
(1983) 08 CAL CK 0030
In the Calcutta High Court
Case No : Matter No. 441 of 1983

Subir Chowdhury

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 30-08-1983

Acts Referred:

Constitution of India, 1950 — Article 124(3), 14, 19, 217(1), 217(2)

Citation : AIR 1984 Cal 7

Hon'ble Judges : Borooah, J

Bench : Single Bench

Advocate : Balai Chandra Roy and Ashoke Chatterjee, Debi Prasad Pal, Party in person, S.K. Acharya, General and Prabir Roy Chowdhury, Swadesh Bhusan Bhuniya and Amar Banerjee, for the Appellant; D.P. Wadhwa and P.K. Bose, for the Respondent

Judgement

Borooah, J.—This writ petition tiled by Shri Subir Chowdhury, a practising Advocate of the Judges Court at Alipore raises a question of some Constitutional Importance affecting the selection and appointment of Judges in the High Court. The petitioner's grievance is that the Advocates practising in the District Courts of West Bengal and who possess the requisite qualification as stipulated in Sub-clause (2) of Article 217 of the Constitution to be appointed as High Court Judges, are never considered for such appointment, and as such the fundamental rights guaranteed to such Advocates under Articles 14 and 19 of the Constitution have been violated.

2. At the very inception the question of maintainability of this Writ Petition has to be gone into as this question has been mooted by Mr. D. P. Wadhwa appearing on behalf of the Union of India and by the learned Advocate-General appearing on behalf of the State of West Bengal.

3. At the time of praying for a Rule Nisi as well as in the course of hearing of the Writ Petition Shri Chowdhury made it clear that he was not an aspirant for the post of a High Court Judge but he was espousing the cause of the Advocates who

practise in the District Courts of West Bengal. No Particular Advocate can come before this Court and say that he has a constitutional or legal right to be considered for appointment as a High Court Judge. On the other hand, if an Advocate practising in a District Court raises a question on behalf of the District Courts' Advocates as a class that although some of them may possess the requisite constitutional qualification for being appointed as a High Court Judge, appointments to the High Court from the Bar have till now been the sole monopoly of the Advocates practising in this High Court, the question can certainly be gone into by this High Court in the exercise of its powers under the Constitutional Writ Jurisdiction.

4. In the case of S.P. Gupta Vs. President of India and Others, Mr. Justice P N. Bhagwati made the following observations (at p. 195) :

"The profession of lawyers is an essential and integral part of the judicial system and lawyers may figuratively be described as priests in the temple of justice. They assist the court in dispensing justice and it can hardly be disputed that without their help, it would be well nigh impossible for the Court to administer justice. They are really and truly officers of the Court in which they daily sit and practice. They have, therefore, a special interest in preserving the integrity and independence of the judicial system and if the integrity or independence of the judiciary is threatened by any act of the State or any public authority, they would naturally be concerned about it, because they are equal partners with the Judges in the administration of Justice."

5. Mr. Chowdhury was supported by Mr. Balai Chandra Roy appearing on behalf of the City Court Bar Association. Mr. Biswanath Bai- Payee on behalf of the Calcutta Small Causes Court Bar Association and Mr. Swadesh Bhusan Bhunia on behalf of the Bar Council of West Bengal. Mr. Roy contended that under the Advocates Act there is only one class of Advocates and all of them have a right to be considered for appointment as High Court Judges. It was further submitted that the constitutional obligation of the Chief Justice of the High Court was to find out the best available talent and by considering the cases of the lawyers practising in the subordinate Courts, the Chief Justice would have a wider field to cover and there is always a possibility of better selections being made. Mr. Roy further submitted that the act of recommending the names by the Chief Justice cannot be a matter entirely for his subjective satisfaction and the Chief Justice must be guided by objective considerations to select the best available talent: this was a fundamental duty under Article 51A (it of the Constitution).

6. Mr. Swadesh Bhusan Bhunia supported the arguments of Mr. Roy and further contended that inasmuch as in making the pending recommendations which are awaiting the final orders of the President of India the case of the District Court's lawyers was not considered, the entire recommendations should be quashed.

7. Dr. Debi Prosad Pal appearing on behalf of the High Court Bar Association has opposed the Rule. His first submission is that there has to be a distinction

between an "Advocate" who is eligible to be appointed as a District Judge under Article 233 (2) of the Constitution and an "Advocate" who is Qualified to be appointed as a Judge of the Supreme Court or the High Court in accordance with the provisions of Articles 124(3)(b) and 217(2)(b) respectively. Dr. Pal's contention is that an Advocate of a High Court appearing in the last two Articles has to be construed literally to mean an Advocate actually practising in the High Court. Dr. Pal's second submission is that even assuming that an Advocate practising in the District Court Bar is qualified to be a Judge of the High Court, he has no right to come before this Court and say that his case must be considered.

8. Mr. Wadhwa apart from challenging the maintainability of the writ petition submitted that no particular Advocate has any constitutional or legal right to demand that he should be considered for appointment as a Judge of the High Court. Mr. Wadhwa however, did not dispute the eligibility of Advocates practising in the District Courts to be considered for appointment as High Court Judges. Mr. Wadhwa's arguments were quite brief but he quoted extensively from certain observations, made by the different learned Judges in the case of S. P. Gupta (AIR 1982 SC 1491 (supra)). Mr. P. K. Bose in his reply on behalf of the Union of India contended in writing:

"Mere fact that no Judge of the Calcutta High Court has yet been appointed from the District Court Bar does not raise any irresistible conclusion that no name of Advocates from the District Court Bar was ever considered by the Hon'ble the Chief Justice of the Calcutta High Court. Consideration by the Hon'ble the Chief Justice is a mental process and need not be apparent on the records. It is to be presumed that the Hon'ble the Chief Justice of the Calcutta High Court knew constitutional provisions and his duties relating to the appointment of the Judges of this Court and he did his duties."

9. The learned Advocate-General appearing for the State of W. B. has also contended that what passes through the mind of a particular Chief Justice at the time the question of making recommendations from the members of the Bar arises, is within the mind of the Chief Justice and cannot possibly be known to others. The learned Advocate-General, however, produced before me the records relating to the appointment to the High Court which were available with the State Government and submitted after going through the records that till today no recommendations have been made for appointment to the High Court from any member of the Bar practising in any Subordinate Court of West Bengal.

10. After the coming into force of the Advocates Act 1961 there are only two classes of Advocates viz., Senior Advocates and other Advocates (vide Section 16(1) of the said Act). Therefore, separate meanings cannot be attributed to the word "Advocate" under Article 233(2) of the Constitution on the one hand and Article 124(3)(b) and Article 217(2)(b) on the other. The Supreme Court has also made this position clear in the case of Prof. Chandra Prakash Agarwal Vs. Chaturbuj Das Parikh and Others, where it has been observed at p. 1064) :

"It is true that in this clause the word "advocate" is used without the qualifying words "of a High Court". It is difficult, however to see how the fact that the word, "advocate" only used in connection with the appointment of a District Judge would assist counsel in the construction suggested by him of the expression "advocate of any High Court" in Article 217. Or that that expression must mean an advocate who has had the necessary number of years" practice in the High Court itself The distinction, if any between the words, "an advocate" in Article 233(2) and the words, "an advocate of a High Court" in Article 217(2)(b) has no significance in any event after the coming into force of the Advocates Act, 1961, as by virtue of Section 16 of that Act there are now only two classes of persons entitled to practice, namely, senior advocates and other advocates."

11. The next and the most crucial question that requires consideration in this case is whether a particular Advocate, whether he be an Advocate of the High Court or a Subordinate Court has the right to come before this Court and pray for an appropriate Writ demanding that his case should be considered for appointment as a Judge of this High Court? The answer is obviously "no". The Supreme Court in the case of S.P. Gupta Vs. President of India and Others, :

"No person, who is proposed for initial appointment as a Judge would be entitled to complain against the decision of the Central Government not to appoint him because he would have no right to be considered for appointment as a Judge."

12. The Court further observed :

"Further, the minimum qualifications for appointment as a Judge (prescribed in Sub-article (2) of Article 217) would be possessed by numerous advocates and by a fair number of service Judges but even so, the special machinery for making appointments is indicated in Article 217(1), obviously designed to recruit persons of great ability, high character and unquestioned integrity to the Bench. All these factors go to show that at the stage of initial recruitment under Article 217(1), no one has a right to be appointed a Judge of the High Court nor the right to be considered for such appointment and, therefore, it does appear that a writ of mandamus at the instance of an aggrieved person would not lie. But at the same time I am quite sure whether simply because a mandamus directing the President to reconsider the case of a non-appointee may not lie it would be correct to say that in the case of non-appointment at the stage of initial recruitment the mandate of consultation becomes otiose, superficial or inconsequential, or that a positive breach thereof may not provide any relief whatever to the aggrieved person but since that question does not arise in the instant case I would rather leave it open for decision in an appropriate case and proceed on the basis that a mandamus for reconsideration of his case would not lie as the aggrieved person does not have the right to be considered."

13. But if, for instance, in making recommendations for appointments to the High Court only Advocates belonging to a particular class, religion or community are considered to the exclusion of others, the Advocates of the deprived class,

religion or community can certainly ventilate their grievances and contend that they are being discriminated against and their cases should be considered.

14. The averment made in the Writ Petition that cases of Advocates practising in the District Courts have never been considered for appointment to the High Court, has not been controverted by either the Hon"ble the Chief Justice of India or the Acting Chief Justice of this Court Through the Secretary of the learned Acting Chief Justice I asked for the records relating to the appointment of Judges of this Court but the learned Acting Chief Justice declined to make the said records available to me. As such I can take it to be an accepted position that till today no Advocate practising in any District Court of West Bengal has been considered for appointment to the post of a Judge of this Hon"ble Court.

15. A scrutiny of the appointments made to the Bench of this High Court since independence will also reveal that not a single Advocate practising in the lower Court has been elevated to the Bench of this Court. As such, it is certainly open to the Writ petitioner to urge that the advocates of the District Courts are being discriminated against in the matter of appointment to the High Court and their cases should be considered when recommendations would be made in the future.

16. It was urged both by Mr. P.K. Bose and the learned Advocate-General that whether a particular Chief Justice considered the cases of any particular, Advocate, whether he be of the High Court or of the lower Court, cannot be ascertained as the consideration might have taken place in the mind of the Chief Justice. The Chief Justice of a High Court is one of the constitutional functionaries involved in the appointment of a High Court Judge. A Chief Justice after all is a human being who might be subjected to extraneous influences and in order to rule out any possibility of arbitrariness, there should be some formal expression of the consideration in the records available and in the recommendations sent up to the president of India.

17. The Constitution of India has fully safeguarded the independence of the Judges of the High Court by guaranteeing complete safety of their tenure and laying down rigid procedures for their removal. The independence of the Judiciary has also been sought to be safeguarded by the procedure laid down for the appointment of Judges. Under Article 217(1) of the Constitution a Judge of the High Court is appointed by the President of India after consultation with the Chief Justice of India, the Governor of the State and in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court. Although there is no bar to any of the three Constitutional functionaries in recommending the name of a particular Advocate for appointment to the post of ,a High Court Judge, however, by convention the procedure for the appointment of a High Court Judge is initiated by the Chief Justice of a High Court who sends his recommendation to the Governor of the State who in turn forwards the same to the Chief Justice of India to be placed before the President of India or in other words, the Central Government, for final appointment.

18. A very important duty is therefore, cast on the Chief Justice of the High Court who has to ensure that the best available person with good legal acumen and of unimpeachable integrity and without any political or religious bias is recommended by him for appointment. In looking for such a person the wider the field, the better is the chance of a proper selection. There is yet another reason why it may be necessary to look beyond the boundaries of the High Court in making recommendations from the Bar. A High Court Judge's take-home pay varies between 200 to 300 Gms. depending on whether or not he contributes to the provident fund. Any good lawyer who can be considered to be suitable for elevation to the Bench can earn this amount in less than a week. So the Chief Justice's invitation to join the Bench is often declined, and as a result lawyers who do not command a good practice have to be recommended. The rate of fees of the Advocates practising in the District Courts is not as high as that of those practising in the High Court and as such more suitable persons may be available from the District Bar to join the Bench.

19. The Law Commission of India in its 58th Report on Structure and Jurisdiction of the Higher Judiciary published in January 1974, in paragraph 10.15 of Chapter 10 has made the following observations:

"After the Second World War, the cost of living has been steadily increasing, until we have reached a stage when it can be said without any exaggeration that Judges, who draw a salary of Rupees 3,500/- are finding it difficult to live a life with ordinary amenities much less a life of comfort and ease. On the other hand, after the Second World War, the professional gains at the Bar have increased by leaps and bounds. The inevitable result of this anomalous situation has been that senior members of the Bar have lost faith in the validity of the principle which governed the ethics of the Bar in the past, and which compelled them as a matter of duty to the profession to accept an invitation of the Chief Justice to join the Bench. In the past, if the Chief Justice of the High Court sent for a member of the Bar and offered him an invitation to be his colleague, it was thought to be a matter of duty to the nation to say "yes" and never to decline the offer. Decline in the faith of this professional principle has now led to this unfortunate and distressing result that the Chief Justice of every High Court has the experience of getting a "no" to his request from several members of the Bar. This is a circumstance the relevance of which cannot be ignored in considering the present problem."

20. If a Munsif can become a High Court Judge, I fail to understand why a District Court lawyer, who possesses the requisite qualification cannot be elevated to the Bench of the High Court. In this context I may also mention that Advocates who have passed the Attorney-ship Examination are also eminently suited to become Judges of the High Court. It is unfortunate that in the history of India only one Solicitor had been appointed as a High Court Judge and he is now an eminent Judge of the Supreme Court of India.

21. I, therefore, dispose of this Rule with a declaration that Advocates practising

in the District Courts are eligible for appointment as. High Court Judges and in making future recommendations the Chief Justice of the High Court should also consider whether there are Advocates practising in the District Courts who are suitable to be recommended for appointment as Judges of the High Court. The modalities for such consideration may be worked out by the Chief Justice in consultation with his senior colleagues or suggestions can be invited from the different District Judges or the Chief Judge of the City Civil Court.

22. Although Mr. Swadesh Bhusan Bhunia has asked me to quash the recommendation which has already been made by the former Chief Justice I do not think. I can do so. It is UP to the President of India, viz., the Central Government to decide whether appointments to the existing vacancies of this High Court will be filled up on the basis of the recommendations already made or fresh recommendations will be sought from the Chief Justice or the vacancies will be filled up by appointments from other States in conformity with the recent policy of the Government of India that one-third of the complement of the High Court Judges will be from outside the State.

23. All interim orders are vacated.

24. There will be no order as to costs.