
(1992) 08 P&H CK 0094
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ Petition No. 9759 of 1992

Dalip Singh Gill

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 04-08-1992

Acts Referred:

Constitution of India, 1950 — Article 216, 217, 222, 225, 226

Citation : AIR 1993 P&H 263 : (1993) 103 PLR 701 : (1993) 4 RCR(Civil) 121

Hon'ble Judges : M.S. Liberhan, J;G.C. Garg, J

Bench : Division Bench

Judgement

M. S. Liberhan, J.—The petitioner, through this petition under Article 226 of the Constitution of India made three fold prayer:

- (i) Not to auot work to respondent-Judges, whose kith and kins are practising in the High Court or are working in Advocate Generals"office;
- (ii) Direct the Senior Advocates elevated to the Bench, either to refund the fees charged with interest or direct the senior advocates of the petitioner"s choice to argue his case free of any charges, and
- (iii) Direction for transfer of Judges be made.

2. Succinctly concluding from the warp and weft of the petition for disposing the petition, the following facts can be woven, from the point of view of the petitioner. The petitioner averred that he engaged one of the respondents, to file a writ petition challenging the removal of his son from the post of a Judicial Officer i.e. Subordinate Judge. The respondent later elevated to bench and did not fiic the writ petition, and advised to wait, as he told the petitioner that since in view of talk he had with a named Judge who was against the petitioner"s son, the petitioner would not get relief till the named Judge is on the Bench. It is averred that on his elevation, he got his brother and daughter engaged as petitioner"s counsel on a payment of Rs. 7000, as the fee. in spite of the fact that he had already charged Rs. 18,000, - as his fee and no writ petition was

filed by him. Vaguely filing of writ by the later counsel was admitted. Inactivity on the part of petitioner's counsel to get an appropriate relief to petitioner's son. in spite of his getting reliefs to some other litigants was attributed. Lastly a bald assertion was made in the petition that the wards or relations of Judges practising in the High Court are having roaring practice which is disproportionate to their merits.

3. The petitioner in a state of frenzy with a zeal to support his prayers made reference to various news items published from time to time. Speech of President of the Bar Association for transfer of all Judges, statement reported to have been made by the ex Chief Justice, Venkataramiah. with respect to Judges" succumbing to local pressures, their wards building practice disproportionate to their merits, their wining and dining outside and their attending lavish parties was referred to in the petition. Reference with respect to 4 to 5 Judges was made out of 90 with respect to whom retired Chief Justice had made the alleged statement.

4. The petitioner attempted sorcery out of the reports published in various newspapers. Further expurgated version as put-forth by the petitioner is to the effect that Judges" relations and wards are having practice disproportionate to their merits. Paranormal sweeping allegations with respect to cholical approach, succumbing to local pressures with respect to all Judges, in spite of the fact that howsoever highly reputed one might have been about his independence, were made. Petitioner after quoting retired Chief Justice's statement, regarding some policy for transfer of Judges sought its implementation. It was not specified even remotely as to that the statement of the Chief Justice meant i.e. whether the policy of transfer of Judges was with respect to ones" who wine and dine or succumb to local pressure or was it for all irrespective of other numerous relevant factors. Further reference was made to the comments for setting up machinery for investigating the conduct of any member of judiciary, as well as providing code of conduct for Judges.

5. It may be noticed, at this stage that the petitioner during the course of arguments refused to even own the responsibility of making vague, reckless and irresponsible sweeping allegations. It was simply pleaded that the references made to the remarks made in various publications be expunged.

6. Country is of and for the people inhabiting in it. People of India by written constitution elected the democratic way of life for their governance and justice to all is one of the essential features in our set up. Creed of the Constitution, in view of the crafty nature of human beings, is to be ensured, through rule of law as it is the law and the law alone which ensures, safety and orderly functioning of society. It is through law that human relations are orderly conducted in a welfare State. Without law life would be cruel and the rule of might is right would prevail and it would be rule of jungle.

7. Respect for law, authority of Courts and other law enforcing agencies is the

quit essence for peaceful living and progress of any civilized society. Civilized society is the substance of democracy itself which is the basic concept of our Constitution.

8. The mechanism evolved by the people for governing themselves is through a written Constitution. It basically provides three independent wings of the Government viz. Legislative, Executive and Judicial.

9. Keeping in view the working of each wing individually, the framers of the Constitution provided expressly and elaborately for the establishment and working of the judicial system. Reference may be made to Chapter IV, Part V for establishing judiciary. Further keeping in view the mixed federal structure of the system in view, the Supreme Judiciary for the State is established by Part VI, Chapter V of the Constitution.

10. It would be expedient at this stage to take notice of the provisions and scheme of the Constitution for establishing and functioning of High Courts, the highest judicial body in the States. Article 216 provides the mechanism for establishment of a High Court. Article 217 has taken care of the manner of appointment of its Judges and the conditions of the office of a Judge. Penultimate provision which would come up for consideration in later part of the judgment would be Article 222 by which powers of transfer has been conferred in President of India. It runs as under:

"Transfer of Judges from one High Court to another: 222 (I). The President of India may, after consultation with Chief Justice of India, transfer a Judge from one High Court to any other High Court.

(2) when a Judge has been or is transferred, he shall during the period he serves, after the commencement of Constitution (Fifteenth Amendment) Act, 1963 as a Judge of other High Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law and, until so determined such compensatory allowance as the President may by order fix".

11. Jurisdiction of High Court has been looked after by Article 225. Power of superintendence on subordinate Courts or tribunals functioning within its territorial jurisdiction, has been conferred on High Court by Article 227. Chief Justice has the authority to deal with the employees of the High Court and subordinate Courts. Other commitments for the post of a High Court Judge has been provided expressly in the written Constitution itself.

12. The founders of constitutional system considered the independence of judiciary as cardinal backbone for efficacious governance for the people. It cannot be denied that judiciary is the sentinel for the proper working of the constitution which is a must for efficacious democratic system of governance. It is a part of the basic structure of the Constitution. Though copious provisions have been made in the Constitution for ensuring independence of the judiciary

and securing it, yet it has to be guaranteed and secured by public opinion and by standard of conduct maintained both by Bench and the Bar.

13. It cannot be denied that paramount factor for proper functioning of the Constitution is that each functionary of the Constitution should remain within its limits. It can basically be attained normally by self imposed discipline and restraints. It stands established customarily by usage as well as jurisprudentially or conceptually or statutorily that judiciary must not usurp the functions of other wings of the system of governance. It should not make an attempt to impose its philosophy for standards.

14. Basically primary functions of the judiciary involve the application of law to facts, though at times it may be difficult to draw a line between judicial decision and Administration. It is to declare law, apply it with a view to observe check on the Administrative authorities from exceeding their powers, direct the performance of the duties owed by the public officials to the citizens and enforce statutory benefits available to the citizens. It is the function of the judiciary to interpret the mind of the Legislatures, their intention and implement the same irrespective of the consequences particularly in view of the fact that in democratic system of governance it is legislatures who are answerable to the people. I may hasten to add that while administering justice, facts, law and circumstances of the case would have to be taken care of by the functionaries of the judicial system.

15. The judiciary on account of the morsel information available to it and further being insulated from the public is the most inapt to say what the law should be though in some exceptional cases, it may be tempted to meet the demand of the changing society or with a view to do substantial justice, may cross the thin line that demarcates the areas of operation of the three wings. I may hasten to add (that utmost care and caution must be observed before pronouncing of the functions of any other wing of the Government while doing justice in accordance with Law laid down. In case Court comes to the conclusion that it cannot go beyond certain limit provided either statutorily or otherwise it must restrain itself and leave it to the Legislatures to devise the means to meet the needs of changing society.

16. I may venture to state that interpretative principles established by catena of authorities are: (i) That supply of words in a statute to suit a particular course of action acceptable to a particular class of persons is not the purview of judicial functions. One can not recast the constitution according to one's own intellectual yard stick or one's own unconscious predictions as to what an ideal Constitution should be, (ii) That courts can not presume that Legislature has either committed error or mistake or omitted something which is very necessary. It is for the other Constitutional wings to remedy the defect, if any, found in provisions administered by the constitution, (iii) Indirect way/ method of doing an act is not permissible, (iv) Affirmative words often in their operation negative objects other than those affirmed.

17. Constitution by Article 222 provides a wide power to the President to transfer a Judge in consultation with the Chief Justice of India but at the same time transfer of all Judges log stock and bar has been kept at bay and I may say with an object in view as general transfers of High Court Judge would be fraught with danger and vice of discrimination which may result in rendering the independence of judiciary as a mere paper slogan.

18. There cannot be a second opinion that the institution of judiciary took time immemorial to establish. Its functionaries working independently without favour and fear within the parameters established by law, tradition, usages, customs etc. earned faith of the public for the institution of being trusted. Mass scale transfers may imperil the entire edifice of the system as such. Even the Law Commission recommended appointment of only 1/3rd Judges from outside to combat the ills crept into judiciary. Even this thought or policy is open to debate which again is within the purview of the Legislature.

19. Normally, it is expected that at the time of appointment of a Judge his fitness, capability, integrity, parochial tendencies, creed by caste and other local links, affiliations, educational qualifications, number of years put in practice, nature of practice, field of specialisation, extent of practice, financial resources, association with political parties, status in society, other curricular activities, his relationship with practising lawyers of the High Court, relationship with sitting Judges of the Supreme Court of India or a High Court, his involvement in criminal cases, his employment and his choice of the High Court in which to be appointed as Judge etc. is considered and kept in view. The recommending authority is expected to take into consideration, before recommending a person for elevation his competence which includes his equipment in law, perception, ability to deal with legal and other complex problems, grasping capacity, his judicial potentiality/maturity, poise and equanimity of temperament, subscription to Constitutional values, capacity to persuade and be persuaded, patience, team spirit, objectivity, analytical mind and fairness in his dealings with others. It is further expected from the recommending and appointing authorities that they would take care of the factors like integrity and character, reputation in legal fraternity and society, his antecedents, his suitability for the office of a Judge, apart from other considerations like need of the Court for a Judge of particular expertise and maintaining the conventional ratio between appointments from the Bar and serving Judges.

20. Above narrated factors are not only required to be kept in view by the recommending authorities alone, they are to be given effect to by all the authorities involved in the process of the considering the names of persons for appointment of Judges viz. the Chief Justice of the High Court concerned, Chief Justice of India and the President of India.

21. People's faith in independence of judiciary is of paramount consideration in public interest or interest of society. To protect the faith of the people in the independence of the judiciary developed, established, accepted by a consistent

tradition from time immemorial, is the avowed duty of every one of us, especially of lawyers. Judges. Legislators, and the Executive. In spite of occupational hazards beset in the life of the Judges" independence of thought, even handed justice without fear and favour is the creed of the Judges. Reputation is as important as a person actually being above board and it includes capability and integrity. Conduct of a Judge is the only safeguard for the reputation of a Judge. Society or the people at large (issuing intellectual honesty, moral honesty, and his eagerness to do justice. Judge is expected to be independent and above board in all respects.

22. It is discernible from the provisions of the Constitution referred to in the earlier part of the judgment that the Constitution has provided an elaborate and detailed scheme for the functioning of the judiciary right from the stage for consideration for appointment of a High Court Judge till his retirement. Basic parameters for the working of judiciary keeping in view the paramount consideration and absolute necessity of independence of judiciary has been spelled out by the Constitution and the Laws made in this regard from time to time. Constitution itself expressly prescribes the authority who can transfer a Judge in public interest. Reference may be made to Article 222 of the Constitution of India.

23. If I may venture to state that with eroded old cautiousness and respect for authority, enlightened generation, with some grain of truthfulness in their suspicions have raised eye-brows about the conduct of the peers of justice, their declining moral values, traditions, puritan standards, self sufficiency and lack of hard work which in turn is destroying the faith of people in the system. It can not be denied that personal stories are in circulations, though there may be canards still these are in circulation. I hope no complaints regarding integrity are made with irresponsibility without realising that these would imperil the entire edifice. Social conditions are fast changing and the changes are even beyond comprehension. Individuals may some time consciously or unconsciously behave in a manner that brings down their own stature and image as also that of the institution to which they belong. But every fact does not lead to logical inference and it will not be prudent to draw generalisations regarding independence of Judges as a community from isolated individual instances. Judiciary has no machinery to investigate, particularly when democracy has released creativity of all kinds including criminal and added new desires, ambitions and frustrations. Judiciary is forwarding towards disintegration under the exceptional conduct of unbecoming of a Judge, provided by an erring member of a bench, which is for either astrology or the person concerned to decide. It cannot be denied that some of us have by our own conduct either innocently or consciously provided opportunity to the people at large to throw sullage and comment as they feel like. It may be draconian assumption about the impartiality yet it does tinker with the principle that justice should not only be done but should also appear to have been done. There is no quarrel with the concept that in order to inspire confidence reputation regarding integrity is as important as a person's actual

capacity of being above board. Imputations are being made with impunity with respect to highest dignitaries in the judicial system. It is society's expectation from Judges that like Caesar's wife they should be above suspicion. Conduct of Judge is always under a microscopic examination, microscope being held by the people, the persons concerned with the system. This in my view is a very small price which one has to pay for the respect, society showers on Judges.

24. Echoing views which were expressed some years ago and which have not lost their efficacy today. One cannot believe that one knows all and absolute truth. Justice cannot be bought or sold nor administration of justice can be equated with ordinary commercial ventures.

25. We can only notice what has been observed above and no more.

26. We find support in our observations from *Maharshi Avadhesh Vs. State of U.P.*, wherein it was observed :

"We can only notice the argument of the petitioner but in view of the constitutional status given to a Judge of the High Court, we cannot do anything more. The Constitution deliberately does not prescribe any code of conduct for the Judges and constitutional authorities in the hope that they will not behave in a manner that will bring down their own stature or of the institution to which they belong-required to act to enhance it. This is all we can observe in respect of the anxiety expressed by the petitioner". It was further observed that no direction can be issued.

It was further observed that:

"The issue in our opinion is entirely administrative and political. Courts have no way to bring parity. Courts can issue only such directions of which it can supervise compliance."

27. Transfer of Judges is an issue engaging the mind of public, the members of the judiciary and one and all concerned with independence of judiciary. Even if it has not always been so the issue is now at-the heart of the problems facing our justice system as prescribed by Indian Judicial system. Balancing exercise has to be made between the principle that justice should not only be done but must appear to have been done and the independence of judiciary and the principle that justice must appear to have been done cannot be stretched too far.

28. Government in awe of State should and must be sensitive to the sentiments of its people. Things would get mustier if pushed under carpet. State should come forward to end animal fear in public mind which is spreading apathy and breeding disrespect for the system. The public policy neither remains static nor can be in fixed mode. It is an edged word of craft, which is to be exercised in public good. There is no gainsaying dimensions and the society at large has a stake in impartial even handed justice. In such a situation State should not sit idle doing nothing except making paper plans. The institution of justice is born and reared on the faith and traditions established in centuries. Persons like

justice Coke have lost their lives to maintain the rule of law and independence of its enforcing of declaring agencies. After satisfactorily working judiciary within the parameters set by traditions, customs, usages, statutes framed on the basis of established traditions and upheld from time to time for more than forty years and having evolved the fine institution the same should not be permitted to be lost by permitting suspicious persons crying wolf and raising fingers with impunity.

29. To attain the independence of judiciary the faith of the people in its independence has to be retained not by enacting statutory laws but by all other means at our disposal. The principle of justice not being only done but also appearing to have been done is one of the conceptual aspects which has to be balanced with independence of judiciary. It has been conventionally, pre-cedently and customarily accepted that in the vicious circle of checks and balances of various constitutional organs after all some one has to be trusted, so let it be Judges, only persons appointed have to be fit to hold such a high constitutional post and this fitness includes capability as well as integrity.

30. A Judge would not be worth" the name or the office he holds, if he is having shakable nerves or is timid. It would be incorridously demeaning to attribute that a person occupying such an exalted office would dabble in patronage of his wards or that of his colleagues. This one has to see from the point of view of an ordinary prudent person and not from the point of view of extremely suspicious person or the one who for reasons best known to him assumed that but for him none else is honest and capable to uphold the independence of judiciary. Should the entire judiciary be put in the dock for the suspicions entertained by persons either because of their failure in getting the desired result in their litigation or for political reasons or for frustration of any other nature. In our considered view such suspicions should not be encouraged, rather should be curbed as these may be undermining the confidence of the public in the institution pose danger to the system itself.

31. Cover attempt to malign the judiciary is implicit in the averments made in the petition. It cannot be presumed that everything rotten and every one is not fit to hold office of authority or trust or service of public nature. It is the Judges who have to act as bastion of rights and freedom of people.

32. There is no denying the fact that since the highest government officials" acts are subject to judicial review and correction, which they violate any legal obligations, judicial system is a bulwark of liberty. Upholding and smooth working of the constitutional or rule of law depends basically on the independence of judiciary which is thus vital for the nation's interest and is required to be protected.

33. Since law binds Judges as well as the judged ones, judiciary should be trusted particularly when powers of judicial review are not unbridled horses as Courts are bound by procedures, rules, precedents and conventions narrowing

down the field of discretion,

34. It is the pious duty of all sections of the society, especially lawyers and other wings of the government machinery to place the Judges beyond the pale of fear or injury which can be inflicted for rendering justice without fear and favour.

People have established for their governance the judicial system which they thought would be most conducive to their happiness. Society as a whole and lawyers in particular have to inculcate implicit faith in the presumption of judicial rectitude in every soul that wears robes though it cannot be denied that it has to be earned by the members of judicial fraternity by their act and conduct, express and implicit,

35. Transfer is fraught with all dangers hampering independence of the judiciary and making the Judges vulnerable to the designs of various agencies which are out to destroy the institution for reasons best known to them. In this process the priority of maintaining the independence of judiciary would tragically suffer. It would then be free for all and anybody would with impunity throw sullage on an independent Judge who will not be able to meet it on account of his isolation and the conduct desired from him professionally i.e. of keeping himself aloof from the society as such.

36. The Constitution has by Article 222 provided for the transfer of Judges from one High Court to another. In the scheme it has been provided that the President in consultation with the Chief Justice of India, can transfer a Judge of a High Court to another High Court with such compensatory allowance as determined by the Parliament by a law. No doubt the power of transferring Judges of a High Court to another vests with the President but it has to be exercised objectively after consideration of all relevant facts and no en masse transfers can be ordered as is sought by the petitioner. The power of transfer has to be exercised with extreme caution keeping public interest in view as also the sufferance of the damages the exercise is likely to cause to the image of the Judges transferred. The only earning ornaments of a Judge is his reputation of being independent and above board which further can also be said to be the only professional satisfaction which one is expected to retain in order to maintain his respect in public which involves not only his real independence of mind but also the faith which the public have about his independence in every respect.

37. The ground realities cannot be lost sight of and may be here and there some lapses on the part of a Judge might have given rise to some suspicion. But simply because some act of an individual Judge has given rise to suspicion, attempt should not be made to damage the faith of people in the independence of judiciary. Interest of an individual has to give way to the interest of society. For an orderly society faith in the independence of the judiciary is of paramount consideration. Undoubtedly the public is interested in the administration of justice and if in the course of administration of justice some one of us has faltered, the Constitution has provided a sufferance viz. impeachment for major

lapse and transfer for minor lapse.

38. We may venture to state that in view of the averments made, we cannot even remotely assume any basis for the assumptions made by the petitioner nor there is any public interest involved. The petitioner appears to be one of the frustrated lot which is clearly indicated from the fact that he is an ex-clerical employee of a Subordinate Court whose son has been dismissed from the post of a Judicial Officer at the threshold of his career.

39. The dignity of the High Court Judges cannot be permitted to be ridiculously and violently hurt by a person who claims to be acting as pro bono publico but who in fact has been provoked by his personal injury. We cannot refrain ourselves from adding that few heads of [the judiciary responsible for maintaining the purity of judiciary might have succumbed to particular views because of various stories prevalent on the eve of their retirement and might have gone to the press making sweeping allegations, polluting the very fountain of justice of which they themselves were the guardians. We find no reason that because some one holds different views on a subject he must brand the others as the one's yielding to extraneous considerations especially when the present judiciary is their successor in whose appointments they were the major participants. We find no cogent reason for persons preceding the present judiciary stilling, their successors and making an attempt to scandalise them. Kith and kins of Judges of a High Court practising in the same High Court is not something new or of recent origin. It is a century old tradition. It is not unknown that even where sons had appeared before their fathers, the flag of independence of judiciary was kept high. The present tirade against the judiciary and the motivation for denigrating the same is beyond us to decode.

40. A mandamus can be issued to act in accordance with law or statute or statutory rules but discretion cannot be regulated by declarations or declaratory, prohibitory or certiorari writs. For seeking transfer of a particular individual Judge, the petitioner is at liberty to approach the appropriate competent authority. Transfer of Judges of this High Court, in our opinion is not within the purview of our jurisdiction. The Court can grant only such reliefs which it can get implemented or supervise its compliance and implementation. Relief in the sweeping nature cannot be granted.

41. We are afraid that we cannot on the basis of the suggestions made in the writ petition even assuming them to be true, though we have, no doubt that these are unfounded, interfere in exercise of writ jurisdiction. Charge of partiality being a serious charge a probe on its basis cannot even be thought of on the basis of allegations which are wild and reckless. In view of the bald averments made on assumptions and presumptions, it is wiser to abstain from interference and so we dismiss the petition with a strong note of disapproval. We hope that the conduct of the petitioner viz.. of making such reckless averments which is nothing short of attempt to create chaos in the society by instigating the people to lose faith in the judiciary shall be condemned and curbed with strong hands by

one and all, who are interested in the orderly society and have faith in democracy, which is the basic creed of our Constitution.

42. Before parting with the judgment, we may express our pious wish that the State would implement the policy of appointment of Judges if at all to refurbish the declining image of the judiciary.

43. In view of observations made above, the writ petition is dismissed.

44. Petition dismissed.