RAKHI RAY & ORS.
v.
THE HIGH COURT OF DELHI & ORS.
(Civil Appeal Nos. 1133-1135 of 2010)

FEBRUARY 01, 2010

[K.G. Balakrishnan CJI., Deepak Verma and Dr. B.S. Chauhan, JJ.]
2010 (2) SCR 239

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. Applications for permission to file Special Leave Petitions are granted.

2. Leave granted.

3. These appeals have been filed for seeking directions to the respondents i.e. the High Court of Delhi and the Lt. Governor of Delhi to offer the appointment to the appellants on the posts in the cadre of District Judges in Delhi Judicial Service.

4. Facts and circumstances giving rise to these appeals are that in order to fill up 20 vacancies in the cadre of District Judge in Delhi, the respondent No.1, the High Court of Delhi, issued an advertisement dated 19.5.2007. Out of these 20 vacancies, 13 were to be filled up from the General Category candidates; 3 from Scheduled Castes; and 4 from Scheduled Tribes. Appellants who belong to General Category, faced the selection process. The result was declared on 3.1.2008. Appellants found place in the merit list but much below. All the 13 vacancies in the said category were filled according to the merit list of General Category candidates. However, two posts reserved for Scheduled Castes candidates and four posts meant for Scheduled Tribes candidates could not be filled up for non availability of suitable candidates.

5. Certain unsuccessful candidates approached the Delhi High Court by filing Writ Petition Nos. 2688/2008, 2913/2008 and 3932/2008 on the ground that 13 vacancies came into existence between 29.2.2008 and 23.5.2008 i.e.

during the pendency of the selection process which could have also been filled up from the said select list in view of the judgment of this Court in *Malik Mazhar Sultan & Anr. v. U.P. Public Service Commission & Ors.* (2007) 2 SCALE 159. The High Court disposed of all the petitions vide its judgment and order dated 3.10.2008 taking a view that only three vacancies came into existence subsequent to the date of Advertisement which could have been filled up from the said list. Out of the said three vacancies, two could be offered to General Category candidates and one to the Scheduled Caste candidate and issued direction to appoint two more candidates whose names appeared at Serial Nos.14 and 15 in General Category Merit List. Hence, these appeals are for seeking directions to the respondents for offering appointment to the appellants also.

6. Shri Ranjit Kumar, learned senior counsel appearing for the appellants has submitted that the judgment in *Malik Mazhar Sultan's* case (supra) was delivered by this Court on 4.1.2007. A large number of directions had been issued in the said case and it also formulated the calendar for conducting the examinations for filling up the vacancies in the Judicial Service. It also provided that while determining the number of vacancies, the concerned Authority would also consider alongwith the existing vacancies, as what would be the anticipated vacancies that may arise within one year due to retirement, due to elevation to the High Court, death or otherwise, say 10% of the number of posts; and to take note of the vacancies arising out of deputation of Judicial Officers to other departments. It also provided that the select list so prepared shall be valid till new select list is published. The examination is to be conducted every year. The High Courts were directed to give strict adherence to the aforesaid schedule fixed by this Court. So far as the Delhi High Court was concerned, it was provided that the High Court would amend its calendar accordingly. In view of the above, it has been submitted that while making the advertisement, the Delhi High Court had not taken note of the anticipated vacancies which could be available during the

next year. As per the direction of this Court, as 13 more vacancies came into existence, those vacancies must be filled up from the select list so prepared. As the appellants are in the select list they should be offered appointments.

7. On the contrary, Shri A. Mariarputham, learned senior counsel appearing for the respondents has vehemently opposed the appeals contending that the law does not permit filling up the vacancies over and above the number of vacancies advertised. Thirteen vacancies of the General Category were advertised; the same had been filled up according to merit, therefore, selection process in that respect stood exhausted. The waiting list does not survive. The appellants had not challenged the advertisement in spite of the fact that the judgment in *Malik Mazhar Sultan's* case (supra) was delivered on 4.1.2007 and vacancies were advertised on 19.5.2007. The appellants were not aggrieved for not offering the appointment to them, as they did not even approach the High Court for any relief. The Special Leave Petitions were filed at much belated stage on 24.10.2008, though the result had been declared on 3.1.2008, and appointments had been made on 3.4.2008. The directions of the Court could not supersede the statutory rules as there was a direction to fill up the vacancies as per the existing statutory rules. Appointments had been made according to law. Thus, the appeals have no merit and are liable to be dismissed.

8. We have considered the rival submissions made by learned counsel for the parties and perused the record.

9. It is a settled legal proposition that vacancies cannot be filled up over and above the number of vacancies advertised as "the recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16(1) of the Constitution", of those persons who acquired eligibility for the post in question in accordance with the statutory rules subsequent to the date of notification of vacancies. Filling up the vacancies over the notified vacancies is neither

permissible nor desirable, for the reason, that it amounts to "improper exercise of power and only in a rare and exceptional circumstance and in emergent situation, such a rule can be deviated and such a deviation is permissible only after adopting policy decision based on some rational", otherwise the exercise would be arbitrary. Filling up of vacancies over the notified vacancies amounts to filling up of future vacancies and thus, not permissible in law. (Vide *Union of India & Ors. v. Ishwar Singh Khatri & Ors.* (1992) Supp 3 SCC 84; *Gujarat State Deputy Executive Engineers' Association v. State of Gujarat & Ors.* (1994) Supp 2 SCC 591; *State of Bihar & Ors. v. The Secretariat Assistant S.E. Union 1986 & Ors* AIR 1994 SC 736; *Prem Singh & Ors. v. Haryana State Electricity Board & Ors.* (1996) 4 SCC 319; and *Ashok Kumar & Ors. v. Chairman, Banking Service Recruitment Board & Ors.* AIR 1996 SC 976).

10. In *Surinder Singh & Ors. v. State of Punjab & Ors.* AIR 1998 SC 18, this Court held as under:

> "A waiting list prepared in an examination conducted by the Commission does not furnish a source of recruitment. It is operative only for the contingency that if any of the selected candidates does not join then the person from the waiting list may be pushed up and be appointed in the vacancy so caused or if there *is some extreme exigency the Government may as a matter of policy decision pick up persons in order of merit from the waiting list. But the view taken by the High Court that since the vacancies have not been worked out properly, therefore, the candidates from the waiting list were liable to be appointed does not appear to be sound.* This practice, may result in depriving those candidates who become eligible for competing for the vacancies available in future. If the waiting list in one examination was to operate as an infinite stock for appointment, there is a danger that the State Government may resort to the device of not holding an examination for years together and pick up candidates from the waiting list as and when required. The constitutional

discipline requires that this Court should not permit such improper exercise of power which may result in creating a vested interest and perpetrate waiting list for the candidates of one examination at the cost of entire set of fresh candidates either from the open or even from service…..Exercise of such power has to be tested on the touch-stone of reasonableness….It is *not a matter of course that the authority can fill up more posts than advertised."*

(Emphasis added)

11. Similar view has been re-iterated in *Madan Lal v. State of J & K & Ors.* AIR 1995 SC 1088; *Kamlesh Kumar Sharma v. Yogesh Kumar Gupta & Ors*. AIR 1998 SC 1021; *Sri Kant Tripathi v. State of U.P. & Ors.* (2001) 10 SCC 237; *State of J & K v. Sanjeev Kumar & Ors.* (2005) 4 SCC 148; *State of U.P. v. Raj Kumar Sharma & Ors.* (2006) 3 SCC 330; and *Ram Avtar Patwari & Ors. v. State of Haryana & Ors.* AIR 2007 SC 3242).

12. In *State of Punjab v. Raghbir Chand Sharma & Ors.* AIR 2001 SC 2900, this Court examined the case where only one post was advertised and the candidate whose name appeared at Serial No. 1 in the select list joined the post, but subsequently resigned. The Court rejected the contention that post can be filled up offering the appointment to the next candidate in the select list observing as under:–

"With the appointment of the first candidate for the only post in respect of which the consideration came to be made and select list prepared, the panel ceased to exist and has outlived its utility and at any rate, no one else in the panel can legitimately contend that he should have been offered appointment either in the vacancy arising on account of the subsequent resignation of the person appointed from the panel or any other vacancies arising subsequently."

13. In *Mukul Saikia & Ors. v. State of Assam & Ors.* AIR 2009 SC 747, this Court dealt with a similar issue and held that "if the requisition and

advertisement was only for 27 posts, the State cannot appoint more than the number of posts advertised". The Select List "got exhausted when all the 27 posts were filled". Thereafter, the candidates below the 27 appointed candidates have no right to claim appointment to any vacancy in regard to which selection was not held. The "currency of Select List had expired as soon as the number of posts advertised are filled up, therefore, the appointments beyond the number of posts advertised would amount to filling up future vacancies" and said course is impermissible in law.

14. In view of above, the law can be summarised to the effect that any appointment made beyond the number of vacancies advertised is without jurisdiction, being violative of Articles 14 and 16(1) of the Constitution of India, thus, a nullity, inexecutable and unenforceable in law. In case the vacancies notified stand filled up, process of selection comes to an end. Waiting list etc. cannot be used as a reservoir, to fill up the vacancy which comes into existence after the issuance of notification/advertisement. The unexhausted select list/waiting list becomes meaningless and cannot be pressed in service any more.

15. In the instant case, as 13 vacancies of the General Category had been advertised and filled up, the selection process so far as the General Category candidates is concerned, stood exhausted and the unexhausted select list is meant only to be consigned to record room.

16. So far as the submission made by Shri Ranjit Kumar that directions issued by this Court in *Malik Mazhar Sultan* (supra) had to be given effect to is concerned, the same requires consideration elaborately.

17. In *All India Judges' Association & Ors. v. Union of India & Ors.* AIR 1993 SC 2493, several directions had been issued by this Court in respect of the service conditions of the Judicial Officers. In view thereof, a notification dated 21st March, 1996 was issued appointing Justice K.J. Shetty Commission to consider about their service conditions.

18. In *All India Judges' Association & Ors. v. Union of India & Ors.* AIR 2002 SC 1752, this Court considered various aspects of Justice Shetty Commission Report and approved the same. However, the question arose as to whether the recommendations so accepted by this Court could be implemented as such or was it required to be incorporated in the statutory rules governing the service conditions of the Judicial Officers or alteration of the rules applicable to them? This Court held as under:

> "We are aware that it will become necessary for service and other rules to be amended so as to implement this judgment…."

19. In *Syed T.A. Naqshbandi & Ors. v. State of J & K & Ors.* (2003) 9 SCC 592, this Court reconsidered the same issue while examining the appointments to the post of District & Sessions Judges (Selection Grade) in the State of Jammu & Kashmir and relying upon its earlier judgment in **All India Judges' Association** (supra) held as under:

> *"Reliance placed upon the recommendations of Justice Jagannatha Shetty Commission or the decision reported in All India Judges' Assn. v. Union of India or even the resolution of the Full Court of the High Court dated 27-4-2002 is not only inappropriate but a misplaced one and the grievances espoused based on this assumption deserve a mere mention only to be rejected. The conditions of service of members of any service for that matter are governed by statutory rules and orders, lawfully made in the absence of rules to cover the area which has not been specifically covered by such rules, and so long as they are not replaced or amended in the manner known to law, it would be futile for anyone to claim for those existing rules/orders being ignored yielding place to certain policy decisions taken even to alter, amend or modify them.* Alive to this indisputable position of law only, this Court observed at SCC p. 273, para 38, that "we are aware that it will become necessary for service and other rules to be amended so as to implement this judgment". Consequently,

the High Court could not be found at fault for considering the matters in question in the light of the Jammu and Kashmir Higher Judicial Service Rules, 1983 and the Jammu and Kashmir District and Sessions Judges (Selection Grade Post) Rules, 1968 as well as the criteria formulated by the High Court. Equally, the guidelines laid down by the High Court for the purpose of adjudging the efficiency, merit and integrity of the respective candidates cannot be said to be either arbitrary or irrational or illegal in any manner to warrant the interference of this Court with the same. Even de hors any provision of law specifically enabling the High Courts with such powers in view of Article 235 of the Constitution of India, unless the exercise of power in this regard is shown to violate any other provision of the Constitution of India or any of the existing statutory rules, the same cannot be challenged by making it a justiciable issue before courts. The grievance of the petitioners, in this regard, has no merit of acceptance".

(Emphasis added)

20. In *Malik Mazhar Sultan's* case (supra), this Court made it clear that appointments in Judicial Service have to be made as per the existing statutory rules. However, direction was issued to amend the rules for future selections. This Court considered the correspondences between various authorities of the States and also the decision taken in the conference of the Chief Ministers and Chief Justices held on 11.3.2006, and observed as under:

"… Before we issue general directions and the time schedule to be adhered to for filling vacancies that may arise in subordinate courts and district courts, *it is necessary to note that selections are required to be conducted by the concerned authorities as per the existing Judicial Service Rules in the respective States/*Union Territories…… As already indicated, the *selection is to be conducted* by authorities empowered to do so *as per the existing Rules.* … In view of what we have already noted about *the appointments to be made in accordance with the respective*

Judicial Services Rules in the States, the apprehension of interference seems to be wholly misplaced…." (Emphasis added).

21. Therefore, it is clear that this Court clarified that selection was to be made as per the existing Rules and direction was issued for amending the existing laws to adopt the recommendations of Justice Shetty Commission as approved by this Court for the future.

22. So far as the judgment of this Court in *Hemani Malhotra v. High Court of Delhi & Ors.* AIR 2008 SC 2103 is concerned, the facts are quite distinguishable. The Delhi High Court did not frame any statutory rule providing for cut-off marks in interview for assessing the suitability for selection. After the selection process had been initiated, such a resolution was adopted. Therefore, the basic issue for consideration before this Court had been as to whether it was permissible for the High Court to change the selection criteria at the midst of the selection process. The Court placing reliance upon its earlier judgments held that once the selection process starts, it is not permissible for the competent authority to change the selection criteria and in that view observation was made that a fresh merit list is to be prepared ignoring the said resolution of the High Court taking cut-off marks in interview. Undoubtedly, the Court had taken note of Justice Shetty Commission Report in this regard and held that such a criteria could not have been provided. In absence of any statutory rule governing a particular issue, directions issued by this Court would prevail.

23. Therefore, it is evident from the aforesaid judgment that in spite of acceptance of the recommendations made by Justice Shetty Commission, this Court insisted that the existing law/statutory rules in making the appointment of Judicial Officers be amended accordingly. In *Syed T.A.Naqshbandi* (supra), this Court repealed the contention which is being advanced by the learned counsel for the petitioners therein and the Court in crystal clear words held that appointments have to be made giving strict

adherence to the existing statutory provisions and not as per the recommendations made by Justice Shetty Commission. Of course, in absence of statutory rule to deal with a particular issue, the High Courts are bound to give effect to the directions issued by this Court.

24. The appointments had to be made in view of the provisions of the Delhi Higher Judicial Service Rules, 1970. The said rules provide for advertisement of the vacancies after being determined. The rules further provide for implementation of reservation policies in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes. As the reservation policy is to be implemented, a number of vacancies to be filled up is to be determined, otherwise it would not be possible to implement the reservation policy at all. Thus, in view of the above, the question of taking into consideration the anticipated vacancies, as per the judgment in *Malik Mazhar Sultan* (supra), which had not been determined in view of the existing statutory rules could not arise.

25. In view of above, we do not find any force in the submissions that the High Court could have filled vacancies over and above the vacancies advertised on 19.5.2007, as per the directions issued by this Court in *Malik Mazhar Sultan's* case (supra). More so, no explanation could be furnished by Shri Ranjit Kumar, learned senior counsel for the appellants as to why the appellants could not challenge the advertisement itself, if it was not in conformity with the directions issued by this court in the said case.

26. It has further been submitted on behalf of the appellants that the Delhi High Court vide its judgment and order dated 3.10.2008 had issued directions to offer appointment to two persons implementing the said judgment in *Malik Mazhar Sultan's* case (supra) whose names appeared in select list at Sl. Nos. 14 and 15, and, as the High Court had implemented the said directions, the appellants could not be treated with such hostile discrimination. Undoubtedly, the directions had been issued to fill up two vacancies over and above the

vacancies notified. However, that part of the judgment is not under challenge before us. In such a fact situation, it is neither desirable nor permissible in law to make any comment on that. A person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the best is a condition of eligibility for purpose of appointment and by itself does not amount to selection or create a vested right to be appointed. The vacancies have to be filled up as per the statutory rules and in conformity with the constitutional mandate. In the instant case, once 13 notified vacancies were filled up, the selection process came to an end, thus there could be no scope of any further appointment.

27. In view of the above, we do not find any force in these appeals which are accordingly dismissed.

JUDGMENT

SLP (C) NO. 28488 and 29248 of 2008.

Navin Kumar Jha

v.

Lt. Governor & Ors.

DR. B.S. CHAUHAN, J. In view of our judgment pronounced today in CA Nos. 1133-1135 of 2010 @ SLP(C) Nos. 3662-3664/2010@ CC Nos. 14852-14854 of 2008 (*Rakhi Ray & Ors. vs. High Court of Delhi & Ors.*) these Special Leave Petitions are dismissed.