

A.C.Thalwal

Vs

High Court of Himachal Pradesh & others

Civil Appeal Nos. 9389-90 of 1995

(Mr. R.C. Lahoti and Mr. K.G. Balakrishnan, JJ.)

17.08.2000

### JUDGMENT

**R.C. Lahoti, J:-** A.C. Thalwal, the appellant was born on 15th September, 1948. On 11.11.1965 he joined the Indian Air Force. On 1st December, 1980 he was released from the Air Force. For a short period between February, 1981 and January 1984, the appellant served as a cashier in the Punjab National Bank. The appellant did his graduation in the year 1971 and post graduation in 1973. He passed the LL.B. examination in the year 1976.

In the year 1983, the High Court of Himachal Pradesh invited applications for recruitment to 12 posts in Himachal Judicial Service, out of which 2 posts were reserved for ex-servicemen. the appellant made an application seeking appointment in the said quota of ex-servicemen. He was selected. On 1.2.1984 he joined the Himachal Pradesh Judicial Service as Sub Judge-cum-Judicial Magistrate.

Having joined the judicial service the appellant made a representation to the High Court submitting that the Ex-Servicemen (Reservation of Vacancies in the Himachal Pradesh Judicial Service) Rules, 1981, hereinafter 'Reservation Rules 1981' for short, provided for the period spent in approved military service, which was 11 years in the case of the appellant, being counted towards the Himachal Pradesh Judicial Service for the purpose of fixing pay and seniority. By an order dated 31.8.1989 the High Court fixed the pay of the appellant by giving him credit of 11 years approved military service. All the increments which the appellant would have been entitled to, if he would have spent the period of approved military service in Himachal Pradesh Judicial Service, were released to him. However, as the High Court had not fixed the appellant's seniority by giving him the benefit of the period spent in approved military service by counting the same fictionally as having been spent in Himachal Pradesh Judicial Service, the appellant made further representations in the year 1990 claiming such benefit. The High Court of Himachal Pradesh invited objections of all concerned to the claim made by the appellant. On 1.11.1991, having considered the objections preferred and after affording opportunity of hearing to all such as wished to be heard, the High Court by its decision dated 1.11.1991 allowed the representations made by the appellant. He was given the benefit of the period spent in approved military service being counted for the purpose of seniority in Himachal Pradesh Judicial Service. He was placed at the bottom of the 1974 batch of judicial officers. Prior to the abovesaid decision of the High Court the appellant was placed at Sl.No. 43 of the seniority list issued in December, 1990. As a result of his representations having been accepted, in terms of the order dated 1.11.1991 passed by the High Court the appellant stepped up to Sl.No. 13 of the said seniority list.

One George, who was then a Senior Sub Judge-cum-Chief Judicial Magistrate, filed civil writ

petition No. 693 of 1991 laying challenge to the seniority assigned to the appellant. The constitutional validity of the Rules granting benefit of seniority to the judicial officers recruited in the quota of ex-servicemen as also the legal validity of the order dated 1.11.1991 were challenged. It is pertinent to note that the only persons impleaded as respondents in the petition filed by George were A.C. Thalwal (the appellant herein), the State of Himachal Pradesh and the High Court of Himachal Pradesh. Other judicial officers who were above Thalwal and became below him as a consequence of the order dated 1.11.1991 passed by the High Court were not joined as parties to the petition. It appears that the respondents therein also did not raise any objection as to non-joinder of such parties. By judgment dated 10.6.1992 the Division Bench of the High Court of Himachal Pradesh dismissed George's petition.

A perusal of the judgment of the High Court shows that the Division Bench was persuaded to accept the constitutional validity of Reservation Rules, 1981 on the assumption that the same was no more res integra as having been already upheld by the Full Bench of that High Court in Mohinder Kumar Sood vs. H.P. Public Service Commission and others AIR 1982 HP 78. The Division Bench also found nothing wrong in the benefit of the period spent in approved military service being given in judicial service of Himachal Pradesh because the same was contemplated by Rules. Aggrieved by the judgment of the High Court, George filed a petition seeking special leave to appeal before this court. On 26.11.1992 the SLP was dismissed by a non-speaking order. The judgment of the High Court was implemented. Seniority was already assigned to the appellant. In view of the appellant's seniority having been stepped up, he was appointed as Senior Sub-Judge-cum-Chief Judicial Magistrate on 15.12.1992.

It appears that the placement of the appellant at the bottom of 1974 batch of judicial officers under order of the High Court dated 1.11.1991 had in effect resulted in a benefit of about 10 years of approved military service being given to the appellant. He once again made a representation for giving him the benefit of full 11 years of approved military service for the purpose of seniority. On 6.8.1993 the representation was considered by the Full Court and accepted. Consequent upon the benefit of 11 years of approved military service having been allowed to the appellant he was placed at the top of 1974 batch of judicial officers.

In August 1993, two writ petitions came to be filed by two sets of judicial officers adversely affected by the orders of the High Court and the action taken pursuant thereto resulting in stepping up of the seniority of the appellant Thalwal. C.W.P. 1184 of 1993 was filed on 19.8.1993 by 14 judicial officers some of whom were District & Session Judges, some were Additional District Judges and some were Chief Judicial Magistrates. C.W.P. 168 of 1994 was filed by 9 judicial officers, all Senior Sub Judge-cum-Chief Judicial Magistrates (or holding equivalent posts/offices). In these two writ petitions, challenge was laid to both the orders of the High Court dated 1.11.1991 and 6.8.1993. Constitutional validity of Reservation Rules 1981 was also put in issue in these two writ petitions on the ground that the Rules have been framed by the State Government without consulting the High Court of Himachal Pradesh as required by Article 234 of the Constitution and therefore they have no validity. The pleas raised by the writ petitioners have been upheld by the Division Bench of the High Court and the two impugned orders of the High Court and consequent action of stepping up of the seniority of the appellant have been ordered to be struck down. The Division Bench has however clarified that the benefit of pay fixation allowed to the appellant and his appointment in reserved quota of ex-army personnel were not being touched or disturbed. The aggrieved appellant has preferred these two appeals by special leave.

Recruitments to judicial services in the State of Himachal Pradesh is governed by H.P. Judicial

Service Rules, 1973 framed by the Governor in consultation with the High Court and in exercise of the powers conferred by Article 234 read with Article 309 of the Constitution of India. These rules do not make any provision for reservation in favour of schedule castes, scheduled tribes and other backward classes. These rules also do not contemplate reservation in the category of ex-army personnel. Full Bench of High Court of Himachal Pradesh in **Mohinder Kumar Sood vs. H.P. Public Service Commission and others** AIR 1982 HP 78 has held that ex-army personnel is a category covered by 'other backward classes'. In the appeal before us we are not called upon to express any opinion on this view of the law taken by the Full Bench of the High Court of Himachal Pradesh. We will, for the purpose of this appeal, only assume the permissibility of such reservation. However, the fact remains that the H.P. Judicial Service Rules do not anywhere provide for any entrant in the judicial service in any reserved category being given an extra benefit in calculating or fixing seniority. These rules provide for seniority being assigned by calculating the length of service from the date of entry in service. It was conceded at Bar that in so far as the appellant Thairwal is concerned, the period spent by him in approved military service being counted for the purpose of fixing seniority in judicial service could have been done only by reference to Reservation Rules of 1981. We would, therefore, proceed to examine the validity of these rules.

The Demobilised Indian Armed Forces (Reservation of Vacancies in H.P. Judicial Service) Rules, 1975 were framed by the Governor in Consultation with the High Court of Himachal Pradesh. These rules came into force on 28.4.1975, the date of their publication in the Government Gazette. The life of these rules was five years, expiring in April 1980. Sub-Rule (1) of Rule 4 provided for the period of approved military service rendered after attaining the minimum age prescribed for the appointment to the H.P. Judicial Service by the candidates appointed against reserved vacancies under Rule 2 (i.e. the approved military service) shall count towards fixation of pay and seniority in that service.

The life of the 1975 Rules expired in April, 1980. The State Government proposed to extend the life of these rules and for that purpose made a reference to the High Court on 29th November, 1980 seeking approval of the High Court to the proposed extension of the rules. The relevant part of the letter stated:-

"It is proposed to extend these Rules upto 31st December, 1982 as per draft amendment (copy enclosed). It is requested that the approval of the High Court/Public Service Commission may kindly be obtained and conveyed to this department immediately".

The amendment enclosed with the letter proposed substitution of Sub-Rule (2) of Rule 1 in the Rules of 1975 so as to read as under:-

(2) These shall come into force on the 28th day of April 1975, and shall not remain in force after the 31st day of December, 1982".

The matter came up for consideration in the Full Court Meeting of the High Court on 6th March, 1981. The Full Court, having given its serious consideration to the proposal, placed on record its opinion that it would not be in the interest of judiciary to agree to any further reservation. The opinion of the High Court was communicated to the State Government. What happened thereafter is something strange. On 1st August, 1981 the Government of Himachal Pradesh notified in the Government Gazette a fresh (set of rules entitled the Ex-Servicemen (Reservation of Vacancies in the H.P. Judicial Service) Rules, 1981. Rule 5(1) of these Rules provides for the period of approved military service rendered after attaining the minimum age prescribed for appointment to the H.P.

Judicial Service by the candidates appointed against reserved vacancies under Rule 3 (which includes the ex-servicemen) shall count towards fixation of pay and seniority in that service. The Preamble of the Rules states as under:-

"In exercise of the powers conferred by the proviso to article 309 read with article 234 of the Constitution of India and all other powers enabling him in this behalf, the Governor, Himachal Pradesh, in consultation with the High Court of Himachal Pradesh and the Himachal Pradesh Public Service Commission, hereby makes the following rules regulating the reservation of vacancies in the Himachal Pradesh judicial service for the Ex-Servicemen, Namely:-" [emphasis supplied]

The publication of the Reservation Rules 1981 was brought to the notice of the High Court. It was viewed with concern. On 28.8.1981 the Full Bench passed the following resolution:-

"The Full Bench views with grave concern the fact that whereas the Government sought 'approval of the High Court' to the proposed amendment vide its letter No. 7-5-70-DP. (Apptt.II) dated 29th November, 1980 and though the Court vide its resolution dated 6th March, 1981 did not agree to the proposed amendment, still the Government has enforced the proposed amendment.

The Registry is directed to convey the same to the Government".

The Government gave no response. However, it continued to make reservation for ex-servicemen under these Rules.

The Division Bench of the High Court in its judgment under appeal has recorded a finding, based on the material available as well as on the records available in the Registry of the High Court, that these Reservation Rules, 1981 were never referred by the Governor to the High Court and the High Court had never had any occasion to consider the Rules. In short, there was no consultation much less effective and meaningful consultation by the State Government with the High Court as contemplated by the Article 234 of the Constitution in so far as the Reservation Rules, 1981 are concerned. The preamble of the rules is factually incorrect.

Article 234 of the Constitution of India provides for appointments to the judicial service of the State (excluding District Judges) to be made by the Governor of the State in accordance with the Rules made by him in that behalf after consultation with the State Public Service Commission and the High Court of the State. The consultation is mandatory. The consultation contemplated by Article 234 is not a matter of mere formality; it has to be meaningful and effective. Judicial services have to be independent of executive influence and so the Constitution has placed them on a pedestal different from other services under the State. The constitutional scheme aims at securing an independent judiciary which is the bulwark of democracy. The status which the High Court as an institution enjoys in the constitutional scheme and the expertise and the experience which it possesses of judicial services command with justification a place of primacy being assigned to the High Court in the process of consultation. As observed by the Constitution Bench in **Supreme Court Advocates-on-Record Association and Ors. vs. Union of India** (1993) 4 SCC 441 the High Court assumes primacy because of its being best equipped to discharge the greater burden in the process of consultation contemplated by Article 234 of the Constitution; it is not a question of determining who between the two constitutional functionaries is entitled to greater importance or to take the winner's prize at the end of the debate. Reference may also be had to the law laid down by this Court in **Chandramouleswar Prasad vs. The Patna High Court and Ors.** - AIR 1970 SC 370 and **Hari Datt Kainthla and Anr. vs. State of Himachal Pradesh and Ors.** - AIR 1980 SC

1426. Rules regarding consultation with the High Court must at the proposal stage be made available to the High Court so that after study, scrutiny and reflection the High Court may be able to offer its advice to the Governor.

The Reservation Rules, 1981 having been framed by the Governor without consultation with the High Court of Himachal Pradesh are ultra vires the constitution and hence ineffective and unenforceable in view of Article 234 of the Constitution. All that was done by the State Government was to refer an amendment in the Reservation Rules, 1975 for the opinion of the High Court so as to seek its opinion on the proposed extension in the life thereof. The proposal of the State Government did not meet the approval of the High Court. The disapproval was conveyed to the State Government. Thereafter there was no correspondence and no reference by the State Government to the High Court. Even the proposed extension of the life of Reservation Rules, 1975 could not be said to have satisfied the test of mandatory consultation with the High Court. In the matter of Reservation Rules of 1981 even that much formality was not done. The Division Bench of High Court is, therefore, absolutely right in forming the opinion that these Rules are void and a nullity.

In as much as the Reservation Rules 1981 are ultra vires the Constitution, the orders of the High Court giving benefit of seniority to the appellant automatically fall to the ground as the orders are based on the Reservation Rules of 1981. Shri Gopal Subramaniam, the learned senior counsel for the appellant, submitted that the constitutional validity of the Reservation Rules 1981 as well as the validity of the order dated 1.11.1991 have been upheld by the High Court of Himachal Pradesh in its judgment dated 10.6.1992 disposing of George's petition and that order having achieved a finality, the benefit available to the appellant thereunder cannot be denied to him. We are not impressed. George's petition was not filed in a representative capacity. The petitioners in the two writ petitioners, the judgment as parties in the petition filed by George and therefore the judgment in George's case cannot, on any principle of law, bind the private respondents before us (who were the writ petitioners in the two writ petitions filed before us (who were the writ petitioners in the two writ petitions filed before the High Court). The two writ petitions were filed in the year 1993 laying challenge to the seniority list of 1990 as modified in the year 1991. the writ petitions are neither belated nor barred by the doctrine of laches. The decision in George's case is based on a fallacy going to the root of the matter. A perusal of the judgment dated 10.6.1992 in George's case shows the Division Bench having proceeded on an erroneous assumption that the constitution validity of the Reservation Rules, 1981 was upheld by the Full Bench of the High Court of Himachal Pradesh in **Mohinder Kumar Soods'** case. A perusal of the Full Bench judgment in **Mohinder Kumar Soods'** case shows that the Full Bench has nowhere upheld the constitutional validity of Reservation Rules 1981. Though the issue was raised incidentally, the Full Bench noticed the relevant facts pointed out to the invalidity of the Rules for want of mandatory consultation with the High Court as required by Article 234 of the Constitution. However, the Full Bench left the matter at that as it held the reservation for ex-servicemen in judicial services permissible by reference to Articles 16(4) and 29 of the Constitution of India. The Division Bench of the High Court was therefore not excluded from now going into the merits of the challenge laid to the constitutional validity of the Reservation Rules 1981 and testing the same on the touchstone of Article 234 of the Constitution.

For the foregoing reasons it is held that the Ex-Servicemen (Reservation of Vacancies in the Himachal Pradesh Judicial Service) Rules, 1981 are ultra vires the Constitution and hence void. They have been rightly struck down as such by the High Court. The orders dated 1.11.1991 and 6.8.1993 passed by the High Court of Himachal Pradesh giving benefit of eleven years of approved military service to the appellant have also been rightly struck down by the High Court. No fault can

be found with the judgment of the High Court. The appeals are held liable to be dismissed.

However, we would like to make it clear that the High Court in its impugned judgment has not disturbed that earlier order of the High Court which gave the appellant benefit of the period spent in approved military service being counted for the purpose of pay fixation and the recruitment of the appellant to the service in the quota of ex-army personnel. No appeal has been filed against the part of the judgment and that has achieved a finality. Obviously the dismissal of this appeal would not prejudice the appellant in that regard. The learned senior counsel for the appellant invited our attention to the fact that the dismissal of this appeal may result in reversion of the appellant from the post of Sr. Sub-Judge-cum-Chief Judicial Magistrate, which the appellant is holding ever since 15.12.1992 for no fault of the appellant. He submitted that the service record of the appellant is 'good' and he has been satisfactorily discharging his duties as Sr. Sub-Judge-cum-Chief Judicial Magistrate which post he may be allowed to retain until the time when he would even otherwise become entitled to hold in spite of the benefit of seniority being denied to him. We find some substance in the submission. It was pointed out at the Bar, during the course of hearing, that shortly the appellant would be due and eligible for being considered for appointment on the post presently held by him even if the benefit of 11 years seniority is denied to him. With a view to balance equities and avoid any hardship to the appellant, it is directed that in spite of these appeals being dismissed and the judgment under appeal being implemented, the appellant shall continue to hold the post presently held by him. He shall be considered by the High Court for appointment by promotion on the post of Sr. Sub-Judge-cum-Chief Judicial Magistrate or an equivalent post at a point of time when he would become eligible for such consideration pursuant to the judgment under appeal of the High Court. If he is found fit for such promotion, he shall be so promoted and for future his seniority in the cadre of Sr. Sub-Judge-cum-Chief Judicial Magistrate shall be reckoned from the date of such promotion. If he may be found not fit for promotion then he may be reverted to the post of Sub-Judge-cum-Judicial Magistrate. In any case till such consideration he shall continue to hold the post presently held by him as a special case.

Subject to the above observation, the appeals are dismissed. The impugned judgment of the High Court dated 17.11.1994 is maintained. No order as to the costs.