
(2000) 09 RAJ CK 0034

In the Rajasthan High Court

Case No : Civil Special Appeal (Writ) No. 757 of 2000

Dalpat Raj Bhandari

APPELLANT

Vs

President of India and Others

RESPONDENT

Date of Decision : 07-09-2000

Acts Referred:

Constitution of India, 1950 — Article 124, 16, 217, 222(1)

Citation : (2001) 1 RLW 604 : (2001) 1 WLC 149 : (2001) 1 WLN 603

Hon'ble Judges : Dr. A.R. Lakshmanan, C.J.;Rajesh Balia, J

Bench : Division Bench

Advocate : D.R. Bhandari, for the Appellant;

Judgement

Lakshmanan, CJ.

1. The unsuccessful petitioner in the writ petition is the appellant in this appeal. The case was argued before the learned Single Judge as well as before us by the petitioner-appellant in person. An interesting prayer was made in the writ petition in the nature of mandamus. The prayer in the writ petition reads as follows:

i) Respondents be directed to advertise the post of Chief Justice of India, Judges of Supreme Court. Chief Justice of High Courts and Judges of High Court and petitioner be provided an opportunity to apply under such advertisement and compete before any appointment is made and selection be made after considering all candidates who are eligibles and applies for such appointment.

ii) It be declared right to opportunity to apply for the post of and appointment of Chief Justice of India, Judge of Supreme Court, Chief Justice of State and High Court is an un- amendable fundamental right in these appointments and every eligible has right to apply and compete for such appointments irrespective of caste, creed or sex.

iii) Any other relief this Hon''ble Court deem fit be awarded to the petitioner."

(2). The President of India, Chief Justice of India, Governor of Rajasthan, Chief Justice of Rajasthan and Union of India, through the Secretary, Ministry of Law and Justice were made party respondents.

(3). According to the petitioner-appellant, in so far as judicial appointments under Articles 124 and 217 are concerned, it is impossible to achieve transparency unless intention of Government is clear and transparent. The petitioner has employed intemperate language in presenting his case and criticised the appointments made for the High Court, Supreme Court and transfers. In Para-4 of the Writ Petition, the petitioner has stated thus:

"That fifty years of Satyanmev Jayale (let truth win) have left us saddled with a Supreme Court Judgment which holds that truth is no defence against the charge of contempt to Court. This judgment is State of Maharashtra vs. Perspective Publications. The result is that the public never knows the truth of the Judicial Guerrilla warfare that goes on in the Apex Court for High Court appointments and transfers. The same applies to the Apex Court appointments and especially the fights for the office of the Chief Justice of India. The Legal business lobbies and the ruling politicians who partake of these fights for public office remain conveniently hidden from the public eye. The same judgment comes in handy to screen of public gaze into the functioning of those appointed. In the name of the independence of the Judiciary and the contempt power against scandalizing courts are wholly opaque and not subject to truth about themselves."

(4). In Paras-7 and 8 the petitioner has stated thus:

(7) "That so far Judges appointments and transfers are concerned, we have made endeavour to seek transparency in such appointments and made attempts by filing various kind of litigation but in 50 years, we have not reached to a right conclusion and Learned President of India has made reference under Article 143 to seek some solution. But there could be no solution unless, all eligibles are invited to seek these appointments.

(8) That every appointment is a NATIONAL PROPERTY and every eligible irrespective of caste creed or sex has right to seek such appointments. It is not a hereditary property that it would be succeeded by the hereditary choice of the appointing authorities. In last 50 years we did only this. All appointments so far made under Article 124 and 217 are in violation of Article 14 and 16. They are against doctrine of Legitimate expectancy. Further they are against basic structure of Constitution that is against principle of "Right to opportunity". The world's best Constitution which we are having is based on basis of Human Rights and India is Champion for last 50 years which had ADVOCATED FOR THE BASIC HUMAN RIGHTS." ONE OF THE BASIC HUMAN RIGHT IS RIGHT TO OPPORTUNITY" WHICH IS AN UNAMENDABLE FUNDAMENTAL RIGHT. BUT WE ARE DENYING THIS RIGHT TO ALL ELIGIBLES. What is going inside can be seen in Ex. A filed alongwith stay petition which may also be treated as part of this writ petition."

(5). An Article by "Krishan Mahajan" "Restoring Judicial Integrity" has been filed and marked as Exhibit A-1 alongwith the stay petition. The petitioner sought for stay of any appointments of the High Court or Supreme Court and any Chief Justice of any High Court or the Supreme Court till the posts and appointments are advertised wherein all eligible shall have right to apply, compete and seek these posts.

(6). According to the petitioner, he is eligible to be appointed as High Court and Supreme Court Judge as he fulfils all qualifications laid down in Articles 217 and 124 of the Constitution of India to seek such appointment. It is also alleged that since independence and after commencement of the Constitution, all appointments of the High Court and the Supreme Court Judges including Chief Justices have been made in hide and seek manner and the posts and vacancies were never advertised and consequently, all appointments so far made being ab initio void. The petitioner earlier filed a writ petition and failed as it was held that the petitioner-appellant had no such right. In Para- 21 of the petition it is stated as follows:

"That the petitioner challenged the validity of judgment and jurisdiction of Judges to lay-down the law which was not in their jurisdiction and the Learned judges decided these things which they were not required to decide, the learned Judges dismissed the Transferred case holding petitioner has no locus standi in the matter."

(7). The copy of the judgment has been filed and marked as Exhibit-1 and copy of the Transferred Case has also been filed and marked as Exhibit-2. The Supreme Court by order dated 31.3.94 dismissed the Transferred Case (Civil) No. 6 of 1994. The order in Ex. 1 reads thus:

"IN THE: SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

TRANSFERRED CASE (CIVIL) NO. 6 OF 1994

Dalpat Raj Bhandari, Advocate Petitioner

vs.

Union of India & Ors..... Respondents

ORDER

The petitioner-in-person, who is an Advocate, is not present though the date was fixed in his presence. The petitioner's application dated 29.3.1994 is rejected.

In the petitioner's absence, we have gone through his writ petition. The constitutional validity of transfer policy was judicially upheld in S.P. Gupta Vs. President of India and Others, In the Judges Case-II (1993 (4) SCC 411) it was held that judicial review in the matter of transfer of Judges was not excluded but the area of justiciability was limited. It is clear from that judgment that it was so

held with a view to prevent any transferred Judge being exposed to any litigation involving him except when he chose to resort to it himself, in the available limited area of justiciability. The parameters of the area of justiciability in the sphere of judicial review have been clarified further in K. Ashok Reddy vs. Government of India (J.T. 1994 (1) 401). Three Judges Bench in Ashok Reddy's case (supra) said:

"We consider it sufficient to observe that the limited area of justiciability in this sphere being clearly declared in the Judges Case - II and also herein while making it clear that no one other than the transferred Judge himself can question the validity of a transfer....."

It was also emphasized in the said judgment:

"It is time that the men at the apex level of the Indian judiciary are permitted to manage the affairs of the judicial family and look after its welfare and interest instead of permitting repeated intrusions by some in the guise of "public interest" thereby rendering the Judge vulnerable to avoidable controversy involving them. We are constrained to observe that the Allahabad case before us is of that kind."

The present case is another one of the type of the "Allahabad Case" referred to above.

In view of the pronouncement aforementioned, this petition is misconceived and has no merits. It is dismissed as such.

Sd/-

(A.S.ANAND) J.

Sd/-

(S.P. BHARUCHA) J.

New Delhi,

(8). In the transferred case No. 6/94, notice was issued by the Assistant Registrar of the Supreme Court that the transferred case will be posted for hearing on 29th March, 1994 and will be taken up by the Court on that day. The petitioner-appellant was informed that in default of his appearance within the time prescribed, the transferred case will be heard and determined in his absence and no further notice in relation thereto shall be given to him. The case was ultimately dismissed on 31.3.1994 which according to the petitioner, ex-parte, without going into the substantial question involved in the case. The appellant has in para 24 of the writ petition has stated as under:

"The Judgment of majority was not based on healthy practices and manner of majority Judges was dis-approved by the learned Judge. In fact the learned Judge was kept away and majority group was not made in official manner. Thus the Judgment casts doubts and is void only in this court."

(9). The appellant in para 25 has stated that the majority judgment laid down the guidelines which are without jurisdiction, illegal and nullity. The petitioner also in paragraphs 26 to 30 has submitted that the guidelines enunciated were wholly illegal, without jurisdiction and nullity as it is in domain of the Parliament and the privilege of the Parliament has very much been violated by the Supreme Court in enacting the guidelines. The petitioner-appellant has further submitted that his transferred case was wrongly decided by the Supreme Court. The petitioner appellant has also stated that though he has made representations to the respondents, the same have not been relied on merits.

(10). The matter came up for admission before Dr. Justice B.S. Chauhan on 13.1.2000. The learned Judge held that the course adopted by the appellant raising the issue regarding of the judgment of Hon"ble Supreme Court in the writ petition is not permissible in law and that the appellant ought to have moved the Supreme Court in review showing sufficient cause preventing him from appearing before the Lordships of the Supreme Court. The learned Judge dismissed the writ petition as totally misconceived and being nothing but the reflection of the frustration of the appellant. On merits, the learned Judge has held that the appointments under Article 124 or 217 of the Constitution of India cannot be termed as public employment as it has been laid down in the case of All India Judges" Association and others vs. Union of India and others (1) that judicial service is not "public employment" in the strict connotation of the term "public employment". In this view of the matter, the learned Judge dismissed the writ petition as devoid of any substance.

(11). Being aggrieved by the said judgment, the appellant- petitioner has preferred the above appeal reiterating the same contentions which have been raised in the writ petition. He has invited our attention to the judgments referred to in the writ petition and in the appeal. At the time of hearing, he repeated the same arguments.

(12). We have carefully considered the submissions made and the points raised in the writ petition and in the appeal urged before us at the time of hearing. We are of the opinion that the writ petition and the writ appeal are not only misconceived but also an abuse of process of law. Similar relief sought for by the appellant was dismissed by the Hon"ble Supreme Court on the ground that the appellant has no locus standi. The appellant has also earlier preferred some case which was heard and decided vide order dated 31.3.1994. The Hon"ble Supreme Court has dismissed the petition that the petition was misconceived and has no merit. According to the petitioner-appellant, the same case was decided in his absence. The statement is absolutely incorrect. The date was fixed for hearing in the presence of the appellant but he did not appear on the date of hearing. Under such circumstances, the matter was disposed of on merits by the Hon"ble Supreme Court. The appellant has submitted that this judgment which was passed behind the back of the appellant is not binding on him not it can be held to be a judgment and order in the legal sense. This argument, in our opinion, is

wholly untenable. If the appellant is aggrieved with the judgment of Hon''ble Supreme Court, he ought to have moved the Supreme Court by filing appropriate petition showing sufficient cause for his non appearance before their Lordships of the Supreme Court. The appellant without adopting the said course, has now again approached this Court by filing another writ petition. Article 124 deals with establishment and Constitution of the Supreme Court. Article 124(2) states that every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Court in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of 65 years.

(13). Article 124(3) provides that a person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and has been for at least five years as a Judge of the High Court or of two or more such Courts in succession, or has been for at least ten years an Advocate of a High Court or of two or more such courts in succession, or is in the opinion of the President a distinguished jurist. Sub-clause (6) of Article 124 provides that every person appointed to be a Judge of the Supreme Court shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

(14). Prior to 1993, there was a consensus of opinion that consultation does not mean concurrence but in 1993, there has been an opinion in the opposite direction. The Supreme Court in Subhash Sharma and others vs. Union of India (2) took the view, the correctness of the majority view in S.P. Gupta's case (3) should be considered by a larger Bench. Accordingly, a direction was issued for constitution of a Bench of 9 Judges to examine two questions (i) the position of the Chief Justice of India and primacy of his opinion (ii) justiciability of the fixation of Judges strength. The majority of the 9 Judges Bench came to the conclusion that the consultation would almost mean concurrence or consent, The majority took the view that regarding appointments of the Constitutional functionaries to perform their duty collectively with a view to reach an agreed decision so that the occasion of primacy does not arise. In case of Supreme Court the proposal is to be initialed by the Chief Justice of India and in the case of High Court, by the Chief Justice of that High Court. In the event of conflict of opinion, the view of the Chief Justice of India has primacy and no appointment of any Judge to the Supreme Court or any of the High Courts can be made unless it is in conformity with the opinion of the Chief Justice of India; and in exceptional cases alone, for stated strong cogent reasons disclosed to the Chief Justice of India indicating that the recommendee is not suitable for appointment, that appointment recommended by the Chief Justice of India may not be made. But in case the Chief Justice of India reiterates his recommendations, then appointment should be made in accordance with his recommendation, the majority also was of the opinion that S.P. Gupta's case does not express the correct view.

(15). Article 217 provides for appointment and conditions of the office of a Judge of the High Court. This Article reads as under:

"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 after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, 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."

(16). Sub-clause (2) of Article 217 says that a person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India, and has for at least ten years held a Judicial office in the territory of India, or has for at least ten years been an advocate of a High Court..... or of two or more such Court in succession. As already noticed in S.P. Gupta's case (supra), a 7 Judges' Bench of the Supreme Court by a majority of 4:3 decided that opinion of the Chief Justice of India does not enjoin primacy over the other two opinions in the matter of appointment of Judges. In Subhash Sharma's case (supra), a 3 Judges Bench of the Supreme Court held that the correctness of the view taken in S.P. Gupta's case should be considered by a larger Bench. Accordingly, a 9 Judges Bench was constituted to examine the two questions decided in S.P. Gupta's case. The case of Supreme Court Advocate-on-Record Association & another vs. Union of India (4) makes the Chief Justice of India a symbol representing the entire judiciary but the Chief Justice has no right to express his views individually. The combined opinion of 5 Judges given by Hon'ble Verma, J. records the summary of conclusion in regard to the appointment of Judge, they are -

(1) The process of appointment of Judges to the Supreme Court and the High Court is an integrated "participatory consultative process" for selecting the best and most suitable persons available for appointment, and all the constitutional functionaries must perform this duty collectively with a view primarily to reach an agreed decision, subserving the constitutional purpose, so that the occasion of primacy does not arise.

(2) Initiation of the proposal for appointment in the case of the Supreme Court must be by the Chief Justice of India, and in the case of a High Court by the Chief Justice of that High Court; and for transfer of a Judge/Chief Justice of a High Court, the proposal has to be initiated by the Chief Justice of India. This is the manner in which proposals for appointment to be Supreme Court and the High Courts as well as for the transfer of Judges/Chief Justices of the High Courts must invariably be made.

(3) In the event of conflicting opinions by the constitutional functionaries, the opinion of the judiciary symbolised by the view of the Chief Justice of India; and formed in the manner indicated, has primacy.

(4) No appointment of any Judge to the Supreme Court or any High Court can be made, unless it is in conformity with the opinion of the Chief Justice of India.

(5) In exceptional cases alone, for stated strong cogent reasons, disclosed to the Chief Justice of India, indicating that the recommendee is not suitable for appointment, that appointment recommended by the Chief Justice of India may not be made. However, if the stated reasons are not accepted by the Chief Justice of India and the other Judges of the Supreme Court who have been consulted in the matter, on reiteration of the recommendation by the Chief Justice of India, the appointment should be made as a healthy convention.

(6) Appointment to the office of the Chief Justice of India should be of the senior-most Judge of the Supreme Court considered fit to hold the office.

(7) The opinion of the Chief Justice of India has not mere primacy, but is determinative in the matter of transfers of High Court Judges/Chief Justices.

(8) Consent of the transferred Judge/Chief Justice is not required for either the first or any subsequent transfer from one High Court to another.

(9) Any transfer made on the recommendation of the Chief Justice of India is not to be deemed to be punitive, and such transfer is not justiciable on any ground.

(10) In making all appointments and transfers, the norms indicated must be followed. However, the same do not confer any justiciable right in anyone.

(11) Only limited judicial review on the grounds specified earlier is available in matters of appointments and transfers.

(12) The initial appointment of a Judge can be made to a High Court other than that for which the proposal was initiated.

(13) Fixation of Judge strength in the High Courts is Justiciable, but only to the extent and in the manner indicated.

(14) The majority opinion in S.P. Gupta Vs. President of India and Others, in so far as it takes the contrary view relating to primacy of the role of the Chief Justice of India in matters of appointments and transfers, and the justiciability of these matters as well as in relation to Judge-strength, does not commend itself to us as being the correct view. The relevant provisions of the Constitution, including the constitutional scheme must now be construed, understood and implemented in the manner indicated herein by us."

(17). Thus, it is seen that the Judges of the Supreme Court of India and High Courts are constitutional functionaries and are discharging sovereign functions of administration of justice and none of them is in public employment. It has been held in the case of All India Judges' Association and others vs. Union of India (supra) that the Judicial Service is not service in the sense of employment and that the Judges are not employees. As members of the judiciary they exercise the sovereign judicial power of the State. They are holders of public offices in

the same way as the members of the council of ministers and the members of the legislature and that there cannot be a link between the service conditions of the Judges and those of members of the other services. The appellant has contended that Article 16 of the Constitution is attracted in the case of appointment of Judges. Such contention, in our opinion, is fallacious. Article 16(1) reads that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. The appointment of a Judge of the Supreme Court or High Court is neither an employment nor an appointment of any office under the State but it is an independent constitutional functions discharged by the persons so appointed and it is certainly not an appointment to in office under the State. Clauses (1) & (2) of Article 16 guaranteed equality of opportunity to all citizens in the matter of appointment to any office or of any other employment under the State. Clauses (3) to (5) however, lay down exceptions to the above rule of equal opportunity.

(18). Thus, in our opinion, the application of Article 16 in the case of appointment of Judges does not arise.

(19). Since doubts have arisen about the interpretation of law laid down by the Supreme Court in regard to the principles and prescribed procedural norms regarding appointment of the Judges of the Supreme Court under Article 124(2) and Chief Justice and Judges of the High Court under Article 217(1) and transfer of Judges from one High Court to another under Article 222(1). In the case of Supreme Court Advocates on Record Association (supra), the H.E. President of India referred the 9 questions to the Supreme Court of India for consideration and to report its opinion on the questions referred. A 9 Judges Bench of the Supreme Court after considering the earlier judgments and after analysing the Articles 124, 216, 217 and 222 of the Constitution of India, answered the questions posed by the reference and emphasised that the answers should be read in conjunction with the body of this opinion, in the case reported in JT 1998 (7) 304 (5). The answers are as under:

(1) The expression "consultation with the Chief Justice of India" in Articles 217(1) and 222(1) of the Constitution of India requires consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India. The sole individual opinion of the Chief Justice of India does not constitute "consultation" within the meaning of the said Articles.

(2) The transfer of puisne Judges is judicially reviewable only to this extent: that the recommendation that has been made by the Chief Justice of India in this behalf has not been made in consultation with the four seniormost puisne Judges of the Supreme Court and/or that the views of the Chief Justice of the High Court from which the transfer is to be effected and of the Chief Justice of the High Court to which the transfer is to be effected have not been obtained.

(3) The Chief Justice of India must make a recommendation to appoint a Judge of the Supreme Court and to transfer a Chief Justice or puisne Judge of a High

Court in consultation with the four senior-most puisne Judges of the Supreme Court. Insofar as an appointment to the High Court is concerned, the recommendation must be made in consultation with the two seniormost puisne Judges of the Supreme Court.

(4) The Chief Justice of India is not entitled to act solely in his individual capacity, without consultation with other Judges of the Supreme Court, in respect of materials and information conveyed by the Government of India for non-appointment of a Judge recommended for appointment.

(5) The requirement of consultation by the Chief Justice of India with his colleagues who are likely to be conversant with the affairs of the concerned High Court does not refer only to those Judges who have the High Court as a parent High Court. It does not exclude Judges who have occupied the office of a Judge or Chief Justice of that High Court on transfer.

(6) "Strong cogent reasons" do not have to be recorded, as justification for a departure from the order of seniority, in respect of each senior Judge who has been passed over. What has to be recorded is the positive reason for the recommendations.

(7) The views of the other Judges consulted should be in writing and should be conveyed to the Government of India by the Chief Justice of India along with his views to the extent set out in the body of this opinion.

(8) The Chief Justice of India is obliged to comply with the norms and the requirement of the consultation process, as aforesaid, in making his recommendations to the Government of India.

(9) Recommendations made by the Chief Justice of India without complying with the norms and requirements of the consultation process, as aforesaid, are not binding upon the Government of India.

(20). In view of the above judgment, we are of the opinion that the reliefs sought for by the appellant-petitioner cannot at all be countenanced and that the appointment of the Judges of the Supreme Court and of the Judges of the High Court and transfers are governed by the above ruling of the Supreme Court.

(21). Consequently, the writ appeal fails and is hereby dismissed.