

State of U.P. and Others

Vs

Harish Chandra and Others

Civil Appeal No. 7068 of 1996

(K. Ramaswamy, G.B. Pattanaik JJ)

12.04.1996

JUDGEMENT

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PATTANAİK, J.:-

1. Leave granted.

2. The impugned direction of the learned Single Judge of the Allahabad High Court in Civil Misc. Writ Petition No. 25696 of 1990 is being challenged in the first case and a similar direction of a learned Single Judge of Allahabad High Court dated 2-4-1993 passed in Civil Misc. Writ Petition No. 28719 of 1992 following the earlier judgment is being assailed in the second case. The question of law involved in both these appeals is one and the same, namely, is the High Court justified in issuing a mandamus to the appellant to make recruitment of the respondents who were in the Select List of the year 1987 even after the expiry of the said list, the list under the Recruitment Rules having the force only for a period of one year from the date of selection.

3. The Recruitment/Selection to the posts in Class III and Class IV is made under a Statutory Rule called the Sub-ordinate Officers Clerical Staff (Direct Recruitment) Rules, 1985 (hereinafter referred to as "Recruitment Rules"). Under the Rules the Appointing Authority is required to determine the number of vacancies to be filled during the course of year and notify the same to the Employment Exchange for sponsoring candidates. The Appointing Authority is also entitled to invite applications directly by issuing an advertisement in a local daily newspaper. On receipt of the names of the candidates the Selection Committee prepares a merit list in the manner prescribed under Rule 23. The Selection Committee then forwards the list thus prepared to the Appointing Authority under Rule 26 mentioning the aggregate marks obtained at the selection by each candidate. The names of the candidates are arranged by the Appointing Authority in accordance with the merit of the candidates and thereafter the appointments are offered in the order in which the names are arranged.

4. The respondents approached the High Court alleging, inter alia, that though there existed vacancies during the year 1987 and the select list was prepared on 4-4-87 but the Appointing Authority arbitrarily did not fill up the vacancies and the respondents having failed in their attempt by filing representations approached the Courts for issuance of mandamus. It was also alleged that the Appointing Authority ignoring the select list prepared by the Statutory Selection Committee has been filling up the vacancies in accordance with its own sweet will and the right of the candidates in the select list is thereby being infringed. The appellant filed counter affidavit controverting the

allegations made in the Writ Applications and took the positive stand that the select list of the year 1987 became inoperative after lapse of one year from the date of selection and, therefore, the applicants who claimed to be in the select list prepared on 4-4-87 do not have any right to be appointed as the list expired by 4-4-88. It was also pleaded before the High Court that there did not exist any vacancy during the year as contended in the Writ Application. The High Court by the impugned order instead of focussing its attention to the relevant provisions of the Statutory Rules, relying upon certain earlier decisions of the Court came to hold that the select list does not lapse on the expiry of one year from the preparation of the list. The High Court also came to the conclusion that several vacancies having occurred after 4-4-87 on account of superannuation of many of the existing employees the stand of the State that there existed only one vacancy cannot be accepted. With this conclusion direction having been issued to appoint the Writ Petitioners the same is being assailed in these appeals.

5. Learned counsel for the appellant contended that in view of the provisions of Rule 26 of the Recruitment Rules the High Court erred in law that the select list does not expire after expiry of one year. He further contended that the vacancy position as was indicated by the State Government is correct and the High Court erroneously came to the conclusion about the existing of more number of vacancies during the year without examining the peculiar circumstances where some appointments have been made. Learned counsel appearing for the respondents do not dispute the position that under the Statutory Rule the select list remains valid for one year from the date of the preparation of list. But they contended that in the past on several occasions the Appointing Authority have been appointing the persons from the select list even after expiry of one year and in support of that they placed reliance on the appointment made in the year 1992 of persons who were selected in the year 1985. The learned counsel also urged that under the Recruitment Rules the Appointing Authority is duty bound to calculate and notify the number of vacancies as it existed and likely to occur during the year and, therefore, the contentions that there will be only one vacancy in the year 1987 is wholly unsustainable. Apart from the aforesaid contention, on merit the learned counsel also urged that there has been delay of 480 days in preferring the Special Leave Petition and no justifiable ground having been given the delay should not be condoned. The learned counsel also urged that against the judgment of the Single Judge a special appeal lies to the Division Bench and the appellant not having taken course to alternative remedy of approaching the Division Bench this Court should not interfere in existence of power under Article 136 . of the Constitution.

6. Before going into the merits of the matter we would first dispose of the two technical objections raised by the learned counsel for the respondents.

7. So far as the question of delay is concerned the learned counsel for the respondents placed reliance on the decision of this Court in the case of Commr. of Wealth Tax, Bombay v. Amateur Raiders Club, Bombay, 1994 Supp (2) Supreme Court Cases 603, and urged that the grounds taken for condonation is due to the delay in processing the matter through official channel and cannot be held to be good ground for condonation. It is undoubtedly true that the applicant seeking for condonation of delay is duty bound to explain the reasons for the delay but as has been held by this Court in several cases, the very manner in which the bureaucratic process moves, if the case deserves merit the Court should consider the question of condonation from that perspective. That apart the respondents themselves approached the High Court in the year 1990 making a grievance that they had not been appointed even though they are included in the Select List of 1987 and 1987 list itself expired under the Rules of 4-4-1988. In this view of the matter and in view of the merits of the case we are of the opinion that sufficient cause has been shown for condoning the delay and accordingly we have condoned the delay.

8. So far as the other contention, namely, availability of an appeal to the Division Bench, we are of the opinion that would not stand on the way of this Court in exercise of power under Article 136 of the Constitution. Ordinarily where an appeal lies to the Division Bench from the Judgment of a learned Single Judge this Court refrains from invoking power under Article 136 of the Constitution but this is a self imposed restriction and not a matter ousting the jurisdiction of the Court. The matter having been pending for more than 2 years and in view of the patent error committed by the High Court we do not think it appropriate to non-suit the appellant merely on the ground that the appellant could have approached the Division Bench against the judgment of the learned single Judge. In the larger interest of all concerned we think it appropriate in the facts and circumstances of this case to invoke our jurisdiction under Article 136 of the Constitution.

9. Coming to the merits of the matter, in view of the Statutory Rules contained in the Rule 26 of the Recruitment Rules the conclusion is irresistible that a select list prepared under the Recruitment Rules has its life only for one year from the date of the preparation of the list and it expires thereafter. Rule 26 is extracted hereinbelow in extenso :-

"26. Appointment by appointing authority :-

The select list referred to in sub-rules (6) and (7) of Rule 23 shall be forwarded by the Selection Committee to the appointing authority mentioning the aggregate marks obtained at the selection by each candidate. The name of general and reserve candidate shall be arranged by the appointing authority in a common list according to the merit of the candidates and the appointment shall be offered in the order in which the names are arranged in the list shall hold good for a period of one year from the date of selection".

10. Notwithstanding the aforesaid Statutory Rule and without applying the mind to the aforesaid Rule the High Court relying upon some earlier decisions of the Court came to hold that the list does not expire after a period of one year which on the face of it is erroneous. Further question that arises in this context is whether the High Court was justified in issuing the mandamus to the appellant to make recruitment of the Writ Petitioners. Under the Constitution a mandamus can be issued by the Court when the applicant establishes that he has a legal right to performance of legal duty by the party against whom the mandamus is sought and said right was subsisting on the date of the petition. The duty that may be enjoined by mandamus may be one imposed by the Constitution or a Statute or by Rules or orders having the force of law. But no mandamus can be issued to direct the Government to refrain from enforcing the provisions of law or to do something which is contrary to law. This being the position and in view of the Statutory Rules contained in Rule 26 of the Recruitment Rules we really fail to understand how the High Court issued the impugned direction to recruit the respondents who were included in the select list prepared on 4-4-87 and the list no longer survived after one year and the rights, if any, of persons included in the list did not subsist. In the course of hearing the learned counsel for the respondents, no doubt have pointed out some materials which indicate that the Administrative Authorities have made the appointments from a list beyond the period of one year from its preparation. The learned counsel appearing for the appellants submitted that in some cases pursuant to the direction of the Court some appointments have been made but in some other cases it might have been done by the Appointing Authority. Even though we are persuaded to accept the submission of the learned counsel for the respondents that on some occasion appointments have been made by the Appointing Authority from a select list even after the expiry of one year from the date of selection but such illegal action of the Appointing Authority does not confer a right on an applicant to be enforced by a Court under Article 226 of the

Constitution. We have no hesitation in coming to the conclusion that such appointments by the Appointing Authority have been made contrary to the provisions of the Statutory Rules for some unknown reason and we deprecate the practice adopted by the Appointing Authority in making such appointments contrary to the Statutory Rules. But at the same time it is difficult for us to sustain the direction given by the High Court since, admittedly, the life of the select list prepared on 4-4-87 had expired long since and the respondents who claim their rights to be appointed on the basis of such list did not have a subsisting right on the date they approached the High Court. We may not be understood to imply that the High Court must issue such direction, if the writ petition was filed before the expiry of the period of one year and the same was disposed of after the expiry of the statutory period. In view of the aforesaid conclusion of ours it is not necessary to deal with the question whether the stand of the State Government that there existed one vacancy in the year 1987 is correct or not.

11. In the aforesaid premises the appeals are allowed. The impugned judgments are set aside and the Writ Petitions filed by the respondents stands dismissed. But in the circumstances there will be no order as to costs. Appeal allowed.