

A VINOD KUMAR BHAGAT AND ORS

v.

STATE OF JAMMU & KASHMIR AND ORS

(Civil Appeal Nos. 6928 of 2021)

B NOVEMBER 17, 2021

**[DR. DHANANJAYA Y CHANDRACHUD, SURYA KANT
AND VIKRAM NATH, JJ]**

Service law: Judicial service – Respondents were appointed

- C *as Judicial Magistrates in 2002-03 – They were placed higher in the merit list compared to the reserved category petitioners – However, the gradation list was prepared by applying the roster for direct recruitment as provided under r.5 of the Jammu and Kashmir Reservation Rules, 2005 – This in effect led to the reserved category petitioners displacing the general category respondents in the gradation list – The third and fourth petitioners were promoted as Sub-Judge on the basis of their placement in the gradation list – Respondent filed writ petition for quashing the gradation list of Judicial Magistrates and for a direction to prepare the gradation list, based on merit – The contention of the respondents before the High Court was that r.5 of the 2005 Rules will be applicable only for direct recruitment and not for determination of inter se seniority for the purpose of promotion – While disposing of the writ petition, High Court relied upon its earlier decision in Ashok Kumar and Others v State of J&K – High Court held that there was merit in the challenge to the gradation list issued by the High Court and to*
- D *promotions granted to the post of Civil Judge on the basis of placement in the gradation list – On appeal, held: High Court had observed that the ratio in Ashok Kumar's case would be sufficient to settle the principle issue raised – The reference to the decision in Ashok Kumar's case was wholly unnecessary since no submission was urged on the basis of that decision by the petitioners before the High Court – However, High Court also undertook an analysis of the validity of the gradation list independent of the ratio in Ashok Kumar's case – The decision of the High Court seems to intertwine the reasoning on both aspects – It was not necessary for the High Court or, for that matter, appropriate to rely upon the decision in*
- E *Ashok Kumar's case, since such a ground was not urged either in*

the writ proceedings or in the course of the submissions by the petitioners before the High Court – Impugned judgment and order of the High Court set aside – Writ petition restored to the file of the High Court for a decision afresh. A

CIVIL APPELLATE JURISDICTION: Civil Appeal No.6928 of 2021. B

From the Judgment and Order dated 27.11.2015 of the High Court of Jammu and Kashmir at Jammu in S.W.P. No.1350 of 2011.

A. K. Ganguli, A. Mariarputham, Sr. Advs., C. Azad, Avneesh Arputham, Ms. Anuradha Arputham, M/s Arputham Aruna and Co., Advs. for the Appellants. C

Tushar Mehta, SG, Ms. Madhavi Divan, ASG, Gaurav Pachnanda, V. Giri, Sanjay R Hegde, Sr. Advs., Rajat Nair, Devashish Bharukha, Ankur Talwar, Ms. Shashi Juneja, Satyajeet Kumar, Ms. Taruna Ardhendumauli Prasad, Ms. Kanu Agrawal, Aditya Manubarwala, Parth Awasthi, Ms. Avni Sharma, Ms. Manisha Ambwani, Anupam Raina, Ms. Suveni Bhagat, Sunando Raha, Deepak Goel, Rutwik Panda, Ms. Nikhar Berry, Ms. Anshu Malik, Arjun Krishnan, Ms. Prerna Mehta, Ram Sankar, Ms. Sujatha Bagadhi, Ms. G. Chitrakala, G. Jai Singh, Aniv Veda Sharma, R. V. Kameshwaran, Gopal Balwant Sathe, Amit Arora, Mohd. Asif Ali, Ajay Kumar, Ms. Richa Pandey, B. L. Shivhare, Yusuf, B. Krishna Prasad, Ms. Astha Sharma, Ms. Mantika Haryani, Sahil Tagotra, Kaustav Som, Advs. for the Respondents. D

The following Order of the Court was passed : E

ORDER

1. Leave granted.
2. This appeal arises from a judgment of a Division Bench of the High Court of Jammu and Kashmir (at Jammu) dated 27 November 2015. G

3. The respondents, who are the petitioners before the High Court, qualified at the Jammu and Kashmir Civil Services (Judicial) Examinations 2002 and were appointed as Judicial Magistrates in 2002-03. They were placed higher in the merit list compared to the petitioners. However, the gradation list was prepared by applying the roster for direct recruitment H

- A as provided under Rule 5 of the Jammu and Kashmir Reservation Rules, 2005¹. This in effect led to the reserved category petitioners displacing the general category respondents in the gradation list. The third and fourth petitioners were promoted as Sub-Judge on the basis of their placement in the gradation list. A Writ Petition was filed seeking to quash the gradation list of Judicial Magistrates and for a direction to prepare the gradation list, based on merit. The contention of the respondents before the High Court was that Rule 5 of the 2005 Rules will be applicable only for direct recruitment and not for determination of inter se seniority for the purpose of promotion. For this purpose, reference was also made to Rule 31 of the 2005 Rules and Rule 24 of the Jammu and Kashmir (Classification, Control & Appeal) Rules 1956.

4. While disposing of the writ petition filed before the High Court, the Division Bench relied upon its earlier decision in **Ashok Kumar and Others v State of J&K and Others** (SLP No 1290/2014 along with connected matters). For convenience of reference, the finding of

- D the High Court, on this aspect, is extracted below:

“16. The issue raised in the present petition squarely falls within the judgment rendered by the Division Bench in Ashok Kumar Sharma’s case. Though petitioners do not assail the Gradation List and the consequent promotion order on the ground that these are not constitutionally permissible and therefore ultra vires Constitution yet the law laid down in Indra Sawhney’s case and relied upon in Ashok Sharma’s case cannot go unnoticed, while dealing with present case as it touches constitutionality of the Reservation Rules whereupon the impugned Gradation List is based and therefore, validity of the High Court orders promoting private respondents on the basis of this placement in Gradation List. The Gradation List in question and promotion orders made on the basis thereof, in favour of private respondents, in implementation of reservation policy, are therefore, liable to be set aside on this ground alone. The conclusion so drawn, ordinarily, would clinches the matter. However, it would be, if not necessary, but appropriate to deal with the issues, other than constitutionality of Reservation in promotion scheme, raised in the petition.”

5. Having come to the conclusion that the earlier decision in **Ashok Kumar’s case** would govern the proceedings, the High Court dealt with

H ¹2005 Rules

other issues, other than the constitutionality of reservation in promotion in the then State of Jammu and Kashmir. Eventually, by its judgment, the High Court held that there was merit in the challenge to the gradation list dated 1 June 2010 issued by the High Court and to the promotions granted to the post of Civil Judge (Senior Division) on the basis of the placement in the gradation list. The operative directions of the High Court are contained in paragraphs 25 and 26 of the judgment, which are extracted below:

“25 For the reasons discussed above, we find merit in challenge to Gradation List dated 01.06.2010 issued by respondent No. 2 as also order promoting respondents 3 and 4 as Civil Judge (Senior Division) on the basis of their placement in the Gradation List. Challenge to such other orders passed on the basis of the impugned Gradation List, allowing the private respondents, belonging to different Reserved Categories to steal march over the petitioners, is also to succeed. We are told that Petitioners 1 to 10 stand already promoted as Civil Judges (Senior Division) and so are respondents 3 to 12 and 14 and 15. The interest of petitioners 1 to 10 is, therefore, restricted to their placement at appropriate place in the seniority list of Civil Judges (Senior Division) maintained by respondent No. 2.

26. Petitioners 11 to 16 and Mis Mir Afroz (on deputation) Abdul Qayoom Mir and Manzoor Ahmad Zargar figuring at S.No. 19 to 27 in order of merit in the Merit List rank senior to respondents 4, 5, 7 to 12 at S. Nos. 32, 37, 31, 33, 34, 41, 38, 30 in the Merit List, and already promoted as Civil Judges (Senior Division) vide different High Court Orders including High Court order No. 252 dated 04.07.2015. Petitioners 11 to 16 and M/s. Mir Afroz (on deputation) Abdul Qayoom Mir and Manzoor Ahmad Zargar, therefore, had a right to be considered for promotions as Civil Judges (Senior Division) ahead of respondents 4, 5, 7 to 12. The respondent No. 2 by ignoring petitioners claim and failure to accord consideration to their claim has infringed their fundamental rights guaranteed under Article 16 of the Constitution. However, M/s. Mir Afroz (on deputation) Abdul Qayoom Mir and Manzoor Ahmad Zargar, have not joined as petitioners in present petition. Petitioners have not questioned the orders whereby private respondents 4, 5, 7 to 12 were promoted including High Court order No. 252 dated

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- A 04.07.2015. Respondents 4, 5, 7 to 12 presumably have been working as Civil Subordinate Judges, Senior Division for quite sometime. We do not have definite information about the posts of Civil Judges (Senior Division) lying vacant as on date so as to examine whether petitioners 11 to 16 and M/s. Mir Afroz (on deputation) Abdul Qayoom Mir and Manzoor Ahmad Zargar, directed to be considered for promotion as Civil Judges (Senior Division) against such post without disturbing respondents 4, 5, 7 to 12 and thereafter placed in the seniority list of Civil Judges (Senior Division) to be prepared by respondent No. 2 strictly in accordance with merit. We, therefore, refrain from setting aside the orders whereby respondents 4, 5, 7 to 12 have been promoted as Civil Judges (Senior Division). We direct respondent No. 2 to undertake an exercise to find out whether any posts of Civil Judge (Senior Division) are lying vacant as on date so that consideration is accorded to petitioners promotion against available posts. Let such exercise be completed with three months from today. In the event, no such post (s) is/ are found lying vacant or less than the posts required to consider petitioners 11 to 16 are lying vacant, the order (s) whereby respondents 4, 5, 7 to 12 have been promoted as Civil Judges (Senior Division), to the extent necessary to accord consideration to petitioners 11 to 16, shall stand set aside on expiry of three months from today and consideration accorded to the petitioners' promotion against the available vacancies. On completion of the exercise either way respondent No. 2 shall reframe and notify the seniority list in accordance with merit."
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- F 6. At the outset, we must note that Mr Gaurav Pachnanda, Senior Counsel appearing on behalf of the High Court has stated that the High Court accepts the correctness of the judgment of the Division Bench insofar as it found infirmities in the gradation list, independent of the observations in paragraph 16.
- G 7. Mr A Mariarputham, Senior Counsel, has appeared on behalf of the appellants and Mr Sanjay Hegde, Senior Counsel, has appeared on behalf of the respondents who were the original petitioners before the High Court.
- H 8. Mr Sanjay Hegde has submitted that there was no occasion for the High Court to consider the subject matter of the challenge raised before the High Court by applying the ratio in **Ashok Kumar's case**,

since this did not form the scope of the challenge at all. Learned Counsel urged that this aspect did not form the subject matter of the petition or of the submissions.

9. The High Court had observed that the ratio in **Ashok Kumar's case** would be sufficient to settle the principle issue raised. The reference to the decision in Ashok Kumar Sharma's case was wholly unnecessary since no submission was urged on the basis of that decision by the petitioners before the High court. However, the High Court also undertook an analysis of the validity of the gradation list independent of the ratio in **Ashok Kumar's case**. However, the decision of the High Court seems to intertwine the reasoning on both aspects. Without commenting on the merits of the independent grounds on which the gradation list has been faulted, we are of the considered view that it would be appropriate to remand the matter back to the High Court. It was not necessary for the High Court or, for that matter, appropriate to rely upon the decision in **Ashok Kumar's case**, since such a ground was not urged either in the writ proceedings or in the course of the submissions by the petitioners before the High Court. Consequently and for the above reasons, we are of the view that it would be appropriate to set aside the impugned judgment and order of the High Court and to remit the proceedings to the High Court for determination afresh. We clarify that the grounds which have weighed in paragraph 16 of the impugned judgment, are not sought to be raised by the respondents – original petitioners before the High Court.

10. The main issue in the writ proceedings before the High Court is whether the seniority for the purpose of the gradation list can be founded on the basis of roster points and this issue would depend upon the view which is taken by the High Court on the legal position. As noted above, Mr Gaurav Pachnanda, learned senior counsel has stated that the High Court has accepted the view that the gradation list is invalid. The High Court on its Administrative side is not precluded from taking a considered decision on this aspect of the matter.

11. Consequently, the impugned judgment and order of the High Court dated 27 November 2015 is set aside. The writ petition is restored to the file of the High Court for a decision afresh. Having regard to the pendency of the proceedings, we would request the High Court to dispose of the petition, on remand, preferably within a period of two months from the date of receipt of a certified copy of this order. In the meantime, pending the decision of the High Court, it would be appropriate if

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A consequential directions on the basis of the gradation list for the batch of 2003 are held in abeyance so as to abide by the final result of the proceedings before the High Court. The High Court is at liberty on the administrative side to take a decision in the meantime.

12. The appeal is accordingly disposed of in the above terms

B 13. Pending application, if any, stands disposed of.

Devika Gujral

Appeal disposed of.