Supreme Court of India
R.G High Court Of Madras vs R. Gandhi And Ors on 5 March, 1947
Author: . B Chauhan
Bench: B.S. Chauhan, J. Chelameswar, M.Y. Eqbal

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (C) NOs. 892-893/2014

Registrar General, High Court of Madras
…Petitioner

Versus

R. Gandhi & Ors.
…Respondent

WITH

TRANSFERRED CASE (CIVIL) NO. 31 OF 2014
(Arising out of WP (C) No. 375/2014 pending in Madras High Court)

WITH

TRANSFERRED CASE (CIVIL) NO. 29 & 30 OF 2014
(Arising out of TP(C) NOS. 383 & 384 /2014(D.3826/2014)

High Court of Madras by Registrar General
…Petitioner

Versus

P. Rathiram & Ors. …Respondents

J U D G M E N T

Dr. B.S. CHAUHAN, J.

1. The issue of selection and elevation to the office of a High Court Judge has engaged the attention of this Court. The issue of such selection reflecting transparency, objectivity and constitutional sustainability has engaged the attention of this Court since this cause came to be espoused and dealt with by a nine-Judge Bench of this Court in Supreme Court Advocates-on-Record Assn. v. Union of India, (1993) 4 SCC 441, more particularly known as Second Judges case.

The said decision also became a subject matter of a Presidential Reference being Special Reference No.1 of 1998 that was answered again by a nine-Judge Bench reported in (1998) 7 SCC 739.

2. One of the issues involved in both these decisions has been issue of judicial review of appointments as a High Court Judge or a Supreme Court Judge. The Second Judges case (supra) answered it in paragraphs 480 to 482 of the aforesaid decision and the Special Reference also answered the same emphasising the limited scope of judicial review and restrained the justiciability of such recommendations and appointment of Judges.

3. More recently, the issue with regard to the elevation of a High Court Judge on a recommendation of the collegium came to be scrutinised in a challenge raised before the Allahabad High Court that came to be finally decided by this Court in Mahesh Chandra Gupta v. Union of India (2009) 8 SCC 273. It was again held therein following the aforesaid decisions that suitability of a recommendee and the consultation are not subject to judicial review but the issue of lack of eligibility or an effective consultation can be scrutinised for which a writ of quo warranto would lie.

4. In the aforesaid backdrop, the present petitions came to be entertained questioning the orders of the Madras High Court dated 8.1.2014 and 9.1.2014 by which and whereunder the Madras High Court entertained writ petitions and passed interim orders to maintain status quo regarding the process of recommendation of 12 aspirants to the aforesaid office after the Chief Justice of the Madras High Court had forwarded the said recommendations to the Supreme Court collegium for consideration. The restraint order also directed the various constitutional authorities including the State Government and the Union Government to act accordingly as the prayer made in the petitions was to return back the recommendations on the allegation that the recommendations were not in conformity with an effective consultative process and that they were otherwise for reasons disclosed unacceptable.

5. This Court vide order dated 13.1.2014 entertained the Special Leave Petitions (Civil) Nos. 892-893 of 2014 filed by the Madras High Court against the orders passed by the Madras High Court on 8.1.2014 and 9.1.2014 in Writ Petition No. 375 of 2014, restraining the High Court to proceed with the hearing of the said writ petition and issued suo motu show cause as to why the said writ petition be not transferred for hearing to this court. It appears that in the meanwhile, Writ Petition No.

1082/2014 titled S. Doraisamy v. The Registrar General, Supreme Court of India & Ors. and Writ Petition No. 1119/2014 titled P. Rathinam v. Union of India & Ors., dealing with the same subject matter had also been filed before the Madras High Court. The Madras High Court preferred transfer petitions to transfer the said two writ petitions to this court for hearing alongwith transferred case arising out of WP (C) No. 375/2014.

Permission to file TP (C) arising out of D.No.3826/2014 is granted. We allow the transfer petitions and all the three aforesaid writ petitions stand transferred to this Court.

Thus, in view thereof, the Special Leave Petitions (C) Nos. 892- 893/2014 have become insignificant and stand disposed of accordingly.

6. The facts and circumstances giving rise to these cases are that:

A. The collegium of the Madras High Court consisting of the Hon'ble Chief Justice and two senior most Judges vide Resolution dated 12.12.2013 recommended a list of 12 persons comprising of ten advocates and two District Judges for consideration by the collegium of Supreme Court for appointment as Judges of the Madras High Court. The said list was forwarded to the Ministry of Law and Justice, Government of India, the Supreme Court of India as well as to the Government of Tamil Nadu on 14.12.2013 as required under the law.

B. The writ petitioner, Mr. R. Gandhi, Senior Advocate, filed Writ Petition No. 375 of 2014 before the Madras High Court seeking a direction to the Union of India and the Supreme Court collegium to return the said list as the recommendees therein were not suitable as per the assessment of the writ petitioner and other members of the Bar for elevation. More so, the collegium of the High Court did not recommend the name of the eligible advocates belonging to different castes. The Hon'ble Chief Justice and first senior most Judge did not hail originally from Tamil Nadu so they were unable to understand and appreciate the complex social structure of the State of Tamil Nadu. C. The Division Bench of the Madras High Court entertained the writ petition and passed the orders dated 8.1.2014 and 9.1.2014. According to the first order, an interim direction was issued directing the Ministry of Law and Justice, Government of India to maintain the status quo, while the order dated 9.1.2014 restrained the Government of Tamil Nadu from making any recommendation in this regard and further to maintain the status quo till 21.1.2014.

D. Aggrieved, the Madras High Court through Registrar General preferred Special Leave Petition (C) Nos. 892-893 of 2014, wherein after hearing the learned Attorney General, appearing for the petitioner – High Court, this Court on 13.1.2014 passed the following order: ?

> "Mr. G.E. Vahanvati, learned Attorney General appearing on behalf of the petitioner has submitted that the Madras High Court in the impugned judgments itself, has taken note of the judgment of this Court in Mahesh Chandra Gupta vs. Union of India, 2009 (8) SCC 273, wherein it has been ?quoted that judicial review is not permissible on the ground of suitability of the candidate whose name has been recommended, therefore, the High Court ought not to have entertained the petition.

> Secondly, it has been submitted that one of the Hon'ble Judge has entered into the Court and made certain suggestions to the Bench hearing the case and there had been commotion in the Court, therefore, there is no conducive atmosphere where the matter should be permitted to be continued with the said High Court.
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> In view of the above, issue notice to the respondents returnable in two weeks as to why this case should not be transferred to this Court and heard by a Bench of minimum three judges. In addition to the normal mode of service, dasti service, is permitted.
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> Meanwhile, the High Court is restrained to proceed further with the matter in W.P.No.375/2014 and the interim order passed by the High Court to maintain status quo regarding the process of the recommendations stands vacated for the reason that it was merely a recommendation and the said recommendation has to be filtered at various levels and it will take a long time.

List after two weeks." E. When the matter came up for hearing on 18.2.2014, Shri Prabhakaran, learned senior counsel appearing on behalf of the writ petitioner made a statement that the Supreme Court collegium had returned the entire list to the Madras High Court for reconsideration, the matter rendered infructuous. The Court passed the order dismissing the Writ Petition as having become infructuous. However, since two other writ petitions had already been filed in the Madras High Court with respect to the same subject matter, the High Court filed the transfer petitions. Some of the learned counsel appearing in these cases suggested that the matter required to be heard on merit. As the order passed earlier had not been signed, the matter was adjourned to be listed for hearing on 25.2.2014.

7. When the matter came on Board on 25.2.2014, the learned Attorney General and other Advocates appearing in these cases insisted that matters must be heard at least to decide the issue of maintainability otherwise in future, it would be impossible to complete the process of appointment of Judges in the High Court, particularly when sitting Judges of the High Court also have started appearing before the Bench hearing the case in support of the contentions of the writ petitioners.

8. Shri Prabhakaran, learned senior counsel, has submitted that the advocates - recommendees were not suitable for appointment as a Judge of the Madras High Court; and the collegium failed to consider the various other eligible and suitable advocates practicing before the Madras High Court having different social backgrounds. In a democratic set-up, it is the sharing of the power and all citizens of this country irrespective of any caste or creed, who are eligible and suitable for the post, have a right to be considered for appointment. The collegium has a "duty" to consider the eligible and suitable Advocates belonging to all sections of the society to ensure wider representation. It may have a larger social dimensions if certain segments of society are not adequately represented on the Bench. The ethos of pluralistic democracy or diverse unequal India should be humane, tolerant and reminiscent, yet balancing the contemporary realities which in the case are agitated on the lines of caste and their inclusion in mainstream of public life. The spirit of equality pervades the provisions of the Constitution, as the main aim of the founders of the Constitution was to create an egalitarian

society wherein social, economic and political justice prevail and equality of status and opportunity are made available to all. However, Shri Prabhakaran, learned Senior counsel still insisted that writ petitions be dismissed as having become infructuous because of the subsequent developments as referred to hereinabove.

9. Shri G.E. Vahanvati, learned Attorney General of India and Shri Mohan Parasaran, learned Solicitor General of India, have contended that judicial review on assessing the suitability is not provided for as it is restricted only to the eligibility. As there is no challenge to the fact that there had been a proper consultation by the Hon'ble Chief Justice of Madras High Court alongwith his other Judges members of the collegium, such judicial review is uncalled for. The writ petition is not maintainable and the High Court has committed an error not only in entertaining the writ petition but also granting the interim relief. The writ petitioner has neither applied for issuance of Writ of Quo Warranto nor Writ of Certiorari, nor could there be any question of filing any writ petition as only the recommendations for consideration of certain names have been made. The allegation that none of the recommendees has any work in court, was not correct as the incomes shown by some of them have been quite substantial indicating roaring practice. The perpetuation of casteism continues social tyranny of ages. The chart filed by the writ petitioner of those recommendees also made it clear that they represented all the social backgrounds equitably since upper caste, minority and other social affiliations have been duly represented. No advocate has a right to be considered for being appointed as a judge. More so, there can be no reservation for a community in selection of a judge. Even in service jurisprudence, reservation cannot be claimed at the cost of compromise to efficiency of administration. Therefore, the petition is liable to be dismissed.

10. Shri L.N. Rao, learned Additional Solicitor General appearing for the Supreme Court, has submitted that the Supreme Court collegium vide Resolution dated 13.2.2014 has returned the whole list of advocates as well as of the judicial officers, with intimation to the Hon'ble Chief Minister and the Governor of State of Tamil Nadu with an observation that the new Chief Justice of Madras High Court as and when appointed, would re-look into the matter and send recommendations in consultation with two senior most colleagues after taking into consideration all the relevant facts. Thus, in view of the subsequent developments nothing survives to be decided.

11. The learned Attorney General tried to persuade us to decide the other relevant issues also. However, in view of the aforesaid view that judicial review does not lie on assessment of suitability of a recommendee, we are not inclined to deal with it. But it is needless to emphasise that the question of an effective representation on the Bench and the qualitative assessment of elevations are not only to be governed by the magnitude of the practice of a lawyer or only his social or legal background. These are factors to be considered alongwith the other qualities of intellect and character including integrity, patience, temper and resilience. The wisdom and legal learning of a particular individual coming from a particular social background may have leanings and individual judges are not un- afflicted by their notions of social, economic and political philosophy, but such matters fall within the realm of suitability to be considered by the collegium making recommendations or accepting the same for appointment as a Judge. The issue of a broad representation has also to be looked into from the point of view that it is necessary to ensure that a more representative Bench does not become a less able Bench.

12. Appointments cannot be exclusively made from any isolated group nor should it be pre-dominated by representing a narrow group. Diversity therefore in judicial appointments to pick up the best legally trained minds coupled with a qualitative personality, are the guiding factors that deserve to be observed uninfluenced by mere considerations of individual opinions. It is for this reason that collective consultative process as enunciated in the aforesaid decisions has been held to be an inbuilt mechanism against any arbitrariness.

13. The proceedings before the Division Bench of the Madras High Court that passed the interim orders were noticed by us while vacating the same, and the conduct of a sitting Judge raised a negative murmur about the maintenance of propriety in judicial proceedings. The sudden unfamiliar incident made us fume inwardly on this raw unconventional protest that was unexpected, uncharitable and ungenerous, and to say the least it was indecorous. In ordinary life such incidents are not reviewed with benevolence or generosity, but here we are concerned with a larger constitutional issue of the justiciability of the cause. We have already indicated that the cause and its contents were beyond the pale of scrutiny in the light of the decisions of this Court noted by us and therefore it is not necessary to respond to the above- mentioned unusual circumstances.

14. Additionally, we find that the learned Judge was not made a party to the proceedings by the Division Bench of the High Court before it nor have we accepted the oral prayer to that effect. The exceptional personal conduct of the learned Judge does not require any judicial response for investigating the unusual circumstances and scrutinising the same as it is not necessary to decide the issue at hand which can be otherwise disposed off in the manner as indicated herein. The learned Judge may have found himself caught in a conflict of class or caste structure and it appears that matured patience might have given way to injure rules of protocol, but that is not the issue that has to be answered by us. Such aspects may require a more serious judicial assessment if required in future and therefore this question is left entirely open.

15. It is said that immense dignity is expected, and weaknesses or personal notions should not be exposed so as to affect judicial proceedings. Judges cannot be governed, nor their decisions should be affected, only by the obvious, as proceedings in a court are conducted by taking judicial notice of such facts that may be necessary to decide an issue. It is for this reason, that the paramount principle of impartiality that is to be available in the character of a Judge has been humbly expounded by none other than Justice Felix Frankfurter in the following words:

> "A good Judge needs to have three qualities, each of which is disinterestedness." (of Law and Life and other things that Matter edited by Philip B. Kurland, 1965 Pg.75) With the above observations and dignified reluctance touching disapproval, we leave this matter for any future milestone to be covered appropriately.

16. Three applications have been filed for impleadment, however, this Court allowed those applicants only to intervene and make their submissions on legal issues without impleading any of them.

In view thereof, Shri P.H. Parekh, learned senior counsel and President of Supreme Court Bar Association duly assisted by Ms. Aishwarya Bhati, Ms. Mahalakshmi Pavani and Shri Chander Prakash, learned counsel, have also advanced their arguments, on various issues, inter-alia, maintainability of the writ petitions.

17. Be that as it may, facts and circumstances of these cases warrant examination of the issue of maintainability at the threshold.

In Mahesh Chandra Gupta (supra), this Court observed: "39. At this stage, we may state that, there is a basic difference between "eligibility" and "suitability". The process of judging the fitness of a person to be appointed as a High Court Judge falls in the realm of suitability. Similarly, the process of consultation falls in the realm of suitability.....

41. The appointment of a Judge is an executive function of the President. Article 217(1) prescribes the constitutional requirement of "consultation". Fitness of a person to be appointed a Judge of the High Court is evaluated in the consultation process....

43. One more aspect needs to be highlighted. "Eligibility" is an objective factor. Who could be elevated is specifically answered by Article 217(2). When "eligibility" is put in question, it could fall within the scope of judicial review. However, the question as to who should be elevated, which essentially involves the aspect of "suitability", stands excluded from the purview of judicial review.

44. At this stage, we may highlight the fact that there is a vital difference between judicial review and merit review. Consultation, as stated above, forms part of the procedure to test the fitness of a person to be appointed a High Court Judge under Article 217(1). Once there is consultation, the content of that consultation is beyond the scope of judicial review, though lack of effective consultation could fall within the scope of judicial review. This is the basic ratio of the judgment of the Constitutional Bench of this Court in Supreme Court Advocates-on- Record Assn. v. Union of India, (1993) 4 SCC 441 and Special Reference No. 1 of 1998, Re (1998) 7 SCC 739..

In the present case, we are concerned with the mechanism for giving effect to the constitutional justification for judicial review. As stated above, "eligibility" is a matter of fact whereas "suitability" is a matter of opinion. In cases involving lack of "eligibility" writ of quo warranto would certainly lie. One reason being that "eligibility" is not a matter of subjectivity. However, "suitability" or "fitness" of a person to be appointed a High Court Judge: his character, his integrity, his competence and the like are matters of opinion.

73. The concept of plurality of Judges in the formation of the opinion of the Chief Justice of India is one of inbuilt checks against the likelihood of arbitrariness or bias. At this stage, we reiterate that "lack of eligibility" as also "lack of effective consultation" would certainly fall in the realm of judicial review. However, when we are earmarking a joint venture process as a participatory consultative process, the primary aim of which is to reach an agreed decision, one cannot term the Supreme Court Collegium as superior to High Court Collegium. The Supreme Court Collegium does not sit in appeal over the recommendation of the High Court Collegium. Each Collegium constitutes a

participant in the participatory consultative process. The concept of primacy and plurality is in effect primacy of the opinion of the Chief Justice of India formed collectively. The discharge of the assigned role by each functionary helps to transcend the concept of primacy between them.

74.....These are the norms, apart from modalities, laid down in Supreme Court Advocates-on-Record Assn. (supra) and also in the judgment in Special Reference No. 1 of 1998, Re. Consequently, judicial review lies only in two cases, namely, "lack of eligibility" and "lack of effective consultation". It will not lie on the content of consultation.

(Emphasis added) (See also: C. Ravichandran Iyer v. Justice AM. Bhattacharjee & Ors., (1995) 5 SCC 457).

18. In Supreme Court Advocates-on-Record Assn. (supra), this Court observed:

> "450..... The indication is, that in the choice of a candidate suitable for appointment, the opinion of the Chief Justice of India should have the greatest weight; the selection should be made as a result of a participatory consultative process in which the executive should have power to act as a mere check on the exercise of power by the Chief Justice of India, to achieve the constitutional purpose..... 467....The opinion of the judiciary 'symbolised by the view of the Chief Justice of India', is to be obtained by consultation with the Chief Justice of India; and it is this opinion which has primacy.
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> 468. The rule of law envisages the area of discretion to be the minimum, requiring only the application of known principles or guidelines to ensure non-arbitrariness, but to that limited extent, discretion is a pragmatic need. Conferring discretion upon high functionaries and, whenever feasible, introducing the element of plurality by requiring a collective decision, are further checks against arbitrariness.
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> 482.....It is, therefore, necessary to spell out clearly the limited scope of judicial review in such matters, to avoid similar situations in future. Except on the ground of want of consultation with the named constitutional functionaries or lack of any condition of eligibility in the case of an appointment, or of a transfer being made without the recommendation of the Chief Justice of India, these matters are not justiciable on any other ground, including that of bias, which in any case is excluded by the element of plurality in the process of decision- making.
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> SUMMARY OF THE CONCLUSIONS
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> 486. A brief general summary of the conclusions stated earlier in detail is given for convenience, as under: ....
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> ....

> (3) In the event of conflicting opinions by the constitutional functionaries, the opinion of the judiciary 'symbolised by the view of the Chief Justice of India', and formed in the manner indicated, has primacy. (4) No appointment of any Judge to the Supreme Court or any High Court can be made, unless it is in conformity with the opinion of the Chief Justice of India." (emphasis supplied)

19. In Special Reference No. 1 of 1998 (supra), this Court held:

> "32. Judicial review in the case of an appointment or a recommended appointment, to the Supreme Court or a High Court is, therefore, available if the recommendation concerned is not a decision of the Chief Justice of India and his seniormost colleagues, which is constitutionally requisite. They number four in the case of a recommendation for appointment to the Supreme Court and two in the case of a recommendation for appointment to a High Court. Judicial review is also available if, in making the decision, the views of the seniormost Supreme Court Judge who comes from the High Court of the proposed appointee to the Supreme Court have not been taken into account.

Similarly, if in connection with an appointment or a recommended appointment to a High Court, the views of the Chief Justice and senior Judges of the High Court, as aforestated, and of Supreme Court Judges knowledgeable about that High Court have not been sought or considered by the Chief Justice of India and his two seniormost puisne Judges, judicial review is available. Judicial review is also available when the appointee is found to lack eligibility." (emphasis supplied)

20. Thus, it is apparent that judicial review is permissible only on assessment of eligibility and not on suitability. It is not a case where the writ petitioners could not wait till the maturity of the cause i.e. decision of the collegium of this Court. They took a premature step by filing writ petitions seeking a direction to Union of India to return the list sent by the collegium of the Madras High Court without further waiting its consideration by the Supreme Court collegium. Even after the President of India accepts the recommendations and warrants of appointment are issued, the Court is competent to quash the warrant as has been done in this case of Shri Kumar Padma Prasad v. Union of India & Ors., AIR 1992 SC 1213 wherein the recommendee was found not possessing eligibility for the elevation to the High Court as per Article 217(2). This case goes to show that that even when the President, has appointed a person to a constitutional office, the qualification of that person to hold that office can be examined in quo warranto proceedings and the appointment can be quashed. (See also: B.R. Kapur v. State of Tamil Nadu & Anr., AIR 2001 SC 3435).

21. In such a fact-situation, the writ petitioners or the members of the Bar could approach Hon'ble the Chief Justice of India; or the Hon'ble Law Minister, but instead of resorting to such a procedure, the writ petitioners had adopted an unwarranted short cut knowing it fully well that on the ground of the suitability, the writ petitions were not maintainable.

We appreciate the fair stand taken by Shri Prabhakaran, learned senior counsel before this Court that suitability cannot be a subject matter of judicial review.

22. In view of the above, the transferred cases stand disposed of. The Writ Petition Nos. 375, 1082 and 1119 of 2014 and all matters relating to this case instituted before the Madras High Court are disposed of accordingly.

.....J.

(Dr. B.S. Chauhan) .....J.

(J. Chelameswar) .....J.

(M.Y. Eqbal) New Delhi, March 5, 2014.
