

(2011) 04 DEL CK 0294

In the Delhi High Court

Case No : Writ Petition (C) No. 2231 of 2011

D.K. Sharma

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 08-04-2011

Acts Referred:

Constitution (Forty-Second Amendment) Act, 1976 — Article 124, 217, 217(1),
217(2), 233
Income Tax Act, 1961 — Section 252(2)

Citation : (2011) 179 DLT 405 : (2011) 3 ILR Delhi 769

Hon'ble Judges : Sanjiv Khanna, J; Manmohan, J

Bench : Division Bench

Advocate : Ashok Gurnani, for the Appellant;

Final Decision : Dismissed

Judgement

Sanjiv Khanna, J.—Mr. D.K. Sharma, a practicing Advocate of this Court, has filed the present writ petition, inter alia, praying for following reliefs:

- a) allow the present petition;
- b) quash (sic) the recommendation of collegium of this Hon'ble Court recommending the appointment and elevation of Respondent No. 3 as a Judge/ Additional Judge of this Hon'ble Court.
- c) restrain/prohibit the Respondent No. 1 & 2 from acting on the basis of such recommendation for appointing and elevating the Respondent No. 3 as an Additional Judge or a Judge of this Hon'ble Court.
- d) a declaration that Explanation [(a)] and [(aa)] inserted to Article 217 of The Constitution of India by the Forty Second Amendment Act, 1976 and by the Forty Forth Amendment Act, 1978 are ultra vires of The Constitution of India and of the powers of the Parliament to amend The Constitution and be declared accordingly.

e) pass any other or further order in favour of the Petitioner and against the Respondent.

2. The contentions of the Petitioner are as under:

(i) The Respondent No. 3, Mr. R.V. Easwar, does not meet the eligibility criteria stipulated in Article 217(2)(a) of the Constitution of India as he has not held and is not holding a judicial office as elucidated and explained by the Supreme Court in S.D. Joshi and Others Vs. High Court of Judicature at Bombay and Others, and other cases.

(ii) The Respondent No. 3 does not meet the eligibility criteria stipulated in Article 217(2)(b) of the Constitution of India as presently he is not a practicing Advocate and in 1991 he was appointed as a member of the Income Tax Appellate Tribunal (for short, the Tribunal) and is presently its President. Under Article 217(2)(b) only Advocates, who are actually practicing in present, are eligible and can be considered for appointment as High Court judges.

(iii) The Respondent No. 3 is not eligible to be appointed as a District Judge under Article 233(2) as he is a member of the Tribunal and, therefore, he is not also eligible to be appointed as a Judge of the High Court.

(iv) The Respondent No. 3 is not suitable to be appointed as a Judge of the High Court and the collegium of the High Court could not have examined the question of suitability as after 2008 he has not been a member of any bench of the Tribunal at Delhi.

(v) Explanation (a) and (aa) to Article 217(2) of the Constitution added by 42nd Amendment Act, 1976 and 44th Amendment Act, 1978 are unconstitutional as they violate the basic structure of the Constitution, namely, separation of powers and independence of judiciary.

3. Article 217(2) of the Constitution including the explanation (a) and (aa) read as under:

Article 217. Appointment and conditions of the office of a Judge of a High Court:

(2) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and-

(a) has for at least ten years held a judicial office in the territory of India; or (b) has for at least ten years been an advocate of a High Court or of two or more such Courts in succession;

Explanation.-For the purposes of this clause-

(a) in computing the period during which a person has held judicial office in the territory of India, there shall be included any period, after he has held any judicial office, during which the person has been an advocate of a High Court or has held the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law;

(aa) in computing the period during which a person has been an advocate of a High Court, there shall be included any period during which the person [has held judicial office or the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law after he became an advocate;

4. Article 217(2) postulates two sources for elevation as Judges of the High Court. The first source is a person who has held a judicial office for at least 10 years in the territory of India and the second source is a person who has for at least ten years been an Advocate of a High Court or of two or more such Courts in succession. The two sources are independent and separate. Qualification prescribed, either in Clauses (a) or (b) to Article 217(2) has to be satisfied in alternative for a person to be eligible for being appointed as a Judge of the High Court.

5. The expression "has for at least ten years been an advocate" does not mean and convey that the person to be appointed should be an Advocate in present i.e. on the date when his name is recommended for appointment by the High Court collegium or at the time of appointment. It is not possible to accept the contention of the Petitioner that the past experience of a person as an Advocate gets obliterated or washed away when an Advocate is appointed as a member of a Tribunal. The aforesaid negative covenant or condition cannot be either expressly or impliedly read into Article 217(2)(b) of the Constitution. The words "has" and "been" used in Article 217(2)(b) do not connote that a person should be a practicing Advocate on the date when his name is recommended for appointment as a High Court Judge.

6. The view, we have taken is in consonance and as per the ratio in Mahesh Chandra Gupta Vs. Union of India (UOI) and Others, wherein it has been held: "48. Commenting on Explanation II, H.M. Seervai in Constitutional Law of India, 1st Edn., p. 1012, has this to say:

The qualification for appointment as a Judge of the Supreme Court is the holding of a Judge's office for at least five years in a High Court or in two or more High Courts in succession; or at least ten years" standing as an advocate of a High Court or two or more High Courts in succession; or distinction achieved as a jurist [Article 124(3)]. In computing the period during which a person has been an advocate, any period during which he has held judicial office not inferior to that of a District Judge after he became an advocate, is to be included [Article 124(3) Explanation II]. It is clear that the Explanation is not attracted if a person has been an advocate for ten years before accepting any judicial appointment, for that by itself is a sufficient qualification for appointment as a Judge of the Supreme Court.

49. In our view, Explanation (aa) appended to Article 217(2) is so appended so as to compute the period during which a person has been an advocate, (sic by including) any period during which he has held the office of a member of a tribunal after he became an advocate. As stated by the learned author, quoted

above, if a person has been an advocate for ten years before becoming a member of the tribunal, Explanation (aa) would not be attracted because being an advocate for ten years per se would constitute sufficient qualification for appointment as a Judge of the High Court.

(emphasis supplied)

7. The aforesaid observations by the Supreme Court adumbrate that the explanation (aa) appended to Article 217(2) need not be made applicable or would not be attracted, if the person otherwise has been an Advocate for 10 years. This by itself would constitute sufficient qualification and make a person eligible for appointment as a Judge of the High Court under Article 217(2)(b).

8. The Supreme Court in the said case had also examined the question whether requirement of Article 217(2)(b) can be equated with "actual practice" or only requires "entitlement to practice". Referring to an earlier decision in *In Re: Lily Isabel Thomas*, , it has been observed in *Mahesh Chander Gupta* (supra) as follows:

51. In *Lily Isabel Thomas*, Re this Court equated "right to practise" with "entitlement to practise" (see para 11). In our view, Article 217(2)(b), therefore, prescribes a qualification for being appointed a Judge of the High Court. The concept of "actual practise" will fall under Article 217(1) whereas the concept of right to practise or entitlement to practise will fall under Article 217(2)(b). The former will come in the category of "suitability", the latter will come in the category of "eligibility".

9. The Supreme Court elaborately dealt with the aforesaid contention and has held that "entitlement to practice" is sufficient to meet the requirements of Article 217(2)(b). The Supreme Court has made specific reference to the difference in language of clauses 1 and 2 to Article 217. It has been held that Article 217(1) has a clause relating to "suitability" or "merits", whereas Article 217(2) has a clause relating to "eligibility requirements or qualification" and does not deal with "suitability" or "merits". The provisions of the Advocates Act, 1961, etc. entitle a person to practice in any High Court and for this purpose mere enrollment is sufficient.

10. Faced with the above difficulty, learned Counsel for the Petitioner submitted that the views expressed by H.M. Seervai are incorrect and contrary to the Constitutional provisions and philosophy. He submits that the commentary does not take notice of Article 233(2) of the Constitution and in fact the opinion expressed negates the basic structure of the Constitution which provides for independence of judiciary and separation between Legislature, Executive and Judiciary.

11. The aforesaid contention cannot be accepted in view of the ratio decendi in the case of *Mahesh Chander Gupta* (supra). This Court is bound by the said ratio. That apart, the contention of the Petitioner that Respondent No. 3 has ceased to

be impartial and independent because he has been acting as a member of the Tribunal, does not appeal to us; (we are not dealing with a case where a person, who was earlier an Advocate, and was appointed to a post under the Union or a State. We express no opinion in this regard). Advocates do get appointed as members of tribunals, but this does not mean that they become disqualified and cannot be appointed as Judges of the High Court, if they meet the eligibility criteria set forth in Article 217(2)(b) of the Act. The submission will be counterproductive and would prevent good Advocates from accepting appointments in tribunals. For example, appointment to the Central Administrative Tribunal is only for a period of five years which can be extended by another period of five years and not beyond.

12. Reference to Article 233 is misconceived. Article 233 of the Constitution relates to appointment of a person as a District Judge. Article 233 reads as under:

233. Appointment of district judges.-(1) Appointments of persons to be, and the posting and promotion of, District Judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a District Judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.

13. It has been held by the Supreme Court in *Chandra Mohan v. State of U.P.* AIR 1966 SC 1987 and *Satya Narain Singh and Others Vs. High Court of Judicature at Allahabad and Others*, that "service" in Article 233(2) means judicial service. This is obvious as Article 233(1) relates to promotion of persons who are already in judicial service, while Article 233(2) provides that a person not already in judicial service is eligible for appointment if he has practiced for not less than 7 years as an Advocate and is recommended for the said purpose by the High Court.

14. The Supreme Court, in *Rameshwar Dayal v. State of Punjab* AIR 1961 SC 816, has held that Article 233 is a self-contained provision regarding appointment of District Judges and the qualification laid down in Clause 2 of Article 233 is that the person concerned should be an advocate/pleader of seven years" standing. It was observed as under:

12. Learned Counsel for the Appellant has also drawn our attention to Explanation I to Clause (3) of Article 124 of the Constitution relating to the qualifications for appointment as a Judge of the Supreme Court and to the explanation to Clause (2) of Article 217 relating to the qualifications for appointment as a Judge of a High Court, and has submitted that where the Constitution makers thought it necessary they specifically provided for counting the period in a High Court which was formerly in India. Articles 124 and 217 are differently worded and refer to an additional qualification of citizenship which is not a requirement of Article 233, and we do not think that Clause (2) of Article

233 can be interpreted in the light of explanations added to Articles 124 and 217. Article 233 is a self contained provision regarding the appointment of District Judges. As to a person who is already in the service of the Union or of the State, no special qualifications are laid down and under Clause (1) the Governor can appoint such a person as a district judge in consultation with the relevant High Court. As to a person not already in service, a qualification is laid down in Clause (2) and all that is required is that he should be an advocate or pleader of seven years" standing. The clause does not say how that standing must be reckoned and if an Advocate of the Punjab High Court is entitled to count the period of his practice in the Lahore High Court for determining his standing at the Bar, we see nothing in Article 233 which must lead to the exclusion of that period for determining his eligibility for appointment as district judge.

(emphasis supplied)

15. Difference in language of Article 233(2) and Article 217(2) is apparent. It will not be proper to read the negative covenant in Article 233(2) into Article 217(2) (b), when it is not specifically incorporated. The Constitution has prescribed different eligibility conditions under the two Articles and they apply accordingly. Eligibility conditions mentioned in Article 233(2) cannot be deemed to be incorporated in Article 217(2)(b) without there being any specific provision. The two Articles operate in their own field. It may be noted that Article 124, which regulates appointment of the Judges of the Supreme Court, refers to a third source/category; eminent jurists who are eligible. Eminent jurists are not a category or a source mentioned in Article 217(2). Thus, there is some difference in the eligibility norms prescribed under Articles 124, 217 and 233 of the Constitution.

16. The contention of the Petitioner that once an Advocate is appointed as a member of a tribunal or becomes a judicial officer, he cannot be appointed under Clause (2)(b) of Article 217, has to be rejected. The aforesaid contention is contrary to the ratio in Mahesh Chander Gupta (supra). It also does not appeal to logic. An Advocate with 10 years" practice, who is appointed as a member of a tribunal or a judicial officer will only have to resign and formally renew his license of practice to get over the said objection. The contention of the Petitioner that this will give unfettered power to appoint the otherwise junior judicial officers or junior members of the tribunal as High Court judges, does not appeal to us. The contention overlooks the difference between the "eligibility" and "suitability". A person with 10 years" experience as an Advocate is eligible but this does not make him suitable for appointment as a Judge of the High Court. In *Shri Kumar Padam Prasad v. Union of India and Ors.* (1992) 2 SCC 428, the Supreme Court observed that the High Court Judges can be appointed from two sources, from members of the Bar and from amongst the persons who have held judicial office of not less than 10 years. Thus, even a subordinate judicial officer manning a court inferior to the District Judge can be appointed as a Judge of the High Court, (see paragraph 22 at page 445).

17. In Mahesh Chander Gupta (supra), challenge was made to appointment of Dr. Satish Chandra as an Additional Judge of the High Court. The said Respondent had not practiced as an Advocate for 10 years. He had also not held any judicial office in a judicial service. The Supreme Court held that the said Respondent satisfied the qualifications prescribed under Article 217(2)(b) read with explanation (aa) as he had worked as a member of the Tribunal for a period of 11 years and before that he was an Advocate of the High Court. The Supreme Court also noticed and rejected the contention in the said case that the Respondent was appointed a Service Judge, in other words he was appointed under Article 217(2)(a). Rejecting the said argument it has been held as follows:

79. This argument advanced on behalf of the original Petitioner is misconceived. The very purpose for enactment of Articles 217(2)(a) and 217(2)(b) is to provide for a mix of those from the Bar and those from service who have the past experience of working as judicial officers/officers in tribunals. This was the object behind a policy decision taken in the Chief Justices' Conference of 2002. The object of adding Explanation (aa) is to complement Explanation (a) appended to Article 217(2) and, together, they have liberalised the source of recruitment for appointment to the High Court. Therefore, for eligibility purposes Clause (aa) of the Explanation read with Sub-clause (b) of Clause (2) of Article 217 would apply to Members of ITAT, in the matter of computation of the prescribed period for an advocate to be eligible for being appointed as a High Court Judge. This aspect of "eligibility" has nothing to do with "suitability".

18. Earlier also we had an instance, when a member of the Tribunal was appointed as a Judge of this High Court and then as a judge of the Supreme Court. Therefore, there are precedents. Officers of the District Judiciary have in the past gone on deputation as judicial members of the Tribunal.

19. Reliance placed by the learned Counsel for the Petitioner on S.D. Joshi (supra) is misconceived. The three issues raised and decided in the said case have been set out in paragraph 1 and read as under:

(a) What is the scope of the expression "judicial office" appearing in Article 217(2)(a) of the Constitution?

(b) Whether a "Family Court" has the trappings of a Court and the Family Court Judges, being the Presiding Officers of such Courts, on the claimed parity of jurisdiction and functions, would be deemed to be the members of the Higher Judicial Services of the State?

(c) If answer to the above question is in affirmative, then whether Family Court Judges are eligible and entitled to be considered for elevation as Judge of the High Court in terms of Article 217 of the Constitution of India?

20. The question before the Supreme Court was whether the Presiding Officers of the family courts are deemed to be members of the higher judicial services of the State and accordingly on seniority-cum-merit, whether they are entitled to be

considered for elevation to the High Court under Article 217(2)(a). It is in this context that the Supreme Court has held that the Presiding Officers of the family courts are not judicial officers as they are not members of the judicial service. They cannot be appointed on the basis of their service as the Presiding Officers of the family court as judges of the High Court under Article 217(2)(a). The Supreme Court was not examining the Article 217(2)(b) and the effect thereof. As noticed above, the two Articles operate in their own field and provide for different sources for elevation as a judge to the High Court.

21. In the present case, the Petitioner has not alleged or stated that the Respondent No. 3 has not been an Advocate for 10 years. As per Section 252(2) of the Income Tax Act, 1961, a person who is an Advocate for 10 years can be appointed as a judicial member of the tribunal. It is stated in the petition that the Respondent No. 3 was practicing as an Advocate prior to 1991, when he was appointed as a member of the Tribunal. Since then he has worked as a member of the Tribunal.

22. In view of the aforesaid findings, we are not required to examine other contentions raised by the Petitioner including challenge to the explanations (a) and (aa) to Article 217(2) inserted by 42nd Amendment Act, 1976 and 44th Amendment Act, 1978. The question of constitutional vires is left open and need not be decided in the present case as the Respondent No. 3 is otherwise eligible under Article 217(2)(b) without applying and taking benefit of Explanation (aa) thereto. Explanation (a) is not applicable.

23. Learned Counsel for the Petitioner has submitted that the collegium did not have the occasion to consider and form an opinion about the "suitability" of the Respondent No. 3. In this regard, reference has been made in the grounds and reliance is placed on paragraph 33 of Centre for PIL v. Union of India 2011 (3) SCALE 148. The said contention has to be rejected for various reasons. Firstly, the question of "suitability" is still to be examined by the collegium of the Supreme Court. Secondly, the contention raised is merely an assumption without any basis. In the petition itself it is mentioned that the Respondent No. 3 was a member of the Tribunal in Delhi from 2004 to 2008. The orders of the Tribunal are made subject matter of challenge in reference/appeal in the Delhi High Court. Judgments before 2004 and after 2008, authored by the Respondent No. 3 were/are always available for examination by the Collegium and by other Judges to form an opinion about "suitability". Lastly, it has been repeatedly held by the Supreme Court that the question of "suitability" or "merits" cannot be made subject matter of judicial review in a writ petition; at least not after the judgment of the Supreme Court in Supreme Court Advocates-on-Record Association and Ors. v. Union of India 1993 (4) SCC 441. In the said case the Supreme Court gave various directions with regard to the procedure to be adopted for appointment of Judges of the High Courts and the Supreme Court and in the light of the said directions on the question of justice ability, it has been held as follows:

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

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

24. Following the said judgment in the case of Mahesh Chander Gupta (supra) it has been observed:

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

25. In view of the aforesaid, we do not find any merit in the writ petition and the same is dismissed. There will be no order as to costs.