

(1996) 11 MAD CK 0073
In the Madras High Court
Case No : Writ Petition No. 16042 of 1996

G. Kumarasamy

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 18-11-1996

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1997) 2 CTC 120

Hon'ble Judges : Shivaraj Patil, J

Bench : Single Bench

Advocate : Vadantam Srinivasan, for the Appellant;

Final Decision : Dismissed

Judgement

Shivaraj Patil, J.—Heard the learned counsel for the petitioner. The petitioner in this writ petition has sought for a writ of mandamus

forbearing the first respondent from issuing a warrant of appointment appointing the 4th respondent as a Judge of the High Court of Judicature at

Madras and to pass such further order or other orders as this Court may deem fit and proper in the circumstances of the case.

2. The petitioner states that he has presented this writ petition in his own capacity as a person aggrieved by the various acts of the 4th respondent

and also in the capacity of a responsible citizen of India, former Secretary of Tamil Nadu Congress Party I and former Editor and Publisher of a

Tamil Daily etc. in the public interest as a public interest litigation.

3. In the writ petition, he has given details of various litigations between himself and the 4th respondent on civil as well as on criminal sides. He has

also given particulars of certain litigations pending between them before the Corporation authorities. It may not be necessary for me for the

purpose of disposal of this writ petition, to narrate the details and particulars relating to the litigation between the petitioner and the 4th respondent.

He has also produced the copies of the judgment and orders passed by the various courts and authorities on the litigations between them to point

out the observations made about the 4th respondent in those judgments and orders and also certain directions in the orders made against him.

4. Learned counsel for the petitioner contended that having regard to the material placed on record, the 4th respondent could not have been

considered fit for appointment as a Judge of this Court. There are records to show that he trespassed in to the property of the petitioner; In spite of

the decree obtained, execution did not take place for longer time and the 4th respondent is made to pay Rs. 50,000 as compensation to the

petitioner. Under the circumstances, learned counsel states that the 4th respondent cannot be appointed as a Judge of this Court. He added that if

this material, which is placed on record, had been brought to the notice of the constitutional functionaries, may be, the 4th respondent could not

have been recommended for appointment. At any rate, his appointment could not have been approved. In paragraph 4 of the affidavit, the

petitioner himself has stated that notwithstanding the facts well known to all about the various irregularities and litigations, the name of the 4th

respondent in his capacity as one of the senior most serving District Judges of Tamil Nadu Subordinate Judiciary, has been recommended. It is

further stated in the same paragraph that the recommendation has been approved by the Governor of Tamil Nadu, Government of India and the

Chief Justice of India. After such approval, orders of appointment by the President are waited.

5. I have considered the submissions made by the learned counsel for the petitioner. In the first place, I think it is appropriate to understand the

scope of judicial review in a matter like this by this Court under Article 226 of the Constitution of India. In Supreme Court Advocates-on-Record

Association and another Vs. Union of India, , the scope of judicial review and justiciability in a matter like this is clearly stated. In order to

appreciate the contentions of the learned counsel for the petitioner, I think it is appropriate to refer to certain paragraphs of the judgment of the

Supreme Court aforementioned. In paragraph 224 of the said judgment, it is stated that in the case of appointment of a Judge to the High Court,

the proposal emanates from the Chief Justice of the High Court and that proposal is considered by the Chief Minister of the state and duly

processed through the Governor and forwarded to the Chief Justice of India through the Ministry of Law and Justice. Thereafter, the Ministry of

Law with the recommendation of Chief Justice of India forwards the proposal to the Prime Minister who then, approves, advises the President to

issue a formal warrant.

6. In the same paragraph, it is stated thus:

It is true that while recommending a candidate for the higher State judiciary, the Chief Justice of the High Court has the advantage of proximity in

evaluating the caliber and legal ability of the candidate. However, the CJI before whom the opinion of the Chief Justice of the High Court as well of

the State Government is placed with all the relevant materials concerning the proposal is in a better position either to accept the recommendation or

reject it for strong and cogent reasons to be recorded. As pointed out in the earlier part of this judgment, the merit of a candidate with regard to

his/her professional attainments, legal soundness, ability, skill etc., can be evaluated only by the Chief Justice of the High Court in the matter of

appointment of Judges of the High Court and by the CJI in the matter of appointment of a Judge to the Supreme Court. However, since the

judiciary does not have sufficient machinery of its own to check the antecedents and background of a candidate, the Chief Justice of the High

Court and the CJI may not be in a position to express any opinion about the conduct, character and antecedents of the candidate. But, the

Government with its powerful machinery can check the antecedents and background of the candidate and give its opinion on that aspect.

Therefore, when a recommendation of the Chief Justice of a High Court comes to the CJI with all particulars including the background of such

candidate, he will be in a better position on examination of all the materials placed before him to evaluate the fitness of the candidate. Therefore, in

all circumstances, the opinion of the CJI is entitled to have the right of primacy in the matter of selection of Judges to the Supreme Court as well as

the High Courts.

7. In paragraph 225 of the said judgment, it is further stated that in the matters relating to the appointment of Judge to the High Court, it would be

better if the Chief Justice of the High Court concerned forms his opinion on consultative process by ascertaining the views of atleast two of the

senior-most Judges of the High Court and such other Judges whose opinion is likely to be significant in the formation of the opinion. The Chief

Justice of India, while forming his opinion on the recommendation made by the Chief Justice of the High Court concerned for appointment of a

Judge to the High Court, may take into account the views of his colleagues in the Supreme Court who are likely to be conversant with the affairs of

the concerned High Court. The Supreme Court, in the said judgment, proceeded to lay down the norms as can be seen from paragraph 501 of the

said judgment. The norms that are relevant for the present purpose read thus:

In matters relating to appointments in the High Courts, the Chief Justice of India is expected to take into account the view of his colleagues in the

Supreme Court who are likely to be conversant with the affairs of the concerned High Court. The Chief Justice of India may also ascertain the

views of one or more senior Judges of that High Court whose opinion, according to the Chief Justice of India, is likely to be significant in the

formation of his opinion. The opinion of the Chief Justice of the High Court would be entitled to the greatest weight, and the opinion of the other

functionaries involved must be given due weight, in the formation of the opinion of the Chief Justice of India. The opinion of the Chief Justice of the

High Court must be formed after ascertaining the views of atleast the two senior most Judges of the High Court.

The Chief Justice of India, for the formation of his opinion, has to adopt a course which would enable him to discharge his duty objectively to

select the best available persons as Judges of the Supreme Court and the High Courts. The ascertainment of the opinion of the other Judges by the

Chief Justice of India and the Chief Justice of the High Court, and the expression of their opinion, must be in writing to avoid any ambiguity.

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9. In order to ensure effective consultation between all the constitutional functionaries involved in the process, the reasons for disagreement, if any,

must be disclosed to all others, to enable reconsideration on that basis. All consultations with everyone involved, including all the Judges consulted,

must be in writing and the Chief Justice of the High Court, in the case of appointment to a High Court, and the Chief Justice of India, in all cases,

must transmit with his opinion the opinions of all Judges consulted by him, as a part of the record.

Expression of opinion in writing is an inbuilt check on exercise of the power, and ensures due circumspection. Exclusion of justiciability, as

indicated hereafter, in this sphere should prevent any inhibition against the expression of a free and frank opinion. The final opinion of the Chief

Justice of India, given after such effective consultation between the constitutional functionaries has primacy in the manner indicated.

8. When it comes to the question of scope of judicial review, in the said judgment in paragraph 504 it is clearly laid down thus:

This is also in accord with the public interest of excluding these appointments and transfers from litigative debate, to avoid any erosion in the

credibility of the decisions, and to ensure a free and frank expression of honest opinion by all the constitutional functionaries, which is essential for

effective consultation and far taking the right decision. The growing tendency of needless intrusion by strangers and busy bodies in the functioning

of the judiciary under the garb of public interest litigation, in spite of the caution in *S.P. Gupta Vs. President of India and Others*, while expanding

the concept of locus standi, was adverted to recently by a Constitution Bench in *Krishna Swami Vs. Union of India and another*, . It is, therefore,

necessary to spell out clearly the limited scope of judicial review in such matters, to avoid similar situations in future. Except on the ground of want

of consultation with the named constitutional functionaries or lack of any condition of eligibility in the case of an appointment, or of a transfer being

made without the recommendation of the Chief Justice of India, these matters are not justiciable on any other ground, including that of bias, which

in any case is excluded by the element of plurality in the process of decision making." (Italics supplied)

9. From the law laid down by the Apex Court in the aforementioned case and, in particular, having regard to the paragraphs extracted above from

the said judgment, I have no hesitation to hold that it is not a case in which this Court can entertain the writ petition inasmuch as the scope of

judicial review is limited to only two grounds. (1) Want of consultation with the named constitutional functionaries; (2) lack of any condition of

eligibility in the case of appointment. There cannot be a judicial review on any other ground. It is not pointed out to me that there is lack of condition of eligibility in the case of the 4th respondent. Learned counsel, no doubt argued, that it cannot be said that this material which is against the 4th respondent was brought to the notice of the constitutional functionaries at all and had this material been placed before the constitutional functionaries involved in the process of selection and appointment of the 4th respondent, the position would have been certainly different. I find it difficult to agree with the learned counsel's submission in this regard for two reasons: (1) The petitioner himself has stated in paragraph 4 of his affidavit that these facts are well known and notwithstanding that these facts are known, still the recommendation was made which has passed through the various constitutional functionaries; and (2) It is difficult to say that the high constitutional functionaries did not take note of all the relevant factors in the matter of recommendation for appointment of the 4th respondent. I specifically asked the learned counsel whether any specific averment is made in the affidavit filed in support of the writ petition that the allegations made against the 4th respondent on the basis of the material placed were not brought to the notice of the constitutional functionaries, learned counsel fairly stated that such specific averment is not made in the affidavit. However, he added, the records themselves are placed for perusal of this Court.

10. At this stage, learned counsel for the petitioner, as instructed by the petitioner who is present in the Court states that the copies of various orders passed against the 4th respondent were sent to the Hon'ble Chief Justice of this Court and Hon'ble the Chief Justice of India. If that is the position, it may be also considered that it has been brought to the notice of the Hon'ble Chief Justice of this Court. Having regard to the fact that the recommendation of the 4th respondent has gone through the various high constitutional functionaries, it is difficult to accept the argument made on behalf of the petitioner that there was no proper consideration or consultation in the matter of recommending the 4th respondent for appointment. At this stage, when I enquired as to whether any other writ petition was filed challenging the appointment of 4th respondent in any other Court, Mr. P. Ratnam, learned Member of the Bar who is present in the court stood up and said that two writ petitions were filed challenging

the recommendation made for appointment of the 4th respondent and one other learned Member of the Bar and he was the 1st petitioner in those

writ petitions. But, the writ petitions were dismissed by the Supreme Court as withdrawn. Under the circumstances, it is not possible for me to

entertain the writ petition in the light of what is stated above.

11. In the result, I reject the writ petition at the stage of admission.