
(2008) 02 MAD CK 0067

In the Madras High Court

Case No : Writ Petition No's. 33524 and 35164 of 2007

M. Senthil Kumar and J. Sivaganesh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 04-02-2008

Acts Referred:

Constitution of India, 1950 — Article 141, 144, 226, 309

Citation : (2008) 2 MLJ 973

Hon'ble Judges : P.K. Misra, J;K.K. Sasidharan, J

Bench : Division Bench

Advocate : S. Palanirajan, in W.P. 33524/2007 and A. Thiagarajan, in W.P. 35164/2007, for the Appellant; T. Murugesan, Govt. Pleader for Respondents 1 to 4, K. Kannan, for G.R. Swaminathan, for Respondent 5, R. Karthikeyan, for Respondent 6, T.P. Manoharan, for Respondents 7 and 8 and S. Parthasarathy, for Respondent 9, for the Respondent

Final Decision : Allowed

Judgement

P.K. Misra, J.—W.P. No. 33524 of 2007 has been filed by a practising Advocate for issuance of writ of mandamus directing the

respondents 1 to 3, namely, the Union of India, Union Territory of Pondicherry and the Law Secretary of the Union Territory of Pondicherry to

frame rules relating to appointment of District Judges and start the selection process according to law. Such writ petition was filed on 15.10.2007

and was admitted on 16.10.2007 by a learned single Judge of this Court. In the connected M.P. No. 1 of 2007, the prayer was for staying the

selection process, wherein notice was directed to be issued on 16.10.2007

2. Subsequently, W.P. No. 35164 of 2007 was filed by another practising Advocate for issuance of writ of mandamus directing the very same

respondents as well as the Registrar General, High Court, Madras, who was

impleaded as fourth respondent, to frame rules for the Union

Territory of Puducherry State Judicial State Service (Cadre and Recruitment) Rules in terms of the directions given by the Supreme Court of India

in Writ Petition (C) No. 1022 of 1989 dated 21.3.2002 and make appointments for the post of District Judge as per the said rules. Such writ

petition, which was filed on 13.11.2007, came before a Division Bench on 15.11.2007. it was directed that notice shall be served on the

Government Pleader (Puducherry) representing Respondents 1 to 3 and the Addl. Government Reader representing Respondent No. 4.

Thereafter, on the request of the Government Pleader (Puducherry), the matter was adjourned from time to time to enable him to file counter.

3. While considering the question of interim stay, the Government Pleader of Puducherry had submitted that on the basis of the selection made by

the High Court, appointment letters have been issued by the Government and sent to the High Court for communication to four Subordinate

Judges. At that stage, while granting interim stay of such appointment, this Court suo motu impleaded the four persons who had been selected as

Respondents 5 to 8. A petition for vacating the stay had been filed by the newly impleaded Respondent No. 5. Subsequently, another Sub Judge

filed a petition for being impleaded, which was allowed by a separate order. A counter was filed by the Government Pleader on behalf of

Respondents 2 and 3. A separate counter was filed by the Registrar General, High Court. Counsels who have appeared for the impleaded

Respondents 5 to 3 and the impleaded Respondent No. 9 had submitted that there was no factual dispute involved. Since the questions involved in

the writ petitions and in the miscellaneous petitions were same and the entire dispute was required to be resolved expeditiously, on the consent of

all the counsels appearing for the parties, the writ petitions were heard on merit and judgment was reserved. At that stage, keeping in view the main

issues involved, the interim order of stay was modified and the Respondents 5 & 6, who had been selected as Serial Nos. 1 and 2 in the selection

list, have been allowed to join by virtue of the order dated 20.12.2007, of course subject to the result of the writ petitions,

4. The two petitioners are practising Advocates. According to the existing rules, one third of the posts can be filled up by direct recruitment from

the Bar. The main contention of the counsels appearing for the petitioners is to the effect that though as per the judgment of the Supreme Court reported in All India Judges Association and Others Vs. Union of India (UOI) and Others, a categorical direction had been issued that recruitment to the post of District Judge in higher judicial service is to be filled up by direct recruitment from Bar and by promotion from among the members of the Subordinate Judicial Service in particular proportion and selection should be made by following the particular procedure and appropriate Rules and the matter should be reported to the Supreme Court, steps had not been taken to finalise the rules. The prayer is made for issuing a direction to the official respondents and the Registrar General of the High Court to finalise the rules In accordance with the direction of the Supreme Court and to complete the process of recruitment in accordance with the Rules. Such direction had been issued by the Supreme Court way back in 2002 and yet the rules had not been finalised.

5. In the counter affidavit filed on behalf of the Respondents 1 to 3, i.e., the Union of India and the Government of Puduchery, it was indicated that rules under Article 309 of the Constitution had been framed as per G.O. Ms. No. 10/96-LD dated 21.3.1996 and as per such rules the method of recruitment to the District Judge is by promotion on the basis of seniority-cum-merit from from the cadre of Civil Judges (Senior Division) and by direct recruitment from the Bar on the basis of viva voce examination held by the High Court. It is further stated that pursuant to the decision of the Supreme Court in All India Judges Association and Others Vs. Union of India (UOI) and Others, , the High Court, Madras has prepared and sent draft Puducherry Judicial Service (Cadre and Recruitment) Rules for notification and such draft rules had been examined by the Government and certain clarifications were sought for from the High Court as per Letter No. 48-12/PJS/07-LD dated 6.8.2007 before notifying the said rules and necessary reply was awaited from the High Court in this regard. While the matter stood thus, the High Court had recommended promotion of four Civil Judges (Senior Division) [those persons have been impleaded as Respondents 5 to 8 in W.P. No. 35164 of 2007] and on the basis of such recommendation of the High Court, Puducherry Government had issued letter of appointment indicating that such appointment was subject to the

result of the pending writ petitions.

6. Fourth respondent, the Registrar General, High Court, in a separate counter affidavit, had indicated that on the basis of the decision of the

Supreme Court in All India Judges Association and Others Vs. Union of India (UOI) and Others, , rules were framed for recruitment of Tamil

Nadu State Judicial Service and such rules have been already notified by the Government of Tamil Nadu on 19.1.2007 and such procedure was

followed in respect of recruitment to Tamil Nadu State Judicial Service. So far as framing of rules for the Puducherry Judicial Services is

concerned, it has been indicated that the Committee has finalised the draft rules and such rules have been sent to the Government of Puducherry on

214.2007 for issuance of necessary notification by the Government of Puducherry. Subsequently, the Government of Puducherry by letter dated

6.8.2007 had sent various suggestions/observations and sought for modification/revision of the draft rules and such correspondence has been

placed before the Committee and on finalisation of such revised/modified draft rules by the Committee, it would be sent to the Government of

Puducherry for issuance of notification. It has been further indicated as follows:

8. ...the existing cadre strength of District Judges in the Puducherry Judicial Service is 6, including 2 ex-cadre post. They are:

1. Chief Judge, Puducherry
2. II Additional District Judge, Puducherry
3. III Additional District Judge, Puducherry
4. Additional District Judge, Puducherry at Karaikal
5. Judge, Family Court, Puducherry (ex-cadre post)
5. Member Secretary, Puducherry Legal Services

Authority, Puducherry (ex-cadre post).

It has been further indicated:

9. ... that 2 Judicial Officers are already functioning in the Puducherry Judicial Service in the cadre of District Judges. One Officer had been

appointed through direct recruitment and another Officer is a promotee. In order to fill up the remaining 4 vacancies in the cadre of District Judges,

urgently, due to administrative exigencies, necessary proposals were mooted out by the Registry, on 31.7.2007, pending approval and publication

of the Puducherry Judicial Service (Cadre & Recruitment) Rules, 2007, based on the directions of the Hon''ble Supreme Court of India in its

order, dated 21.3.2002, in W.P. (C) No. 1022/1989.

It is further indicated that selection has been made as per extant Rules and four Sub Judges have been selected and the Government of Puducherry

had issued orders of promotion subject to the result of the W.P. Nos. 33524 and 35164 of 2007. It has been further indicated:

15.... that the draft Puducherry Judicial Service (Cadre & Recruitment) Rules, as already finalised by the High Court, are yet to take a final shape

as various observations/suggestions made by the Government of Puducherry and referred to this Hon''ble High Court are still under the

consideration of this Hon''ble High Court, As the process is expected to take some more time for issuance of notification of the revised/modified

draft Puducherry Judicial Service (Cadre & Recruitment) Rules, after getting the views on the observations/suggestions made by the Puducherry

Government, in order to cope with the administrative exigencies, the proposal to fill up 4 vacancies in the cadre of District Judges was mooted out.

7. Out of the four selected candidates, who have been suo motu impleaded as Respondents 5 to 8, Respondent No. 5 has filed a petition for

vacating the stay wherein it is indicated that selection has taken place on the basis of the existing rules by scrutinising the judgments of various

incumbents. It has been further stated that the prayer in the form in which it has been sought for cannot be granted and no Mandamus can be

issued to the Government to frame rules in a particular manner.

8. In the petition filed by Respondent No. 9, a Subordinate Judge, who was placed 6th in the selection list, it has been indicated that as per the

decision of the Supreme Court, promotion has to be effected by way of merit-cum-seniority and upto 50% of the total posts by way of merit-cum-

seniority and, purely on the basis of merit from among the subordinate service in the ratio of 25% and the rest 25% is to be recruited through direct

recruitment from among the Bar members. Such procedure having been not followed, selection of all the four vacancies through conventional

promotion is obviously against the decision of the Supreme Court.

9. In the course of hearing, the learned Government Pleader appearing for the Puducherry Government and also the learned counsels appearing for

Respondents 5,6 and 7 & 8 submitted that since new rules had not been framed there was no embargo in following the procedure contemplated

under the existing rules. Moreover, the decision of the Supreme Court itself has made it clear that any dispute relating to implementation of such

direction of the Supreme Court can be raised only before the Supreme Court and not by filing a writ for issuing Mandamus under Article 226 of

the Constitution of India. It is also submitted that at any rate no Mandamus can be issued to the Government to frame rules in a particular manner.

10. As per the existing rules, recruitment to the post of District Judge is by way of promotion from the Subordinate Judicial Service on the basis of

seniority-cum-merit. The rules also provide that upto one third of the vacancy can be filled up by way of direct recruitment from the Bar on the

basis of viva voce.

11. At the time of hearing of the case, the entire file relating to selection process was made available. In the present case, we are confining our

attention to the mode and method of recruitment rather than the selection process itself. As apparent from the counter affidavit filed by the fourth

respondent, so far as recruitment to Tamil Nadu Judicial Service is concerned, new rules have been framed strictly in accordance with the

directions issued by the Supreme Court. So far as Puducherry Government is concerned, the High Court office had sent the draft rules for

publication and at that stage certain suggestions/ queries had been received from Puducherry Government. While the proposal relating to

promotion of four Subordinate Judges was placed, it was never indicated in the Office Note prepared by the Registry that in fact draft rules for

Puducherry Government had been prepared and finalised by the High Court and were pending before the Puducherry Government. Even though

there is a passing reference to the decision of the Supreme Court, nowhere it is indicated that similar rules had been framed for Tamil Nadu

Judicial Service.

12. In our considered opinion, if all the appointments would be allowed to be made on the basis of the suggestions given by the High Court, the

direction given by the Supreme Court would be directly contravened.

13. At this stage, it is necessary to refer to the observations made by the Supreme Court. It was observed:

27. ...While we agree with the Shetty Commission that the recruitment, to the Higher Judicial Service i.e. the District Judge Cadre from amongst

the advocates should be 25 per cent and the process of recruitment is to be by a competitive examination, both written and viva voce, we are of

the opinion that there should be an objective method of testing the suitability of the Subordinate Judicial Officers for promotion to the Higher

Judicial Service. Furthermore, there should also be an incentive amongst the relatively junior and other officers to improve and to compete with

each other so as to excel and get quicker promotion. In this way, we expect that the calibre of the members of the Higher Judicial Service will

further improve. In order to achieve this, while the ratio of 75 per cent appointment by promotion and 25 per cent by direct recruitment to the

Higher Judicial Service is maintained, we are, however, of the opinion that there should be two methods as far as appointment by promotion is

concerned: 50 per cent of the total posts in the Higher Judicial Service must be filled by promotion on the basis of principle of merit-cum-seniority.

For this purpose, the High Courts should devise and evolve a test in order to ascertain and examine the legal knowledge of those candidates and to

assess their continued efficiency with adequate knowledge of case law. The remaining 25 per cent of the posts in the Service shall be filled by

promotion strictly on the basis of merit through the limited departmental competitive examination for which the qualifying service as a Civil Judge

(Senior Division) should be not less than five years. The High Courts will have to frame a rule in this regard.

39. The States as well as the Union of India shall submit their compliance report by 30th September, 2002, Case be listed thereafter for further

orders.

40. Any clarification that may be required in respect of any matter arising out of this decision will be sought only from this Court. The proceedings,

if any, for implementation of the directions given in this judgment, shall be filed only in this Court and no other Court shall entertain them.

14. The aforesaid observations, which are more or less peremptory in nature, would be obviously flouted if the present selection is allowed to be

implemented. It is rather unfortunate that the Registry, while placing a note relating to promotion of Subordinate Judges, did not indicate even

remotely that the draft rules in accordance with the direction of the Supreme Court had been approved by the High Court and had been sent to

Puducherry Government for notification nor it had been indicated that certain clarifications had been sought for by the Puducherry Government, it is

of course true that it has been highlighted in the counter affidavit that there was necessity to fill up the post urgently, but from the counter it is

apparent that the draft rules had been sent long before and clarifications had been sought for by the Puducherry Government in August and yet the

Registry instead of finalising the matter, initiated proposal relating to completion of the process of appointment on the basis of the existing rules. It is

also very interesting to note that the rules had already been finalised for Tamil Nadu Judicial Service. It is no doubt true that technically speaking

the extant rules had not yet become extinct in spite of the peremptory nature of the direction issued by the Supreme Court and in such a restricted

sense there may not be any legal flaw in completing the process of recruitment in accordance with the existing rules. However, having regard to the

fact that more than five years have lapsed from the date when the Supreme Court had issued the direction and at any rate draft rules had been

made, heaven would not have fallen if the recruitment to such post would have been postponed by a few weeks or may be even couple of months.

This is more so keeping in view the limited number of posts available under the Puducherry Judicial Service. If such flawed recruitment would be

allowed to continue, the possibility of making recruitment in accordance with the direction of the Supreme Court would be frustrated for a

considerable length of time, may be for the next decade or so. It would not be in the interest of administration of justice to allow such glaring

violation of the direction of the Supreme Court.

15. Learned counsel appearing for Respondents 5 to 8 and even to some extent the Government Pleader appearing for Respondents 1 to 3 by

inviting our attention to the observation made in para 40 of the judgment, submitted that as per the observation of the Supreme Court, the matter

can be agitated only before the Supreme Court.

16. It is indeed unfortunate and rather surprising that inspite of such peremptory direction contained in paras 27 and 39, matters have been allowed

to linger in their own meandering way. The latter part of the observation, of

course, makes it clear that appropriate clarifications or directions regarding implementation are to be sought for from the Supreme Court. The contention raised presents a Hobson's choice so far as the High Court is concerned. Non-compliance of the direction given by the Supreme Court within the time frame indicated prima facie tantamounts to disobedience of such judgment. On the other hand, the observations make it clear that if any clarification and directions are required in the matter, it should be only placed before the Supreme Court.

17. In our considered opinion, since there is no controversy relating to the directions given and there is no question of seeking any clarification, we may justifiably come to the conclusion that action should be taken in accordance with the positive directions given and not in direct conflict with the clear observation of the Supreme Court. In such view of the matter, we prefer to follow our judicial conscience and observe that selection process to the extent it is contrary to the clear observation of the Supreme Court should not be allowed to be completed. In this context, we think it appropriate to observe that in view of the provisions contained in Articles 141 and 144 of the Constitution of India, it is our constitutional obligation, nay duty, to see that the judgment and directions of the Supreme Court are observed and obeyed in letter and in spirit. We may also observe that it ill-behoves the Respondents 1 to 3 to raise such a contention, particularly when such respondents had the primary obligation to comply with the direction of the Supreme Court.

18. Learned counsel appearing for Respondent No. 5 has raised a question that no Mandamus can be issued for the aforesaid purpose He has placed reliance upon two decisions of the Supreme Court reported in A.K. Roy and Others Vs. Union of India (UOI) and Others, and Aeltemesh Rein, Advocate, Supreme Court of India Vs. Union of India (UOI) and Others, .

19. We do not think the ratio of such decisions can be made applicable to the peculiar facts and circumstances of the present case in view of the categorical observations made by the Supreme Court in All India Judges Association and Others Vs. Union of India (UOI) and Others, and in view of the provisions contained in Articles 141 and 144 of the Constitution.

20. In the present case, in view of the clear directions and in view of the provisions contained in Articles 141 and 144, it is the obligation of all the

functionaries to implement the direction of the Supreme Court. In such a sense it is not that a Mandamus is being issued for the purpose of framing

a rule but the purpose of the present writ petition is to issue a direction to the authorities concerned to comply with the directions already given by

the Supreme Court. The decisions cited are therefore clearly distinguishable.

21. Next question is regarding the relief to be granted. It is no doubt true that the prayer in the present writ petitions is for issuing a writ of

mandamus to frame the rules. The ancillary prayer is for making recruitment in accordance with such rules, in other words, in accordance with the

principles contemplated by the Supreme Court.

22. Having regard to the facts and circumstances, it can be said that, while issuing a direction to the Respondents 1 to 4 for finalising the Rules, an

ancillary direction can also be given that the recruitment shall be made in accordance with such amended Rules. Accordingly, Respondents 1 to 4

are directed to finalise the Rules in accordance with the directions issued by the Supreme Court within a period of 30 days from the date of receipt

of the order and they are further directed to make the recruitment in accordance with such rules to be notified.

23. While considering the question of stay, we had modified the interim order of stay and had permitted Respondents 5 & 6 to join the post

without prejudice to the contentions raised in the writ petitions. We find that as per the direction of the Supreme Court, upto three persons can be

promoted through the conventional method of promotion, namely, the merit-cum-seniority and only one such person has been promoted earlier.

Accordingly, even if the rules are modified, obviously there is scope of promoting two more on the basis of merit-cum-seniority. Accordingly, the

Respondents 5 & 6 are allowed to continue This, however, is without prejudice to the contentions, if any, to be raised by any of the other

respondents relating to process of the selection itself. In other words, if any of the Sub Judge has any grievance that he should have been selected

ahead of the Respondents 5 & 6, it would be open to such Sub Judge to raise such question before the appropriate forum and such question is not

decided by us.

Subject to the aforesaid directions and observations, both the writ petitions are allowed to the extent indicated above. No costs.