ANNA MATHEWS AND OTHERS

v.

SUPREME COURT OF INDIA AND OTHERS

(Writ Petition (Civil) No. 148 of 2023)

FEBRUARY 10, 2023

[SANJIV KHANNA AND B. R. GAVAI, JJ.]

Constitution of India: Art.217 – Collegium recommendation – Scope and ambit of judicial review in the matter of appointment of judges – Held: The Collegium of the Supreme Court takes the final call after considering recommendation of High Court, inputs of intelligence agencies, comments from the government, opinion and comments of the judges of this Court and a number of letters and communications from all quarters – Supreme Court while exercising power of judicial review cannot issue a writ of certiorari quashing the recommendation, or mandamus calling upon the Collegium of the Supreme Court to reconsider its decision, as this would be contrary to the ratio and dictum of the earlier binding decisions of this Court – To do so would violate the law as declared, as it would amount to evaluating and substituting the decision of the Collegium, with individual or personal opinion on the suitability and merits of the person.

Constitution of India: Art.217 – While Art.217(2) prescribes the threshold limit or the entry point for a person to be qualified to be a judge of a High Court, Art.217(1) prescribes the procedure to be followed, which procedure is designed to test the fitness of a person so to be appointed; her character, her integrity, her competence, her knowledge and the like – When eligibility is put in question, the question would fall within the scope of judicial review – However, the question whether a person is fit to be appointed as a judge essentially involves the aspect of suitability and stands excluded from the purview of judicial review.

Dismissing the writ petitions, the Court

Held:

After the Collegium of the High Court makes a recommendation for elevation, inputs are received from the intelligence

* Author

agencies, which conduct a background check, and comments from the government are considered by the Collegium of the Supreme Court consisting of the Chief Justice of India and two senior most Judges. Opinion and comments of the Judges in this Court conversant with the affairs of the High Court concerned are called for in writing and placed before the Collegium. Invariably a number of shoot down and dismissive letters and communications from all quarters are received. Only thereafter, and on consideration, the Collegium of the Supreme Court takes a final call, which is then communicated to the government. [Para 7]

2. **During the course of hearing before this Court, it was accepted that a number of persons, who have had political backgrounds, have been elevated as judges of the High Courts and the Supreme Court, and this by itself, though a relevant consideration, has not been an absolute bar to appointment of otherwise a suitable person. Similarly, there have been cases where the persons recommended for elevation have expressed reservations or even criticised policies or actions, but this has not been held to be a ground to treat them as unsuitable. It goes without saying that the conduct of the judge and her/his decisions must reflect and show independence, adherence to the democratic and constitutional values. This is necessary as the judiciary holds the centre stage in protecting and strengthening democracy and upholding human rights and Rule of Law. [Para 8]**

3. **It is in this context that the argument that the facts were not known and considered by the Collegium is rejected. The petitioners have themselves stated and enclosed copy of their representation dated 1st February 2023, albeit the Collegium of the High Court and the Supreme Court have not, on this basis, deemed it appropriate to withdraw the recommendation or recall their decision. [Para 9]**

4. **This Court while exercising power of judicial review cannot issue a writ of certiorari quashing the recommendation, or mandamus calling upon the Collegium of the Supreme Court to reconsider its decision, as this would be contrary to the**

ratio and dictum of the earlier decisions of this Court, which are binding on this Court. To do so would violate the law as declared, as it would amount to evaluating and substituting the decision of the Collegium, with individual or personal opinion on the suitability and merits of the person. [Para 10]

5. The person in question has been elevated as an Additional Judge of the High Court of Judicature at Madras. On taking oath the person pledges to work as a judge to uphold the Constitution and the laws. Article 51A of the Constitution casts an obligation on every citizen, and more so on every judge, to promote harmony, spirit of common brotherhood among all transcending religious, linguistic, regional or sectional diversities. Principle of secularism and dignity of every individual – regardless of the religion, caste or creed, is the foundation of Rule of Law and equal protection of laws. Not only is the conduct and judgments delivered considered at the time of confirmation, a judge is judged everyday by the lawyers, litigants and the public, as the courts are open and the judges speak by giving reasons in writing for their decisions. [Para 12]

Mahesh Chandra Gupta v. Union of India and Others **(2009) 8 SCC 273 : [2009] 10 SCR 921;** *M. Manohar Reddy and Another v. Union of India and Others* **(2013) 3 SCC 99 : [2013] 1 SCR 711;** *Supreme Court Advocates-on-Record Association and Others v. Union of India* **(1993) 4 SCC 441 : [1993] 2 Suppl. SCR 659;** *Special Reference No. 1 of 1998, Re* **(1998) 7 SCC 739 : [1998] 2 Suppl. SCR 400;** *N. kannadasan v. Ajoy Khose and Others,* **(2009) 7 SCC 1 : [2009] 7 SCR 668 – relied on.**

Shri Kumar Padma Prasad v. Union of India and Others **(1992) 2 SCC 428 : [1992] 2 SCR 109 – referred to.**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No.148 of 2023.

(Under Article 32 of The Constitution of India)

With

Writ Petition (Civil) No.147 of 2023.

Ms. Sanchita Ain, Srisatya Mohanty, Ravinder Singh, Advs. for the Petitioner.

The following Reasons were given by the Court:

REASONS

1. The legal issue raised in the aforementioned writ petitions relates to the scope and ambit of judicial review in the matter of appointment of judges to the High Courts under Article 217 of the Constitution of India[1].

2. In our opinion, this legal issue is settled and is not *res integra.*

3. This Court, in ***Mahesh Chandra Gupta v. Union of India and Others***[2], has held that appointment of a judge is an executive function of the President of India. Article 217(1) prescribes the constitutional requirement of consultation. Fitness of a person to be appointed as a judge of the High Court is evaluated in

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1 **217. Appointment and conditions of the office of a Judge of a High Court.—** (1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal on the recommendation of the National Judicial Appointments Commission referred to in article 124A, and shall hold office, in the case of an additional or acting Judge, as provided in article 224, and in any other case, until he attains the age of sixty-two years:
Provided that—
(a) a Judge may, by writing under his hand addressed to the President, resign his office;
(b) a Judge may be removed from his office by the President in the manner provided in clause (4) of article 124 for the removal of a Judge of the Supreme Court;
(c) the office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.
(2) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and—
(a) has for at least ten years held a judicial office in the territory of India; or
(b) has for at least ten years been an advocate of a High Court or of two or more such Courts in succession;
Explanation.— For the purposes of this clause—
(a) in computing the period during which a person has held judicial office in the territory of India, there shall be included any period, after he has held any judicial office, during which the person has been an advocate of a High Court or has held the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law;
(aa) in computing the period during which a person has been an advocate of a High Court, there shall be included any period during which the person has held judicial office or the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law after he became an advocate;
(b) in computing the period during which a person has held judicial office in the territory of India or been an advocate of a High Court, there shall be included any period before the commencement of this Constitution during which he has held judicial office in any area which was comprised before the fifteenth day of August, 1947, within India as defined by the Government of India Act, 1935, or has been an advocate of any High Court in any such area, as the case may be.
(3) If any question arises as to the age of a Judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final.

2 (2009) 8 SCC 273.

the consultation process. Evaluation of the worth and merit of a person is a matter entirely different from eligibility of a candidate for elevation. While Article 217(2) prescribes the threshold limit or the entry point for a person to be qualified to be a judge of a High Court, Article 217(1) prescribes the procedure to be followed, which procedure is designed to test the fitness of a person so to be appointed; her character, her integrity, her competence, her knowledge and the like. Thus, this judgment draws on the basic difference between eligibility and suitability. Eligibility is an objective factor which is determined by applying the parameters or qualifications specified in Article 217(2). Therefore, when eligibility is put in question, the question would fall within the scope of judicial review. However, the question whether a person is fit to be appointed as a judge essentially involves the aspect of suitability and stands excluded from the purview of judicial review.

4. The ratio in this judgment has been followed in ***M. Manohar Reddy and Another v. Union of India and Others***[3], inter alia, observing that the consultative process envisaged under Article 217(1) is to limit the judicial review, restricting it to the specified area, that is, eligibility, and not suitability. After referring to two decisions of the 9 Judges' Bench in ***Supreme Court Advocates-on-Record Association and Others v. Union of India***[4], and ***Special Reference No. 1 of 1998, Re:***[5] , it is opined that judicial review lies when there is lack of eligibility or 'lack of effective consultation'. Judicial review does not lie on 'content' of consultation.

5. Elaborating on what is meant by the term 'lack of effective consultation', we would like to refer to the observations made by this Court in Supreme Court Advocates-on-Record Association and Others (supra):

3 (2013) 3 SCC 99.
4 (1993) 4 SCC 441.
5 (1998) 7 SCC 739.

"JUSTICIABILITY

Appointments and Transfers

480. The primacy of the judiciary in the matter of appointments and its determinative nature in transfers introduces the judicial element in the process, and is itself a sufficient justification for the absence of the need for further judicial review of those decisions, which is ordinarily needed as a check against possible executive excess or arbitrariness. Plurality of judges in the formation of the opinion of the Chief Justice of India, as indicated, is another inbuilt check against the likelihood of arbitrariness or bias, even subconsciously, of any individual. The judicial element being predominant in the case of appointments, and decisive in transfers, as indicated, the need for further judicial review, as in other executive actions, is eliminated. The reduction of the area of discretion to the minimum, the element of plurality of judges in formation of the opinion of the Chief Justice of India, effective consultation in writing, and prevailing norms to regulate the area of discretion are sufficient checks against arbitrariness.

481. These guidelines in the form of norms are not to be construed as conferring any justiciable right in the transferred Judge. Apart from the constitutional requirement of a transfer being made only on the recommendation of the Chief Justice of India, the issue of transfer is not justiciable on any other ground, including the reasons for the transfer or their sufficiency. The opinion of the Chief Justice of India formed in the manner indicated is sufficient safeguard and protection against any arbitrariness or bias, as well as any erosion of the independence of the judiciary.

482. This is also in accord with the public interest of excluding these appointments and transfers from litigative debate, to avoid any erosion in the credibility of the decisions, and to ensure a free and frank expression of honest opinion by all the constitutional functionaries, which is essential for effective consultation and for taking the right decision. The growing tendency of needless intrusion

by strangers and busybodies in the functioning of the judiciary under the garb of public interest litigation, in spite of the caution in *S.P. Gupta* while expanding the concept of locus standi, was adverted to recently by a Constitution Bench in *Krishna Swami v. Union of India*. It is, therefore, necessary to spell out clearly the limited scope of judicial review in such matters, to avoid similar situations in future. Except on the ground of want of consultation with the named constitutional functionaries or lack of any condition of eligibility in the case of an appointment, or of a transfer being made without the recommendation of the Chief Justice of India, these matters are not justiciable on any other ground, including that of bias, which in any case is excluded by the element of plurality in the process of decision-making."

6. Following the ratio, in ***Mahesh Chandra Gupta*** (supra), it has been held that:

"77. As stated above, in the present case, the matter has arisen from the writ of quo warranto and not from the writ of certiorari. The biodata of Respondent 3 was placed before the Collegiums. Whether Respondent 3 was "suitable" to be appointed a High Court Judge or whether he satisfied the fitness test as enumerated hereinabove is beyond justiciability as far as the present proceedings are concerned. We have decided this matter strictly on the basis of the constitutional scheme in the matter of appointments of High Court Judges as laid down in *Supreme Court Advocates-on-Record Assn.* and in *Special Reference No. 1 of 1998, Re.* Essentially, having worked as a member of the Tribunal for 11 years, Respondent 3 satisfies the "eligibility qualification" in Article 217(2)(b) read with Explanation (aa)."

7. To further elucidate, we need to state that after the Collegium of the High Court makes a recommendation for elevation, inputs are received from the intelligence agencies, which conduct a background check, and comments from the government are considered by the Collegium of the Supreme Court consisting of the Chief Justice of India and two senior most Judges.

Opinion and comments of the Judges in this Court conversant with the affairs of the High Court concerned are called for in writing and placed before the Collegium. Invariably a number of shoot down and dismissive letters and communications from all quarters are received. Only thereafter, and on consideration, the Collegium of the Supreme Court takes a final call, which is then communicated to the government.

8. During the course of hearing before us, it was accepted that a number of persons, who have had political backgrounds, have been elevated as judges of the High Courts and the Supreme Court, and this by itself, though a relevant consideration, has not been an absolute bar to appointment of otherwise a suitable person. Similarly, there have been cases where the persons recommended for elevation have expressed reservations or even criticised policies or actions, but this has not been held to be a ground to treat them as unsuitable. It goes without saying that the conduct of the judge and her/his decisions must reflect and show independence, adherence to the democratic and constitutional values. This is necessary as the judiciary holds the centre stage in protecting and strengthening democracy and upholding human rights and Rule of Law.[6]

9. We have made the said observations as these are aspects which are established and are taken into consideration by the Collegiums, both of the High Courts and the Supreme Court. It is in this context that we reject the argument that the facts were not known and considered by the Collegium. The petitioners have themselves stated and enclosed copy of their representation dated 1st February 2023, *albeit* the Collegium of the High Court and the Supreme Court have not, on this basis, deemed it appropriate to withdraw the recommendation or recall their decision.

6 See N. Kannadasan v. Ajoy Khose and Others, (2009) 7 SCC 1.

10. We are clearly of the opinion that this Court, while exercising power of judicial review cannot issue a writ of *certiorari* quashing the recommendation, or *mandamus* calling upon the Collegium of the Supreme Court to reconsider its decision, as this would be contrary to the ratio and dictum of the earlier decisions of this Court referred to above, which are binding on us. To do so would violate the law as declared, as it would amount to evaluating and substituting the decision of the Collegium, with individual or personal opinion on the suitability and merits of the person.

11. The decision of this Court in *Shri Kumar Padma Prasad v. Union of India and Others*[7], was a case relating to eligibility of a person, in whose favour the warrant for appointment as a judge of the High Court had been issued, but who was not qualified to be appointed as a judge of the High Court. The ratio of this judgment cannot be extended to apply the power of judicial review to examine the suitability or merit of a candidate.

12. We may also state that the person in question has been elevated as an Additional Judge of the High Court of Judicature at Madras. On taking oath the person pledges to work as a judge to uphold the Constitution and the laws. Article 51A[8] of the Constitution casts an obligation on every citizen, and more so on every judge, to promote harmony, spirit of common brotherhood among all transcending religious, linguistic, regional or sectional diversities. Principle of secularism and dignity of every individual – regardless of the religion, caste or creed, is the foundation of Rule of Law and equal protection of laws. Not only is the conduct and judgments delivered considered at the time of confirmation, a judge is judged everyday by the lawyers, litigants and the public, as the courts are open and the judges speak by giving reasons in writing for their decisions.

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7 (1992) 2 SCC 428
8 Part IV-A- Fundamental Duties.

13. For the aforesaid reasons, we do not find any merit in the present writ petitions and, thus, we are not inclined to entertain and issue notice.

14. The writ petitions are dismissed at the admission stage.

Headnote prepared by: Devika Gujral *Result of the case:* Writ petitions dismissed.