

Chandra Mohan

Vs

State of U. P. and Others

Civil Appeal No. 1703 of 1969

(CJI A.N. Ray, M.H. Beg, R.S. Sarkaria, P.N. Shinghal, Jaswant Singh JJ)

19.04.1976

JUDGMENT

SARKARIA, J. -

1. This appeal by certificate granted by the High Court under Articles 132 and 133(1)(c) of the Constitution, is directed against an appellate judgment of January 6, 1969, of the High Court of Allahabad. It arises out of these facts.
2. U.P. Higher Judicial Service had two grades : (1) Under the proviso to Article 309 of the Constitution, the Governor framed rules governing recruitment and other conditions of this service. The rules are known as U.P. Higher Judicial Service Rules, 1953 (hereinafter called the 1953 Rules). Under the 1953 Rules, the appointment of Civil and Sessions Judges was made by two separate methods. The first method was by promotion from the U.P. Civil Service (Judicial Branch). The second method was by recruitment of advocates and judicial magistrates as Civil and Sessions Judges. Under the 1953 Rules a number of persons were appointed to U.P. Higher Judicial Service between 1953 and 1964.
3. The appellant, Chandra Mohan is a permanent member of the U.P. Civil Service (Judicial Branch). In the year 1965, he was officiating as Civil and Sessions Judge. Since he apprehended that direct recruitment of advocates and judicial magistrates to the service would adversely affect the chances of his confirmation and promotion, he filed a writ petition under Article 226 of the Constitution challenging the validity of the 1953 Rules and the appointments thereunder of advocates and judicial magistrates to the service. The writ petition was partly allowed by the High Court on February 21, 1966. It was held that Shri Om Prakash, respondent was not eligible for appointment to the U.P. Higher Judicial Service.
4. Against the judgment, the writ petitioner however came in further appeal to this Court. His appeal was allowed by this Court by a judgment, dated August 8, 1966. This judgment is reported as Chandra Mohan v. State of U. P. ((1967) 1 SCR 77 : AIR 1966 SC 1987 : (1967) 1 LLJ 412) Thereby this Court held : (a) that the 1953 Rules providing for recruitment of District Judges contravened the constitutional mandate of Article 233(1) and (2) and therefore the rules and the appointments made thereunder were illegal; (b) the 1953 Rules empowering the Governor to recruit District Judges from the judicial officers were also unconstitutional because the expression "service" in clause (2) of Article 233 of the Constitution can only mean "Judicial Service" and all judicial officers of the State of U.P. were not members of the Judicial Service. Therefore, the recruitment of judicial officer respondents was bad.

5. As a result of these findings, the Court issued a writ of mandamus directing respondent No. 1 (State) not to make any appointment by direct recruitment to the U.P. Higher Judicial in pursuance of the selections made under the 1953 Rules.
6. This decision created a difficult situation. To remedy the same, the Constitution (Twentieth) Amendment Act, 1966 inserted Article 233A in the Constitution.
7. Thereafter on February 1, 1967, the appellant herein again filed a writ petition challenging the appointment of respondent Nos. 2 to 16, from advocates and judicial magistrates, between 1953 and 1964. Respondent Nos. 13, 14 and 15 were parties to the earlier appeal before this Court.
8. In his writ petition (No. 397 of 1967), the appellant contended that the Constitution (Twentieth) Amendment Act was unconstitutional inasmuch as it affected the provisions of Articles 129, 141 and 142 of the Constitution, and could not have been enacted without the ratification of the State legislatures under proviso (b) to Article 368 of the Constitution. The writ petitioner further challenged the constitutional validity of the 1953 Rules on the ground that they make unfair discrimination between direct recruits and promotees and as such contravene Articles 14 and 16 of the Constitution. It was alleged that respondent Nos. 4, 5 and 6 herein were recruited to the U.P. Civil Service (Judicial Branch) in 1940 through a competitive examination, but after their selection as direct recruits, in 1957, they were made senior to all the other members of the U.P. Civil Service (Judicial Branch); that the result of this discriminatory operation of the 1953 Rules was that officers "promoted" to the Higher Judicial Service continued to officiate indefinitely, sometimes for 10 years or more, while the direct recruits were promoted and confirmed only two years after their "direct" recruitment.
9. The Special Bench of the High Court upheld the validity of Article 233A and dismissed the writ petition by a judgment, dated January 6, 1969.
10. Hence this appeal.
11. The State Government issued a notification, dated March 31, 1969 confirming respondent Nos. 11 to 13 as Civil and Sessions Judges w.e.f. May 27, 1968, May 31, 1968 and June 1, 1968 respectively.
12. On October 28, 1969, the appellant filed a petition in this Court for leave to urge additional grounds challenging the validity of this notification. On July 15, 1975, when this case came up for hearing, Mr. S. C. Agarwal, appearing for the appellant sought permission to withdraw the appeal. Consequently, the Court made an order dismissing the an affidavit, made by the appellant, the dismissal was set aside and the appeal was restored on the record. That is how the appeal has now come up for hearing on merits.
13. Mr. R. K. Garg, appearing for the appellant does not press the challenge to the validity of Article 233A of the Constitution. The only contention now canvassed by the Counsel is that in Chandra Mohan v. State of U. P. (supra), this Court had considered the entire scheme of the 1953 Rules, with particular reference to Rules 5, 8, 13, 14, 15 17 and 19 and had declared the said rules as unconstitutional and avoid. It is contended that Rule 20, which provides for determination of seniority and Rule 23 providing for confirmations in the service are inextricably intertwined with Rules 17 and 19 and are an integral part of the scheme of the Rules relating to recruitment which were declared unconstitutional by this Court; consequently, confirmations made in the service and

consequent fixation of seniority on the basis of Rules 20 and 23 of the 1953 Rules after the aforesaid decisions of this Court are illegal and ineffectual. On these premises, it is urged that a direction be issued to respondent No. 1, to treat the orders of information of respondent Nos. 11 to 13 in the service, on the basis of 1953 Rules, under notification dated March 31, 1969 as void and ineffectual, to refix the seniority of the appellant and the respondent concerned in accordance with the new rules promulgated in 1975.

14. It is not disputed that the Constitution (twentieth Amendment) Act did not validate the rules which were declared unconstitutional by this Court.

15. We have therefore to see whether Rules 20 and 23 of the 1953 Rules governing seniority and confirmation in the service, were, directly or in effect, rendered invalid or unworkable by the aforesaid decision of this Court. A reading of the judgment, as a whole, leaves no doubt that only those rules which related to the recruitment/appointment of District Judges were held to be invalid because they contravened the constitutional mandates of Article 233(1) and (2) of the Constitution. We therefore take it that Rules 20 and 23 were not directly invalidated by that decision. But that does not conclude the enquiry. The further question to be considered is : Were they, in result, rendered inoperative and ineffectual by the unconstitutionality of Rules 8, 13, 14, 15 17 and 19 ? Answer to his question depends on whether Rules 20 and 23 are severable from the aforesaid void Rules ? Rule 20 reads as under :

20. Seniority - Subject to the provisions of Rule 31, seniority in each of the two classes of posts in the Service shall be determined by the date of confirmation in that class of post :

Provided that if in any class of the post, two or more persons are confirmed on the same date, their seniority will be determined according to the order in which their confirmation has been notified :

Provided further the in the case of direct recruits, their inter se seniority will be fixed in the same order in which their appear in the list prepared by the Selection Committee under Rule 17.

16. It is manifest that the second proviso to Rule 20 which refers to Rule 17 and was declared invalid by this Court, has as a result of this Court's aforesaid decision become unworkable and ineffective. But this proviso is severable from the rest of this provision which is viable by itself. The excision of the second proviso will not main or render unworkable the main provision. It is therefore open to the competent authority to determine the seniority of the appellant in accordance with Rule 20 sans the second proviso, supplemented by any other valid principles or rules.

17. Subject to this observation, we dismiss the appeal leaving the parties to bear their own costs.

18. Before we part with this judgment we would like to observe that we have considered this contention in regard to determination of seniority only incidentally as a matter of indulgence although this point was not specifically urged before the Division Bench of the High Court. We express no opinion in regard to the validity of the confirmations made under the aforesaid notification, dated March 31, 1969.

</html