
(1988) 09 BOM CK 0024

In the Bombay High Court

Case No : Writ petition No. 1789 of 1988 (Bom. Original Side)

Harishchandra Mahadev Parab

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 20-09-1988

Acts Referred:

Constitution of India, 1950 — Article 50

Citation : (1988) 90 BOMLR 549 : (1989) MhLj 364

Hon'ble Judges : Ashok Agarwal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Ashok Agarwal, J.—The short question that arises for determination in this petition is whether the petitioner, who is a Member of the Maharashtra State Co-operative Appellate Court, can be transferred by the State Government from Bombay to Nagpur as has been done in the present case.

2. By an order dated July 1, 1977 the petitioner was appointed as a Judge of the Co-operative Court. On May 12, 1987 he was promoted and appointed as Member of the Maharashtra State Co-operative Appellate Court at Bombay. On April 7, 1988 four other persons were similarly appointed as Members of the Co-operative Appellate Court and by order dated April 15, 1988 of the President, the respondent No. 2, they were posted at "Benches in Bombay, Nagpur, Pune and Aurangabad. By the impugned order dated June 7, 1988 the petitioner was transferred from Bombay to Nagpur and this transfer order is challenged in this petition.

3. On June 20, 1988 this petition was summarily rejected by my learned brother Justice Kurdukar. The petitioner preferred Appeal No. 800 of 1988 wherein by order dated June 28, 1988 the learned Chief Justice and Justice Bharucha allowed the appeal, issued Rule and directed stay of the order of transfer, after recording an undertaking of the petitioner to temporarily preside over in a Bench

of the Maharashtra State Co-operative Appellate Court either at Nagpur, Pune, or Aurangabad as may be directed by the respondent No. 2, the President of the Maharashtra State Co-operative Appellate Court. On July 11, 1988 the respondent No. 2 issued a circular directing the petitioner to preside over the Bench of the Appellate Court at Nagpur until further orders. The petitioner complied with the said directions as per his undertaking but took out Notice of Motion No. 2034 of 1988 in Appeal No. 800 of 1988 for discharging him from the undertaking, or fixing the period of temporarily posting at Nagpur. On August 8, 1988 the said Notice of Motion was directed to be heard along with the present petition. On August 18, 1988 the petitioner took out Chamber Summons No. 766 of 1988 in the present petition for amendment of his petition so as to introduce a challenge to the power of the respondent No. 2 to transfer a Member of the Co-operative Appellate Court. By an order dated September 6, 1988 my learned brother Justice Daud directed this Chamber Summons to be heard along with the main petition.

4. Mr. Damania, the learned Counsel appearing in support of the petition stated that he does not wish to press the Chamber Summons for amendment. He was accordingly permitted to withdraw the same.

5. Mr. Damania submitted that the proposal to appoint the petitioner as Member of the Maharashtra Co-operative Appellate Court was made by the President of the said Court. By letter dated January 6, 1987, it was proposed that the petitioner who was then a Judge of the Co-operative Court No. 3 at Bombay be appointed as Member of the Maharashtra Co-operative Appellate Court at Bombay. The order of appointment dated May 12, 1987 appointed the petitioner as Member of the Maharashtra State Co-operative Appellate Court at Bombay. After four other persons were appointed as Members of the Appellate Court vide order dated April 7, 1988, the respondent No. 2 by his Order dated April 15, 1988 issued orders regarding the posting of the said four Members to the different Benches at Bombay, Pune, Nagpur and Aurangabad. According to Mr. Damania, once the petitioner had been posted as Member of the Co-operative Appellate Court at Bombay which was the Head-quarter of the said Courts, the petitioner was not liable to be transferred to any of the Benches at Pune, Nagpur or Aurangabad. In any event, the State Government did not have the authority to pass the order of transfer. Placing reliance on the directive principle of the State policy to separate judiciary from the executive in the public service of the State as enshrined in Article 50 of the Constitution of India, he submitted that once the State Government had appointed the petitioner as Member of the Co-operative Appellate Court its function ceased. The State Government was thereafter not authorised to pass any order of transfer in the face of the order of appointment which specifically appointed the petitioner at the Bench at Bombay. If at all the petitioner could be asked to preside over any of the Benches of the Appellate Court outside Bombay that could be only for a temporary period and that too only at the instance of the respondent No. 2, the President. The impugned order of transfer not having been authorised by law is liable to be

struck down.

6. Mr. Chogle, the learned Government counsel appearing on behalf of the respondents submitted that the transfer was a management function and the power of appointment to a particular post, necessarily carried with it the power to transfer. The petitioner was in Government service as a Judge of the Co-operative Court on the date of his appointment as Member of the Cooperative Appellate Court. Hence under the Rule 104(5) all the conditions of service which were applicable to him would continue to apply. The petitioner would be governed by the Maharashtra Civil Services Rules and the service of the petitioner would be liable to transfer and no exception can be made to such order. The petition was therefore devoid of merit and deserved to be dismissed.

7. Section 149 of the Maharashtra Co-operative Societies Act, 1960 provides for the constitution of the State Co-operative Appellate Court. The power to appoint the President and the Member of the State Appellate Court is vested in the Government. The Co-operative Appellate Court, in exercise of its powers conferred by Sub-section 7 of Section 149, has, in consultation with the State Government, framed Maharashtra State Co-operative Tribunal Regulations 1962 for regulating its procedure and for disposal of its business. Under Regulation 2(e) the "Bench" means a Bench of the Tribunal constituted by the President under Sub-section (4) of Section 149. Regulation 3 provides that the headquarters of the Tribunal shall be at Bombay or such other place as may be notified by the State Government in the Official Gazette. Regulation 3(2) provides that all appeals and applications shall ordinarily be heard at the headquarters; however, the Tribunal may, having regard to the number of appeals or applications received from any particular area or for any other reason, hear them at any other convenient place in the State of Maharashtra. Regulation 3(3) provides that sufficient notice of the sitting of the Tribunal or the Bench outside Greater Bombay shall be given.

8. It is apparent from the Government Resolution dated November 15, 1983 and June 6, 1986, Annexure "A" to the affidavit of Smt. Sumitra Ramakrishna Kulkarni dated June 16, 1988 that independent Benches have been constituted at Pune, Nagpur and Aurangabad and independent staff has been appointed to man the said Benches.

9. The Government of Maharashtra, in exercise of its powers conferred by Sub-sections (7) and (2) of Section 165, has framed the Maharashtra Co-operative Societies. Rules 1961. Rule 104 deals with the qualifications of President and other members of the Maharashtra State Co-operative Appellate Court and their appointment. Sub Rule 5 of Rule 104 provides that if the President or any other Member of the Appellate Court is in Government service at the time of his appointment, his pay, allowance and other conditions of service shall continue to be governed by the services conditions rules applicable to him before such appointment, and if he is a direct recruit, his pay, allowances and other conditions of service shall be governed by the Bombay Civil Services Rules and

other rules made by the Government, from time to time. The aforesaid provision makes it clear that the President as also the Members of the Appellate Court are all governed by the Bombay Civil Services Rules. If the President or other Members were in Government service at the time of their appointment they would be governed by the Bombay Civil Services Rules by virtue of the provision of Sub-rule (5) where under the conditions of service applicable prior to their appointment as such would continue to apply. In respect of direct recruits the Bombay Civil Services Rules have been made applicable specifically by the said sub-rule. Once it is held that the President and the Members of the Maharashtra Co-operative Appellate Court are governed by the Maharashtra Civil Services Rules, it will have to be held that their services are transferable at the instance of the State Government. The Benches of the Maharashtra Co-operative Appellate Court have been duly constituted also at Nagpur, Pune and Aurangabad. In my view the President and Members are Government servants and the provisions of Maharashtra Civil Services Rules, apply to them. Hence no fault could be found with the impugned order of transfer transferring the petitioner from Bombay to Nagpur. Even though the initial appointment of the petitioner may have been at Bombay the same cannot retract from the authority of the State to transfer him at another station for presiding over a Bench or Benches for hearing of appeals or applications as the exigencies of work may require. It is undoubtedly true that the directive principles of the Constitution do provide that the State should strive to separate the judiciary from the executive. It is earnestly hoped that the same is done expeditiously by carrying out suitable amendment in the Act. However till that time the law as it stands will have to be construed and given its due effect.

10. In this view of the matter, it will have to be held that there is no merit in the present petition and the same deserves to be dismissed.

11. In view of my aforesaid finding that the services of the petitioner are transferable at the instance of the Government and in view of the final disposal of this petition no other orders are required to be passed on the Notice of Motion No. 2034 of 1988 except to the order of dismissal which I hereby pass with no order as to costs.

12. Rule issued in the petition is discharged. There shall be no order as to costs.

13. At the request of Mr. Damania, the order of stay of the impugned order of transfer to continue for a period of four weeks on Mr. Damania, on behalf of the petitioner, giving an undertaking to continue to preside at Nagpur as per the 2nd Respondent's order dated July 11, 1988.