

(1998) 04 AP CK 0076

In the Andhra Pradesh High Court

Case No : Writ Petition No. 3088 of 1998

Syed Rahamtullah Khadri

APPELLANT

Vs

Government of A.P. and Another

RESPONDENT

Date of Decision : 03-04-1998

Acts Referred:

Andhra Pradesh State Higher Judicial Services Rules, 2007 — Rule 3
Constitution of India, 1950 — Article 217(2), 233, 233(2)

Citation : (1998) 4 ALD 514 : (1998) 4 ALT 612

Hon'ble Judges : T.N.C. Rangarajan, J;S.V. Maruthi, J

Bench : Division Bench

Advocate : Mr. M. Ravindranath Reddy, for the Appellant; Government Pleader for Home and Mr. P. Raviprasad, SC for High Court, for the Respondent

Judgement

T.N.C. Rangarajan, J.—This writ petition relates to the claim of the petitioner for appointment to the post of the District and Sessions Judge (Grade-II)

2. The petitioner is an advocate. He states that he obtained the degree in Bachelor of Law in 1989 and enrolled as an advocate with the Bar Council of Andhra Pradesh on 22-6-1989. He claims to have set up practice at Chirala by joining the office of Sri B.V. Raghavaiah, advocate, practicing at Chirala. He also states that he obtained ML. degree after obtaining permission from Bar Council. The petitioner applied for the post of District and Sessions Judge (Grade-II) on 21-8-1996, wrote the test on 24-11-1996 and appeared for the interview on 18-11-1997. He was asked by the Government by a memo dated 5-6-1997 to furnish certain particulars in the attestation form which he complied with. However, he came across G.O.Ms.No.291 (IA&J-SCF) Department dated 4-12-1997 appointing four advocates as District Judges but his name was not in the list. He claimed that he was recommended by the High Court but was not appointed by the Government and therefore filed the writ petition for a mandamus directing the 1st respondent Government to appoint him to that post.

3. The second respondent is the High Court. The Registrar of the High Court filed

a counter affidavit accepting the fact that the High Court had recommended the name of the petitioner for appointment as a District Judge on 13-3-1997 but a complaint was received stating that the petitioner was continuously working as a lecturer in Justice Komaraiah College of Law in Karimnagar and he simply obtained me practice certificate from the Bar Association, Chirala. It is stated that this complaint was investigated by discreet enquiries by the District and Sessions Judge of Karimnagar, Guntur and Ongole and the matter communicated to the Government for verification. Subsequently, after discreet enquiry, the Government informed the High Court that the petitioner docs not appear to be having the prescribed standing of not less than seven years at the Bar which is the pre-requisite qualification under Rule 3 of the A.P. Higher Judicial Service Rules for appointment as a District Judge. The matter was considered by the High Court in the Full Court meeting held on 17-10-1997 and it was resolved that in view of this information, the candidature of this petitioner as well as another candidate were to be withdrawn from the recommendation made earlier. Consequently, the other appointments were made excluding the petitioner from the list of recommendation.

4. Respondent No.1-Government of Andhra Pradesh adopted the counter affidavit filed by the 2nd respondent.

5. The petitioner filed a reply affidavit stating that he was appointed as a part time lecturer in Justice Komaraiah College of Law in September 1994 and he worked for a period of seven months. He stated that he was allotted six periods in a week and he had not suspended the practice but he was attending the office of Sri B.V. Raghavaiah, advocate at Chirala during the other three days and that they paid him at the rate of Rs.2,500/-. He also referred to the Advocates" (Right in Take Up Law Teaching) Rules, 1979 and claimed that part-time lecturership was not a bar to practice. He claims that he was disqualified without providing an opportunity to show that he did not cease to be an advocate by reason of employment as part-time lecturer.

6. The learned Counsel for the petitioner submitted that the High Court cannot withdraw the recommendation once it was made. He also submitted that the principles of natural justice were not followed in this case and that vitiated the entire procedure of withdrawing the recommendation. Thirdly, it was submitted that the Government cannot enquire into any matter relating to the candidate as the entire process must be done by the High Court. He submitted that in these circumstances, failure to appoint the petitioner though recommended initially by the High Court was illegal and at any rate he was entitled to have proper consideration of his candidature by giving an opportunity to prove that in spite of part-time employment, he was practicing as an advocate and was fully qualified to be appointed as a District Judge.

7. On the other hand, the learned Counsel for the High Court submitted that the Government is entitled to enquire into the antecedents of the candidate to find out whether there is any objection to his appointment. He also submitted that if

any adverse material is found, the Government can again consult the High Court and the advise of the High Court to drop his name is a culmination of the consultation process, as such consultation does not end until the appointment is made. He also submitted that in the case of appointment of the judicial post, the question of giving opportunity to the candidate does not arise as it is a matter between the Government and the High Court. He also submitted that if at all the petitioner is entitled to any opportunity, he had such a post-decisional opportunity in this proceeding and yet failed to show that he was qualified by producing the appointment order as a part-time lecturer. He submitted that in the absence of that appointment order, it must be taken that the petitioner was a full-time lecturer at Karimnagar making it impossible for him to practice at Chirala which is about 500 Kms away. He also pointed out that the statement in the reply affidavit was contradictory to the representation made by the petitioner wherein he said that he only gave lectures during the vacation. He also submitted that mandamus cannot be issued as the selection by itself does not confer any right of appointment.

8. We have carefully considered the submissions of both sides. The main issue in this case is whether the petitioner fulfils the qualification prescribed for being appointed as a District Judge (Grade-II). Article 233(2) of the Constitution of India states that:

"Article 233 : Appointment of District Judges:

(1)

(2) A person already in the service of the Union or of the State shall only be eligible to be appointed a district Judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment."

Rule 3 of the A.P. State Higher Judicial Service Rules reads as follows :

"3. Qualification:

A. Person for appointment to Category-11 from Bar-

(a) shall be an advocate or a Pleader of not less than seven years standing at the Bar."

9. We must first consider the meaning of the expression "has been for not less than seven years an advocate or a pleader" in Article 233(2) of the Constitution of India and ""shall be an advocate or a pleader of not less than seven years standing at the Bar in Rule 3 of the A.P. State Higher Judicial Service Rules. Obviously, both these expressions are not identical and the content of these two expressions could be different. The learned Counsel for the petitioner submitted that mere enrollment is sufficient and in extreme cases, a briefless lawyer who sits at home could after a lapse of seven years be technically eligible for appointment as a District Judge. He relied on the observation in the case of Prof.

Chandra Prakash Agarwal Vs. Chaturbuj Das Parikh and Others, , where with reference to the Article 217(2)(b) of the Constitution which is the expression "as for at least ten years be an advocate of the High Court" held that it means an advocate whose name has been enrolled as an advocate of the High Court no matter whether he practiced in the High Court itself or in the Courts subordinate to it or in both. He submitted that this indicate that the enrollment is more important than actual practice. On the other hand, the learned Counsel for the respondent drew our attention to the following observation of the Supreme Court in the case of Madan Lal v. State of J&K AIR 1975 SC 1088:

"A member of the bar can be said to be in actual practice for 2 years and more if he is enrolled as an Advocate by the concerned Bar Council since 2 years and more and has attended law Courts during that period. Once the Presiding Officer of the District Court has given him such a certificate, it cannot be said that only because as an advocate he has put in less number of appearances in Courts and has kept himself busy while attending the Courts regularly by being in the law library or in the bar room, he is not a member of the profession or is not in actual practice for that period. The words "actual practice" should mean continuous appearances in the Court would amount to re-writing the rule when such is not the requirement of the rule.""

10. In another decision in the case of State of Assam Vs. Horizon Union and Another, , where the qualification for appointment as a Presiding Officer of the Tribunal was that the person concerned must have worked as a District Judge for a period of three years, it was held that holding of that post was sufficient and he need not have actually worked as an Additional District Judge. Reading these cases it appears to us that the Supreme Court has taken note of the impracticabilities in accepting either of the extreme positions. If it is to be said that mere enrollment is enough then any briefless lawyer by lapse of time would be qualified. Not that a person who was not fortunate in getting any brief could not become an excellent Judge but that he would not have had the experience and maturity to handle the judicial work of a higher level entrusted to him. On the other hand, if it is to be held that constant and continuous practice on his own is a prerequisite, then again such persons, who will naturally be very successful in the Bar, may be reluctant to appear for a post of District Judge. In practice, therefore, it means that the candidate should be regularly attending the Court and arguing the case if not on his own but on behalf of other. We are convinced that a person cannot be qualified merely by lapse of seven years after enrollment, if it is shown that during that period he did not actually attended the Court or could not have attended the Court by reason of his employment elsewhere.

11. We now come to the second question whether the petitioner was in fact practicing as an advocate at Chirala. The learned Counsel for the petitioner scruttled this issue by submitting that decision to disqualify him and to withdraw recommendation was void because of lack of opportunity given to the petitioner

and hence the original recommendation should stand and the Government directed to make the appointment on the basis of that recommendation. The Supreme Court has held in *State of Kerala Vs. Smt. A. Lakshmikutty and others*, , that even if the Government does not make an appointment on the "basis of the recommendation made by the High Court, the affected candidate cannot ask for a mandamus. The learned Counsel, therefore, attacked the withdrawal of the recommendation by submitting that it was made on the basis of material collected behind his back without giving him an opportunity to rebut the same. He also questioned the power of the Government to enquire into the complaint.

12. As far as the question of enquiring into the antecedents of the candidates are concerned, it is now well settled that the Government has a right to verify the antecedents. The Kerala High Court in the case of *K.M. Sugatha Prasad and Others Vs. State of Kerala and Others*, , held that a selected candidate has no right of being appointed and the nature of the materials to be collected and the satisfaction that is to be arrived at, about the character and antecedents of the person to be appointed is entirely for the appointing authority. The same view was taken earlier by that Court in the case of *K. George Vs. The State of Kerala*, , and it was observed that the Court can interfere only if it was shown that the exclusion was based on alien or irrelevant grounds.

13. The question that arises is as to whether a candidate has a right to have a say in respect of the material that may surface in such enquiries. There is a decision of the Supreme Court in the case of *S. Govindaraju v. K.S.R.T.C.* AIR 1966 SC 1680, where it was observed that:

"On the removal of his name from the select list serious consequence entail as he forfeits his right to employment in future. In such a situation even though the Regulations do not stipulate for affording any opportunity to the employee, the principles of natural justice would be attracted and the employee would be entitled to an opportunity of explanation though no elaborate enquiry would be necessary. Giving an opportunity of explanation would meet the bare minimal requirement of natural justice."

14. But as pointed out by the learned Counsel for the respondent that was a case where the selected candidate was allowed to work in a temporary capacity and the right to be appointed had crystalised into a quasi vested right. Generally, however, when one authority has to make a recommendation in the course of consultation process for another authority to make the appointment, the candidate whose name is in the selected list, has no right to be appointed. The appointing authority also has a right to verify the antecedents and reject his name even though he might have been recommended by the recommending authority.

15. The learned Counsel for the petitioner submitted that since the appointments of a District Judge is governed by the provisions of the Article 233 of the

Constitution, the Government cannot act on material other than the recommendation of the High Court. He relied on the decision of the Supreme Court in the case of Chandra Mohan v. State of U.P. AIR 1966 SC 1987 and in particular the following observation:

"These provisions indicate that the duty to consult is so integrated with the exercise of the power that the power can be exercised only in consultation with the person or persons designated therein. To state it differently, if A is empowered to appoint B in consultation with C, he will not be exercising the power in the manner prescribed if he appoints B in consultation"

16. In the present case, we must say that this principle, has in fact, been complied with by the Government referring the matter back to the High Court. This is not a case where the Government has acted on material other than the recommendation of the High Court because even the additional material was placed before the High Court and it is only because of the advise of the High Court to drop the name of the petitioner that the Government did not appoint him.

17. The learned Counsel for the petitioner then confined his case to the question of his right to be considered for appointment. He submitted that this right means fair consideration. He relied on the decision of the Supreme Court in the case of Ramana v. I.A. Authority AIR 1979 SC 1658 and submitted that the power of the Government with reference to award of jobs must be based on some valid principle which is not irrational or unreasonable or discriminatory. He also relied on the decision of the Supreme Court in the case of Km. Nelima Misra Vs. Dr. Harinder Kaur Paintal and others, and submitted that where extraneous material is relied upon, the selection will be vitiated. The learned Counsel for the respondent pointed out that the post of District Judge is not an ordinary job which can be considered as largesse but a post carrying prestige and dignity requiring great circumspection in the selection process. He also submitted that since the Government consulted the High Court, which felt that he did not qualify for the appointment, the question of giving an opportunity to the petitioner cannot arise. He submitted that the matter of natural justice depends upon the context and in the case of appointment in consultation with the High Court, such a question if arises at all is taken care of at the time of judicial review as a post-decisional opportunity.

18. In the present case, the application form contained a column No. 11 for "other particulars" after column No. 10 "place of practice". Column No.12 was "whether working in State or Central Government." The petitioner did not fill up the Column No. 11 but stated "No" in Column No. 12. The learned Counsel for the respondent submitted that the failure to fill up the Column No. 11 amounted to suppression of information that he was actually working in the Law College whether part-time or full-time. The learned Counsel for the petitioner, however, contested this by stating that he cannot be blamed for not answering a question which was not asked namely; whether he was working elsewhere. It does appear

that Column No. 12 as to whether he was working in State or Central Government was with reference to the provisions of the Article 233(2) of the Constitution which bars a person already in the service either State Government or Central Government from being appointed as a District Judge when recruited from the Bar. Column No. 11 cannot take colour from that column so as to say that "the other particulars" referred to "employment elsewhere". We must observe that the application form requires to be amended to elicit such information clearly. In the absence of such a column, we do not think that it could be said that the petitioner had suppressed any such information,

19. But the question still remains whether the petitioner was actually practicing at Chirala. It is with reference to this question that a doubt arose after the first recommendation because of a complaint given by somebody. The learned Counsel for the petitioner submitted that whatever be the complaint, the petitioner is entitled to be heard before that complaint is acted upon. He relied on the decision of the Supreme Court in *S.L. Kapoor Vs. Jagmohan and Others*, . He also relied on the decision of *Easlow Homes v. Redbridge*, L.B.C. (1972) Q.B. 417 where Lord Denning quoted Lord Parker C.J., in *In Re H.K. (An Infant)* (1967 2 Q.B. 617).

"....even if an immigration officer is not in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the subsection, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly."

He submitted that the High Court did not act fairly when the complaint was acted upon without giving an opportunity to rebut the same, the material being gathered behind his back. At first blush it appears to be a just criticism. But in the context of a recruitment for Judicial Office, it falls into insignificance. Generally, a candidate is interviewed on the basis of the information furnished by him and as well as on his performance in the written examination if the High Court were to verify the statements made in the application before the interview, he would have been asked about it. Even if he had not been asked, he could not have any objection to the authority rejecting his application which did not stand up to that verification.

20. The learned Counsel for the petitioner accepted that he could not have asked for an opportunity with specific reference to any verification made at that point. But, he submitted that where such a verification is made subsequent to the recommendation, he must have an opportunity to rebut the same. We can see no difference in the situation. All that has happened is that the claim he had made or that the particulars he gave in the application have been verified on the basis of certain information received subsequent to the recommendation and it was found that his claim that he was qualified was unacceptable. As long as the Government as the appointing authority or the High Court as the recommending

authority, did not take into account any irrelevant material in arriving at the conclusion that the petitioner did not fulfil the prerequisite qualifications, he cannot complain of any unfair treatment. We are fortified in this view by the recent decision of the Supreme Court in *Union of India v. Shri Rati Pal Saroj* 1998 (2) SC 465.

21. The learned Counsel for the petitioner submitted that hearing of this writ petition will not qualify as a post-decisional opportunity and once it is found that the petitioner was not given an opportunity to rebut the material gathered behind his back the matter must be remitted to the authority for fresh consideration after giving him an adequate opportunity. We are unable to accept this contention. There are cases where it is impracticable to give an opportunity of being heard and if at all there is any specific grievance, a post-decisional hearing by means of a judicial review would meet the ends of justice. In fact, the question of remitting the matter for fresh consideration is a matter of judicial discretion and such a remedy can be declined if there is no miscarriage of justice. De Smith in *Judicial Review of Administrative Action* notes :

"The large number of applicants competing for scarce resources may make it impracticable to offer each applicant a hearing. If for example, there are 1,200 applicants for seventy places available in the Law Department of a University institution (or a corresponding ratio of applicants to available licences, permits or grants) it may be impossible to afford interviews (or hearings) to many of those who, from the particulars supplied with their written applications, appear sufficiently meritorious or suitable to warrant fuller personal consideration. Criteria for selection should however be evolved and applied in an attempt to do justice as far as this is possible; but there will inevitably be persons who will reasonably feel aggrieved at having been denied an adequate opportunity of presenting their case. Where a hearing can be provided, consideration of administrative practicality may influence or determine the content of the procedure which is capable of being adopted."

The present case falls under that category where the entire process including the enquiry into antecedents by the Government is only a selection process to weed out those who are prima facie not eligible for appointment. It will be difficult and impracticable to introduce into the weeding out process, the concept of giving individual hearing with reference to any adverse material that the authorities may come across. Even in the case of appointment of the High Court Judges, the Supreme Court observed in the case of *Supreme Court Advocates-on-Record Association and another Vs. Union of India*, as follows :

"Even though no appointment can be made unless it is in conformity with the opinion of the Chief Justice of India, yet in an exceptional case, where the facts justify, a recommendee of the Chief Justice of India, if considered unsuitable on the basis of positive material available on record and placed before the Chief Justice of India may not be appointed. Primacy is in making an appointment; and, when the appointment is not made, the question of primacy does not arise.

There may be a certain area, relating to suitability of the candidate, such as his antecedents and personal character, which, at times, consultees, other than the Chief Justice of India, may be in a better position to know. In that area, the opinion of the other permits non-appointment of the candidate recommended by the Chief Justice of India, on the basis of positive material indicating his appointment to be otherwise unsuitable, that the Chief Justice of India does not have the primacy to persist for appointment of that recommendee. Non-appointment of any one recommended, on the ground of unsuitability, must be for good reasons, disclosed to the Chief Justice of India to enable him to reconsider and withdraw his recommendation on those considerations. If the Chief Justice of India does not find it necessary to withdraw his recommendation even thereafter, but the other Judges of the Supreme Court who have been consulted in the matter are of the view that it ought to be withdrawn, the non-appointment of that person, for reasons to be recorded, may be permissible in the public interest. However, if after due consideration of the reasons disclosed to the Chief Justice of India, that recommendation is reiterated by the Chief Justice of India with the unanimous agreement of the Judges of the Supreme Court consulted in the matter, with reasons for not withdrawing the recommendation, then that appointment as a matter of healthy convention ought to be made."

22. From the above passage, it is clear that the interest of candidates are safeguarded by the consultation process itself and no specific opportunity is envisaged in appointments to judicial posts.

23. We now come to the merits of the case. The learned Counsel for the petitioner submitted that the petitioner was not disqualified from being eligible for the post merely because he was a part-time lecturer in the Law College. Here he referred to the rules framed under the Advocate Act by the Bar Council which state that an advocate may, while practicing, take up teaching of law so long as the hours during which he is so engaged in the teaching of law do not exceed 3 hours a day and such an employment will not require the advocate concerned to suspend his practice. He relied on the decision in the case of *G.P. Saxena v. State of A.P.* 1992 (2) ALT 46.

"That he shall be a present member of the Bar is not the requirement either of the rule of the notification unlike in the case of a member of the judicial service who is required to be a present member of the service."

and submitted that as long as the petitioner has not suspended his practice, he must be taken to be qualified. But that was a case where the candidate had already completed 7 years of practice and was working in a bank as Law Officer which was recognised by the Bar Council as continuation of practice as such an appointment, did not require that he should suspend his practice. In the present case, the petitioner has not been able to produce the appointment order from the college to indicate the nature of his service, whether it was full-time or part-time. If only he can establish that he falls squarely within the scope of the rule permitting part-time employment that it could be said that his employment was

not exclusive or precluded him from practicing. Apart from this technical position, there is also a practical angle to this case. The petitioner claims that he was practicing at Chirala which is stated to be about 500 Kms. from Karimnagar where he admits to be in employment. Even assuming that he was employed only as part-time lecturer and was not required to suspend his practice, was it practically possible for him to shuttle between Chirala and Karimnagar for an effective practice in Chirala ? He was enrolled in 1989 and by the time he applied for the post, he had hardly completed seven years. In this period if he had been at Karimnagar and that period of his stay/employment at Karimnagar is excluded, then certainly, he does not have seven years of practice as mentioned in the beginning though Article 233(2) refers to "being an advocate", the service rule requires "standing as an advocate" which is more restrictive and certainly requires constant presence at Chirala in this background, when the petitioner has not been able to show that he had in fact practiced for seven years at Chirala, the question of quashing the withdrawal of the recommendation as void for want of an opportunity to the petitioner cannot arise. The writ petition fails and accordingly it is dismissed. No costs.