2024 INSC 660

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C) NO. 312 OF 2024

CHIRAG BHANU SINGH & ANR. …PETITIONER(S)

VERSUS

HIGH COURT OF HIMACHAL PRADESH & ORS. …RESPONDENT(S)

JUDGMENT

Hrishikesh Roy, J.

1. Heard Mr. Arvind P. Datar, the learned Senior Counsel appearing for the writ petitioners. The High Court of Himachal Pradesh is represented by Dr. S. Muralidhar, the learned Senior Counsel.

2. This writ petition under Article 32 of the Constitution of India has been filed by the two seniormost District and Sessions Judges serving in the State of Himachal Pradesh. The prayer in the writ petition reads thus:

> "(a) Issue writ/writs including a writ in the nature of certiorari calling for the minutes of meeting of the collegium of the Hon'ble High Court of Himachal Pradesh whereby names of officers junior to the

present petitioners have been recommended for elevation as Judges of the Hon'ble High Court ignoring the directions of reconsideration given by the Hon'ble Collegium of Hon'ble Supreme Court of India.

(b) Issue writ/writs, order or direction, writ being in the nature of mandamus, directing the Respondent No. 1 to consider the names of the Petitioners as directed by the Hon'ble Collegium of the Hon'ble Supreme Court of India vide Resolution dated 4.1.2024.."

FACTS

3. The petitioners i.e. Chirag Bhanu Singh and Arvind Malhotra were recommended by the then Collegium of the High Court on 6th December 2022 for elevation as judges of the Himachal Pradesh High Court. On 12th July 2023, the Supreme Court Collegium, however, deferred their consideration. Thereafter, on 4th January,2024, the Supreme Court Collegium in its wisdom resolved that the proposal for the elevation of both be remitted for reconsideration to the Chief Justice of the Himachal Pradesh High Court. In the letter dated 16th January,2024, addressed by the Minister for Law and Justice to the Chief Justice of the Himachal Pradesh, in reference to the Supreme Court Collegium Resolution dated 4th January,2024, a request was made that fresh recommendations be sent for the two officers

against the available service quota vacancies in the Himachal Pradesh High Court.

4. The grievance of the writ petitioners is that the High Court Collegium without first reconsidering the two petitioners in terms of the Supreme Court Collegium Resolution dated 4th January,2024 as communicated in the Law Minister's letter dated 16th January,2024 had recommended two other judicial officers for elevation. The argument is that if the latter recommended persons are considered for appointment ahead of the two petitioners, it would amount to ignoring their seniority and long-standing unblemished service.

5. On 13th May,2024, adverting to the contentions raised, this Court issued notice only to the Registrar General of the Himachal Pradesh High Court with the following order:

> "1. Heard Mr. Arvind Datar, learned senior counsel appearing for the petitioners.
> 2. The counsel would submit that the two petitioners are the senior most judicial officers serving in the State of Himachal Pradesh. Their names were recommended for elevation to High Court Judgeship in December, 2022. The Supreme Court Collegium on 12.07.2023 however resolved to defer consideration for the two petitioners for the present with the observation that it will be taken up by the Collegium at an appropriate stage. The senior counsel then submits that the persons who were recommended in

December, 2022 along with the petitioners have since been appointed as Judges of the High Court on 28.07.2023.

3. The Supreme Court thereafter on 04.01.2024 resolved that the proposal for elevation of the two petitioners be remitted to the Chief Justice of the Himachal Pradesh High Court for fresh recommendation by the High Court. This decision is reflected in the communication dated 16.01.2024 addressed by the Minister for Law and Justice to the Chief Justice of the Himachal Pradesh High Court where request is made that fresh recommendations be sent for the two officers i.e., Chirag Bhanu Singh and Arvind Malhotra against the unfilled vacancies from service quota in the Himachal Pradesh High Court.

4. Projecting the grievances of the petitioners, Mr. Datar would submit that the Himachal Pradesh High Court Collegium on 23.04.2024 has recommended the names of two other Judicial Officers for elevation as High Court Judges without first acting on the recommendations of the Supreme Court Collegium and the 16.01.2024 letter of the Law Minister, for reconsideration of the two petitioners. Since both petitioners are the senior most judicial officers, Mr. Datar contends that if recently recommended judicial officers are considered for elevation, it will cause serious prejudice to the expectations of the petitioners who have unblemished service record as Judicial Officers.

5. Issue notice only to the Registrar General of the Himachal Pradesh High Court so that appropriate information can be obtained on whether the High Court Collegium had reconsidered the cases of the two petitioners, pursuant to the Supreme Court Resolution dated 04.01.2024 and the Law Minister's Communication dated 16.01.2024."

6. Following the above notice, a Report in sealed cover was filed by the Registrar General of the Himachal Pradesh High Court. The

Report was perused and was also furnished to the learned Counsel for the writ Petitioners.

7. The Report of the Registrar General, reflected that the Resolution of the Supreme Court Collegium (dated 4th January, 2024) was never received by the Chief Justice of the High Court. It was further stated that the Chief Justice of the High Court had written to the Chief Justice of India on 11th December 2023 seeking guidance on whether the Collegium of the Supreme Court needed further inputs about the suitability of the two officers for elevation as High Court judges. On 6th March 2024, the Chief Justice of the High Court individually addressed a letter to the Supreme Court Collegium on the suitability of the petitioners. This is projected to be in full compliance of the resolution dated 4th January, 2024 of the Supreme Court Collegium. The report also notes that a representation was made by one of the Petitioners to the Chief Justice of India against non-consideration for elevation. This letter, it is alleged was contemptuous.

8. When the present matter was next heard on 23rd July, 2024, this Court called for the Supreme Court Resolution dated 4th

January, 2024 as the parties wanted to be sure of the same, to make further submissions. A copy of the Supreme Court resolution was then produced before this Court and was allowed to be perused by the respective counsel for the parties.

SUBMISSIONS

9.1. Mr. Datar, the learned Senior Counsel projected that the two petitioners were direct recruits and the seniormost district judges in the State of Himachal Pradesh. Over the last two decades, both have had a blemish-free record and all their 17 ACRs have either been 'Outstanding' or 'Excellent'. It was then submitted that as the two seniormost judges, they have a constitutional right for reconsideration of their names. Referring to paragraph-10 of the Registrar General's Report, the senior counsel argues that the issue of elevation has to be collectively considered by the High Court Collegium and not by the Chief Justice acting alone. As regards the letter written by one of the judicial officers to the Chief Justice of India, it was submitted that it only highlights his judicial journey and the anguish for not being considered for elevation despite 17 years of exemplary service. According to Mr. Datar, the letter does not

contain any insinuation against members of the Supreme Court Collegium and is not contemptuous or disrespectful or in bad taste as is alleged in the Report of the Registrar General.

9.2. On maintainability, it was submitted that the present writ petition is limited to 'lack of effective consultation' and hence is maintainable. Reliance has been placed on the decisions of this Court in *Mahesh Chandra Gupta v. Union of India*[1](for short "Mahesh Chandra Gupta"), where it was held that the issues of 'eligibility' and 'effective consultation' would be within the realm of judicial review. This was followed in *M. Manohar Reddy v. Union of India*[2] and reiterated recently in *Anna Mathews v. Supreme Court of India*[3] where it was held that judicial review is restricted to 'eligibility' and not 'suitability' or 'content of consultation'. It was also submitted that the consideration by the Collegium collectively is an in-built check against the likelihood of arbitrariness or bias.

9.3. On the other hand, Dr. S. Muralidhar, Learned Senior Counsel appearing for the High Court of Himachal Pradesh argued that

[1] (2009) 8 SCC 273
[2] (2013) 3 SCC 99
[3] (2023) 5 SCC 661

the present writ petition is not maintainable. The prayer for reconsideration is, in effect, a request for judicial review over the 'suitability' of the candidates. To highlight the limited scope of judicial review, reliance has been placed on the decisions of this Court in *Supreme Court Advocates-on-Record Assn. v. Union of India*[4] (for short "Second Judges case"), *Mahesh Chandra Gupta(supra)*[5], *M. Manohar Reddy v. Union of India*[6], *Registrar General, Madras High Court v. R. Gandhi*[7], *Common Cause v. Union of India*[8] and *Anna Mathews v. Supreme Court of India*[9]

9.4. As regards the Chief Justice of the High Court individually taking a decision and addressing the letter to the Chief Justice of India, it was argued by Dr. Muralidhar that the resolution of the Supreme Court Collegium(4.01.2024) did not specify that the reconsideration of the petitioners' names was to be in consultation with the other members of the High Court Collegium. Therefore, the High Court Chief Justice according

[4] (1993) 4 SCC 441(Para 482)
[5] Para 39-41, 43-44 and 71,74
[6] (2013) 3 SCC 99(Para 17-20)
[7] (2014) 11 SCC 547(Para 25-26)
[8] (2018) 12 SCC 377(Para 17)
[9] (2023) 5 SCC 661(Para 10)

to the learned counsel, could have made the reconsideration all by himself.

ISSUES

10. Going by the above submissions, the following questions arise for our consideration:

A) Whether the writ petition is maintainable?

B) Whether elevation for judgeship in the High Court has to be considered collectively by the High Court Collegium or whether the Chief Justice acting individually can reconsider the same?

Issue A

11. At the outset, it is apposite to address the issue of maintainability of the writ petition and the limited scope of judicial review in such matters. This aspect was addressed by a nine-judge bench of this Court in *Supreme Court Advocates-on-Record Association. v. Union of India*[10] (for short *"Second Judges case"*). It was observed therein that the scope of judicial review in appointment of judges is limited as it introduces the 'judicial

[10] (1993) 4 SCC 441

element' in the process and further judicial review is not warranted apart from some exceptions such as want of consultation amongst the named constitutional functionaries. In this regard, the following passage from the *Second Judges case(supra)* bears consideration:

> "**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 [1981 Supp SCC 87 : (1982) 2 SCR 365] while expanding the concept of locus standi, was adverted to recently by a Constitution Bench in Krishna Swami v. Union of India [(1992) 4 SCC 605] . 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."*
>
> [emphasis supplied]

12. Thereafter in *Special Reference No. 1 of 1998, Re*[11] (for short "*Third Judges case*"), it was noted as under:

> **"32.** Judicial review in the case of an appointment or a recommended appointment, to the Supreme Court or a High Court is, therefore, available if the recommendation concerned is not a decision of the Chief Justice of India and his seniormost colleagues, which is constitutionally requisite. They number four in the case of a recommendation for appointment to the Supreme Court and two in the case of a recommendation for appointment to a High Court. Judicial review is also available if, in making the decision, the views of the seniormost Supreme Court Judge who comes from the High Court of the proposed appointee to the Supreme Court have not been taken into account. Similarly, if in connection with an appointment or a recommended appointment to a High Court, the views of the Chief Justice and senior Judges of the High Court, as aforestated, and of Supreme Court Judges knowledgeable about that High Court have not been sought or considered by the Chief Justice of India and his two seniormost puisne Judges, judicial review is available. Judicial review is also available when the appointee is found to lack eligibility."

13. Subsequently, a two-judge bench speaking through S.H. Kapadia J laid down important principles in *Mahesh Chandra Gupta(supra)*. This Court distinguished between 'eligibility' and 'suitability' and noted that Article 217(1) of the Constitution of India pertains to the 'suitability' of an individual, whereas Article 217(2) concerns the 'eligibility' of a person to become a

[11] (1998) 7 SCC 739

Judge. While 'eligibility' is an objective criterion, 'suitability' is a subjective one. The bench further observed that decisions regarding who should be elevated, which primarily involve considerations of "suitability," are not subject to judicial review. It held as under:

> "**44**. At this stage, we may highlight the fact that there is a vital difference between judicial review and merit review. Consultation, as stated above, forms part of the procedure to test the fitness of a person to be appointed a High Court Judge under Article 217(1). Once there is consultation, the content of that consultation is beyond the scope of judicial review, though lack of effective consultation could fall within the scope of judicial review. This is the basic ratio of the judgment of the Constitutional Bench of this Court in Supreme Court Advocates-on-Record Assn. [(1993) 4 SCC 441] and Special Reference No. 1 of 1998, Re [(1998) 7 SCC 739]."

14. The above view where the Court distinguished between 'eligibility' and 'suitability' has been consistently followed[12] in subsequent decisions of this Court including in the recent

[12] Manohar Reddy and Anr. v. Union of India(2013) 3 SCC 99, Registrar General, Madras High Court v. R. Gandhi (2014) 11 SCC 547, Common Cause v. Union of India (2018) 12 SCC 377

decision in *Anna Mathews v Supreme Court of India*[13] where it was noted as under:

> "**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."

15. The following position emerges as a result of the above:

i) '*Lack of effective consultation'* and '*eligibility*' falls within the scope of judicial review.

ii) '*Suitability*' is non-justiciable and resultingly, the '*content of consultation'* falls beyond the scope of judicial review.

16. The above legal position clearly suggests that the absence of consultation amongst the members of the Collegium would be within the limited purview of judicial review. Proceeding on this understanding, this Court had issued notice to the

[13] (2023) 5 SCC 661

Registrar General to ascertain whether the High Court Collegium adhered to the procedural requirement of an 'effective consultation' for the reconsideration exercise. The Chief Justice of the High Court, it was submitted had never received the Resolution of the Supreme Court Collegium. It was therefore argued that perusing the Resolution of the Supreme Court was essential for the respective counsel to make their submissions. As earlier noted, a copy of the resolution(dated 4th January 2024) was produced in Court and the same was allowed to be perused by the respective counsel for the parties.

17. The aforesaid re-consideration resolution was requisitioned only for factual determination as to whether 'effective consultation' was made, in terms of the resolution of the SC Collegium. This scrutiny has nothing to do with the 'merits' or the 'suitability' of the officers in question but to verify whether 'effective consultation' was made. Such scrutiny is permissible within the limited scope of judicial review as discussed before. Therefore, the present writ petition for this limited scrutiny is found to be maintainable.

Issue B

18. The second issue that falls for our consideration is whether elevation for judgeship in the High Court has to be considered collectively by the Collegium of the High Court or whether the Chief Justice acting individually can reconsider the same. The process of judicial appointments to a superior court is not the prerogative of a single individual. Instead, it is a collaborative and participatory process involving all Collegium members. The underlying principle is that the process of appointment of judges must reflect the collective wisdom that draws from diverse perspectives. Such a process ensures that principles of transparency and accountability are maintained.

19. Mr. Datar, the learned Senior Counsel earnestly submitted that the Chief Justice of a High Court individually cannot reconsider a recommendation. To appreciate the legal basis for such a contention, we may refer to the following judgments discussed below.

20. This Court in the *Second Judges case(supra)* noted as under:

> "**468**. The rule of law envisages the area of discretion to be the minimum, requiring only the application of known principles or guidelines to ensure non-

> arbitrariness, but to that limited extent, discretion is a pragmatic need. Conferring discretion upon high functionaries and, whenever feasible, introducing the element of plurality by requiring a collective decision, are further checks against arbitrariness. This is how idealism and pragmatism are reconciled and integrated, to make the system workable in a satisfactory manner."

21. Again, in the *Third Judges case(supra)*, it was observed that "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."

22. Mr. Datar placed reliance on the following passage from the decision in *Mahesh Chandra(supra)* to buttress his submission:

> "**73.** The concept of plurality of Judges in the formation of the opinion of the Chief Justice of India is one of inbuilt checks against the likelihood of arbitrariness or bias. At this stage, we reiterate that "lack of eligibility" as also "lack of effective consultation" would certainly fall in the realm of judicial review. However, when we are earmarking a joint venture process as a participatory consultative process, the primary aim of which is to reach an agreed decision, one cannot term the Supreme Court Collegium as superior to High Court Collegium. The Supreme Court Collegium does not sit in appeal over the recommendation of the High Court Collegium. Each Collegium constitutes a participant in the participatory consultative process. The concept of primacy and plurality is in effect primacy of the opinion of the Chief Justice of India *formed collectively*. The discharge of the assigned role by each

functionary helps to transcend the concept of primacy between them."

23. What was emphasized above is that collaborative deliberations bring in transparency in the process, as decisions are deliberated, debated, and recorded. This contributes to public trust in the judiciary, as it demonstrates that appointments are being made based on thorough consideration.

24. Tracing the departure in the process of appointment of judges pre and post-1990 after the emergence of the Collegium system, a legal Scholar[14] notes that the *Second Judges case(supra)* effectively ended the 'primacy' or the 'preponderating voice' of the Chief Justice over senior colleagues. Contrasting the observations of the Law Commission, in its 80th Report in 1979[15] with the current system, the author observes that while the Commission recommended that a Chief Justice of a High Court should consult his two seniormost colleagues before recommending names to the government for judicial

[14] Abhinav Chandrachud, 'The Fictional Concurrence of the Chief Justice' in Supreme Whispers, Conversations with Judges of the Supreme Court 1980-1989 (OUP 2018) 162-166

[15] Law Commission of India, 'The Method of Appointment of Judges' (80th Report, August 1979) Available at https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/20220805100-2.pdf, <Last accessed on 5.9.2024>

appointments, it *did not* mandate that these recommendations be unanimous or binding. However, the collegium system introduced through the *Second Judges case(supra),* institutionalized the practice of consulting senior colleagues, making it *binding* on the chief justice.

25. With the above judgments holding the field, it is difficult to accept the contention of the learned Senior Counsel, Dr. Muralidhar who argued that the Chief Justice of the High Court can individually reconsider a candidate based on how Resolutions are worded. To substantiate this argument, various Supreme Court Resolutions were placed before us to show that there is a difference in language and in the present case, it was specifically addressed to the Chief Justice of the High Court. It was contended that this wide power of the Collegium to direct reconsideration individually by the Chief Justice may not be curtailed. We are disinclined to accept this view as it is well-settled that the Supreme Court Collegium does not sit in appeal over the High Court Collegium[16]. It is a participatory process

[16] Mahesh Chandra Gupta v. Union of India (2009) 8 SCC 273

where each of the Constitutional functionaries have a role to play. In our opinion, the language therein by itself cannot be understood as permitting the Chief Justice of the High Court to act on his own, in matters of recommendation or even reconsideration, for elevation to the High Court bench. The recommendation by the Supreme Court Collegium for reconsideration, is not expected to be addressed individually to all the members of the High Court Collegium. Such communications are naturally addressed to the Chief Justice of the concerned High Court but as noted earlier, the letter addressed to the Chief Justice will not enable the Chief Justice to act without participation by the other two Collegium members.

26. In this case, the Court is not concerned with the aspects of 'suitability' of the petitioners for elevation as judges of the High Court or even the 'content of consultation'. Our scrutiny is limited to whether the reconsideration of the proposal for the elevation of the two petitioners, was jointly made by the Collegium members of the High Court, following the Supreme Court Resolution dated 4th January 2024.

27. This Court is mindful of the limited scope of interference in such matters. But this appears to be a case where there was no collective consultation amongst the three Constitutional functionaries of the High Court i.e. the Chief Justice and the two senior-most companion judges. The absence of the element of plurality, in the process of reconsideration as directed by the Supreme Court Collegium, is clearly discernible.

28. At this juncture, we must also address the submissions on the letter written by one of the petitioners, as referenced in the Report of the Registrar General and argued before this Court. It was contended that the letter contained contemptuous remarks directed at the Supreme Court Collegium. We have perused the letter. It is definitely an expression of hurt by the judicial officer, but will not bring the letter into the contemptuous category.

29. Before parting, it needs to be stated that there is also a need to protect certain sensitive information in matters involving appointment of judges. While transparency is necessary to ensure fairness and accountability, it must be carefully balanced with the need to maintain confidentiality. Disclosing

sensitive information would compromise not only the privacy of the individual but also the integrity of the process.

30. In the case before us, the procedure adopted in the matter of reconsideration of the two petitioners is found to be inconsistent with the law laid down in the *Second Judges (supra)* and the *Third Judges case(supra)*. There was no collective consultation and deliberations by the members of the High Court Collegium. The decision of the Chief Justice of the High Court, on the suitability of the two petitioners as conveyed in his letter dated 6th March 2024, appears to be an individual decision. The same therefore stand vitiated both procedurally and substantially.

31. The final finding from the above is as follows:-

(i) The writ petition is maintainable as it questions the lack of effective consultation;

(ii) The Chief Justice of a High Court cannot individually reconsider a recommendation and it can only be done by the High Court Collegium acting collectively.

32. In light of the above, the High Court Collegium should now reconsider the names of Mr. Chirag Bhanu Singh and Mr. Arvind Malhotra for elevation as Judges of the High Court,

following the Supreme Court Collegium decision dated 4th January,2024 and the Law Minister's letter dated 16th January,2024. It is ordered accordingly.

33. The matter stands allowed in above terms.

.....J.
[HRISHIKESH ROY]

.....J
[PRASHANT KUMAR MISHRA]

NEW DELHI
SEPTEMBER 6, 2024