
(2008) 12 AP CK 0039

In the Andhra Pradesh High Court

Case No : Writ Petition No. 22559 of 2008

E. Giri Yadav. M.A.

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 12-12-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 133, 135
Constitution of India, 1950 — Article 124, 124(4), 124(5), 129, 215
Criminal Procedure Code, 1973 (CrPC) — Section 197(1)
Judges (Inquiry) Act, 1968 — Section 3
Judges (Protection) Act, 1985 — Section 3(2)
Penal Code, 1860 (IPC) — Section 77

Citation : (2009) 2 ALD 608 : (2009) 3 ALT 304

Hon'ble Judges : P.V. Sanjay Kumar, J;Goda Raghuram, J

Bench : Division Bench

Advocate : S. Ramachandra Rao and K.R. Prabhakar, for the Appellant; A. Rajashekar Reddy, Asst. Solicitor General, for the Respondent

Final Decision : Dismissed

Judgement

P.V. Sanjay Kumar, J.—Recent events involving the higher judiciary highlighted by the Press and the Media seem to have spurred the petitioner, a member of the legal fraternity, professed social worker and a self-proclaimed sentinel of judicial independence, to file the present writ petition. His prayer in the writ petition is in the following terms:

...this Hon''ble Court may be pleased to issue an appropriate writ, order or direction more particularly, one in the nature of Writ of Mandamus declaring that no authority be it constitutional or statutory has any power to order enquiry or investigation and call for a report against any Judge of any High Court or Supreme Court of India and that no investigating agency or police or other authorities shall have any power to investigate, enquire and submit any report against any sitting Judge of the High Court or the Supreme Court of India except as provided by the Constitution of India, i.e., by way of impeachment only, as it

would be violative of Articles 124(4) and 218 of the Constitution of India and also violative of the Basic Structure of the Constitution and Doctrine of Separation of Powers apart from being contrary to Section 3 of the Judges (Inquiry) Act, 1968, after declaring Section 3(2) of Judges (Protection) Act, 1985 as unconstitutional as it is violative of the Articles 124(4) and 218 of the Constitution of India and also violative of the Basic Structure of the Constitution and Doctrine of Separation of Powers apart from contrary to Section 3 of the Judges (Inquiry) Act, 1968 or pass such other order or orders as are deemed fit and proper in the circumstances of the case.

2. The permission granted by the Honourable The Chief Justice of India to the Central Bureau of Investigation to examine two Judges of the Punjab and Haryana High Court gave impetus to this writ petition. This permission is characterized by the petitioner as an administrative order open to challenge as it impinges upon the independence of the Judiciary. It is his contention that this permission upsets the balance of powers amongst the three branches of constitutional government and provokes examination of the basic structure of our constitutional dispensation, thereby enabling this Court to exercise it's power of judicial review under Article 226 of the Constitution of India.

3. Conscious of the fact that he is treading on shaky ground, the petitioner tries to explain at great length in his affidavit as to why the writ petition is maintainable before this Court.

4. The petitioner likens this administrative action on the part of the Honourable The Chief Justice of India to a "Damocles Sword" hanging over the head of every High Court Judge and alleges that under such a threat, no High Court Judge would be able to function independently, without fear and apprehension of being subjected to investigation. Such action, according to the petitioner, would be violative of Articles 124(4) and 218 of the Constitution of India and would also be contrary to Section 3 of the Judges (Inquiry) Act, 1968 (for short, "the Act of 1968").

5. The petitioner also challenges the constitutional validity of Section 3(2) of the Judges (Protection) Act, 1985 (for short, "the Act of 1985"). Section 3 of the Act of 1985 reads as follows:

3. Additional protection to Judges.:

(1) Notwithstanding anything contained in any other law for the time being in force and subject to the provisions of Sub-section (2), no Court shall entertain or continue any civil or criminal proceeding against any person who is or was a Judge for any act, thing or word committed, done or spoken by him when, or in the course of, acting or purporting to act in the discharge of his official or judicial duty or function.

(2) Nothing in Sub-section (1) shall debar or affect in any manner the power of the Central Government or the State Government or the Supreme Court of India

or any High Court or any other authority under any law for the time being in force to take such action (whether by way of civil, criminal, or departmental proceedings or otherwise) against any person who is or was a Judge.

Section 3(2) is perceived to be unconstitutional by the petitioner on the ground that it violates Articles 124(4) and 218 of the Constitution of India and Section 3 of the Act of 1968. He contends that the provisions of Section 3(2) have the effect of making the judiciary at all levels inferior and subordinate to the other wings of the Government, viz., the executive and the legislature. This, the petitioner states, would deprive the Judges of the Supreme Court and High Courts of their judicial independence and would violate the doctrine of separation of powers which has been declared to be part of the basic structure of the Constitution of India and would also mean the end of the "Rule of Law". The provisions of Section 3(2) of the Act of 1985 are also said to be in violation of the procedure prescribed u/s 3 of the Act of 1968. For these reasons, the petitioner prays that his writ petition should be allowed in terms of the prayer extracted supra.

6. Sri S. Ramachandra Rao, learned senior counsel appearing for the petitioner, contends that every individual Judge is a symbol of the institution of the Judiciary and threat or pressure against even a single Judge would constitute an invasion of judicial independence. He submits that by tradition and convention, Judges could not complain when their constitutional powers and functions were impaired and that it was for public spirited individuals, such as the petitioner, to champion their cause. He points out that the permission granted by the Honourable The Chief Justice of India pertained to examination of the conduct of the Judges of the Punjab and Haryana High Court, Such an action on the part of the Honourable The Chief Justice of India opens up the possibility of risk and threat to every High Court Judge in the country. It is therefore contended that it is open to the petitioner to challenge the said action before this Court, notwithstanding the fact that no cause of action, as such, arose within the territory of the State of Andhra Pradesh.

7. It is his case that Judges of the High Courts are appointed after thorough verification and confirmation of their antecedents, entitlement, probity and integrity and it would be debilitating to the system to permit the undermining of the authority of Judges; all the more so, as they adjudicate matters against the State and its instrumentalities day in and day out. If Government Officials were given the leeway to request the Honourable The Chief Justice of India to initiate an examination or investigation into the conduct of such Judges, it would seriously impair the functioning of the Higher Judiciary.

8. He further contends that members of the Higher Judiciary viz., the Supreme Court Judges and High Court Judges could only be removed from office by strictly following the procedure laid down under the Constitution. The Act of 1968, having been promulgated to give effect to Article 124(5) of the Constitution, according to him, delineates the procedure to be followed for removal of such

Judges. The learned senior counsel would have it that except for impeachment as provided by the Constitution, the Judges of the Supreme Court and High Courts could not be touched. He went to the extent of stating that such protection to Judges is not only concomitant with their occupying the office but would continue even thereafter for their entire lifetime. He submits that this alone would guarantee judicial independence. The learned senior counsel places strong reliance upon the minority opinion expressed by Justice J.S. Verma (as His Lordship then was) in *K. Veeraswami Vs. Union of India (UOI) and Others*, whereby the learned Judge held that Judges of the Supreme Court and High Courts could not be brought within the purview of the Prevention of Corruption Act, 1988. The learned senior counsel therefore submits that the situation mandates the intervention of this Court under Article 226 of the Constitution of India to protect judicial independence and ultimately the institution of the judiciary.

9. We are not inclined to go into the issue of maintainability of this petition or otherwise for want of territorial jurisdiction. The matter is amenable to resolution on its merits and accordingly we adjudicate on issues other than technical.

10. We would also like to make it clear that we are not dealing with the instance involving a learned Judge of the Punjab and Haryana High Court. What we state hereunder is with reference to the general and not the particular.

11. There can be dispute with the proposition that judicial independence forms the bedrock of the justice delivery system. It cannot be put better than in the words of Honourable Bernard L. Shientag in his Benjamin N Cardozo memorial lectures:

There can be no government of law without a fearless, independent judiciary. The independence of the Judge is the chief of all the cardinal judicial virtues. He must be entirely free from all external influence and subservient only to his own conscience.

12. This sentiment was echoed by the Supreme Court when it said: "Judicial independence is the very essence and basic structure of the Constitution" *State of Bihar v. Bal Mukund Sah* (2002) 4 SCC 640 and that "Judicial independence cannot be secured by making mere solemn proclamations about it. It has to be secured both in substance and in practice". *All India Judges' Association and Others Vs. Union of India and Others*, .

13. In this regard, reference may also be made to the observations of the Supreme Court in *U.P. Sales Tax Services Association Vs. Taxation Bar Association, Agra and others*, .

11. It is fundamental that if rule of law is to have any meaning and content, the authority of the court or a statutory authority and the confidence of the public in them should not be allowed to be shaken, diluted or undermined. The courts of justice and all tribunals exercising judicial functions from the highest to the

lowest are by their constitution entrusted with functions directly connected with the administration of justice. It is that expectation and confidence of all those, who have or are likely to have business in that court or tribunal, which should be maintained so that the court/tribunal perform all their functions on a higher level of rectitude without fear or favour, affection or ill-will. Casting defamatory aspersions upon the character, ability or integrity of the judge/judicial officer/authority undermines the dignity of the court/authority and tends to create distrust in the popular mind and impedes the confidence of the people in the courts/tribunals which is of prime importance to the litigants in the protection of their rights and liberties. The protection to the judges/judicial officer/authority is not personal but accorded to protect the institution of the judiciary from undermining the public confidence in the efficacy of judicial process. The protection, therefore, is for fearless curial process....

14. The protection endowed to Judges is not merely to safeguard them or the office they hold, it is essential to the working of the polity and the democratic system as we know it.

15. At the same time, it must be remembered that Judges are armed with enormous power and with power automatically come the ills which unfortunately seem to be its cohorts. Perhaps that is the reason why Judges are expected to be persons of high standard of conduct, ethics and probity to withstand the vagaries and temptations of wielding such power.

16. Accountability is a norm inbuilt in all walks of public life and the judicial stream is no exception to this essential attribute of democracy. The very functioning of the judiciary is such that accountability looms large in its process. Each reasoned decision rendered by a Judge, basing on a hearing in open court is subject to correction by a higher Court.

17. The issue is as to how judicial accountability must be balanced with judicial independence. These two values, according to Justice S. Rajendra Babu (as His Lordship then was) in his Paper on Judicial Accountability and Judicial Independence, should be perceived as complementary rather than antithetical. The learned Judge also pointed out that independence of judiciary precludes neither disciplinary surveillance nor civil or criminal liability for abuse of power, as no immunity of function can be absolute.

18. Therefore, on the one hand, we have the sacred mantra of judicial independence which cannot be put at risk and on the other, the necessity for judicial accountability to curb excesses of the powers that come with the office.

19. It must be remembered that Judges are ultimately mere mortals as prone to human fallibilities as the next man. The words of Thomas Reed Powell are apposite of quotation:

Judges have preferences for social policies as you and I. They form their judgments after the varying fashions in which you and I form ours. They have

hands, organs, dimensions, senses, affections, passions. They are warmed by the same winter and summer and by the same ideas as a layman is.

20. It is universally accepted and we are conscious of the fact that judges are also human beings. They have their own likes, dislikes, their preferences and prejudices. These were the words of the Supreme Court in *Samya Sett Vs. Shambu Sarkar and Another*, .

21. The inherent risks, woven into the cloth of the justice delivery system, therefore posit a requirement for great probity on the part of the individual Judge in his/her functioning. The steady decline of the very essentials of judicial attributes in incumbents of curial office is leading to a situation where the justice delivery system is being subjected to an unbecoming and searching public scrutiny. The threat to judicial independence is therefore not only from without but also from within. In such a situation, it would not be in the interest of the justice delivery system either to deify the holders of judicial office or to sanctify them to unholy heights.

22. In recognition of the need to bridle unbounded judicial independence, Justice Desai in *S.P. Gupta Vs. President of India and Others*, observed:

...Independence of judiciary under the Constitution has to be interpreted within the framework and the parameters of the Constitution, There are various provisions in the Constitution which indicate that the Constitution has not provided something like a "hands off attitude" to the judiciary. One can profitably refer to a number of articles in the Constitution conferring power on other constitutional institutions such as the executive which when it acts within the limits of power, will have a direct impact on the functioning of the judiciary....

...It would thus unquestionably appear that the independence of judiciary is not to be determined in all its ramifications as some a priori concept but it has to be determined within the framework of the Constitution. True, that the thrust is to ensure that adjudications are untrammelled by external pressures or controls and it was conceded that independence of judiciary under the Constitution is confined to the adjudicatory functions of the Courts and the tribunals and they are insulated from executive control in that behalf. It is not unlikely that the total insulation may breed ivory tower attitude, a bishop delivering sermon from the pulpit and therefore no claim to be imperium in imperio can be extended to the judiciary or for that matter to any other instrumentality under the Constitution. It is not as if judicial independence is an absolute thing like a brooding omnipresence...Nor should judges be independent of the broad accountability to the Nation and its indigent and injustice ridden millions. Therefore, consequently one need not too much idolize this independence of judiciary so as to become counterproductive... in putting the indeoendence of judiciary on a pedestal one cannot lose sight of the fact that the judiciary must keep pace with the changing mores of the day, its decision must be informed by values enshrined in the Constitution, the goals set-forth in the fundamental law of the land, peoples"

yearning desire for a chance for the better and the promised millennium. An activist role in furtherance of the same is a sine qua non for the judiciary.

23. The learned senior counsel placed reliance upon the minority view in K. Veera Swami's case (supra) to support his contentions. It is however to be noted that in their majority opinion in the said case, Justices Shetty and Venkatachallaiah observed that the Judge whose character is clouded and whose standards of morality and rectitude are in doubt may not have judicial independence and may not commend the confidence of the public.

24. The learned Judges also observed that various protections are afforded to Judges to preserve independence of the Judiciary under the Judicial Officers Protection Act, 1850. They are exempted of civil liability for any act done or ordered to be done by them in discharge of their judicial duty irrespective of whether they perform such duty within the limits of their jurisdiction. The learned Judges pointed out that under Article 361 of the Constitution the immunity provided to the President and Governors of the States was also limited to their term in office. The learned Judges held that Judges are liable to be dealt with just the same way as any other person in respect of a criminal offence.

25. In this regard, it would be pertinent to recall that Professor Jackson said: "Misbehaviour by a Judge, whether it takes place on the bench or off the bench, undermines public confidence in the administration of justice, and also damages public respect for the law of the land; if nothing is seen to be done about it, the damage goes unrepaired. This must be so when the Judge commits a serious criminal offence and remains in office". (Jackson's Machinery of Justice by J.R. Spencer, 8th Edition).

26. Judicial independence must therefore find its moorings within the framework of the Constitution. It is no doubt true that Article 124(4) read with Article 218 of the Constitution provides security of tenure to the Judges of the High Courts and prescribes an onerous procedure for removing such an officer, be it on the ground of proved misbehaviour or incapacity. The same, however, does not mean that Judges are to be put beyond the pale of law in all other respects. It is relevant to remember that Article 361 of the Constitution of India affords protection only to the President, Governors and Rajpramukhs. Even such protection from civil and criminal liability is only concomitant with the term of office held by the President, Governors or Rajpramukhs, as the case may be. Pertinent to note, no such protection has been extended to Judges by Article 361 of the Constitution.

27. Limited protection from civil and criminal proceedings is afforded to Judges by the statutes and not under the Constitution. Section 133 of the Code of Civil Procedure, 1908, exempts Judges of the Supreme Court and High Courts from personal appearance in Court. Similarly, Section 135 of the Code of Civil Procedure, 1908, exempts judicial officers from liability to arrest under civil process while going to, proceeding in or returning from his Court.

28. As regards criminal proceedings, Section 77 of the Indian Penal Code, 1860 provides that nothing done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law, shall be an offence. Therefore, the Constitution and the statutes demonstrate that Judges are not free from the legal process in all their activities. The Supreme Court, conscious of this fact, prescribed certain guidelines for the protection of judges. In *U.P. Judicial Officers Association v. Union of India*, (1994) 4 SCC 687, it was held that no crime or criminal case shall be registered against a judicial officer in respect of anything allegedly done or purported to be done in discharge of his duty or in his capacity as holder of such judicial office without the prior permission of Chief Justice of the High Court concerned. This was the interim order passed by the Supreme Court basing upon its observations in *K. Veeraswamy v. Union of India* (supra). Guidelines were issued by the Supreme Court in *Goodwill Paint and Chemical Industry Vs. Union of India* and another, with regard to the treatment of a judicial officer charged with and arrested in relation to a criminal offence.

29. The learned senior counsel placed reliance upon the Full Bench Judgment of this Court in *Advocate General, Andhra Pradesh, Hyderabad Vs. Rachapudi Subba Rao*, . In the said case, the learned Judges were seized of the question as to whether Section 197(1) Cr.P.C. which deals with sanction by the appropriate Government before institution of criminal proceedings against a public servant, would be applicable to a Judge of the High Court in respect of the functions discharged by him in his judicial capacity. In the course of the Judgment, the Full Bench had occasion to refer to Section 3 of the Act of 1985 and observed that Section 3(2) of the Act of 1985 did not have the effect of bringing Judges of the Supreme Court and of the High Courts within the disciplinary domain envisaged therein for the self-evident reason that what has been ordained by the Constitution under Article 124 of the Constitution cannot be modified or departed from by an ordinary law.

30. We are in respectful agreement with the opinion expressed by the learned Full Bench. There can be no dispute with the proposition that Judges of the Supreme Court and the High Courts are not employees of either the Union or the State Government. They are constitutional functionaries coordinate with the executive and the legislature.

31. It is relevant to note that the Full Bench dealt with the issue as to whether the omission of Judges in Article 361, which provides immunity to the President and Governors, by inference implies that such immunity is not afforded to Judges. However, this aspect was only examined by the Full Bench in respect of actions of Judges in the discharge of their judicial functions. The Full Bench did not deal with immunity being available to Judges, be it of the Supreme Court or High Courts, in respect of an action other than in the course of their judicial function which may constitute an offence under penal statutes.

32. The Full Bench held that upon conjoint reading of Articles 124(4) and (5),

129 and 215 of the Constitution, no judge of a superior Court in this country is liable to be proceeded against in respect of acts performed qua Judge, except with regard to proved misbehaviour or incapacity.

33. In the present case, we are not concerned with the immunity available to Judges in respect of their actions in discharge of their judicial functions. Venality is antithetical to the very notion of judicial functioning. Any allegation of venality or lack of integrity would therefore fall outside the parameters of immunity afforded to Judges under the Constitution and the statutes. The subject matter before us is not the allegation made against a learned Judge of the Punjab and Haryana High Court. We are concerned here with anything in general which would belittle the institution of the judiciary. In such a situation, a Judge cannot seek shelter behind the institutional robe. Indifference to the growth of the malignancy within is what has perhaps led the institution to face the present day crisis.

34. Though not argued by the learned senior counsel, the petitioner specifically contends that Section 3 of the Act of 1985 is unconstitutional, being opposed to the "Basic Structure of the Constitution". Legislation such as the Act of 1985 or the provisions thereof cannot be subjected to challenge on such grounds. A legislation can be declared to be invalid or unconstitutional only on two grounds - (i) lack of legislative competence and/or (ii) violation of a Fundamental Right or any provision of the Constitution. In this regard, it is pertinent to note that in *The State of Assam Vs. Bhubhan Chandra Dutta and Another*, , Chief Justice A.N. Ray pointed out that making legislative measures subject to restrictions on the theory of basic structure would be to equate legislative measures with Constitutional amendments. In the same Judgment, Justice K.K. Mathew observed that Articles 245 and 246 of the Constitution give the power and also provide the limitation upon the power of the legislative organs to pass laws and it would be only the specific provisions enacted in the Constitution which could operate as limitation upon that power. The same view was reiterated by a Bench of 7 Judges of the Supreme Court in *State of Karnataka Vs. Union of India (UOI) and Another*, . Similar are the views expressed by the Supreme Court in *Kuldip Nayar Vs. Union of India (UOI) and Others*, and *Uttar Pradesh Gram Panchayat Adhikari Sangh and Others Vs. Daya Ram Saroj and Others*, . This aspect needs no further belabouring on our part.

35. Section 3(2) of the Act of 1985 is not shown to be beyond the legislative competence of the Parliament. It is not found to be contrary to Section 3 of the Act of 1968, inasmuch as the two enactments operate in different spheres altogether. The petitioner failed to make out the violation of any fundamental right or other provision of the Constitution of India in the context of the impugned statutory provision. We therefore hold that Section 3(2) of the Act of 1985 is constitutionally valid.

36. The act of balancing judicial independence and judicial accountability may some times be difficult but necessarily has to be tackled. It has to be recognized

that judicial independence is not an unfettered domain letting Judges wander free, uncaring and unaccountable for their actions, in all walks of life.

37. Speaking of the rot which has set into the system. Justice V.R. Krishna Iyer said:

...the judiciary is still far higher than the other bureaucracy and the political coterie. But the gut issue of judicial corruption, in its broadest connotation, must be faced and not swept under the carpet. That politicians and civilians have lost their virtue is no excuse. Ministerial villainy does not condone judicial felony....The one service which had resisted the virus and kept its soul intact had been the judiciary. But between then and now, there yawns an ethical chasm. While the Judges still, as a class, perform far better than the other public services and the political cadres, delinquency has been steadily invading the inner fabric of the robed brethren....The basic factor is the judicial factor - reality, not myth. If the judicial process fails the people's sense of justice, violence fills the vacuum; and the streets, not the Courts, settle disputes.... The present generation of Judges should not preside over the liquidation of a great heritage. We still have great hopes; we still have great confidence in the Courts. But the countdown has begun and a national discussion amongst statesmen in politics and law, and scholars in social science, is long overdue. To save the Judges from themselves is now a critical need." ("Our Courts on Trial" by Justice V.R. Krishna Iyer).

38. Current events cast an unsavoury light upon the institution of the Judiciary and require soul searching from within to mitigate the loss of faith. What is perceived by the petitioner as being a retrograde step for judicial independence is being lauded by others. The Chief Justice of India has been conferred an award by the V.K. Krishna Menon Foundation, London, for what is being recognized as his fight against corruption in the judicial system. The step taken by the Chief Justice of India opening up the process of such cleansing therefore cannot be termed an insidious attack on the independence of Judges.

39. The herculean task of cleaning out the Augean stables of the justice delivery system cannot be put off any longer. The action of the Honourable The Chief Justice of India heralds the awakening on the part of the Institution to this clarion call.

40. We are of the considered opinion that the petitioner's apprehensions are utterly unfounded. We do not foresee any threat to judicial independence from what we perceive to be a step in the right direction.

41. The writ petition is devoid of merit and is accordingly dismissed. There shall be no order as to costs.