
(1985) 04 KL CK 0017
In the High Court Of Kerala
Case No : O.P. No. 5713 of 1984

Mary Teresa Dias

APPELLANT

Vs

The Hon"ble Acting Chief Justice and Others

RESPONDENT

Date of Decision : 29-04-1985

Acts Referred:

Constitution of India, 1950 — Article 133(1), 134A, 226, 233

Citation : AIR 1985 Ker 245

Hon'ble Judges : V. Bhaskaran Nambiar, J;U.L. Bhat, J

Bench : Division Bench

Advocate : K. Ramakumar, for the Appellant; A.G., Govt. Pleader, T.L. Viswanatha Iyer and B. Raghunathan, for the Respondent

Judgement

Bhaskaran Nambiar, J.—The petitioner, an Advocate, enrolled in 1964 was a junior Government Pleader in the High Court from 1974 to 1976 and now holds the post of the District Government Pleader and Public Prosecutor at Ernakulam from 21-2-1984. She is an Anglo Indian belonging to the Latin Catholic community. She was one of the applicants for the post of a District Judge and her name was, however, not recommended by the High Court to the Government, though the panel of names submitted included fourteen names. The selection was based on an interview conducted by three senior Judges of this Court. The petitioner contends that based on her performance at the interview, she was awarded very high marks to merit her inclusion within the first five and thus she was entitled to be selected on merit. But still her name was not recommended, even though the selection committee found 15 persons including herself "eligible for consideration". The majority of the committee held that the petitioner was "ineligible for selection" in view of the criterion laid down in Rule 3(2)(c) of the Special Rules which insisted that the candidates concerned shall be of good character and thus it came to the conclusion that the panel to be sent to the Government need consist of only 14 persons omitting the name of the petitioner. The report of the committee was circulated among all the Judges and at the Judges' meeting held on 12th June, 1984, it was resolved by a majority to

accept the majority report of the selection committee. Thus the High Court did not recommend the petitioner's name to the Government. The petitioner therefore filed this writ petition praying that the High Court may be directed to recommend her name also for appointment as District Judge. But, it later transpired that the Government decided to reject the entire recommendation and to call for fresh applications. The petitioner has subsequently amended her writ petition challenging this decision of the Government and for appropriate directions to include her in the panel to be sent to the Government.

2. The decision of the Government to invite fresh applications ignoring the selection already made and the recommendation already sent by the High Court is the subject-matter of challenge in other writ petitions as well. Therefore this and other writ petitions were heard together.

The decision of the Government is thus common challenge in this and other writ petitions, We are delivering a separate judgment in the other writ petitions quashing the decision of the Government rejecting the recommendation.

3. Even when the decision of the Government is set aside, the petitioner's contention has to be considered independently and separately for, her complaint is against her non-inclusion in the panel sent to the Government and unless a direction is issued for inclusion of her name, she cannot claim to be appointed.

4. The petitioner alleged in the writ petition :--

"The exclusion of the name of the petitioner is solely on the basis of the alleged personal knowledge of the majority of the Judges who participated in the Departmental Full Bench, about her character, which was acquired while they were practitioners in the Ernakulam Bar. Such a consideration it is submitted is totally irrelevant and extraneous.

xxx xxx xxx xxx To right a serious wrong done to the petitioner, the so-called personal knowledge of the Judges should be totally excluded from consideration in which case, admittedly the petitioner is entitled to be included in the panel. Under the Kerala Higher Judicial Services Rules it is only the Appointing Authority who can reject a candidate's name on consideration of character, as the recommending authority has admittedly no machinery to assess the character of an individual. The petitioner therefore should be included in the panel as required by the Government now and a panel based on the interview held in the month of May 1984, should be sent to the Government of Kerala in accordance with the provisions of Article 233. Government have no powers to cancel a panel forwarded by the High Court".

5. When this writ petition came up for hearing, Shri K. Ramakumar, the learned counsel for the petitioner raised a preliminary objection that this Bench may not hear this petition. Of course, he rightly and fairly conceded that he was not attributing to us any bias either for or against the petitioner; but contended that it would not be proper for any judge who participated at the Judges meeting on

12th June, 1984 to hear this case. In fact, he even went to the extent and correctly too, of stating that the question as to whether the petitioner possessed good character or not did not arise for determination in this judicial proceeding. According to the counsel the question to be decided was whether the selection committee could consider the question of the character of any applicant at all and whether it was not a matter to be taken note of and considered by the appointing authority. Did not the function of the selection committee come to an end when once it held on the basis of assessment at the interview, on the merits that the petitioner was entitled to fairly high marks entitling her to be included with the first five? Assuming the selection committee or the departmental Full Bench of the High Court, acting administratively, could consider the character of an applicant, can the judges import their knowledge, acquired before they were appointed as Judges? Even if this information could be relied, could it be used against the petitioner without her being told the grounds on which such conclusion was reached. These, of course, are all questions of law to be decided at the final hearing. But, is it proper for the same Judges who participated at the Judges meeting on the administrative side to hear the case on the judicial side, asks the petitioner, of course, most respectfully? If the contention is accepted, none of the twelve Judges who were present at the Judges' meeting can hear this writ petition.

6. It is relevant at this stage to refer to the petitioner's specific pleadings regarding two of the three judges (respondents 3 and 4) who were members of the selection committee (Mr. Justice T. K. Kochu Thommen and Mr. Justice M. P. Menon).

"In fact, the petitioner believes that at all times they have maintained high standards of integrity, independence and impartiality. They have been made parties to this original petition only because they are necessary and proper parties and to facilitate the production of the Minutes prepared by them at the time of interview and the award of marks and the files pertaining to the selection. No reliefs whatever are claimed against them except to this limited extent".

7. There are no personal allegations made against respondents 1 and 2 (the Chief Justice and the senior-most puisne Judge. Mr. Justice K. K. Narendran).

8. Even though no bias is attributed to the twelve Judges including both of us who participated in the decision for recommending the names of persons to be appointed as District Judges, and even though only question of law arises for determination in the Original Petition, the counsel for the petitioner submits that justice should not only be done; but also appear to be done and it is not proper for us, in these circumstances, to consider the O. P. on the merits. In fact, his objection is in regard to any one of the twelve Judges sitting and hearing this Original Petition. He has, of course, cited several Indian and English decisions on the subject and out of deference to the contentions we shall advert to some of these important decisions.

9. One of the earliest cases cited was *The Judges v. Attorney-General for Saskatchewan* (1937) 53 TLR 464 (PC), a decision rendered on 25th Feb. 1937. The question to be considered was whether the Judges' salary was liable to Income Tax and it was a question in which the Judges were vitally interested. Sir Sidney Rowlatt delivering the judgment of the Board observed thus :--

"The reference in question placed the Court in an embarrassing position, all its members being from the nature of the case personally interested in the point in controversy. They took the view (quite rightly in their Lordships' opinion) that they were bound to act *ex necessitate*. In the result they came unanimously to a conclusion adverse to the contention put" before them on behalf of their order".

And one of the latest decisions of a foreign Court was that of the Court of Appeal in England, *Bromely London Borough Council v. Greater London Council* (1982) 1 All ER 129. Lord Denning M.R., observed thus :--

"At the outset I would say that all three members of this Court are interested on all sides. We are all fare-paying passengers on the tubes and buses and benefit from the 25% cut in fares. My wife and I also have the benefit of senior citizens to travel free. We are all rate payers in the area of Greater London and have to pay the increase in rates imposed by the supplementary precept. No objection is taken by any party to our hearing the case. Any Court of Appeal would be likewise placed."

10. We shall refer to *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, , where Bhagwati, J. speaking for the majority observed thus (para 58):--

"xxxxx Natural justice is a great humanising principle intended to invest law with fairness and to secure justice and over the years it has grown into a widely pervasive rule affecting large areas of administrative action. Lord Morris of Borth-Y-Gest spoke of this rule in eloquent terms in his address before the Bentham club :

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And then again, in his speech in the House of Lords in *Wiseman v. Borneman* 1971 AC 297 the learned Law Lord said in words of inspired felicity:

"that the conception of natural justice should at all stages guide those who discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of the law. We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many authorities. But any analysis must bring into relief rather their spirit and their inspiration than any precision of definition or precision as to application. We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done. The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only "fair play in action". Nor do we wait for directions from Parliament".

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11. In A.K. Kraipak and Others Vs. Union of India (UOI) and Others, it was held thus (Para 20) :--

"The aim of the rules of natural justice is to secure justice or to put it negatively, to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it. The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules, namely (1) no one shall be a judge in his own cause, and (2) no decision shall be given against a party without affording him a reasonable hearing. Very soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably."

12. In one of the recent decisions of the Supreme Court, J. Mohapatra and Co. and Another Vs. State of Orissa and Another, it was held thus (Para 11) :--

"It hardly requires any argument to show that a person who has written a book which is submitted for selection, either by himself or by his publisher, is interested in the matter or selection. Authors get their books published by publishers or may themselves publish them. In either case, they stand to benefit financially..... It is not, therefore, the actual bias in favour of the author-member that is material but the possibility of such bias. All these considerations require that an author-member should not be a member of any such committee or sub-committee.

There is, however, an exception to the above rule that no man shall be a judge in his own cause, namely, the doctrine of necessity. An adjudicator, who is subject to disqualification on the ground of bias or interest in the matter which he has to decide, may be required to adjudicate if there is no other person who is competent or authorized to adjudicate or if a quorum cannot be formed without him or if no other competent tribunal can be constituted. In such cases, the principles of natural justice would have to give way to necessity for otherwise there would be no means of deciding the matter and the machinery of justice or administration would breakdown."

13. "Marshall" on "Natural Justice", states thus :--

"No man shall be Judge in His Own Cause. "Judges, like Caesar's wife, should be above suspicion". Bowen L. J. in Leeson v. General Council of Medical Education (1889 61 LT 849)"

"The principle is not confined merely to the case where the judge is an actual party to a cause, but applies to a cause in which he has an interest. An "interest", as we shall see below, has been defined as a legal interest or a pecuniary interest and is to be distinguished from "favour". Such an interest will disqualify a judge."

"Interest is to be distinguished from favour; and favour is not to be presumed in a judge. We have referred in Section 2 of Chap. 2 to the case of *Brookes v. Earl of Rivers* (1668 145 ER 569) in which the distinction was drawn between interest and favour and where it was stated that favour should not be presumed in a judge."

"Exceptions to the first principle of natural justice.-- (1) Necessity. -- A judge who would otherwise be disqualified may act in a case of necessity where no other judge has jurisdiction".

14. S. A. De Smith in his *Constitutional and Administrative Law*, Third Edition, has this to say : --

"English law recognises two principles of natural justice: that an adjudicator be disinterested and unbiased (*nemo iudex in causa sua*) and that the parties be given adequate notice and opportunity to be heard (*audi alteram partem*)".

"..... There are, moreover, considerations which incline English lawyers towards retaining "natural justice" as part of their vocabulary. The term expresses the close relationship between the common law and moral principles, and it has an impressive ancestry. That no man is to be judged unheard was a precept known to the Greeks, inscribed in ancient times upon images in places where justice was administered, proclaimed in Seneca's *Medea*, enshrined in the scriptures, mentioned by St. Augustine, embodied in Germanic as well as African proverbs, ascribed in the Year Books to the law of nature, asserted by Coke to be a principle of divine justice, and traced by an eighteenth-century judge to the events in the Garden of Eden. The historical and philosophical foundations of the English concept of "natural" justice may be insecure; it is not the less worthy of preservation. If it is vulnerable to rational criticism, so too are the ""unalienable rights" of the Founding Fathers of the American Constitution. And the view that "natural justice is so vague as to be practically meaningless" is tainted by "the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist."

15. Shri T. L. Viswanatha Iyer, appearing for the High Court, submitted that the recommendation under Article 233 was not of a single individual but of a collective body and the power was vested in a high constitutional judicial authority. Such a recommendation is not amenable to challenge at all on the ground that the Judges constituting the High Court have imported their knowledge in making selection from the Bar for appointment to the post of District Judges. When no personal bias is attributed to the Judges, no bias can be attributed to the High Court as such and there is neither illegality nor impropriety in any of the 12 judges who participated at the Judges' meeting hearing the case on the judicial side.

16. The Advocate-General appearing for the State submitted that there is nothing wrong in this Bench hearing this writ petition and unless we are "embarrassed" we could proceed with the case.

17. We have given our very serious consideration to the preliminary objection advanced and of course, we have patiently heard counsel appearing on either side and also counsel appearing in the other connected writ petitions.

18. Natural justice is not a static concept. It is part of a judicial vocabulary in the administration of justice. It is not "extra legal", though it may be "extra legislative". It is recognised as a guiding factor in administrative law and forms the constitutional basis for judicial scrutiny of legislative and executive actions. It is the sense of justice that represents the ethics of judicial conscience. While a statute may expressly abrogate the principles of natural justice, these principles may also have to yield to the "demands of necessity" where the "jurisdiction is exclusive and there is no legal provision for calling a substitute".

19. In this case, the counsel for the petitioner has submitted fairly and clearly that the petitioner does not impute any personal bias to both of us or to any of the Judges who participated at the Judges' meeting on 12th June, 1984. An administrative decision of the High Court is open to challenge on the judicial side in the same High Court and there are several instances in this court itself where administrative decisions were in fact successfully challenged under Article 226 of the Constitution. (See for instance C.K. Madhavan Nair Vs. Registrar, High Court of Kerala, Ernakulam and Others, , Krishnan Nair v. State of Kerala; 1974 KLT 313 : (1974 Lab IC 1170) and M. James Thomas and Others Vs. The Hon'ble the Chief Justice and Others, . The plea therefore that a participation of the Judges on the administrative side disqualifies them from hearing the matter on the judicial side cannot be accepted. It has also to be noted that the recommendation under Article 233 is not that of any Judge of the High Court; but of a superior Court, the collective constitutional entity, the High Court. The High Court cannot be said to be prejudiced simply because it did not recommend a person to be appointed as a District Judge. When the High Court makes the recommendation and it is challenged before the same Court, the Judges of that Court are bound to hear the petition "ex necessitate"-- a region where the principle of natural justice, in any case, have to yield. Moreover, the petitioner herself chose the forum and filed the writ petition in the High Court. Having done so, it is not open to her to raise any preliminary objection. It has also to be remembered that this Bench was constituted by the Chief Justice after some of the Judges expressed to be excused on personal grounds. Moreover, the questions raised, as noticed already, are pure questions of law and if there was violation of any legal principle in making the recommendation, they are matters which can be considered in the Original Petition itself and if those grounds are sustained, naturally, relief will have to be moulded accordingly.

20. In the result we do not find any merit in the preliminary objection and it is overruled.

21. Post the O. P. for hearing on 10-6-1985.

22. Learned counsel for the petitioner made an oral application for certificate for

appeal to the Supreme Court under Article 134A(b) read with Article 133(1) of the Constitution. We are not satisfied that the case involves any substantial question of law of general importance which, in our opinion, needs to be decided by the Supreme Court. The application for leave is therefore rejected.

23. Issue carbon copies or photostat copies (whichever is possible) as expeditiously as possible to such of the parties as may apply in this behalf.