SUPREME COURT AND APPOINTMENT'S TO THE JUDICIAL SERVICE : A NEED FOR JUDICIAL RETHINKING

IN RAFIQUDDIN,[1] the two-judge constitutional bench of the Supreme Court has directed that "in future selection for appointment to the Judicial Service shall be made by the Commission on the expert advice of a sitting judge of the High Court nominated by the Chief Justice."[2] This direction of the court is based on its earlier direction given by Justice Bhagwati in *Ashok Kumar Yadav*.[3]

In *Rafiquddin* the seniority amongst the munsifs selected and appointed was in issue while in *Ashok Kumar Yadav* the selection of the Haryana Civil Service (Executive) 1981 was challenged. But Bhagwati J. has, while delivering the court's judgment, directed: "It is, therefore, essential that when selections to the judicial service are being made a sitting judge of the High Court to be nominated by the Chief Justice of the State should be invited to participate in the interview as an expert and since such sitting judge comes as an expert who, by reason of the fact that he is a sitting High Court Judge, knows the quality and character of the candidates appearing for the interview, the advice given by him should ordinarily be accepted, unless there are strong and cogent reasons for not accepting such advice and such strong and cogent reasons must be recorded in writing by the Chairman and members of the Public Service Commission."[4]

This portion of the judgment requires a deeper study in its various legal remifications and effects. The decision has made the candidates to suffer on account of the postponement of the interview to be conducted in December 1987 for the Judicial Service Examination 1986 by the Public Service Commission, Allahabad. The candidates who would have been selected had been coerced to appear in the examination, 1987. It is this judgment which has caused unnecessary delay and irreparable loss of money and time to the commission, the candidates and the people of Uttar Pradesh (U.P).

Briefly stating, the three appeals were filed against the judgment of the High Court of Allahabad in the Supreme Court and four writ petitions filed under article 226 of the Constitution in the Allahabad High Court raised the common question of law relating to the determination of seniority of munsifs appointed in the U.P. *nyayik seva* as a result of competitive examination of 1970, 1972 and 1973 held under the U.P. Civil Service (Judicial Branch) Rules 1951. Since the appeals and the petitions raised common questions aof law they have been heard together and are being disposed by a common judgment

---

1. *State of U.P.* v. *Rafiquddin*, A.I.R. 1988 S.C. 162.
2. *Id.* at 183.
3. *Ashok Kumar Yadav* v. *State of Haryana*, A.I.R. 1987 S.C. 454.
4. *Id.* at 477.

By virtue of notification issued in September 1970 by the Public Service Commission, the examination was held in February 1971 to 85 posts of munsifs. 918 candidates appeared, out of them 294 were called for interview. The commission submitted a list of 46 candidates to the state government for their appointments as munsifs in October 1971. On the request of the state government the commission reduced the percentage in the aggregates from 40 percent to 35 percent and recommended a list of 33 candidates in April 1972 to it. All the 79 candidates were appointed as munsifs between May, 1972 to June, 1973. Their *inter-se* seniority was also fixed by the notification of 1973. In pursuance of the decision taken by the High level committee consisting of the Chief Minister, Chief Justice and the Chairman of the commission held in May 3, 1974, the commission forwarded a third list of 37 candidates of the 1970 examination who had attained 40 per cent or more marks in the aggregate but who had failed to secure 35 per cent qualifying marks in the *viva voce*. The candidates included in the third list are called "unplaced candidates" out of 37, 16 were also included in the list of approved candidates on the basis of the examination held in 1972. However, in March 1977 the state government had determined the seniority of all the candidates selected out of the examination held in 1970 irrespective of their appointment made in 1975.

Rafiquddin and 36 "unplaced candidates" of 1970 examinations claimed seniority of 1970 in terms of rule 22. The state government as well as the High Court rejected their claim and in their view they formed a separate class and recruited in the special circumstances. Thereupon Rafiquddin and other "unplaced candidates" filed writ petitions under article 226 in the High Court. The division bench of the High Court consisting of M.N. Shukla and K.N. Dayal, JJ., held the the appointment of these "unplaced candidates" has been made in pursuance of the result of the competitive examination 1970 as such they were entitled to seniority in 1970 in accordance with rule 22. Accordingly, these unplaced candidates were entitled to be senior to those appointed to services on the basis of the competitive examination of 1972 even though they had been appointed to service later in time.

Further, the seniority among all the candidates appointed to service out of the first, second and third lists of the 1970 examination is rearranged. Thus the effect of the High Court judgment is that it has adversely affected the *inter se* seniority of 1970 examination candidates and has made all the candidates selected out of the 1972 competitive examination junior to the "unplaced candidates" of 1970 examination.

It is this issue of seniority which made the state of U.P. to go to the Supreme Court to get the High Court judgment modified. The Supreme Court while rectifying the negative and mischievous effect of the High Court judgment has sought to reinforce with greater amount of emphasis on *Ashok Kumar Yadav* direction that only a sitting High Court judge should be invited in the judicial service *viva voce* examination as an expert

and his advice on the fitness of the candidates should be accepted. If the advice of the High Court judge cannot be accepted on account of strong and cogent reasons such reasons must be communicated in writing by the chairman and members of the commission.

Is it feasible to follow what has been laid down by the court ? Does not it amount to give supremacy to the opinion of the judge of the High Court ? Can the primacy be given to the opinion of the High Court judge over the opinion of other experts who participate in the judicial service *viva voce* examination ? Can the same mode of *viva voce* be extended to the *viva voce* examination of IAS, IFS and IPS and other services?

In *Ashok Kumar Yadav* briefly stating sometime in October, 1980 the Haryana Public Service Commission invited applications for recruitment to 68 posts of Haryana Civil Service (Executive) and other allied services. The procedure for requirement was governed by the Punjab Civil Services (Executive Branch) Rules, 1930 as applicable in the state of Haryana. In response to the advertisement about 6000 applied and appeared at the written examination held by the Haryana Public Service Commission. For about 1300 candidates obtained more than 45 per cemt marks and thus qualified for being called for intervew. The Commission called all the 1300 and more candidates for interview which lasted for almost half a year. However, some of the candidates who obtained very high marks in written papers but obtained very poor marks in the *viva voce* te<t could not be selected. Thus they challenged the entire examination as illegal by filing a writ petition in the Punjab and Haryana High Court.

The petitioner had *inter alia* challenged that the chairman and members of the Haryana Public Service Commission were not men of high integrity, calibre and qualification and therefore, the *viva voce* was not conducted fairly and honestly and thus the selections made were vitiated on account of nepotism, favouritism and casteism and also political motivation.

The Punjab and Haryana High Court had passed some strictures and made certain uncharitable observations against the chairman and members of the Haryana Public Service Commission and quashed the selection made by the Commission. Since disparaging observations were made against the chairman and members of the commission by the High Court division bench in its judgment the three members felt aggrieved and sought the special leave to appeal and on such leave being obtained preferred civil appeal in the Supreme Court.

The question before the court was whether the division bench of the High Court was right in condemning the chairman and members of the Haryana Public Service Commission as men lacking in integrity, calibre and qualification and alleging corrupt motives against them ?

What was not raised was the mode of recruitment to the state judicial service but what was in issue in the case was the selection for Haryana Civil Service (Executive). Inspite of this, Bhagwati J. preferred to direct the

Public Service Commission of every state that the selections to the judicial service should be made on the advice of the sitting judge of the High Court—unless there are strong and cogent reasons for not accepting such advice and such strong and cogent reasons must be recorded in writing by the chairman and members of the Public Service Commission.

There is an apprehension of clash between the two constitutional organs *i.e.*, High Court and the Public Service Commission in the selections of the judicial service of the state. Both these organs have been constitutionally assigned their specific duties to discharge. The Public Service Commission has a duty to recruit employees for the state to handle its executive, legislative and judicial functions effectively and efficiently. The High Court is empowered to interpret the Constitution and the law without any fear or favour and to supervise the functioning of courts and the tribunals within its jurisdiction.

The function of the public service commission is to make judicial appointments in accordance with the rules made by the Governor after consultation with the state public service commission and the High Court. The only duty imposed upon the Commission is that it should conduct the examination in accordance with the rules made by the Governor of the State. If the rules for conducting the examination made by the Governor do not provide that the advice given by a sitting judge as an expert in the *viva voce* be accepted as binding, how can primacy or supremacy be attached to the advice of the High Court judges as directed by the Supreme Court in *Ashok Kumar Yadav* and *Rafiquddin*. The judicial direction given by the court suffers from various infirmities. Analogically speaking, if the High Court judge's advice should be accepted as an expert, then why not the advice of the Union Cabinet Secretary or the Union Home Secretary in case of IAS and IPS and Foreign Secretary in case of IFS be accepted. Similarly the advice of the Chief Secretary and Home Secretary of the state government should also be accepted in the appointment of the executive officers.

If we accept the direction in regard to the judicial service then the same kind of modality has to be extended to each and every branch of service and the advice of persons representing the concerned service should be accepted as binding, if it is to be accepted then why other members of the interview board from other walks of life be invited to sit idle in the *viva voce* examination. After all, other members are also expected to participate in conducting the *viva voce* examination and hence cannot be mere witnesses.

Justice Bhagwati's direction in *Ashok Kumar Yadav* comes in conflict with what he has said in the *Judges case*[5] regarding the binding nature of the opinion of the Chief Justice of India. The learned judge has said that the President of India is not bound to accept the advice of the Chief Justice

5. *S.P. Gupta* v. *The President of India*, A.I.R. 1982 S.C. 149. "This case is popularly known as *Judges* case".

of India in the appointment of a High Court judge. How can it be said that the Hgh Court judge's advice should be accepted by the publie service commission in judicial appointments? Would it not amount to arrogating to the High Court what is not given to it under the Constitution? Does it not amount to usurpation of power by the High Court ? Giving binding nature to the High Court judge's opinion means the conversion of the High Court as a recruiting agency of the state as far as judicial service is concerned

The reasons which might have motivated Justice Bhagwati in holding that the opinion of the Chief Justice of India could not be binding upon the President of India in appointing the Supreme Court and High Court judges should have desisted him from directing that the advice of the High Court judges should ordinarily be accepted unless there are strong and cogent reasons for not accepting such advice.

The High Court judge sits as one of the experts in the interview board and not as a sole expert. In *Lila Dhar*,[6] Chinnappa Reddy J., speaking for the Supreme Court has refused to suggest any method of selection other than prescribed in the rules provided by the Governor in consultation with the High Court and Public Service Commission. He has, however, hastened to add that "we would not [hesitate] to interfere in cases of proven or obvious oblique motive."[7]

A similar view has also been taken by Jagannatha Shetty J. in *Durga Charan*.[8] In that case applications were invited from eligible candidates for the posts of probationary munsifs. The petitioner applied and secured 470 marks in written papers and 30 marks in *viva voce* test and obtained in all 500 out of 1150. He did not find his name in the list of 56 candidates selected by the Orissa Public Service Commission.

The rules did not prescribe any minimum marks to be secured by the candidates at the *viva voce* test. But what was prescribed in *Durga Charan* was that the minimum marks should be secured by a candidate at the *viva voce* test on the advice of the High Court judge. In dealing with this issue raised by the petitioner, Justice Jagannatha Shetty observed that the High Court judge present in the *viva voce* test cannot advice anything which goes contrary to the statutory rules. The role of a Hih Court judge sitting in the viva voce examination of the judicial service has been very succinctly limited by Shetty J. in *Durga Charan* which runs as follows:

> He may advise the Commission as to the special qualities required for judicial appointments. His advice may be in regard to the range of subjects in respect of which the viva voce shall be conducted. It may also cover the type and standard of questions to be put to candidates; or the acceptance of the answers given thereof. But his advice cannot run counter to the statutory Rules.[9]

---

6. *Lila Dhar* v. *State of Rajasthan*, A.I.R. 1981 S.C. 1777.
7. *Id.* at 1782.
8. *Durga Charan* v. *State of Orissa*, A.I.R. 1987 S.C. 2267.
9. *Id.* at 2272.

In *Umesh Chandra*[10] in 1984 the Registrar of the Delhi High Court invited applications from eligible persons for the posts of the Delhi judicial service. The examination in written papers was held in October, 1984. In all 27 candidates passed the examination who secured not less than 50% in each written paper and not less than 60% in the aggregate and SC and ST candidates who secured not less than 40% in each written paper and not less than 50% in the aggregate. The full court approved the initial list of 27 candidates who qualified at the said written test. However, the judges of the High Court having appreciated that a few candidates who had otherwise secured very high marks would have to be kept out of the zone of consideration for final selection by reason of their having secured one or two marks below the aggregate or the qualifying marks prescribed for the particular paper, deided that "moderation of two marks in each paper to every candidate of the 1984, Delhi judicial service be done".[11]

Thereupon moderation led to the notification of a second list of candidates declared qualified for the interview. The question before the court was whether the High Court in the circumstances of the case had the power to add two marks to the marks obtained in each paper by way of moderation. While delivering the court's decision Justice Venkataramiah held that the High Court in the circumstances of the case had no power to add 2 marks to the marks obtained in each paper by way of moderation.

So the cumulative effect of *Umesh Chandra* and *Durga Charan* is that *nothing can be done contrary to and in conflict with the rules provided* for the examination by the Governor of a state under article 234 of the Constitution.

Impracticability of *Ashok Kumar Yadav* and *Rafiquddin* is that the selection for the appointment of a candidate to the judicial service is made on the basis of his aggregate marks secured in written and *viva voce* examination. The selection is made neither solely on written papers nor on the basis of interview marks. To give effect to this judicial direction what is required is that both written papers and *viva voce* should either be examined by a sitting High Court judge or by a panel of the sitting High Court judges. Alternatively, the selection for appointment to the judicial service should be made only and exclusively through the *viva voce*. Unless and until either of the above stated modes of selection is adopted no selection to the judicial service can be made in U.P. on the expert advice of the sitting judge of the High Court as directed by the Supreme Court in *Ashok Kumar Yadav* and *Rafiquddin*.

The advice of the sitting High Court judge becomes totally infructuous in the following situations. *Firstly*, the High Court judge rates a candidate very high but his performance in written papers is poor, then he can not be taken in. *Secondly*, if a candidate, in the opinion of the High Court judge

10. *Umesh Chandra* v. *Union of India*, A.I.R. 1985 S.C. 1351.
11. *Id.* at 1355.

is very poor, but secured good marks in his written papers and he may finally get selected in the judicial services. Thus, the advice of the High Court judge in these and similar other situations would carry no weight. As it is clearly visible from the PSC (Judicial) examination 1985 which is as follows:

The marks of Om Prakash Tripathi* who topped the judicial service examination of 1985 are given below .

	Minimum marks	*Obtained marks*
Present Day	150	80
Part-Hindi, Urdu	100	92
Law-Paper I	200	83
Law-Paper II	200	144
Law-Paper III	200	127
Total of written papers	850	526
Personality test	100	54
Total	950	580

*Pragati Manjoosha Allahabad, December 87.

Marks of Sarfraz Khan*, who could not secure a place among the munsifs selected by the Allahabad Public Service Commission in 1985 examination:

	Minimum marks	*Obtained marks*
Present Day	150	91
Hindi Urdu	100	93
Law—Paper I	200	53
Law—Paper II	200	120
Law—Paper III	200	105
Total of written papers	850	462
Personality test	100	68
Total	950	530

*Munsif magistrate posted at Aligarh

The tables show that Om Prakash Tripathi was rated inferior to Sarfraz Khan in the interview, even then Tripathi has not only been selected as munsif but has also stood first in order of merit. This is due to his excellent performance in the written papers. Though Sarfraz Khan was adjudged fit for munsifship by the interview board yet he was not taken on account of his performance in written papers.

This and other glaring anomalies may crop up if the selection to the judicial service would be made, as directed by the Supreme Court, on the advice of a sitting judge of the High Court.

We have, therefore, failed to understand the rationale behind the judicial thinking in *Ashok Kumar Yadav* and *Rafiquddn* that the selection for appointment to the judicial service should be made by the commission on the expert advice of a sitting judge of the High Court.

However, the judicial direction can be and must be carried out to the extent that a sitting High Court judge nominated by the Chief Justice of the state and not a retired judge should be invited to the *viva voce* test for judicial service. Beyond that the judicial direction given by Bhagwati J. in *Ashok Kumar Yadav* which is reinforced by Justice K. N. Singh in *Rafiquddin* appears to be impracticable, judicially ill-advised, administratively inexpedient and constitutionally impermissible. The judicial direction made in *Ashok Kumar Yadav* and *Rafiquddin* is pregnant with mischief and the earlier it is overruled the better it would be.

*Shariful Hasan**

* Faculty of Law, Aligarh Muslim University, Aligarh.