

ALLAHABAD HIGH COURT

Mahesh Prasad Srivastava

Vs

Abdul Khair

Special Appeal No. 378 of 1970

(S.N. Dwivedi and C.D. Parekh, JJ.)

25.02.1970. 18.08.1970

JUDGMENT

S.N. Dwivedi, J.

1. By our order dated July 22, 1970 we dismissed this appeal and stated that reasons will follow shortly. We are now setting forth our reasons.
2. The appellant and the respondents are members of the High Court staff. All of them belong to the class of Upper Division Assistants. At present the appellant holds the post of the Assistant Superintendent, Administrative Department (Records). He was recently promoted to this post by an order of Hon'ble the Chief Justice.
3. The respondents filed a writ petition praying for the quashing of this order.
4. Promotion to the post of the Assistant Superintendent, Administrative Department, is regulated by Rule 9 of the Allahabad High Court (Conditions of Service of Staff) Rules, 1946. Rule 9 provides that promotion shall be made "by selection, irrespective of seniority."
5. The respondents allege that the appellant was promoted merely by virtue of his being senior in the class of Upper Division Assistants. According to them his promotion is in breach of R. 9.
6. The learned single Judge, who heard the petition, accepted the contention of the respondents and quashed the order of Hon'ble the Chief Justice promoting the appellant to the post of the Assistant Superintendent, Administrative Department.
7. Feeling aggrieved with the judgment of the learned single Judge, the appellant has filed this appeal.
8. "Selection, irrespective of seniority" in Rule 9 necessarily implies that a person promoted should be chosen out of a number of eligible candidates for the post to which he has been promoted. Selection should be made obviously on a comparison of merit of the eligible candidates. The order of Hon'ble the Chief Justice, however, shows that this procedure, which is

implicit in Rule 9, was not followed. The note put up by the Additional Registrar in respect of the promotion of the appellant contains the following remarks :

"There is a vacancy in the post of Assistant Superintendent consequent on the transfer of Sri K. N. Srivastava to Lucknow. This is a selection post. Both seniority and merit have to be taken into consideration in making the appointment. According to the latest orders of Hon'ble C. J. Sri Mahesh Prasad Srivastava is the senior most Upper Division Assistant entitled to this promotion. He is a graduate and has a good record of service."

The Registrar endorsed the proposal of promotion of the appellant. Hon'ble the Chief Justice made a one word Order "approved".

9. During the hearing of arguments before the learned single Judge a statement was made on behalf of Hon'ble the Chief Justice by the Standing Counsel. The statement is recorded in the order-sheet dated February 13, 1970. Standing Counsel stated that

"as far as the Chief Justice can recollect the only material placed before him, when he passed the orders on 23-4-1969 and 25-4-1969 set forth in annexures R. I and R. 2 to the rejoinder affidavit (filed in reply to the counter affidavit of respondent No. 4), was the report and recommendations of the Additional Registrar set forth in those annexures and no character rolls were shown to him."

From the above facts it will appear conclusively that, firstly, greater emphasis was laid on seniority rather than on merit and, secondly, that the merit of Mahesh Prasad Srivastava has not been compared with the merit of any other Upper Division Assistant who is eligible for promotion to the post of the Assistant Superintendent, Administrative Department. Accordingly we agree with the learned Judge that the appellant has not been promoted by "selection, irrespective of seniority", as contemplated by Rule 9.

10. Counsel for the appellant has submitted an objection in the nature of a preliminary objection to the writ petition. The objection was raised also before the learned Single Judge but was not accepted. The objection is that no writ, order or direction can issue to Hon'ble the Chief Justice by any Judge of this Court under Article 226 of the Constitution. The basis of the argument is that Hon'ble the Chief Justice and other Judges of the court are of equal rank and that a writ, order or direction can issue only to an inferior authority. Reliance is placed on three decisions. *In re Babul Chandra Mitra*¹, a Full Bench of the Patna High Court held that no writ, order or direction could be issued to the High Court by the High Court. In that case an application of Babul Chandra Mitra for enrolment as an Advocate of the High Court was rejected by the High Court. The order rejecting his application was signed by all the Judges of the High Court. Refusing to entertain a petition under Article 226, the Full Bench gave two reasons : (1) the High Court cannot call upon itself to show cause why it should not quash its own order; (2) a Judge cannot issue a writ, order or direction to a Judge of co-ordinate jurisdiction.

In the *High Court, Calcutta v. Amal Kumar*², a member of the Judicial Service in the State instituted a suit in the lower court against the High Court. The suit was decreed. Although an appeal from the decree lay to the High Court, the Supreme Court directly entertained an appeal

from the decree of the lower court under Article 136 of the Constitution. According to the Supreme Court this unusual step was taken because of the principle that a person cannot be a Judge in his own cause. As the order challenged in the suit was that of the High Court, it could not hear the appeal from the decree of the lower court. Counsel says that this decision of the Supreme Court fortifies the first reason given by the Full Bench of the Patna High Court. In *Naresh v. State of Maharashtra*³, Sri Justice Sarkar in his judgment has said that the Supreme Court cannot issue a writ to the High Court under Article 32 of the Constitution. But Sri Justice Hidayatullah has expressed a contrary opinion. It may be noted that the Supreme Court cases do not help the appellant. No question arose in Amal Kumar's case, AIR 1962 Supreme Court 1704 regarding issue of a writ, order or direction by one or more Judges of the Court to the Chief Justice. The question also did not arise in Naresh's case, AIR 1967 Supreme Court 1. In the latter case the order of a Judge of the Bombay High Court was challenged before the Supreme Court. The challenged order was made by a Judge acting judicially and not administratively. In the present case, the respondents seek relief against the order of the Chief Justice passed by him in an administrative capacity and not judicially. If any order is passed by any Judge including the Chief Justice, acting judicially, there is little doubt that it cannot be challenged under Article 226.

11. Babul Chandra Mitra is also distinguishable from the case before us. In that case all the Judges passed the impugned order; in this case only the Chief Justice has passed the impugned order. So while in the former case the order was one by the High Court, in this case the order is only that of the Chief Justice acting administratively. This is one important distinction. The principle that a person cannot be a Judge in his own cause is not applicable to the facts of the case before us. The order of Hon'ble the Chief Justice is not our order. So we are not sitting as a Judge in our own cause.

12. It appears to us that the second reason assigned by the Full Bench of the Patna High Court is rather broadly stated. There should be little difficulty in saying that a writ in the nature of quo warranto may be issued under Article 226 to a Judge of the High Court if he has not been validly appointed. Again, although Judges are appointed by the President of India, a writ order or direction may be issued to the Central Government for quashing his order or for enjoining the Central Government from enforcing his order. In our view, when the Chief Justice or any other Judge passed an order while acting in an administrative capacity, he is amenable to the writ jurisdiction of the Court under Article 226. Indeed, this court has been regularly entertaining writ petitions against the order of Hon'ble the Chief Justice. In *Iqbal Ahmad v. Chief Justice of Allahabad High Court*⁴, a Division Bench issued a writ in the nature of mandamus to the Chief Justice. The decision of the Division Bench was upheld by the Supreme Court. However, it may be said that the question which has been raised before us was not raised in that case. But we are only pointing to the practice that has prevailed in this Court since the commencement of the Constitution.

13. In *Pradyat Kumar Bose v. Chief Justice of the High Court, Calcutta*⁵, Supreme Court did not enter into the question relating to the issue of a writ to the Chief Justice. However, the Supreme Court made this observation :

"We consider it, however, desirable to say that our view that the exercise of power of dismissal of a civil servant is the exercise of administrative power may not necessarily preclude the availability of remedy under Article 226 of the Constitution in an appropriate

case. That is a question on which we express no opinion one way or the other in this case. This observation suggests that it is not quite correct to maintain that this Court has got no power to issue a writ, order or direction to the Chief Justice or any other Judge of the Court while acting in an administrative capacity. The observation suggests that the Court has got power but a writ, order or direction may be issued only in an appropriate case. So the question is not one of power but of propriety.

14. In *T. N. Devasahayam v. State of Madras*⁶, the High Court of Madras held that a writ, order or direction may issue to a Judge acting in an administrative capacity. The same view has been taken by two of the three Judges constituting the Full Bench of the Calcutta High Court in *Pramatha Nath v. Chief Justice of Calcutta*⁷, So we think that the learned Judge properly issue a direction quashing the order of Hon'ble the Chief Justice which promoted the appellant to the post of the Assistant Superintendent, Administrative Department.

15. Counsel has also urged that as the order of the Chief Justice is the order of the High Court, we cannot sit in judgment over our own order. We cannot accept this argument.

16. Article 214 of the Constitution provides that there shall be a High Court for a State. According to Article 216 the High Court shall consist of the Chief Justice and Judges. Articles 224, 225, 226, 227 and 228 speak about the High Court as a collective institution. Article 229 (1) and (2) confer power on the Chief Justice in respect of the staff of the court. In contrast with this Article, Article 233 (1) provides that appointments of persons to be made, and the posting and promotion of district Judges shall be made by the Governor in consultation with the High Court. Similarly. Article 234 provides that appointments of persons other than district Judges to the judicial service shall be made by the Governor in accordance with rules made by him after consultation with the High Court. To the same effect is Article 235. This fasciculus of Articles will show that the Constitution has made a distinction between the High Court as a collective institution and the Chief Justice. When the Chief Justice acts in exercise of the power vested in him under Article 229, he does not act for the High Court. He acts in his individual capacity as the Chief Justice.

17. No other points have been raised.

Order accordingly.

Cases Referred.

1AIR 1952 Pat 309 (FB)

2AIR 1962 SC 1704

3AIR 1967 SC 1

4AIR 1962 All 391

5(1955) 2 SCR 1331: AIR 1956 SC 285

6AIR 1958 Mad 53

7AIR 1961 Cal 545