority of these petitioners vis-a-vis respondent No.4, nor was the appointment by promotion of the said respondent No.4 as Chief Secretary, Bihar, a positive act of selection by respondent No.2 after considering the claim of promotion as Chief Secretary, Government of Bihar, of these petitioners, who are all senior to the said respondent No.4 but that the said respondent No.4 was promoted to higher post of Chief Secretary on extraneous considerations, particularly to favor a person belonging to the backward class to which the respondent No.2 belongs.

20. That the claim of these petitioners for promotion to the post of Chief Secretary to the Government of Bihar was not considered objectively by respondent No.2 before respondent No.4, who is junior to these petitioners, was promoted to the post of Chief Secretary.

21. That these petitioners have strong reason to believe that the appointment of respondent No.4 as Chief Secretary was made purely on considerations other than merit and that the overriding consideration was the fact that respondent No.4 belongs to a Backward Class. This belief of the petitioners is based, among other things, on statements made to the press by Shri Jagdeo Prasad, a member of the Council of Ministers in Bihar. A copy each of two statements made by the said Shri Jagdeo Prasad, as published by local Press are Annexures 5 series to this petition.

22. That the appointment of respondent No.4 as Chief Secretary was made arbitrarily and in the mala fide manner without considering the merits and seniority of these petitioners and the manner of appointment constitutes discrimination against these petitioners on the ground of caste."

9. According to the petitioners, a post of Kosi Development Commissioner in the super-time scale of pay of a Divisional Commissioner (Rs.2,500-125/2-2,750) was created with effect from 13th November 1965, when all the petitioners were holding posts in the super-time scale of Divisional Commissioners and Sri R.S. Mandal was holding a post in the senior scale (Selection Grade) of Rs.1,800-100-2,000. It is stated that immediately, thereafter, Sri S.K. Chakravarti, an officer in the service two places junior to Sri R.S. Mandal, was promoted to the post of Kosi Development Commissioner and he joined this post on 15th November 1965. According to the petitioners, further, when the post of Development Commissioner, Bihar, fell vacant in June 1970, at that time carrying a fixed pay of Rs.2,750, the appointment of Sri J.S. Bali (petitioner No.2) to this post was notified, but, thereafter, Sri N.P. Mathur (petitioner No.1), senior to Sri Bali, was appointed as Development Commissioner Bihar. Sri R.S. Mandal was then working as Additional Chief Secretary to the Government of Bihar in the super-time scale of Divisional Commissioner's pay of Rs.2,500-125/2-2,750.

10. It is necessary at this stage to quote two more paragraphs of the writ application:

"26. That in promoting respondent No.4 to the post of Chief Secretary to the Government

> of Bihar in supersession of the claims of these petitioners who were all senior to the said respondent No.4, respondent No.1 depended entirely on the arbitrary choice of one individual, namely, the Chief Minister of Bihar, respondent No.2, and unlike the procedure obtaining in other Services, not even a Screening Committee or a Selection Committee was formed to assess objectively the merits and seniority of the senior officers and then adjudge by a definite act of selection as to which officer in the Service, on merit and seniority, had the best claim for appointment to the post of Chief Secretary.

27. That the illegal and mala fide promotion of respondent No.4 to the post of Chief Secretary in supersession of the claims of these petitioners, in violation of these petitioners' Fundamental Rights, evoked strong protest from different quarters, both public and political parties, and accordingly respondent No.1 issued a press note justifying its action in promoting Sri R.S. Mandal, respondent No.4, a comparatively junior officer, to the post of Chief Secretary to the Government of Bihar. A copy of the said press note dated 27-11-1970 is annexed hereto marked Annexure-'6' and forms a part of this petition." (The substance of the press note was to the effect that the post of Chief Secretary was a "Selection Post" and appointment to this post has to be made primarily on the basis of merit and suitability and this appointment cannot go by consideration of seniority alone.) Reference was made in this press note to a decision of their Lordships of the Supreme Court, in the case of *Dr. Jai Narain Mishra v. State of Bihar, in*[1] The petitioners have alleged that the only consideration on which Sri Daroga Prasad Roy had promoted Sri R.S. Mandal as Chief Secretary was consideration of caste, as both Sri Daroga Prasad Roy and Sri R.S. Mandal were members of the backward class.

11. The petitioners have, thereafter, referred to Rule 3(2-A) of the Indian Administrative Service (Pay) Rules 1954, in paragraph 30 of the writ application, alleging that Sri R.S. Mandal had been promoted to the post of Chief Secretary in utter disregard of this rule. The rule, as it should read, runs thus:

> "Appointment to the Selection Grade and to posts carrying pay above the time scale of pay in the Indian Administrative Service shall be made by selection on merit with due regard to seniority."

12. According to the petitioners, after the issue of the impugned notification (Annexure-2), some of the petitioners along with a few other officers of the service had met Sri Daroga Prasad Roy, who was then Chief Minister of the State, on 30th November 1970 "to explain their deep sense of shock and frustration at the most arbitrary and illegal action" in promoting Sri R.S. Mandal to the post of Chief Secretary in violation of the claims of these persons. It is stated in the writ application that Sri Daroga Prasad Roy observed during the discussions that he was under the impression that the appointment of Sri Mandal involved no supersession of any officer and that the intention of the State Government or of himself was not that any senior officer should be superseded. A memorandum of the discussion is said to have been sent to the Special Secretary to Sri Daroga Prasad Roy on 2nd December 1970, a copy of which has been annexed as Annexure-8. The petitioners have alleged that notwithstanding the assurance given by Sri Daroga Prasad Roy that he would have the matter examined quickly, that was not done, and, on the other hand, the post of Additional Chief Secretary, vacated by Sri Mandal, was filled up with "indecent

haste", so that Sri Mandal cannot be reverted to the post of Additional Chief Secretary.

13. The entire grievance of the petitioners has been incorporated in paragraph 36 of the writ application, the substance of which is that as the post of Chief Secretary to the Government of Bihar is higher than all other selection posts in the Bihar cadre of the Indian Administrative Service, both in status and pay, selection to this post has to be made on the basis of merit with due regard to seniority and in promoting Sri Mandal to the post of Chief Secretary, Sri Daroga Prasad Roy had not considered the cases of the petitioners. The petitioners have alleged that Sri Mandal had been appointed as Chief Secretary on the ground that he belonged to the backward class. It is contended in this paragraph that the appointment of the Chief Secretary was the duty of the Council of Ministers under the rules of executive business framed under Article 166(3) of the Constitution of India and it was not competent for the Council of Ministers to delegate its power to the then Chief Minister by their resolution, dated the 17th June 1970. It may be stated at this stage that at the end of the writ application the petitioners have mentioned that Sri R.S. Mandal is due to superannuate on 1st March 1972 and the petitioners have sought for speedy remedy by way of this writ application, as "the normal channel of appeal to Government of India and a final decision thereon is a lengthy process."

14. In the supplementary petition filed by the petitioners on 4th January 1971 the petitioners have alleged that the notification, dated the 28th December 1970 (Annexure-10) was vitiated by mala fides of Sri Daroga Prasad Roy, as he had known by that time that this writ application had been filed by the petitioners in this Court, although Sri Daroga Prasad Roy was out of office when Annexure-10 was issued. (It has come on record that in the evening of the 18th December 1970 the Government, of which Sri Daroga Prasad Roy was the Chief Minister, fell in consequence of a vote of no-confidence, vide an affidavit sworn by Sri N.P. Mathur, petitioner No.1, and filed on 7th May 1971.)

15. A counter-affidavit has been filed on behalf of the State of Bihar, respondent No.1, the substance of which may be mentioned. It is contended that the post of the Chief Secretary is a selection post and the State Government had considered the cases of all officers who were eligible for appointment, before Sri Mandal had been appointed as the Chief Secretary. It is stated that the State Government had considered the relative fitness of all the eligible officers, including the petitioners. It is stated that in appointing Sri Mandal as the Chief Secretary, the Government of Bihar had followed the principle enunciated by the Government of India in its letter, dated the 22nd July 1968, a copy of which has been appended as Annexure-A to the counter-affidavit. It will be necessary to quote a few paragraphs of this counter-affidavit for appreciating the main contentions raised for opposing the writ application.

Paragraphs 9, 10 and 11 are quoted below:

> "9. That, with reference to the allegation made in paragraph 17 of the writ petition, I am to state that in so far as it is alleged that the matter of appointment of the succeeding Chief Secretary was referred to the Council of Ministers, is correct. As to in what manner the Council of Ministers took a decision about the advice to be tendered to the Governor, I am unable to admit the allegation contained in paragraph 17 of the writ petition. I am advised to state that the procedure adopted by the Council of Ministers for the formulation of the

advice or the final advice or the advice as finalized and tendered to the Governor, are matters of a confidential nature to which neither the petitioners nor the deponent had access nor is that matter permissible to be enquired into in any regard by a court of law. The enquiry is barred by the provision of Article 163(3) of the Constitution of India.

10. That, the deponent is further advised to state that the manner or the procedure adopted by the Council of Ministers to finalise their advice cannot be a ground to vitiate an order duly made by or on behalf of the Governor and authenticated in the manner provided by Article 166 of the Constitution of India.

11. That, referring to paragraphs 18 to 20 of the writ petition, it is submitted that cases of all Civil servants, who were eligible for promotion to the Selection post of Chief Secretary, were considered and after full consideration objectively, the respondent No.4 was selected and appointed to the selection post of the Chief Secretary. All allegations to the contrary in these paragraphs are denied. It is denied that the selection and appointment of respondent No.4 to the selection post of the Chief Secretary was made on any extraneous considerations. The State Government had before it the records of the performance of the respondent No.4 of his functions belonging to the Chief Secretary during the period 23-6-1970 to 25-11-1970." The petitioners' allegation that Sri Mandal had been appointed on consideration other than merit or on consideration of the fact that he belonged to the backward class has been refuted. It is contended in the counter affidavit that the Bihar Government had made attempts to obtain the services of some officers of the Indian Civil Service and Indian Administrative Service of the State cadre, who were then on deputation to the Central Government, and who were considered suitable to the post of Chief Secretary, but the services of none of them were available. Copies of letters marked as Annexure-C series, have been relied upon in this context. Petitioners' case of supersession of Sri Mandal by the appointment of Sri S.K. Chakravarti as Kosi Area Development Commissioner has also been refuted. Referring to Rule 3(2-A), quoted above, it has been mentioned that the Government had given due weight to all relevant factors including seniority before appointing Sri Mandal as the Chief Secretary. The petitioners' allegation in connection with the appointment of the Additional Chief Secretary with "indecent haste" has been controverted, by saying that this important post could not be kept vacant for a long period and as such it was filled up in the normal course of affairs. It has been mentioned in the counter affidavit that the State Government having failed to obtain the services of any of the I.C.S. and I.A.S. Officers of the Bihar cadre on deputation, the cases of officers available in the State were considered and Sri Mandal was appointed on the grounds of merit and suitability. As Sri Mandal had already worked as Chief Secretary with effect from the 23rd June 1970 to 25th November 1970 and as he had performed certain statutory functions during this time, including that of the Secretary to the Council of Ministers, the State Government had formally appointed him to the post of Chief Secretary for this period by Annexure-10. It is mentioned that this decision had been taken by Sri Daroga Prasad Roy when he was still the Chief Minister, although the notification had been issued on the 28th December 1970. With respect to the petitioners' case that they had to move this Court by a writ application because Sri Mandal will superannuate on the 1st March 1972, it has been mentioned in this counter-affidavit that two officers senior to Sri Mandal, namely, Sri S.V. Sohoni, I.C.S. and Sri K. Abraham, I.A.S., have filed representation and appeal to the Government of India against the appointment of Sri Mandal as the Chief Secretary and as such a proceeding under Article 226 of the Constitution of India at the instance

of the petitioners was not an appropriate procedure.

16. A counter affidavit has also been filed by Sri Daroga Prasad Roy, mentioning, that he will confine his counter-affidavit to matters which concern him personally and that he has found that the statements made in the affidavit filed on behalf of the State are correct. The substance of the counter-affidavit filed by Sri Roy is as follows. It is mentioned that, in view of oath of secrecy taken by him when he became Chief Minister of the State, as also in view of the provisions of Article 163(3) of the Constitution of India, it is not permissible for him either to admit or to deny the various statements made in the writ application which relate to the manner in which the Council of Ministers dealt with the question of appointment of the Chief Secretary or to the advice given to the Governor of the State in this connection. In paragraph 5 certain denials have been made and this portion may be quoted:

> "The statements that Respondent No.4 was appointed in disregard of merit and seniority of the petitioners, that mind was not applied to assessing the relative merit and seniority of the petitioners vis-a-vis respondent No.4, that the appointment of respondent No.4 was not a positive act of selection after considering the claim of the petitioners, that respondent No.4 was appointed Chief Secretary on any extraneous consideration as alleged or otherwise, that the claim of the petitioners was not considered objectively, that the appointment of respondent No.4 was made on any consideration other than merit, that respondent No.4 being of any particular caste or of any so-called backward class was any consideration at all in his appointment as Chief Secretary, that the appointment of respondent No.4 as Chief Secretary was made in any arbitrary or mala fide manner and that the manner of appointment of respondent No.4 constituted any discrimination against the petitioners on the ground of caste, are all incorrect and are denied."

It has been mentioned that Sri Roy had made efforts by correspondence and personal contact to obtain the services of some officers who were on deputation under the Government of India, but he was not successful. With reference to the meeting held with him on the 30th November 1970 mentioned in the original writ application, it has been stated that Sri Roy was given to understand that the aggrieved officers would file individual representations which would be duly considered by the Government, but no such representations had been filed. In paragraph 11, it has been stated in positive form that

> "The deponent states that in making the appointment of respondent No.4 the Government made the selection on merit with due regard to seniority, and found respondent No.4 to be the most suitable amongst the available eligible officers."

With respect to the order, dated the 28th December 1970 (Annexure-10) it has been mentioned that the publication of the notification was in pursuance of an order made on the 21st December and that the order had been passed to regularise the acts done by Sri R.S. Mandal commencing with 23rd June 1970 till he was appointed Chief Secretary.

17. A short counter affidavit has also been filed by Sri R.S. Mandal, the substance of which may

be given here. It stated that the post of Chief Secretary had always been treated as a selection post and that he has been advised to submit that the filling up of the post is in the domain of Governmental responsibility and the pleasure of the Governor within the limits of the Constitution. All insinuations made against him have been denied and he has adopted the stand taken by the State of Bihar in its counter affidavit.

18. Government of India in the Ministry of Home Affairs, New Delhi, having been impleaded as respondent No.3, through the Secretary of that Ministry, an application has been filed by the Union of India through the Under secretary to the Government of India, Department of Personnel (Cabinet Secretariat) as follows. It is stated that one of the aggrieved senior officers, namely, Sri K. Abraham, has filed an appeal before the Central Government under Rule 16(iii)(c) of the All India Services (Discipline and Appeal) Rules 1969, and the matter is pending decision and that as the Central Government will have to deal with the matter as an appellate authority, it is not called upon to deal with the various allegations made in the writ application. In such circumstances, it is stated, that no counter affidavit has been filed on behalf of the Government of India.

19. A large number of affidavits and affidavits in reply etc., have also been filed by the parties, to which no specific reference need be made at this stage and they have been taken on record, in view of the importance of the matter under consideration and specific references have been made to them whenever necessary.

20. In the first instance, I would like to deal with a matter which culminated in our order passed on the 12th May 1971, during the course of the hearing of the case. The order is quoted in extenso:

> "We have heard Sri Basudeva Prasad and the learned Advocate General on the objections taken to the production of certain documents, by Sri Karpoori Thakur, the Chief Minister, by an affidavit filed on the 3rd February 1971 and we direct that such portions of file No.I/P1-2098/70 and file No.I/A1-2020/70 and any other file, which have dealt with the consideration of the cases of the petitioners and Shri R.S. Mandal, respondent No.4, for appointment as Chief Secretary of the Government of Bihar, leading to the appointment of Shri R.S. Mandal, on the retirement of Sri Sachidanand Singh, must be produced and filed in this Court today. We are informed by the learned Advocate General that file No.I/P1-2098/70 and file No.I/A1-2020/ 70 are with him. Other file or files, if any, may be produced tomorrow. It is made clear that no portion of any file dealing with the advice tendered by the Ministers to the Governor would be produced and it will be open to the learned counsel for the parties to argue that no question or questions will be enquired into by this Court, as to whether any, and if so what advice was tendered by the Ministers to the Governor, in view of Article 163(3) of the Constitution of India, notwithstanding the production of the documents.

Reasons for this order will be given in our Judgment in the writ case." On the same day the learned Advocate General handed over the two files and we directed that the learned Counsel for the petitioners may be given a copy of the typed note at pages 1 and 2 of file No.1/A1-2020/70

upto the fifth paragraph only, at his request for copy. On the 13th May, the learned Advocate General filed a peon book, which was ordered to be kept on the record. The matter arose in the following circumstances. When the writ application was admitted on the 5th January, 1971 and notices were ordered to be issued for hearing, a request had been made by the learned counsel for the petitioner, orally, that the relevant files connected with the appointment of Sri R.S. Mandal may be produced in Court at the time of hearing of the writ application and the following order was passed on that day:

> "The relevant files connected with the appointment of respondent No.4 as the Chief Secretary to the Government of Bihar, Patna, should be sent to the Advocate General for use in Court, subject to any claim of privilege that may be made. Learned counsel for the petitioners will be permitted to see such documents in possession of the learned Advocate General to which no objection is taken on the ground of privilege."

This order was passed on hearing the Advocate-General, who had appeared at that stage on notice having been given to him under the Rules of this Court. The learned counsel for the petitioners had, at that stage, referred to paragraphs 17 to 22 of the writ application, which have been quoted in full for maing (sic) his oral request. In due course an affidavit was filed by Sri Karpoori who had then succeeded Sri Daroga Prasad Roy as Chief Minister of Bihar, referring to certain files and objecting to the production of the documents. The relevant portions of the affidavit are quoted below:

1. That I am Chief Minister, Bihar, and am conversant with the facts and circumstances of this case.

2. That I have examined Appointment Department's file Nos.I/P1-2098/70 regarding Relinquishment of the Charge of Chief Secretary by Sri S.N. Singh, I.A.S. and consequential arrangement and I/A1-2020/70 regarding appointment of Sri R.S. Mandal, I.A.S. as Chief Secretary to the Government of Bihar. Pages Nos.1, 6 and 7 of file No.I/P1-2098/70 and pages Nos.1 and 2 of file No.I/A1-2020/70 contain resolutions, opinions or decisions of Ministers or Minister of the State of Bihar to the matter of the appointment of Chief Secretary on the retirement of Shri Sachchida Nand Singh, the previous Chief Secretary.

2 (sic) That, constitutionally, the aforesaid documents embody the advice given on behalf of the Council of Ministers to the Governor and is a matter which cannot be investigated by a Court in view of Article 163(3) of the Constitution of India.

3. That, as a matter of principle, I consider that the production of such documents would not be in the interest of the State." What objection has been taken by Shri Daroga Prasad Roy in his counter-affidavit under the provision of Article 163(3) of the Constitution of India has already been mentioned above. On 2nd March 1971 an application was filed on behalf of the petitioners complaining that in spite of the efforts made by Shri Basudeva Prasad, the portions of the files mentioned in the affidavit of Shri Karpoori Thakur, in respect of which privilege had not been claimed, were not being shown to him although he had spoken to the learned Advocate General in this connection. It was prayed that suitable orders may be passed in the interest of justice. This application was considered by a Division Bench on the 18th March and an order was passed to the effect that this application may be considered at the time of the hearing of the case, on a

statement made by the Advocate-General appearing for the State of Bihar that Shri Karpoori Thakur's objection related to the two files mentioned in his affidavit, in their entirety. On these facts, the learned Advocate-General appearing for the State of Bihar contended, during the hearing of this case, that no portion of the two documents mentioned in the affidavit of Shri Karpoori Thakur can be looked into by the Court, as Article 163(3) states:

> "The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court."

On the other hand, Shri Basudeva Prasad referred to paragraph 2 of Shri Karpoori Thakur's affidavit and submitted that the words of this paragraph, themselves, namely "on behalf of the Council of Ministers" show that the advice had not been tendered to the Governor by the Council of Ministers and, therefore, Article 163(3) is not at all attracted. In my opinion, both the learned counsel have put their cases a little too high, with reference to Article 163(3) of the Constitution of India, so far as it is applicable to the facts and circumstances of the present case. The argument of Shri Basudeva Prasad, mentioned above in this connection, has of course, no validity. There cannot be any such distinction as advice given by the Ministers to the Governor and "advice given on behalf of the Council of Ministers to the Governor" mentioned in the affidavit of Shri Karpoori Thakur. But, the contention of the learned Advocate-General in this connection is that no portion of the two files can be looked by the Court as such consideration will amount to an enquiry as to the advice which had been tendered by the Ministers to the Governor for appointment of Shri R. S. Mandal as the Chief Secretary of Bihar and this contention is also not wholly valid. Shri Karpoori Thakur has mentioned in his affidavit that one of the files dealt with the relinquishment of the charge by Shri S.N. Singh and the consequential arrangement made. The other file namely, No.I/A1-2020/70 was said to contain the resolutions, opinions or decisions of Ministers or Minister of the State of Bihar in the matter of the appointment of the Chief Secretary, on the retirement of Shri S.N. Singh. In my opinion, the files in their entirety cannot be considered to be the advice that had been tendered by the Ministers to the Governor, within the meaning of Article 163(3) of the Constitution. It must be presumed that advice had been given by the Ministers to the Governor for the appointment of Shri R.S. Mandal as Chief Secretary and Shri Basudeva Prasad can hardly contend that no such advice had been given. Moreover, I do not think that the Court will be justified in inquiring into the matter mentioned in paragraph 17 of the writ application, where it was stated that the Council of Ministers decided at a meeting held on 17th June 1970 that the Chief Minister be authorized to take a decision regarding the appointment of the Chief Secretary and grievance made in paragraph 36 to the effect that the Council of Ministers cannot delegate its power to another authority. The principle of joint responsibility of the Council of Ministers has been adverted to by their Lordships of the Supreme Court, in the recent decision of a *Sanjeevi Naidu v. State of Madras, reported in*[2] and on the principle laid down by the Supreme Court, it cannot be held, as has been argued by Shri Basudeva Prasad, that the Council of Ministers had illegally delegated their function of dealing with the question of appointment of the Chief Secretary to the Chief Minister. The meaning of delegation of power has also been considered by their Lordships of the Supreme Court, in the case of *State of Bihar v. Rani Sonabati Kumari, reported in*[3] and if it is assumed, as the petitioners have done in paragraph 17 of the writ application, that the question of appointment of the Chief Secretary had come up before the Council of Ministers, then the ultimate step taken in the matter must be held to have been the result of decision of the Council of Ministers. But, this

conclusion does not support the learned Advocate-General's argument that no portion of file No.I/A1-2020/70 can be looked into for any purpose whatsoever. Elaborate reference has been made by the learned counsel for the parties to the rules of executive business framed under Article 166(3) of the Constitution of India, as to the procedure to be adopted for posting of the Chief Secretary of the Government. How the matter has to be dealt with has been mentioned in the rules. Rule 8 reads as follows:-

> "Subject to the orders of the Chief Minister under Rule 12, all cases referred to in the Third Schedule to these rules shall be brought before the Council in accordance with the provisions of the rules contained in part II:
> Provided that no case in regard to which Finance Department is required to be consulted under Rule 10 shall, save in exceptional circumstances under the direction of the Chief Minister, be discussed by the Council unless the Finance Minister has had an opportunity for its consideration."

Item 29 of the Third Schedule deals with the proposals relating to transfers and posting of the Chief Secretary to the Government. If the contention raised by the learned Advocate-General is accepted, then, no court will be in a position to judge whether Rule 3(2-A) of the Indian Administrative Service (Pay) Rules 1954, has been complied with or not. Just as their Lordships of the Supreme Court stated in, AIR 1961 SC 221 that the process of making an order precedes and is different from the expression of it; so, in my opinion, it can be held in the present context, that the process of selecting a Chief Secretary by the method visualized by Rule 3(2-A) is different from the ultimate advice tendered by the Ministers to the Governor. Any document that deals with the process of selection of the Chief Secretary, keeping in view Rule 3(2-A) can be scrutinized by the Court as that will not be a question of enquiring into the advice tendered by the Ministers to the Governor; otherwise, in my opinion, Rule 3(2-A) may just as well be erased from the Pay Rules.

21. The learned Advocate-General went so far as to contend that everything that had been done by Shri Daroga Prasad Roy or the Council of Ministers in respect of the appointment of the Chief Secretary will be covered by the bar envisaged by Article 163(3) of the Constitution of India. Curiously enough, in this very context the counter-affidavit filed by the State of Bihar appended with it Annexures C and C(1), dated the 2nd November, 1970 and 9th November, 1970 respectively, to show that Shri Daroga Prasad Roy had made some attempt to obtain the services of an I.C.S. Officer Shri P.K.J. Menon, then posted as Adviser, Programme Administration, Planning Commission, at Delhi, for appointment as the Chief Secretary in Bihar. Annexure-C was a letter from Shri P.K.J. Menon to Shri Daroga Prasad Roy informing him that it would be difficult for him to leave Delhi to be appointed as Chief Secretary in Bihar. Annexure-C(1) was a letter from Shri Daroga Prasad Roy to Shrimati Indira Gandhi, mentioning that he would not press for the recall of Shri Menon for this appointment in Bihar. If the learned Advocate-General's contentions are valid, these two documents would also fall within the scope of the bar under Article 163(3) of the Constitution and the State Government have themselves brought these on the record to show that Rule 3(2-A) of the Indian Administrative Service (Pay) Rules, 1954, had been followed in considering the cases of all available officers of the Bihar cadre, even when they were on deputation elsewhere. Be that as it may it must also be stated that these documents cannot operate as an estoppel in raising the bar under the Constitution. But, for the

reasons given above, I am of the view, that when the Indian Administrative Service (Pay) Rules 1954, lays down a procedure to be followed and a grievance that the procedure has not been followed can be made the subject-matter of appeal, documentary evidence, if they exist, showing how the cases of the members of the service have been considered for the appointment of the Chief Secretary may be scrutinized by the Court, except those portions which will go to indicate the advice that had been tendered by the Ministers to the Governor in this respect. So far as I can find, there will be no bar in the Central Government calling for such papers in an appeal filed under The All India Service (Discipline and Appeal) Rules, 1969. In such circumstance we have taken into consideration the first five paragraphs at pages 1 and 2 of file No.I/A1-2020/70. These paragraphs are quoted below:-

> "The post of Chief Secretary has been vacant since the time when Shri S.N. Singh proceeded on leave preparatory to retirement. It is essential to have as Chief Secretary, an officer of proved merit and quality, whose integrity and character can provide proper leadership to the services and can command the respect and confidence of Government Servants as well as non-officials.

2. Keeping in view the special requirements of this important assignment, I had thought of getting back the services of some senior officers of the ICS/IAS cadre of Bihar, who are now on deputation to the Central Government. Unfortunately, none of the officers suitable and available for the post are willing to return to Bihar. As such, the selection has to be made from amongst the officers serving in Bihar.

3. The post of Chief Secretary is a "selection post" and appointment to this post has to be chiefly on the basis of suitability and not merely on the basis of seniority alone, even though the post carries higher pay than others. This has been the practice not only in other States, but also in Bihar, where there have been several occasions when the Chief Secretary has been junior to one or more Commissioners.

4. I have considered the cases of Officers of Commissioner's rank for this post. Some of the officers who might otherwise have been suitable for this assignment cannot be considered at the present stage as their conduct has been adversely commented upon by the Iyyer and Mudholkar Commissions of Enquiry, and the matter is still under examination.

5. I consider Shri Ram Sewak Mandal as the most suitable officer for being appointed as Chief Secretary, having regard to his excellent record of service, his experience in responsible and difficult assignments and the successful manner in which he has been carrying on the responsibilities of the post of Chief Secretary for the last several months."

22. On the wordings of the third paragraph of the affidavit filed by Shri Karpoori Thakur, the learned Advocate-General has also raised an objection to the production of the two files mentioned in the affidavit, under Section 123 of the Evidence Act. On the face of the affidavit, it does not appear that the objection taken by Shri Karpoori Thakur was really on the basis of Section 123 of the Evidence Act, but, in view of the contentions urged before us I propose to deal with the matter at this stage. If Rule 3(2-A) of the Administrative Service (Pay) Rules, 1954, has to be followed for the appointment of the Chief Secretary of the Government and it is admitted

on behalf of all the parties that this rule applied, then the appointment has to be made by selection on merit with due regard to seniority. The question is, if documentary evidence in the nature of unpublished official records exist, dealing with the selection of the Chief Secretary, can it be said that the evidence relates to "affairs of State", within the meaning of Section 123 of the Evidence Act? The scope of Sections 123 and 162 of the Evidence Act has been considered elaborately by their Lordships of the Supreme Court, in the case of *State of Punjab v. Sodhi Sukhdev Singh, reported in*[4] and in the case of *Amar Chand Butail v. Union of India, reported in*[5] The main conclusion of the earlier case is to be found in the judgment of Gajendragadkar J. (as he then was), in the following words:-

> "Thus our conclusion is that reading Sections 123 and 162 together the Court cannot hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in question. That is a matter for the authority concerned to decide; but the Court is competent, and indeed is bound, to hold a preliminary enquiry and determine the validity of the objections to its production, and that necessarily involves an enquiry into the question as to whether the evidence relates to an affair of State under Section 123 or not."

The Supreme Court stated, further, that in this enquiry the Court has to determine the character or class of the document, and if it comes to the conclusion that the document does not relate to affairs of State, it should reject the claim for privilege and direct its production. If the court comes to the conclusion that the document relates to affairs of State, it should leave it to the head of the department to decide whether he should permit its production or not. The Supreme Court repeated this conclusion in the second case and in both the cases the Supreme Court looked into certain disputed documentary evidence to find out whether they related to "affairs of State" or not. In the light of the principles laid down by the Supreme Court we have looked into the two files and the peon book brought on the record during the hearing of the case and specially into pages 1 and 2 of file No.I/A1-2020/70 mentioned in Shri Karpoori Thakur's affidavit, keeping in view the serious grievances made by high ranking administrative officers of the State, some of whom are the petitioners before us, to the effect that their cases for selection to the post of the Chief Secretary of the Govt. had not been considered on merit, in utter disregard of Rule 3(2-A) of the Pay Rules.

If the contentions of the State Government and of Shri Daroga Prasad Roy, then Chief Minister are that cases of all eligible officers were considered on merit, then documentary evidence, if any, showing the steps taken for the selection, can hardly be held to be documents relating to "affairs of State" which must be kept out of the purview of the Court and necessarily behind an impenetrable veil so far as the petitioners are concerned. One cannot lose sight of the fact that in para 19 of the counter-affidavit of the State, it has specifically been asserted that full effect was given to Rule 3(2-A) of the Pay Rules. As a matter of fact, the first five paragraphs of file No.I/A1-2020/70 deal with the selection of the Chief Secretary and in view of the Rule 3(2-A) of the Pay Rules this portion of the file can hardly be held to be a closed chapter, incorporating matters relating to "affairs of State" only I may quote from what Gajendragadkar J. (as he then was), stated in the first case reported in AIR 1961 SC 493, namely

> "Care has, however, to be taken to see that interests other than that of the public do not

> masquerade in the garb of public interest and take undue advantage of the provisions of Section 123."

In the 2nd case, reported in AIR 1964 SC 1658, Gajendragadkar C.J. speaking for the Court, stated thus:

> "In view of the fact that Section 123 confers wide powers on the head of the department, this court took the precaution of sounding a warning that the heads of departments should act with scrupulous care in exercising their right under Section 123 and should never claim privilege only or even mainly on the ground that the disclosure of the documents in question may defeat the defence raised by the State. Considerations which are relevant in claiming privilege on the ground that the affairs of State may be prejudiced by disclosure must always be distinguished from considerations of expediency which may persuade the head of the department to raise a plea of privilege on the ground that if the document is produced, the document will defeat the defence made by the State. That is one important aspect of this problem which has been decided by this court in the case cited above."

(Meaning the case reported in AIR 1961 SC 493.)

In the Instant case, on the face of persistent complaint that the action of Shri Daroga Prasad Roy was tainted with mala fides, that the selection of Shri R.S. Mandal was made on the only ground that he was a member of the backward Class, I should have thought that concrete evidence, if any showing that the case of all eligible officers had been considered should have been voluntarily produced before the Court. I have mentioned earlier that the State has produced Annexures C and C(1) to support its case that the selection had been made properly, after considering the cases of all eligible officers. Apart from this, an objection taken under Section 123 of the Evidence Act can be rejected in the instant case on another ground, dealt with by the Supreme Court in the case reported in AIR 1961 SC 493. In the language of Gajendragadkar J. (as he then was), nothing has been said by Shri Karpoori Thakur in his affidavit to the effect that having considered the two files mentioned therein he was satisfied that their disclosure would lead to public injury. Moreover, in the language of the Supreme Court, in the same case, Shri Karpoori Thakur's affidavit in this case does not indicate, within permissible limits, the reason why it is apprehended that the disclosure of any portion of the two files would lead to injury to public interest. All that Shri Karpoori Thakur has stated in this connection is that, as a matter of principle, he was of the view that the production of "such documents" would not be in the interest of the State. This reminds me of what Gajendragadkar J. (as he then was) stated in this decision that

> "scrupulous care must be taken to avoid making a claim for such a privilege on the ground that the disclosure of the documentary may defeat the defence raised by the State."

and it appears to me that the objection taken to the production of the two relevant files in their entirety, in the words of Shri Karpoori Thakur incorporated in the third paragraph of his affidavit,

can very well lead to the suspicion that if privilege was claimed under Section 123 of the Evidence Act at all, it was claimed on the ground that the disclosure may go against the defense taken in the writ case. These were the reasons which had weighed with us for passing our order, dated the 12th May, 1971, quoted above in paragraph 20. As a matter of academic interest, I would like to refer to another aspect of a matter elaborately dealt with by Gajendragadkar J. (as he then was), in the case reported in AIR 1961 SC 493. On the question as to whether the courts can enquire into the possible injury to public interest resulting from disclosure of certain documents, his Lordship dealt with the case of *Duncan v. Cammell Laird and Co. Ltd., reported in*[6] elaborately, showing how one aspect of Viscount Simon's judgment had been seriously challenged before the House of Lords in the case of *Glasgow Corporation v. Central Land Board, reported in*[7] referring to Duncan's case, his Lordship has stated at one place that although Duncan's case has been followed by the English Courts, sometimes the learned Judges have expressed a sense of dissatisfaction when they are called upon to decide an individual dispute in the absence of relevant and material documents. In a very recent decision of the *House of Lords, Conway v. Rimmer, reported in*[8] what Gajendragadkar J. stated in 1960 in the case reported in AIR 1961 SC 493, was repeated by Lord Reid in the following words:-

> "Secondly, events have proved that the rules supposed to have been laid down in Duncan's case, 1942 A.C. 624, is far from satisfactory. In the large number of cases in England and elsewhere which have been cited in argument much dissatisfaction has been expressed and I have not observed even one expression of whole hearted approval."

The relevant portion of the placitum of Conway's case, 1968-2 WLR 998 is quoted below:-

> "When there is a clash between the public interest (1) that harm should not be done to the nation or the public service by the disclosure of certain documents and (2) that the administration of justice should not be frustrated by the withholding of them, their production will not be ordered if the possible injury to the nation or public service is so grave that no other interest should be allowed to prevail over it, but where the possible injury is substantially less, the Court must balance against each other the two public interests involved. When the Minister's certificate suggests that the documents belongs to a class which ought to be withheld then, unless his reasons are of a kind that judicial experience is not competent to weigh, the proper test is whether the withholding of a document of that particular class is really necessary for the functioning of the public service. If on balance, considering the likely importance of the document in the case before it, the court, considers that it should probably be produced, it should generally examine the document before ordering the production.

In the present case it was improbable that any harm would be done to the police service by the disclosure of the documents in question, which might prove vital to the litigation." and the contrary dicta of Lord Simon L.C. in Duncan's case, 1942 AC 624 has been overruled. Clearly a departure has now been made in the English Courts on the question of the power of the Courts to look into evidence when privilege of non-disclosure is claimed on the ground that disclosure will be injurious to public interest. However, so far as courts in India are concerned the matter is

governed by statutory law of evidence and unless the Supreme Court of India holds otherwise, the view expressed by it in the case, reported in AIR 1961 SC 493 must be the guiding factor for the High Courts.

23. Now I shall consider the principal point urged in the case, based on Rule 3(2-A) of the Pay Rules, quoted in para. 11 of this judgment. The topic can be divided into two parts, one dealing with the question as to how the case of Shri R.S. Mandal was considered and the other with the question as to whether the cases of the petitioners were considered or not. On the first topic much has been made by Shri Basudeva Prasad appearing for the petitioners on the point that a test of suitability has been applied on the question of the appointment of Shri Mandal as the Chief Secretary even if the post is considered to be a selection post. According to the learned Counsel, the word "suitable" or "suitability" is not to be found in Rule 3(2-A) under which merit alone has to be considered with due regard to seniority. Learned Counsel has argued that in more than one place in the Indian Administrative Service (Appointment and Promotion) Regulation, 1955, the words "merit" and "suitability" have been used, whereas, the word "suitability" does not find place in Rule 3(2-A) of the Pay Rules. Similarly, our attention has been drawn to the Indian Administrative Service (Recruitment) Rules, 1954, where the "suitable" has been used in some context. On these materials, amongst others it has been contended that whoever noted the five paragraphs, extracted from file No.I/A1-2020/70, went on a wrong track altogether by considering the question of suitability. Reference has also been made to paragraph 10 of the counter-affidavit filed by Shri Daroga Prasad Roy, where the expression "merit and suitability" has been used. According to the learned counsel for the petitioner, merit, in the instant case, may connote competence, efficiency and experience, as has been pointed out by their Lordships of the Supreme Court in the case of *Sant Ram Sharma v. State of Rajasthan, reported in*[9] but in dealing with the officers in the same service for promotion to a higher grade, no question of suitability can arise. According to Shri Basudeva Prasad, in the notes dealing with the appointment of the Chief Secretary, a political consideration of suitability has been brought in and this is quite a foreign consideration for taking action under Rule 3(2-A) of the Pay Rules. It is argued that the words "merit" and "suitability" must have different connotation, as in Sant Ram Sharma's case, AIR 1967 SC 1910 their Lordships of the Supreme Court have used the expression "suitability" in the case of *Dr. T.C Pillai v. The Indian Institute of Technology, Guindy, Madras*[10] I do not think, that there is any validity in this argument of Shri Basudeva Prasad. It is difficult to hold that the case of Shri R.S. Mandal was considered only on such a consideration as political suitability, as has been argued. It is clear, that the word "suitable" or "suitability" has been used in the notes extracted from file No.I/A1-2020/70 in the sense of suitability on merit. I do not think, that the arguments advanced by the learned counsel, on the difference between "merit" and "suitability", based on the two decisions of the Supreme Court of India, mentioned above, is quite valid in the facts and circumstances of the instant case. From the quotation from paragraph 11 of Shri Daroga Prasad Roy's counter-affidavit it appears that his case is that Shri R.S. Mandal was selected by the Government on merit with due regard to seniority, as he was found to be most suitable and this case may very well be interpreted to mean that Shri Mandal was selected on sheer merit taking into consideration his standing vis-a-vis the eligible officers senior to him. In any case I am of the view that in the appointment of the Chief Secretary of the Government, the Government may very well consider the suitability of an eligible officer also, if the question of merit of a particular officer, as well as the merit of his seniors, in the strict sense of the term, is not kept out of consideration. This is amply borne out by the judgment of the Supreme Court in Civil Appeal No.477 of 1970, D/d. 15-9-1970 : (reported in AIR 1971 SC 1318), a copy of

which has been given as Annexure-7. In Dr. Jai Narain Mishra's case Civil Appeal No.477 of 1970, D/d. 15-9-1970 : (reported in AIR 1971 SC 1318) the question was appointment of the Director of Agriculture in this State and in due course Dr. Jai Narain Mishra was recommended for appointment by the Public Service Commission. The aggrieved party had moved this Court in a writ application which had succeeded. The Supreme Court has stated in its judgment that the post of the Director of Agriculture being a selection post, it was for the State Government to select such officer as it considered as most suitable. In more than one place their Lordships of the Supreme Court have used the word "suitability" for the appointment in the selection post, holding that the selection of the post of Director of Agriculture (An ex-cadre post) was to be made solely on the basis of merit. Therefore, although Rule 3(2-A) of the Pay Rules has not used the word "suitable" or "suitability", suitability to a particular selection grade post is inherent in the selection on merit. Of Course, if in the instant case Sri R.S. Mandal has been selected only on the ground of political expediency, the matter might have been different. But, paragraph 5 of the extract of file No.I/A1-2020/70 has referred to his record of service, his experience, in responsible and difficult assignments and, therefore, it cannot be held that the merit of Sri Mandal had never come in the picture and only suitability on political consideration was the sole criterion for his selection. In this connection, I would like to dispose of the contention raised to the effect that Sri Mandal had been appointed solely on the consideration of caste or on the ground that both he and Sri Daroga Prasad Roy were members of the backward class. I do not think that there is any substance at all in this contention. Nothing has been brought on record to prove any mala fides of Sri Daroga Prasad Roy in selecting Sri Mandal as the Chief Secretary of the Government. Sri Daroga Prasad Roy has categorically denied that he had made any discrimination against the petitioners and in favor of Sri Mandal on the ground of caste and there is no reason to hold to the contrary. The argument made by Sri Basudeva Prasad to the effect that Sri Daroga Prasad Roy had selected Sri Mandal in a mala fide manner must be firmly rejected. According to Sri Basudeva Prasad, the case of Sri R.S. Mandal was really not considered on merit, because if that was done, it would have been discovered that in November 1965, Sri R.S. Mandal has been superseded, while his junior Sri S.K. Chakravarti, was promoted to the post of Kosi Development Commissioner in the super-time scale in Commissioner's rank. This allegation has been refuted in the counter-affidavit of the State (paragraph 15), where it has been mentioned that soon after the appointment of Sri S.K. Chakravarti as Kosi Area Development Commissioner Sri R.S. Mandal was appointed as Additional Food Commissioner-Cum-Secretary, Supply and Commerce Department. Then, according to Sri Basudeva Prasad, if the merit or otherwise of Sri Mandal had really been considered, it would have been found that Sri N.P. Mathur had been appointed as the Development Commissioner, Bihar, in June, 1970 and at that time Sri Mandal had not been thought fit for this appointment. This allegation has also been controverted in paragraph 15 of the counter-affidavit of the State Government, where it has been stated that when Sri N.P. Mathur was appointed as Development Commissioner, Bihar, Sri Mandal was functioning as additional Chief Secretary and his services were considered essential in that post and he could not be released in public interest. These assertions made on behalf of the State cannot be lightly brushed aside for holding that the case of Sri Mandal had not really been considered on merit at the time of his appointment as the Chief Secretary of the Government of Bihar. Then, it has been seriously argued by Sri Basudeva Prasad that the cases of officers senior to Sri R.S. Mandal were really not considered for selection as Chief Secretary, although some reference to officers of the Commissioner's rank has been made in paragraph 4 of the extract of file No.I/A1-2020/70. According to the learned counsel, it may be that some officers, whose conduct has been adversely commented upon by the Ayyar and Mudholkar

Commissions of Enquiry, were not thought fit for this post but the petitioners were not involved in the enquiry and so their cases were not really considered. It is not possible to scrutinise the relevant extract under consideration with a tooth-comb. No one had expected that the notes will be the subject-matter of comment in a court of law and it is not expected that in such notes all details will be available as are expected in a well-considered judgment deciding the rights of parties. I am of the opinion, that, a broad and overall picture is all that is necessary to be taken, if this extract is admissible in evidence and it is difficult to hold on the argument advanced by Sri Basudeva Prasad, that, the cases of his clients were not considered at all for the selection in question. Much has again been made out by the learned counsel from paragraph 4 of the extract, when he argued that even if officers of the Commissioner's rank were considered, the case of Sri N.P. Mathur could not have been considered, as he was then holding a higher post of the Development Commissioner-cum-Principal Secretary to the Government of Bihar. It is contended that the post of the Development Commissioner, Bihar, was higher in rank and in pay to the super-time scale of Divisional Commissioners and, therefore, Sri Mathur's case could not have been considered. In my opinion, this argument is also not acceptable. In paragraph 8 of the writ application itself it has been mentioned that Sri Mathur was promoted to the rank of Divisional Commissioner in the super-time scale of pay of; 2,500-125/2-2,750/- on 5th June, 1962 and since 4th June, 1970 he was posted as Development Commissioner to the Government of Bihar, drawing Rs.2,750 (fixed) sanctioned for the post. Therefore, it is difficult to hold that the authority or authorities considering the cases of eligible officers for the selection to the post of the Chief Secretary should have considered the case of Sri N.P. Mathur separately on the footing that he was holding a post higher than that of a Divisional Commissioner. As a matter of fact, the petitioners have given one single gradation list as Annexure-1, where the names of all the petitioners and that of Sri R S. Mandal, amongst others, find place. It is not possible to hold that if officers of the Commissioner's rank were considered for selection to the Chief Secretary's post, the case of Sri Mathur was deliberately or inadvertently ignored. The relevant portion of the peon book shows that a large number of character rolls were sent to the Personal Assistant to the Special Secretary to the then Chief Minister, including those of all the present petitioners on 12th November, 1970, which were duly returned on 26th November. Then, it has been contended by Sri Basudeva Prasad that paragraph 2 of the extract of file No.I/A1-2020/70, where it was mentioned that none of the senior officers of the I.C.S./I.A.S. Cadre of Bihar on deputation were willing to return to Bihar, does not represent the true state of affairs, inasmuch as Exhibits C and C(1), mentioned above, do not support this version. According to the learned counsel, the letter, dated the 2nd November 1970 from Sri P.K.J. Menon was obtained from him for some ulterior purpose, only to show that some officers on deputation had been contacted. Apart from the fact, that, if the cases of the present petitioners had been considered for the appointment of the post of the Chief Secretary, when the case of Sri R.S. Mandal was considered, they are likely to fail in this writ case, the petitioners can hardly contend that the cases of some other officers senior to Sri R.S. Mandal were not considered, as a champion for their cause. The argument in this context, based on Annexure-C series cannot be accepted as valid. Sri Daroga Prasad Roy has stated in his counter-affidavit that he had made efforts by correspondence and personal contact to obtain a suitable officer from those serving on deputation under the Government of India, but he was not successful. It is not possible to reject this stand outright. Sri. Daroga Prasad Roy has reiterated his stand in his affidavit in reply, filed on the 27th March, 1971, where he has stated that he had, in the course of personal contact discussed the names of Sri T.P. Singh (junior) and Sri B.D. Pande, apart from contacting Sri P.K.J. Menon, for the purpose of selection of the post of Chief Secretary and there is no reason to disbelieve this assertion. I must repeat here, that, it was not

expected that when Sri Daroga Prasad Roy was making attempts to obtain the services of a suitable officer from Delhi for appointment as the Chief Secretary in Bihar, he would prepare his papers in such a way that they would stand scrutiny in a court of law, if a contravention of Rule 3(2-A) was alleged. Moreover, it has been rightly submitted by the learned Advocate-General that the selection of a Chief Secretary did not involve any quasi-judicial procedure, so that this court may be called upon to scrutinise the evidence to find out whether Rule 3(2-A) of the Pay Rules had strictly been followed or not, by considering the cases of all officers senior to Sri R.S. Mandal. I am of the opinion that at the stage at which the question of appointment of the Chief Secretary of the Government of Bihar was considered, it was a matter of exercise of administrative power of the Government and exercise of this writ application only on well-known principles established by the courts (sic). The allegations made by the petitioners that Sri Daroga Prasad Roy had acted in a mala fide manner, on consideration of caste and that he had selected Sri Mandal because both of them had belonged to the backward class have failed, for the reasons given above and I do not think that there is much substance in the contention of Sri Basudeva Prasad, to quote his language, that, in selecting Sri Mandal as Chief Secretary, things which ought not to have been taken into consideration were taken into consideration and things which ought to have been taken into consideration were not taken into consideration. An argument has also been advanced by Sri Basudeva Prasad to the effect that paragraph 5 of the extract of file No.I/A1-2020/70 shows that Sri R.S. Mandal's experience in wrongfully acting as the Chief Secretary was also taken into consideration for holding that he was a suitable officer and this was an unfair advantage given to Sri Mandal. How Sri Mandal had worked as the Chief Secretary from 23rd June, 1970 to 25th November, 1970 will be considered in due course, as the notification contained in Annexure-10 has also been challenged, but on a broad view being taken of the contents of the extract of the file under consideration, I do not think that any substantial injustice has been done to the other officers, if the working of Sri Mandal as Chief Secretary for a few months had also been taken into consideration for his ultimate selection on merit. It seems that Sri Mandal had in fact worked as Chief Secretary before he had actually been appointed as such and consideration of this aspect of his service cannot be held to vitiate his selection altogether. It is difficult to lay down any hard and fast rule as to what may be considered for weighing the merits of the officers for a particular post, if no substantial advantage to any officer or no substantial dis-advantage to others can be conclusively proved.

24. In interpreting Rule 3(2-A) of the Pay Rules Sri Basudeva Prasad has referred to paragraph 8 of the counter-affidavit sworn by Sri N.D.J. Rao and filed on 19th February 1971 and has submitted that if the post of Chief Secretary has to be filled up by selecting an officer from the super-time scale of the I.A.S. Cadre, the Government must choose by seniority, unless a senior officer is found unfit. That is to say, the case of the senior-most officer must be taken first and if no objection is found to his appointment, he must be appointed without considering the cases of his junior officers. In my opinion, these contentions are not at all valid. It is agreed on all hands that the post of the Chief Secretary is a selection post from the officers in the super-time scale of pay and it is also agreed that Rule 3(2-A) of the Pay Rules applies. In those circumstances, it is clear that selection to the post of Chief Secretary will depend on merit, irrespective of seniority. In my opinion, the principle laid down by their Lordships of the Supreme Court in Sant Ram Sharma's case, (AIR 1967 SC 1910) makes this position clear, it may be noticed that Annexure-A, dated the 22nd July 1968 was an instruction given by the Government of India in the Ministry of Home Affairs to the Chief Secretaries of all State Governments on the criteria for promotion to selection posts, by referring to Sant Ram Sharma's case and stating that appointments to selection

posts should be made primarily on consideration of merit and seniority being regarded where other qualifications are practically equal. It may also be noticed that Rule 3(2-A) of the Pay Rules was inserted on 21st November, 1968. Clearly, this date gives a clue to the method of interpretation of Rule 3(2-A). If the selecting authority has to move down the gradation list, in the manner suggested by Sri Basudeva Prasad, the whole principle of selection of eligible officers on merit will be nullified. In my opinion, all that the court hearing the writ application should do is to see whether the cases of all eligible officers, senior to a particular selected officer, were considered or were omitted for consideration. What particular weight was given to the merit of a selected officer in comparison with the merit and seniority of a senior officer, may be the subject-matter of consideration on appeal under The All India Services (Discipline and Appeal) Rules, 1969, and I say this tentatively, but a writ court ought not to scrutinise such matters, as if the selection of a particular officer is being questioned in the appellate forum. As a matter of fact, the principle which Sri Basudeva Prasad relied upon in this context is seniority-cum-merit rule, whereas, in the instant case, Rule 3(2-A) must be interpreted in the light in which their Lordships of the Supreme Court have laid down the principle in Sant Ram Sharma's case (AIR 1967 SC 1910) and in Dr. Jai Narain's case, referred to above Civil Appeal No.477 of 1970, D/d. 15-9-1971 : (reported in AIR 1971 SC 1318). If the post is considered to be a selection post, then the question of seniority comes after merit. That is clear from Rule 3(2-A) itself. Of course, under that rule, the question of seniority cannot be lost sight of altogether. As a matter of fact, Rule 3 of the Indian Administrative Service (Pay) Rules, 1954, makes it clear that going up to a Selection Grade Post, if I may put it in this way, is not a promotion but an appointment to the Selection Grade. This is clear from Rule 3(2) and Rule 3(2-A) of the Pay Rules. This aspect of the matter was also clarified by the Supreme Court in Dr. Jai Narain Mishra's case, although that case dealt with the appointment to an ex-cadre post.

25. I shall now pass on to the petitioners' case challenging the legality of the retrospective appointment of Sri R.S. Mandal as Chief Secretary from 23rd June, 1970 to 25th November, 1970, by the notification incorporated in Annexure-10, dated the 28th December, 1970. It may be stated, in the first instance, that, if the petitioner's main case challenging the appointment of Sri Mandal as Chief Secretary by the notification, dated the 26th November, 1970, incorporated in Annexure-2, fails, they can hardly complain of this matter for obtaining any relief from this Court. However, as the matter has been argued in full, I would like to dispose of this point also. The facts and circumstances of the case show that Sri R.S. Mandal had, in fact, performed certain duties, statutory or otherwise, which only a regular Chief Secretary to the Government could have performed. What Sri R.S. Mandal had done during the period in question has been given in detail in the counter-affidavit filed on behalf of the State on 29th March 1971. The relevant portion is quoted below:

> "The fact is that the State Government put this respondent in full charge of the duties of the post of Chief Secretary, in addition to his own duties which he, in fact, performed all through the months to the full knowledge of the Council of Ministers and all others concerned. In that capacity, he prepared the agenda for the meetings of the Council of Ministers, attended all the meetings, recorded the decisions, communicated them to the departments concerned and obtained compliance reports. There was therefore, no element of hide or seek or any mala fides involved in it and, in fact, the clear intention and the decision of the State Government were fully implemented and respondent No. 4 made

> sustained extra and strenuous efforts to perform all the duties and functions of the two posts.

It is submitted further in that connection that for the purpose of the constitution of the Selection Committee under regulation 3(1) of the Indian Forest Service (Initial Recruitment) Regulations, 1966, for selection of officers for promotion to the Personnel Department of the Government of India, in their order No.3/1770/AIS (iv), dated the 26th October, 1970 (Annexure-14 to the affidavit under reply) constituted the Selection Committee in which Respondent No.4 was formally described as the Chief Secretary to the Government of Bihar." Sri Daroga Prasad Roy, in his counter-affidavit, has described this state of affairs thus:

> "That with regard to the allegations made in the subsequent petition praying for quashing of Annexure-10, I state that the insinuations contained in the said petition are uncalled for. Publication of the notification (Annexure-10) was in pursuance of the order made on 21-12-1970. The deponent further states that the notification became necessary to be issued to regularise the various acts and orders of Sri R.S. Mandal during the period commencing with 23rd June, 1970 till he was appointed as a Chief Secretary. It may be stated that some of those acts were of statutory nature and their validity would be questionable in the absence of due authority vested in the said Sri R.S. Mandal as Chief Secretary."

It appears that in these circumstances, the order incorporated in Annexure-10 was passed. Learned counsel for the parties have also referred to file No.I/P1-2098/70, mentioned in our order of the 12th May, 1971, for giving certain dates on which certain orders were passed, but I do not think it is necessary at all to refer to these matters, as other materials on record are sufficient for the consideration of this point. The facts not being in dispute, all that Sri Basudeva Prasad could urge in this context, is that the order incorporated in Annexure-10 shows that mala fides of Sri Daroga Prasad Roy, who was instrumental in the passing of the retrospective order, knowing that this writ application was pending in this court from the 18th December, 1970.
It is contended that the Government headed by Sri Daroga Prasad Roy fell under a vote of no-confidence on the 18th December, 1970 and the order giving retrospective appointment to Sri R.S. Mandal was clearly a mala fide order. I do not think that these contentions are valid. The very facts stated in the second application filed by the petitioners on the 4th January, 1971, which has now become part of the original writ application, show that nothing out of the way had been done. It appears that the new Ministry headed by Sri Karpoori Thakur was sworn in on the 22nd December, 1970 and the order incorporated in Annexure-10 had been passed on the 21st December, when the old Ministry was functioning as a care-taker Ministry. Therefore, in regularizing matters, Sri Daroga Prasad Roy must be taken to have acted in the regular course of business and not in "pretended exercise of power", as mentioned in the petitioners' second application. In an affidavit sworn by Sri N.P. Mathur and filed on the 26th February, 1971, many facts have been alleged in connection with the exercise by Sri Mandal of the functions of the Chief Secretary, before he had actually been so appointed and a contention has been raised that all such acts of Sri Mandal were illegal and invalid. But, this question is entirely foreign to the scope of the present writ application and if the conclusion is that the order incorporated in Annexure-10 was not vitiated by mala fides of Sri Daroga Prasad Roy or otherwise and it did

reflect on the manner of Sri Mandal's appointment as the Chief Secretary by Annexure-2, dated the 26th November, 1970, then nothing further need be said on the last contention.

26. On a consideration of all the points argued in this case, I am of the opinion that no relief can be given to the petitioners in this writ application. A point was urged during the course of the argument on behalf of both parties as to whether the petitioners were well-advised to file this writ application, or whether they should have gone in appeal under the appropriate provision of law. I do not think there was any bar in the petitioners filing the writ application, in view of the allegations made by them and in view of the prayers made by them, contending that their fundamental rights have been affected by non-compliance with Rule 3 (2-A) of the Pay Rules and by the appointment of Sri R.S. Mandal as Chief Secretary in an illegal and mala fide manner by the then Chief Minister of Bihar. I would like, however, to point out that when the petitioners and other high-ranking administrative officers of the State, belonging to the Indian Civil Service and Indian Administrative Service had complained of their alleged supersession to Sri Daroga Prasad Roy, as is apparent from Annexure-8, some positive action should have been taken by Sri Daroga Prasad Roy to look into the matter. It may be that even after reconsideration, the petitioners would not have obtained any relief from Sri Roy, but, they would have found that their grievances had been looked into. In the counter-affidavit filed by Sri Daroga Prasad Roy he has referred to a letter, dated the 12th December, 1970, which was then appended as Annexure-18/1 by the petitioners, which was addressed to Sri S.V. Sohoni, Additional Member, Board of Revenue, stating that in the interview granted by Sri Daroga Prasad Roy on the 30th November, 1970 it was understood that the aggrieved officers would file individual representations, which, when received, would be duly considered by the Government and that no representations having been filed, no action was being taken on the facts and circumstances mentioned in Annexure-8, the memorandum of the meeting or interview. It seems that this letter must have been one of the reasons for the petitioners to move this court, knowing that their grievances would not be considered by the State Government, if Sri Daroga Prasad Roy was at all inclined to reconsider the earlier appointment of Sri Mandal, it may have been more charitable to reconsider the matter without calling for individual representations, as all the grievances were apparently placed before him in the meeting of the 30th November, 1970. So, the petitioners cannot be blamed, if they moved this court for redress in the circumstances.

26-A. After a consideration of all the relevant points arising in the case, I am of the opinion that the writ application must fail and it is hereby dismissed. In the circumstances of the case, however, there will be no order for costs.

Untwalia, J.

27. I agree with my Lord the Chief Justice. I, however, proceed to discuss some of the points raised in the case in my separate, but concurring, judgment.

28. In the 17th paragraph of the writ petition, it is stated that the Council of Ministers decided at a meeting held on 17-6-1970 that the Chief Minister be authorized to take a decision in the matter of appointing an officer of the service to the vacant post of Chief Secretary, Bihar, it is further stated in the subsequent paragraphs that for over five months the Chief Minister did not take any decision in terms of the said resolution of the Council of Ministers, and all on a sudden the impugned notification dated 26-11-1970 (Annexure-2) was issued appointing the 4th respondent

to the post of Chief Secretary. Later on, he was appointed for the back period also. The attack on the appointment is on the following grounds:-

> (i) That under the Rules of Executive Business the appointment had to be made by the Council of Ministers. They had no right to authorize the Chief Minister to take a decision. Any decision taken by him resulting in the impugned appointment was illegal and ultra vires.
> (ii) That the appointment was made in violation of Rule 3(2-A) of the Indian Administrative Service (Pay) Rules, 1954 hereinafter called the Pay Rules.
> (iii) That the appointment was made mala fide in an arbitrary manner and without considering the cases of the petitioners.
> (iv) That the retrospective appointment of respondent No.4 for the back period is mala fide, illegal and void.

29. In the counter-affidavits filed by Shri Daroga Prasad Roy, the then Chief Minister, and on behalf of the State of Bihar, with reference to the allegations of the petitioners that the appointment was made by the Chief Minister alone on being authorized to do so by the Council of Ministers, a privilege is claimed under Article 163(3) of the Constitution and inability is pleaded to disclose the manner in which the advice was tendered to the Governor leading to the impugned appointment. On an oral prayer being made for production of the relevant files a Bench of this court presided over by my Lord the Chief Justice had made an order on 5-1-1971 that the relevant files connected with the appointment of respondent No.4 as the Chief Secretary to the Government of Bihar, Patna, should be sent to the Advocate-General for use in court, subject to any claim of privilege that may be made. On 3-2-1971 an affidavit sworn by the then Chief Minister Shri Karpoori Thakur was filed with reference to files 1 and 2 stating therein that they contain resolution, opinions or decisions of Ministers of the State of Bihar in the matter of appointment of Chief Secretary and the said documents constitutionally embody the advice given on behalf of the Council of Ministers to the Governor and is a matter which cannot be investigated by a court in view of Article 163(3). In paragraph 3 of this affidavit, it is stated:-

> ".....as a matter of principles, I consider that the production of such documents would not be in the interest of the State."

30. During the course of the hearing of this case, after considering elaborate arguments advanced on behalf of both sides, we had made the order directing the production of files 1 and 2; the peon book was also produced. In file No.1 which contains the decision leading to the issuance of the notification of appointment of the Chief Secretary, we directed disclosure of paragraphs 1 to 5 only of the said decision, and not the rest of it. The question is what is the extent and import of the inhibition contained in, or privilege claimed under, Article 163(3), and whether a privilege in this case could be justifiably claimed under Section 123 of the Evidence Act; if so, to what extent.

31. Although our Constitution is a written document, it has enshrined in many Articles by necessary implication something which is not law in the strict sense of the term but is "conventions of the constitution" as understood in England. This really creates difficulties in the

matter of interpretation of some of the Articles of the Constitution. Confining the discussion to chapter II of part VI of the Constitution, which deals with the State Executive, it would be noticed that under Article 154 the executive power of the State vests in the Governor and is to be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Under Section 49(1) of the Government of India Act, 1935, the executive authority of a province was exercised on behalf of his Majesty by the Governor. Under our Constitution although the Governor holds office during the pleasure of the President under Article 156(1), normally and generally the executive power is not exercised by him on behalf of the President. To all intents and purposes, in the governance of the State he is the fountain head of the executive power. But then Article 163(1) says-

> "There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion."

This embodies the British constitutional convention. The Council of Ministers has been expressly made collectively responsible to the Legislative Assembly of the State under clause (2) of Article 164. Clauses (a) and (b) of Article 167 speak about the duties of the Chief Minister as respects the furnishing of information to the Governor and under clause (c) the latter can require the Chief Minister to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council. Under Article 166 all executive actions of Government of a State are to be expressed to be taken in the name of the Governor. Orders made in the name of the Governor are to be authenticated in such manner as may be specified in rules to be made by the Governor. If so authenticated the validity of the order cannot be called in question on the ground that it is not an order made by the Governor. Clause (3) empowers the Governor to make rules for the more convenient transaction of the business of the Government of the State and for the allocation among Ministers of the said functions in so far as it is not business with respect to which the Governor is by or under this constitution required to act in his discretion.

32. In England many powers are conferred in terms of the statutes passed by the Parliament on individual Ministers. In India hardly it is so done. Here, apart from the exercise of the power by statutory body, corporation or the like whenever a power is to be exercised by the Government of a State, conferment of the power is either to the Governor or to the State Government, which expression, as defined in the General Clauses Act, is not different from the Governor. It would thus be seen that theoretically and strictly in terms of the law the executive power is exercised by the Governor but to all intents and purposes following the British convention the powers, as a matter of fact, are exercised by the Council of Ministers. Ministers individually or the Secretary of the Department, who all function as limbs of the Government. The argument on behalf of the petitioners that each one under the Rules of Business being authorized to perform a particular function performs it as a delegate of the Governor and he, in his turn, cannot further delegate his power to somebody else, is a whole misconception. It was pointed out by the Privy Council with reference to similar provisions of the Government of India Act, 1935 in *Emperor v. Sibnath Banerji*[11], that Ministers are officers subordinate to the Governor within the meaning of Section 49(1). Technically the same may be the position under our Constitution, although factually and really power vests in the Council of Ministers of which the Chief Minister is the head and he is

called the head of the Government, in any event, it is
wholly wrong to say that they are delegates of the Governor. In this connection reference may also be made to the two decisions of the Supreme Court in *Gullappalli Nageswararao v. State of Andhra Pradesh*[12], and (AIR 1970 SC 1102)-vide paragraph 8 in column 2 of page 1380 and paragraph 7 on page 1106 respectively.

33. Clause (3) of Article 163 is a very anomalous and difficult provision of our Constitution. It seems to have been copied in Article 74(1) from Section 10(4) of the Government of India Act and from Section 51(4) in Article 163(3). A constitutional head the Monarch in England, the President at the Centre or the Governor in a State in India cannot venture to act without or contrary to ministerial advice. But if it were to be that he has acted without any such advice or contrary to it, the courts of law have been prevented from enquiring into the matter. The proceeding of the Council of Ministers has always been treated a secret and privileged document. Courts have never compelled their disclosure. In India the position is anomalous and difficult because the order of the Governor expressed in his name in a large number of cases, almost in all except a few, will be actually not his but notionally is his and is supposed to be based upon the advice tendered by a Minister or Ministers. In such a situation, if a question arises that the order is not on any advice of a Minister or is contrary to such advice, an investigation in relation to this attack is barred under Article 163(3) of the Constitution. The order made and authenticated in the manner prescribed has got to be treated as an order of the Governor under Article 166(2) and the bar contained in Article 163(3) must be limited to the question just indicated above, namely, that the order is not based upon any advice or is not in accordance with it. The order is not amenable to attack on this limited ground in view of Article 163(3).

34. A long argument was advanced before us as to whether an order of the State Government duly authenticated and expressed in the name of the Governor, but if made in violation of the Rules of Executive Business, can be held to be ultra vires, void or illegal. Petitioners contended that it can be so, Learned Advocate-General for the State of Bihar and Mr. Kanhaiyalal Mishra, learned Counsel for respondent No.2 contended that although in none of the cases this point has been specifically canvassed and decided in the form it was argued here, it has got to be answered against the petitioners because Rules of Executive Business framed under Clause (3) of Article 166 are for the more convenient transaction of the functions of the Government and for the allocation among Ministers of the said Business. I do not propose to decide this larger question in this case as it is not necessary to do so. I may, however, indicate that if in any case a question arises as to the validity of an order made in violation of the Rules of Executive Business, which does not attract the limited bar as to the enquiry in any court imposed by clause (3) of Article 163, I am doubtful whether the bald contention put forward on behalf of the respondents will succeed. In this particular case, however, the violation alleged was only of one kind, later developed into two species. The alleged violation is squarely covered by the bar of Article 163(3).

35. Under Rule 8 of Part II cases referred to in the 3rd Schedule to the Rules of Executive Business had to be brought before the Council in accordance with the
provisions of the rules contained in part II. Item 29 of the 3rd Schedule speaks about proposals relating to transfers and postings of many categories of Government servants including the Chief Secretary. Under Rule 15 occurring in Part II a memorandum is to be prepared in cases dealing with appointments to service and posts which should state fully qualifications of each of the

candidates whose names are mentioned in the memorandum or in the copy of the letter from the State Public Service Commission attached thereto. In the petition the attack was that the decision as to the appointment of respondent No.4 to the post of Chief Secretary was not taken by the Council of Ministers. In their meeting held on the 17th June, 1970 they merely authorized the Chief Minister to take the decision., in violation of the Rules of Executive Business. Later on the point was further developed to say that no memorandum in accordance with Rule 15 was prepared and placed before the Council.

36. In my opinion, the question is to be answered against the petitioners. In what way the decision for advice was taken by the Council of Ministers whether by all of them sitting in a Council or by authorizing the Chief Minister to take the decision on their behalf is a matter which attracts the bar of enquiry under Article 163(3). What advice was tendered by the Council of Ministers or, as a matter of that, by the Chief Minister cannot be enquired into by this Court. These are political matters which could be agitated and corrected, if wrong, by the Council of Ministers, the Legislature or the Governor himself acting under Article 167(c). Courts are not concerned with going into the question as to advice, if any, tendered by the Ministers, if so, what, which necessarily includes the procedure of reaching the advice. I may also add that on the allegations made in the petition I find it difficult to hold that there was a violation of Rule 8 or Rule 15 or the result of the alleged infraction is nullification of the appointment. The proposal relating to the posting or appointment of a particular officer to the post of a Chief Secretary had to be brought before the Council of Ministers. Not necessarily it was incumbent upon them to take a final decision. It was well within their power to authorize the Chief Minister to take the decision. The principle of delegatus non potest delegare is not attracted. Under Rule 15 preparation and placing of a memorandum is not mandatory. Under the first part of the rule the Chief Minister can direct otherwise. In cases dealing with appointment to posts it is desirable that the memorandum should state fully the qualifications of each of the candidates but it is not obligatory to do so. No memorandum was called for and no such attack was made in the Writ Petition that the decision was taken without a memorandum.

37. In regard to the portion of the document which we permitted to be produced and disclosed, I am definitely of the opinion that there is no bar to enquiry as to the decision, under Article 163(3). It has been observed by Lord Thankerton in Sibnath Banerji's case, AIR 1945 PC 156 at page 162 (column 1) that-

> ".....the provisions of Chapter 2 of Part 3 of the Act of 1935 as to the Provincial Executive and its executive authority use the term 'executive' in the broader sense as including both a decision as to action and the carrying out of such decision."

The files directed to be produced and disclosed contain the decision as to action. The impugned order contained in Annexure-2 is carrying out of such decision. The legality of the decision will always be open to challenge except where it attracts the bar of enquiry under Article 163(3) or the decision is contained in a document in which can be claimed to be a privileged one under Section 123 of the Evidence Act. The two matters may sometimes overlap and it may sound anomalous to say that the decision is open to challenge but the question of advice cannot be enquired into. I, however, venture to draw a line, though subtle and thin yet real, between the two aspects of the matter. The bar of Article 162(3) must, in the context of our constitutional set up,

be held to be a very limited one. It cannot be allowed to make nugatory so many guarantees given to the citizens under our Constitution. The real object of the bar is not to permit the bringing before a court of law the minutes of the proceeding of the Council of Ministers.

38. Before dealing with the matter of privilege further, I may dispose of 2 or 3 grounds of objections made by Mr. Basudeva Prasad, learned counsel for the petitioners. He submitted that under Rule 7 of the Indian Administrative Service (Cadre) Rules, 1954 made under Section 3(1) of All India Service Act, 1951 (Central Act 1 of 1951) all appointments to the cadre posts have to be made in the case of State cadre by the State Government. The power so exercised by the State Government is not an executive power as the limit of the executive power prescribed under Article 162 is confined to the matters with respect to which the State Legislature has power to make laws. Since it has no power to make laws with regard to the Indian Administrative Service, the power of appointment exercised under Rule 7 of the I.A.S. (Cadre) Rules is not an executive power. The argument is wholly wrong. Learned counsel was not able to contend that the power of appointment was legislative or judicial and in the teeth of several decisions of the Supreme Court could not contend against the proposition that a power which is neither legislative nor judicial must be executive [vide *Jayantilal Amratlal v. F.N. Rana*[13]*,]*. That apart, it was rightly pointed out by the learned Advocate-General that the executive power of a State under Article 154(1) vests in the Governor irrespective of the source of the power. In Sibnath Banerji's case, (AIR 1945 PC 156) on a consideration of the identical provisions of the Government of India Act it was said at page 162 (column 2)-

> "Their Lordships construe sub-section (2) of Section 49 as providing an extensible limit and not a maximum limit, and the provisions of sub-section (2) of Section 124 as affording a means of such extension."

On reference to Article 258 of the Constitution it would be found that either the President or the law made by Parliament can confer powers or functions in State Government. Undoubtedly such a power, as the power under Rule 7 is, would be executive power within the meaning of Article 154(1).

39. Learned counsel for the petitioners further submitted that the petitioners approached this Court for quashing the impugned order of appointment of respondent No.4 to the post of Chief Secretary by a writ of certiorari and in such a proceeding

[13] AIR 1964 SC 648 (at page 655)

record has to be called up and the impugned order if bad, has to be quashed; Article 163(3) is not bar to the calling up of the record. In my opinion, the order of appointment is a purely executive order. The State Government was under no obligation to exercise the power of appointment in a quasi-judicial manner. Even assuming that the order is one which can be quashed by grant of a writ of certiorari, it would be quite wrong to say that in a proceeding for issuance of a writ of certiorari all the records must be brought and disclosed in the proceeding and no bar can be attracted under Article 163(3) or no privilege can be claimed under Section 123 of the Evidence Act. This contention must be rejected.

40. Learned Counsel then argued that when the challenge to the order was on the ground of arbitrariness and mala fides, bar of Article 163(3) could not be claimed. I shall be in a position to

deal with this aspect of the matter when I come to the attack on the order on the ground of mala fides. Suffice it to say here that there is no allegation of any kind of bad faith against the entire Council of Ministers. Whatever allegation has been made, which will be dealt with hereinafter, is against the then Chief Minister only. Allegations of mala fides may weaken the claim of privilege under Section 123 of the Evidence Act as I shall presently show. But I must make it clear that the bar under Article 163(3) within the very limited sphere I have interpreted it to be cannot be broken by mere allegations of mala fides or even by their proof aliunde.

41. In (AIR 1961 SC 493) a question arose as to the ambit of privilege under Section 123 of the Evidence Act, Gajendragadkar, J. as he then was, did not feel inclined to go to the extent the decision of the House of Lords had gone in, (1942 AC 624) and with reference to Section 162 of the Evidence Act, the law laid down in that case as observed in paragraph 10 of the judgment in (AIR 1964 SC 1968) was-

> ".....that though under Sections 123 and 162 of the Evidence Act the Court cannot hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in question, that matter being left for the authority concerned to decide, the court is competent to hold a preliminary enquiry and determine the validity of the objection to its production and that necessarily involves an enquiry into the question as to whether the document relates to affairs of State under Section 123."

It would be further found from the observations of Gajendragadkar, C.J., in Amar Chand's case, AIR 1964 SC 1658 that their Lordships went into the question as to whether the claim of privilege was rightly made and then at the end of paragraph 13 it was said-

> "Having seen all the documents produced before us, we were satisfied that the claim for privilege made by respondent No.2 was not justified at all and may even be characterized as not bona fide".

But then in the case of (AIR 1961 SC 493), it would be noticed from paragraph 42 at page 511 that three of the documents, the discovery of which the respondent claimed, were described as original orders passed by the Pepsu Cabinet on the three respective dates. Those documents were documents relating to the discussions that took place amongst the members of the Council of Ministers and the provisional conclusions reached by them in regard to the respondent's representation from time to time. The documents embodying the minutes of the meetings of the Council of Ministers and the advice which the Ministers gave to the Rajpramukh were held to be expressly saved by Article 163(3) of the Constitution, and it was said-

> ".....In the case of such advice no further question need to be considered."

42. Duncan's case, 1942 AC 624 along with other cases came for serious consideration of the House of Lords in [(1968) 2 WLR 998]. Lord Reid said in his speech at page 1005-

> "It is universally recognized that here there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public

> service by disclosure of certain documents, and there is the public interest that the administration of Justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done."

The view in Duncan's case, 1942 AC 624 was not fully approved. At pages 1013-1014 Lord Reid has said-

> "But in this field it is more than ever necessary that in a doubtful case the alleged public interest in concealment should be balanced against the public interest that the administration of justice should not be frustrated..... It cannot be said that there would be any constitutional impropriety in enabling the court to overrule a Minister's objection."

It was, however, observed at page 1015-

> "I do not doubt that there are certain classes of documents which ought not to be disclosed whatever their content may be. Virtually everyone agrees that Cabinet minutes and the like ought not to be disclosed until such time as they are only of historical interest."

Lord Morris of Borth-y-Gest in the opening paragraph of his speech at page 1017, in answer to the question posed whether the final decision as to the production in litigation of relevant documents is to rest with the courts or with the executive, said-

> "I have no doubt that the conclusion should be that the decision rests with the courts."

His Lordship was pleased to observe at page 1019-

> "A Court would always pay the greatest heed to a statement that production of a document was not in the public interest and in most cases would be likely to give effect to it. There are many matters upon which the executive will be likely to be best qualified to form a view. It will be easy for a court to recognize this and to give full weight to this consideration. The court, however, will be in a position of independence and will as a result often be better placed than a department to assess the weight of competing aspects of the public interest including those with which a particular department is not immediately concerned."

An important passage occurs at page 1032 to the following effect-

> "I am convinced that the courts, with the independence which is their strength, can safely be entrusted with the duty of weighing all aspects of public interests and of private interests and of giving protection where it is found to be due."

A distinction was made between claim of privilege as to a particular document having regard to the contents and the document belonging to a class which on the grounds of public interest must,

as a class, be withheld from production.

43. I wish the law in India could go to the extent the House of Lords has unanimously gone in Conway's case, 1968-2 WLR 998. But still there is a clear and authoritative decision of the Supreme Court to that extent, I think the Courts have power to examine the claim of privilege to the extent laid down by the Supreme Court in AIR 1961 SC 493. In the instant case, however, the claim of privilege in paragraph 3 of the affidavit of Shri Karpoori Thakur is in regard to the class of documents mentioned in the earlier paragraph. The claim is not couched in a language or sufficient facts have not been stated in the affidavit so as to uphold the claim of privilege within the ambit of the principles decided in the Supreme Court cases referred to above. The petitioners' contention is that their cases have not been considered while making the appointment to the post of Chief Secretary, and on the basis of class or caste consideration alone the appointment has been made in bad faith. In such a situation, relying upon the observations quoted from the speeches of the learned and noble Lords in Conway's case and to the extent they find support from the decision of Gajendragadkar, C.J., in Amar Chand's case, (AIR 1964 SC 1658) while ordering production and disclosure of the documents, we had unhesitatingly come to the conclusion that neither Article 163(3) nor Section 123 of the Evidence Act could shut completely the production and disclosure of the documents. In pursuance of our direction, the two files were produced and so was produced the peon book. File No.2 deals with the matter of retrospective appointment of respondent No.4 to the post of Chief Secretary. There was nothing more in it. In File No.1 were contained in paragraphs 1 and 5 excluding the portion which was not directed to be disclosed, the notings of the then Chief Minister leading to the decision of appointment of the 4th respondent to the post of Chief Secretary. It has been repeatedly held that no Government servant has a fundamental right to promotion to any higher post. But the matter of promotion is a matter relating to employment within the meaning of Article 16 of the Constitution, and giving equality of opportunity in matters of promotion means considering the cases of all eligible for promotion. If a citizen makes a grievance that such an equality of opportunity has been denied to him, it would be a travesty of justice ordinarily and generally to uphold the claim of privilege. Except in very exceptional circumstances which would clearly bring about injury to public interest, such a claim is not to be upheld. To add to it, allegations of mala fides will weaken the claim still further.

44. In *Lakshmishwar Prasad Sinha v. The State of Bihar*[14] by a Bench of this court of which I was a member it was held that the order amending "C.P.S.7 Rule" expressed and duly authenticated in the name of the Governor in view of Article 166(2) of the Constitution could not be challenged on the ground that it was not an order made on the advice of the Council of Ministers as required by the Rules of Executive Business. Although Article 163(3) was not referred to in that case, the effect of the judgment, reading the two provisions of the Constitution, namely, Articles 163(3) and 166(2), is the same. My Lord the Chief Justice in *Vidyassagar Singh v. Krishna Ballabha Sahay*[15], upheld the assertion of the Chief Minister in paragraph 7 of his counter-affidavit that he was not at liberty to reveal the proceedings of the Cabinet or the communication between him and the Cabinet and the Governor in relation to the nominations of opposite parties 3 to 7 as members of the Bihar Legislative Council with reference to Article 163(3) of the Constitution.

45. Learned Advocate-General, on the basis of the decisions in *Gangamoyi Debi v. Troiluckhya Nath Chowdhary*[16], *Jitendra Nath v. Manmohan*[17] and *Ishwarlal Girdhari Joshi v. State of*

Gujarat[18], vehemently argued that official acts must be presumed to have been performed duly and after due observance of the formalities required under the law. Mere allegation of the petitioners that their cases were not considered is not sufficient to rebut that presumption. The fact alleged could not be from their personal knowledge and could not be based upon any legal or valid information derived by them. In such a situation, learned Advocate-General submitted, the allegation must be thrown out without any further enquiry. In Ishwarlal's case, AIR 1968 SC 870 Hidayatullah, J., as he then was, has observed in paragraphs 9 and 10 at page 876 that the burden would be heavy in view of the presumption and the provisions of Article 166(2) to challenge the correctness of the order of the Governor. His Lordship observed that-

> ".....there is a strong presumption of regularity of official acts and added thereto is the prohibition contained in Article 166(2). Government was not called upon to answer the kind of affidavit which was filed with the petition because bare denial that Government had not formed an opinion could not raise an issue."

The prohibition contained in Article 166(2) is only to this extent that if the order is expressed and authenticated in the manner prescribed then there is an irrebuttable presumption that the order is of the Governor, and on what basis that order was made cannot be enquired into in view of the provision contained in Article 163(3). But, in my opinion, the presumption of regularity of official acts cannot be stretched to the extent we were asked to do by the learned Advocate-General. If it is to be presumed without any further material that cases of all eligible for appointment to the post of Chief Secretary including those of the petitioners were considered or that Rule 3(2-A) of the Pay Rules was complied with then no order of the Government can ever be
challenged on the ground of violation of any law or being violative of any Article of the Constitution. At the time an act is done, ordinarily and generally the person aggrieved is not supposed to be present and if the Government can be allowed to take shelter by stretching the law of presumption of regularity of official acts to the extent urged by the learned Advocate-General, it is plain that almost all actions of the Government will be beyond the pale of challenge. Even Article 32- the guaranteed right to move the Supreme Court for enforcement of the fundamental rights-or Article 226 which is also, inter alia, for that purpose will be rendered almost nugatory. The order will be the order of the Governor. What advice was tendered by the Minister cannot be enquired into by a court of law. There should be a strong presumption that the order was made by the State Government by observing all formalities of law and fulfilling all its requirements. No person outside the group which had a hand in taking the decision can challenge it with his personal knowledge or otherwise, as contended by the learned Advocate-General. To what a ridiculous extent the law of bar, privilege or presumption will be pushed is so apparent that I have no difficulty in rejecting it outright. In my opinion, when a petitioner makes out a prima facie case of commission of illegality in the official act, specially in relation to the fundamental rights, a court, in the context and set up of our constitutional machinery, must insist for production of materials for its satisfaction as to the legality of the official acts. Courts cannot shut their eyes to great injustice which may be brought about to the citizens and the society if the law were mechanically interpreted to be, as argued on behalf of the State Government. In the instant case the petitioners have made out a grievance that they and others who were senior to respondent No.4 by many many places have been superseded unjustifiably and illegally without consideration of their cases or in any event without proper consideration, as required under Rule

3(2-A) of the Pay Rules. Supersession of so many officers prima facie was sufficient to rebut the presumption of regularity in the official acts, specially when an act of bad faith was also alleged. In such a situation, the case could not be thrown out on the theory of presumption of regularity in official acts or on other grounds of privilege urged on behalf of the State Government. Justice glaringly required an enquiry into the matter, of course, within the limited range of the power of this court under Article 226 of the Constitution.

46. I may take up ground Nos.2 and 3 in relation to the attack on the order of appointment together. Sub-rule (2-A) was inserted in Rule 3 of the Pay Rules by Notification No.1/146/67-AIS(II)-A dated 21-11-1968. The history of the insertion of such a sub-rule, as it appears from the records in this case, is that after the decision of the Supreme Court in (AIR 1967 SC 1910), a letter dated 22nd July, 1968 was written by the Government of India to the State Governments, giving quotations from the decision of the Supreme Court in Sant Ram Sharma's case. It was stated at the end of the letter that-

> "..... having regard to the basic principle that these posts above the senior scale are selection posts, appointments to which should be made primarily on consideration of merit, seniority being regarded only where other qualifications are practically equal, and formulate appropriate procedures for selecting officers primarily on merit before appointment to such posts in the All India Service Cadre of the State."

The reaction of the various State Governments was invited. It's not known as to what was the reaction of any State Government. But then about 4 months later was inserted Rule 3(2-A) in the following terms-

> "Appointment to the Selection Grade and to posts carrying pay above the time scale of pay in the Indian Administrative Service shall be made by selection on merit with due regard to seniority."

It is to be noticed from Rule 3(2-A) of the Pay Rules that in the Indian Administrative Service there is a junior scale and senior scale. In the senior scale there is a time scale of pay and a selection grade. Rule 3(2-A) says that appointment to selection grade, that is, when an officer is promoted even in the senior scale from time scale to the selection grade, has to be by selection on merit, so also to a post carrying pay above the time scale. Under Rule 8 any member of the service appointed to hold a post specified in Schedule III which are selection posts shall, for so long as he holds that post, be entitled to draw the pay indicated for the post in the said Schedule. Personally speaking, I was inclined to take the view that the question of application of sub-rule (2-A) comes when an officer is appointed by promotion from selection grade to selection posts mentioned in Schedule III. But once a promotion is made to any post carrying super time scale in Schedule III then giving him the post of Chief Secretary or Member, Board of Revenue, or Development Commissioner and Principal Secretary, is not a further promotion, which strictly attracts the application of sub-rule (2-A). Appointments to those posts in Schedule III can be at the instance and convenience of the State Government even by interchangeability as it may suit it. But I do not stick to this view as it was conceded by all that appointment to the post of Chief Secretary from another selection post in Schedule III was a matter of further promotion, and it

did attract sub-rule (2-A). In Sant Ram's case, AIR 1967 SC 1910 Ramaswami, J., clearly pointed out that in the matter of appointment to selection posts the consideration "is to be based primarily on merit and not on seniority alone." The principle is that-

> "When the claims of officers to selection posts are under consideration, seniority should not be regarded except where the merit of the officers is judged to be equal and no other criterion is, therefore, available."

Interpreting sub-rule (2-A) in the light of the judgment of the Supreme Court, as reiterated in the letter which is annexure to the counter-affidavit of the State, I do not find any escape from the conclusion that the meaning of Rule 3(2-A) of the Pay Rules is that the selection for appointment to selection posts is to be on merit primarily and regard to seniority is due to be given only when merit is equal. In *Henry R. Towne v. Mark Eisner*[19], the celebrated Judge Mr. Justice Holmes has said-

> "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." (underlining mine).

Even on grammatical construction of the rule, the selection is on merit, and at the time of selection due regard to seniority is also to be given. There cannot be any mathematical formula to judge the merit vis-a-vis the seniority. An overall picture has to be taken and if, in the opinion of the appointing authority, a particular officer possesses merit superior to that of his seniors then irrespective of his position in the gradation list the selection for appointment has to fall on him. Of course, the phrase "with due regard to seniority" can only mean that seniority cannot be ignored. Merit being equal or balanced or not decisively in favor of a junior incumbent, selection has to be made in favor of a senior one.

47. The portion of the decision contained in File No.1 disclosed in this case would indicate that the then Chief Minister, respondent No.2, had considered the cases of officers of Commissioner's rank for this post, and having regard to the excellent record of service of respondent No.4 found him most suitable officer for appointment to the post of Chief Secretary. It is stated earlier in this decision that appointment to the post of Chief Secretary has to be chiefly on the basis of suitability and not merely on the basis of seniority alone. After all, the decision contained in File No.1 was not to be in the form of a judgment or a judicial decision it was an administrative decision. It may not have been couched in perfect language. But on the whole it does show compliance with the requirement of Rule 3(2-A) of the Pay Rules. The word 'suitability' or 'suitable' has been used in the order in the sense of merit. In the expression "merit and suitability" suitability is made explicit. In the use of the term 'merit' alone suitability is implicit. Suitability cannot mean suitability to a particular Government or the Chief Minister. Suitability must mean suitability to the post and the word 'merit' is comprehensive enough to embrace within its ambit 'suitability' also. An officer may have good educational and academic qualification but he may lack integrity and commonsense; surely he cannot be said to possess merit for the post. To adopt the phrase of Chief Justice B.P. Sinha in *The High Court, Calcutta, v. Amal Kumar Roy*[20], an officer may have more learning than wisdom, but then he cannot be said to be meritorious for a particular post. Tact, nature, commonsense, punctual habits, etc, about which only the appointing

authorities may have knowledge, in a particular officer undoubtedly will count in the assessment of the merit for appointment to the selection post. By hair-splitting argument it was pointed out by learned counsel for the petitioners that petitioners 2 to 5 were in the rank of Commissioners but petitioner No.1 was in a rank higher than that of Commissioner, only cases of officers of the rank of Commissioners were considered and so not of petitioner No.1. The argument does not appear to be sound and sustainable. The pay of an officer in the Commissioner's rank is Rs.2,500-125-2-2750 while Development Commissioner is in the fixed scale of Rs.2,750/-. There is not much difference either in the rank or in nomenclature of the various offices held by the petitioners. In view of the assertions in the counter-affidavits filed by respondent No.2 and on behalf of the State as also in view of the decision in writing contained in File No.1, I have also come to the conclusion that the cases of all the petitioners were considered and there was no denial of equality of opportunity to them in the matter of promotion and appointment to the post of the Chief Secretary. The appointment was neither arbitrary nor without considering the cases of the petitioners nor was it in violation of Rule 3(2-A) of the Pay Rules. I shall now proceed to consider the question of mala fides seriously urged and combated on behalf of the petitioners and the respondents
respectively.

48. What is meant by judicial review of administrative action on the ground of mala fides? What is the scope of such an enquiry? I have found in numerous cases a challenge to all sorts of governmental actions and orders on grounds of mala fides with vague, wild, certain, uncertain, true or false allegations, as they may be. The learned Professor S.A. de Smith in his book Judicial Review of Administrative Action, Second Edition, has pointed out at page 302 that there are several forms of abuse of discretion in exercise of the governmental powers, and these forms overlap to a very great extent and run into one another. Yet they are recognised as forming distinct legal categories, and in the majority of cases separate identification is not impossible. An order may be had because of its having been made in excess of power or abuse of power or wrong exercise of power in violation of law - exercise of power in bad faith for an ulterior motive or purpose. In other words, a dishonest exercise of power is commonly and generally characterised as exercise of power mala fide. If a power granted for one purpose is exercised for a different purpose, that power has not been validly exercised. But the exercise of power for a different purpose may not be necessarily in bad faith or dishonest. In such a situation, my view is that it cannot be attacked on the ground of mala fides although it is vulnerable on other principles of law. There may be a plurality of purposes in exercise of the power. If the dominant purpose is good and valid, the action cannot be struck down [vide para 8 of *P.V. Jagannath Rao v. State of Orissa*[21],]. But if the dominant purpose or motive was bad and dishonest for some ulterior reasons, the order will be struck down as having been made mala fide. It is a well-settled principle of law that a dishonest exercise of power - an order made in bad faith - is no exercise of power in the eye of law. Such an order is invalid and must be struck down by a court of law. Courts of law enforcing the rule of law cannot tolerate and allow to stand governmental actions or orders which are glaringly tainted with mala fides. Theoretically the principle is very sound and wholesome. But in application of the principle difficulties are insurmountable in a large number of cases. On mere suspicion that the order has been made mala fide, it cannot be struck down. To interfere with it on the ground of such an attack, very cogent reasons and crystal grounds are necessary. The facts must be proved by a person who wants to attack an executive order on the ground of mala fides to show that the irresistible conclusion is that the sole motive or purpose or in any event the dominant one was such as was neither legal nor honest. It is only

then that an order can be held to have been made mala fide and can be struck down as such. It is to be noticed that of late a practice has grown to attack all sorts of executive orders on vague grounds of mala fides. But it is to be pointed out that such attacks are made without appreciation of the true, legal position in this regard.

49. S.A. de Smith has said in his book at page 315-

> "The concept of bad faith eludes precise definition, but in relation to the exercise of statutory powers it may be said to comprise dishonesty (or fraud) and malice. A power is exercised fraudulently if its repository intends to achieve an object other than that for which he believes the power to have been
> conferred. His intention may be to promote another public interest or private interests. A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise."

I would do better to quote 2 earlier paragraphs also from pages 312 to 314 of the same book-

> "The difficulty of establishing that a public authority has used its powers for an improper purpose cannot be adequately explained by belaboring the substantive law of judicial review. As we have explained, the scope of review is flexible, and nowadays the courts are reluctant to accept ouster of their jurisdiction because of a subjectively worded statutory formula. The main difficulty is to establish a prima facie case of abuse of power. Proceedings may be instituted on the strength of material gleaned from the minutes or resolution of a local authority, official statements made at a public inquiry or elsewhere, newspaper reports, correspondence, private information or mere optimistic speculation. Occasionally the pursuit of an illicit purpose may be disclosed on the face of a formal written decision. The reasons underlying decisions taken within government departments have tended to be particularly opaque, but the publication of inspectors' reports, the extension of statutory duties to give reasons for decisions and the trend towards openness in procedure have allowed some rays of light to penetrate, and it may be that prospective litigants may obtain some further illumination from the investigations and reports of the Parliamentary Commissioner for Administration.

Once proceedings have begun, additional ammunition is sometimes provided in the form of admissions in the pleadings, speeches by counsel, affidavits and oral evidence. But an authority that has intended to achieve an ulterior object will seldom be so forthcoming; and the readiness with which Crown privilege has been asserted for official documents has made it very difficult to probe into the motives of officials acting on behalf of Ministers. Moreover the burden of proving abuse of power is not lightly discharged, especially if bad faith is alleged. The absence of a general duty to give reasons for decisions, the fact that lack or inadequacy of reasons (if there is no express duty to give them) is not a clearly established and distinct head of judicial review in English law, the hesitancy of the courts to draw adverse inferences from the inadequacy of the reasons preferred and the inability of the courts to resort to effective inquisitorial procedures for

getting at the facts are also significant handicaps. However, if a prima facie case of abuse of power by a public authority has been established, the failure of that authority to adduce any evidence in reply from which it can reasonably be inferred that the avowed purposes had in fact been pursued may lead a court to the conclusion that they have not been genuinely pursued. It is also open to a court to deduce the true intentions of the authority from the practical consequences that flow, or may reasonably be expected to flow from its conduct but the effect of conduct does not necessarily indicate its cause or quality."

50. In *Errington v. Metropolitan District Rly., Co*[22]. Sir George Jessel, Master of the Rolls, has said at page 571 how one can show want of *bona fides* in regard to the action of a company acquiring certain property. His Lordship has said-

> "You may show it by proving that the lands are wanted for some collateral purpose as a fact, or you may show it by proving that the alleged purpose is so absurd, under the circumstances, that it cannot possibly be bona fide."

51. In *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*[23] Lord Greene, Master of the Rolls, has said at page 228-

> "The courts must always, I think, remember this: first, we are dealing with not a judicial act, but an executive act; secondly, the conditions which, under the exercise of that executive act, may be imposed are in terms, so far as language goes, but within the discretion of the local authority without limitation .....

What, then, is the power of the courts? They can only interfere with an act of executive authority if it be shown who assert that the local authority has contravened the law to establish that proposition".

That case was dealing with the alleged violation of the law by the local authority, Minister of Town Planning, in granting licence for Sunday performance on certain conditions. It has been further said at page 230 that-

> ".....his proposition that the decision of the local authority can be upset if it is proved to be unreasonable, really meant that it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to."

In *Westminster Bank Ltd. v. Minister of Housing and Local Govt*[24]. Lord Reid in his speech at page 652 has criticised the use of the word 'unreasonable' in the above decision. His Lordship has said-

> "The word 'unreasonable' as there used requires, I think, a little expansion. The decision of any authority can be attacked on the ground that it is in excess of its powers or on the ground that it is an abuse of its powers. The word 'unreasonable' is not at all an apt description of action in excess of power, and it is not a very satisfactory description of

action in abuse of power. So in the chapter of the law the word has come to acquire a rather artificial meaning."

52. Lord Radcliffe in his speech in the case of *Smith v. East Elloe Rural District Council*[25], has said-

> "Mala fides is a phrase often used in relation to the exercise of statutory powers. It has never been precisely defined as its effects have happily remained mainly in the region of hypothetical cases. It covers fraud or corruption. As the respondents have moved before the bad faith has been particularized, one must assume the worst.

It has been said that bad faith is an example of ultra vires, and observations to this effect are relied on by the respondents in support of their submission that the words 'not empowered to be granted' in paragraph 15 of Part IV of Schedule I to the Act cover cases where fraud or corruption is relied on " Referring to a passage of Warrington, L.J. in *Short v. Poole Corporation*[26], the learned and noble Lord observed further-

> "This way of describing the effect of bad faith should not be used to blur the distinction between an ultra vires act done *bona fide* and an act on the face of it regular but which will be held to be null and void if mala fides is discovered and brought before the court. The division in law is clear and deep. No party would be allowed to raise fraud under an allegation of ultra vires simpliciter."

53. No case was brought to our notice from any English Reports where an executive order of the kind being dealt with in this case or, say, an administrative order of a transfer of a government servant or the like could be successfully challenged on the ground of mala fides; if so, how, on proof of what kind of facts. Very few cases are to be found in the Indian Reports. In *Province of Bombay v. Khushaldas S. Advani*[27] Das, J., as he then was, said at page 257 (Column 1)-

> "For all we know she may have been a more deserving person whose needs were more urgent than those of the petitioner. The point is that it lies heavily on the person who challenges the *bona fides* of a public authority or who contends that the authority had acted outside its powers to establish his case on cogent legal evidence. He cannot succeed by leaving the matter in the air and to the ingenuity of his counsel in creating an atmosphere of mere suspicion, which falls for short of legal proof."

54. I now refer to the most important decision of the Supreme Court on the point, i.e. *Pratap Singh v. State of Punjab*[28] The facts pleaded by the appellant before the Supreme Court, if I may say so, were so cogent and coercive that Ayyangar, J., in the majority judgment, had to set aside the order of the then Chief Minister of Punjab on the ground of mala fides. Even then two of the learned Judges did not feel persuaded to agree with the majority judgment. That demonstrates the great difficulty in the way of striking down executive orders on the ground of the violation of the rule that every power vested in a public body or authority has to be used honestly and bona fide. In that case, the use of the power, for achieving an alien purpose-wreaking a Minister's

vengeance of the officer-was held to be mala fide and colourable exercise of the power. It was observed at page 83 (column 1) by his Lordship in the majority judgment-

> "Doubtless, he who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by Government of its powers. While the indirect motive or purpose, or bad faith or personal ill-will is not to be held established except on clear proof thereof, it is obviously difficult to establish the state of a man, mind, for that is what the appellant has
>
> to establish in this case, though this may sometimes be done (See *Edgington v. Fitzmaurice*[29], The difficulty is not lessened when one has to establish that a person in the position of a minister apparently acting in the legitimate exercise of power has, in fact, been acting mala fide in the sense of pursuing an illegitimate aim. He must, however, demur to the suggestion that, mala fide in the sense of improper motive should be established only by direct evidence that is that it must be discernible from the order impugned or must be shown from the notings in the file which precede, the order. If bad faith would vitiate the order, the same can, in our opinion, be deduced as a reasonable and inescapable inference from proved facts."

Lastly the grounds of disciplinary action proposed to be taken in that case were briefly examined and compared to the other facts proved in that case. It was held that the Chief Minister had exercised the power in bad faith to wreak his vengeance and not for the purpose he purported to exercise the power, as, the grounds for disciplinary action were not such as to justify the order.

55. A confusion between the wrong or illegal exercise of power and it having been exercised mala fide is often made. Repelling such an argument in *Union of India v. H.C. Goel*[30], Gajendragadkar, J., as he then was, says at page 369 (column 2)-

> "Mala fide exercise of power can be attacked independently on the ground that it is mala fide. Such an exercise of power is always liable to be quashed on the main ground that it is not a *bona fide* exercise of power. But we are not prepared to hold that if mala fides are not alleged and *bona fides* are assumed in favor of the appellant, its conclusion on a question of fact cannot be successfully challenged even if it is manifest that there is no evidence to support it. The two infirmities are separate and distinct though, conceivably, in some cases both may be present."

56. In *Arbind Prasad Sinha v. State of Bihar*[31], a Bench of this court of which I was a member had the occasion to consider some cases of preventive detention under the Defence of India Rules. In one of the cases dealt with in that judgment it was found that there existed animosity of the then Chief Minister, the detaining authority against the detenu. Holding that in absence of grounds or facts leading to the detention, merely on the ground of animosity, it was difficult to find the order of detention as having been made mala fide. I had said delivering the judgment on behalf of the Bench at page 395 (column 2)-

"If a person cannot ask the court to declare the law made in violation of those rights ultra vires, he also cannot ask indirectly for their enforcement by seeking the aid of the court to compel the executive to do what they are not bound to be under the law, merely because allegations of bad faith have been made. If those allegations can be sustained without enforcement of the rights
like the ones engrafted in Article 22 and if in a given case, it is possible to hold
that the impugned order has been passed not in genuine exercise of the powers conferred on the executive but out of ulterior considerations in bad faith, the courts will have no hesitation in knocking down the order. But, as pointed out above, from the practical point of view in large number of cases, if not in all, a judge will feel helpless, without examining the facts and grounds of contention, to cross the region of suspicion, however strong it may be, and to come to a positive finding, as he has to, before knocking down the order on the grounds of mala fides that it has been made on such account and not in genuine exercise of the power."

57. In this background of the law, the present case has to be judged. Attack on the order of appointment of the 4th Respondent to the post of Chief Secretary on the ground of violation of Article 16 of the Constitution is a different thing. The alleged non-consideration may be *bona fide* - may be mala fide. In either event, if the fact of non-consideration of the cases of the petitioners would have been proved then without proof of mala fides the order could have been struck down as being violative of Article 16 of the Constitution. It must, however, be made clear that the petitioners could not ask this court to strike down the order for non-consideration of the cases of other officers if they failed to show that their cases were not considered. On the materials placed before us from the various affidavits and the files directed to be produced it has not been possible to hold that the cases of the petitioners were not considered. What then remains in regard to the allegation of mala fides? The only fact pleaded in that connection is that respondent No.4 was appointed on the ground of class or caste considerations to which class or caste the two respondents namely respondents 2 and 4 are said to belong. It is not alleged by the petitioners that the Chief Minister or as a matter of that any other Minister in the council had any bias or animus against any of the petitioners or other officers who were senior to respondent No.4. Nor is it alleged that the Chief Minister had any other interest in the 4th respondent except that of class or caste Supersession of a large number of officers who were senior to the 4th respondent in the matter of the appointment to the most important post of Chief Secretary in the hierarchy of the State Government coupled with the fact that the two respondents aforesaid belonged to the same class or caste, a fact which is not denied in any of the counter-affidavits, does create a doubt or suspicion in regard to the exercise of the power by respondent No.2. A question mark has got to be put as to whether the power was exercised bona fide. But it is difficult to hold on these two materials only that the power was exercised dishonestly, in bad faith or mala fide with the ulterior motive of unduly helping the 4th respondent on the ground of class or caste considerations. This court was not asked nor it could to go into the question of the relative merits of the petitioners, others and the 4th respondent. The character rolls were not asked to be produced in this court. Apart from the character rolls, as I have said above at one place, the merit of an officer for appointment to the post of Chief Secretary has to be judged in a wider perspective than in a narrow field. It was for the appointing authority to take into

consideration very many qualities of the various officers eligible for appointment deep into the matter in respect of the respective merits of the officers concerned. By substituting its own opinion, it was not possible to come to the conclusion that the appointment made was not on the basis of merit but for class or caste considerations. Here comes in the difficulty which is there insurmountable in most of the cases of successfully attacking the executive orders on the ground of mala fides. The petitioners had a right of appeal to the Central Government. Some of the officers (not any of the petitioners) did exercise that right. The appellate authority has a wider discretion in the matter. The scope of judging the impugned order in appeal is much wider than in this court. I am constrained to observe that the petitioners were ill-advised to rush to this court to attack the order contained in Annexure-2 on the ground of mala fides on the infirm and insufficient materials as were available to them for pleading before the court. The judicial limb of the State, in my opinion, can never be justified in interfering with the actions and orders of the executive, the other limb of the State, on mere, suspicious, infirm and insufficient grounds of mala fides. A very strong foundation of facts is necessary to be constructed for satisfaction of the court, as was in Pratap Singh's case AIR 1964 SC 72 before the Supreme Court, to induce it to hold that the impugned order could not but be a dishonest one the power having been exercised in bad faith with the ulterior motive of either wreaking vengeance on the person affected by it or with the ulterior motive of pushing a favorite. It is difficult to find in favor of the petitioners in this case that they have proved an exception to the general rule to failures in such cases of discharging the heavy burden which lies on the petitioners.

58. In regard to the attack on the retrospective appointment of the 4th respondent to the post of the Chief Secretary for the period 23rd of June to 25th of November, 1970, I may state that the said retrospective appointment was necessitated for regularising the functions which the said respondent had performed during that period. He had not been appointed to that post in that period. Yet he was allowed to perform the duties and exercise powers of the Chief Secretary including the statutory ones. It is difficult to discover any bad faith or legal defect in the retrospective appointment when the regular, prospective appointment of the 4th respondent to the post of Chief Secretary could not be assailed with success on any ground. It may also be pointed out that the State Government have power to make an appointment with retrospective date provided it does not affect adversely the right of anybody else. In this case when the petitioners could not make out a case, with success of infringement of their rights by the regular order of appointment contained in Annexure-2, it is not possible to take the view that the order or retrospective appointment contained in Annexure-10 has adversely affected their right.

S.N.P. Singh, J.

59. I entirely agree with the views expressed by my Lord the Chief Justice and Untwalia, J., on the various questions which were raised in the writ applications and the conclusion arrived at by them and I have nothing useful to add in the judgment.
Petition dismissed.

Cases Referred.

[1] Civil Appeal No.477 of 1970, D/d. 15-9-1970 : (reported in AIR 1971 SC 1318)
[2] AIR 1970 SC 1102
[3] AIR 1961 SC 221

[4] AIR 1961 SC 493
[5] AIR 1964 SC 1658
[6]1942 A.C. 624
[7]1956 S.L.T. 41 : 1956 SC (H.L.) 1
[8](1968) 2 W.L.R. 998
[9] AIR 1967 SC 1910
[10](Civil Appeal No.2263 of 1968, decided by their Lordships on 29-4-1971) : (reported in AIR 1971 SC 1811)
[11](AIR 1945 PC 156)
[12] AIR 1959 SC 1376
[14](C.W.J.C. No.550 of 1969 D/d. 24-2-1971 (Pat))
[15](AIR 1965 Pat 321)
[16](1906) 33 Ind App 60 (PC)
[17](57 Ind App 214 : (AIR 1930 PC 193))
[18](AIR 1968 SC 870)
[19]((1918) 245 U.S. 418 : 62 Law. Ed. 372) at page 376 (column 1)
[20](AIR 1962 SC 1704)
[21](AIR 1969 SC 215)
[22]((1882) 19 Ch. D. 559)
[23]((1948) 1 KB 223)
[24]((1970) 2 WLR 645)
[25](1956 AC 736) at pages 770-71
[26]((1926) 1 Ch. 66)
[27](AIR 1950 SC 222)
[28](AIR 1964 SC 72).
[29](1884) 29 Ch D. 459
[30](AIR 1964 SC 364)
[31](AIR 1966 Pat 391)