

(2001) 08 MAD CK 0008

In the Madras High Court

Case No : Writ Petition S.R. No. 75701 of 2001 and W.M.P. S.R. No"s. 75703, 75716 and 75717 of 2001

K. Ventatasubbaraju

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 28-08-2001

Acts Referred:

Constitution of India, 1950 — Article 216, 217, 217(1)(c), 222, 223

Citation : (2001) 08 MAD CK 0008

Hon'ble Judges : P. Shanmugam, J

Bench : Single Bench

Advocate : M. Muthuswamy in WP. No. 75701 of 2001, Mr. S. Doraisamy in WP. No. 75714 of 2001, for the Appellant; V.T. Gopalan, Solicitor General (for KM) aggisted by Mr. V. Vathialiugam, S.C.G.S.C., Mr. N.R. Chandran, Advocate General (R-2 and R-3), for the Respondent

Judgement

P. Shanmugam, J.—These two unnumbered W.P. SR. Nos. 75701 and 75714 of 2001 have been filed for the following reliefs respectively:

(i) For the issue of a Writ of Quo Warrants or any other appropriate order, Writ direction in the nature of a writ directing the second respondent

under what authority he is holding the office of the Chief Justice of the Madras High Court and consequently directing the second respondent to

demit the Office of the Chief Justice of Madras High Court forthwith and pass such further or other orders as this Honourable Court may deem to

pass and thus render justice.

(ii) For the issue of a writ of mandamus or order or direction in the nature of writ directing the first respondent to not to permit the second

respondent to function as the Chief Justice of Madras High Court at Chennai in view of the order of transfer issued by the President of India

transferring him from Madras High Court to Karnataka High Court and pass such further or other orders and thus render justice.

Both these writ petitions were posted for maintainability. I have heard the counsel for the petitioners and on notice, learned Additional Solicitor

General of India and the learned Advocate General of Tamil Nadu, made their submissions.

2. As per the Notification to be published in the Gazelle of India, Part-I, Section-2, Government of India, Ministry of Law, Justice and Company

Affairs (Department of Justice), dated 20th August 2001, in exercise of the powers conferred by clause (1) of Article 222 of the Constitution of

India, the President, after consultation with the Chief Justice of India, was pleased to transfer Shri Justice Nagendra Kumar Jain, Chief Justice of

the Madras High Court, as Chief Justice of the Karnataka High Court and to direct him to assume charge of the office of the Chief Justice of the

Karnataka high Court on or before 4th September, 2001.

3. The case of the petitioners is that by virtue of this notification, the Chief Justice cannot continue to hold the office judicially or administratively on

or after 20.8.2001, or at any rate, after receipt of the copy of the notification on 21-8-2001. This, according to them, will erode the confidence in

the judiciary and his continuance in office is contrary to the principle laid down by judicial decisions and precedents. It is submitted that once the

order of transfer is passed, the Chief Justice ceases to hold the office of the Chief Justice of Madras High Court and is not empowered to

discharge the functions of the Chief Justice.

4. Learned Additional Solicitor General, after a brief submission, filed written submissions on behalf of the Union of India, wherein it is stated that

when a Chief Justice, is transferred on or before a particular date, only an outer time limit is fixed. Nothing prevents a Judge who is transferred

from assuming office in the court to which he is transferred immediately without waiting for the maximum time granted to him to expire. A

transferred Judge is not to be concerned with the consequential order of appointment of another Chief Justice, either permanent or acting, in his

place. That is a matter for the President to act under Article 223 of the Constitution. On coming to know of the date on which a Judge or a Chief

Justice who is transferred, will assume office in the court to which he is

transferred, immediate action will be taken under Article 223 and an appointment can be made even during the course of the same day within a few hours. In his written submissions, it is further stated as follows:

A Judge or a Chief Justice who is transferred, during the time given to him to join the court to which he is transferred, may dispose of part-heard

matters or deliver judgments reserved earlier. Whether he could take up new cases is left to the discretion of the Judge concerned, about which,

the Executive Government may not like to have any say. It is for the Judges themselves to evolve constitutional conventions, principles and

proprieties to govern such a situation.

5. Learned Advocate General appearing on behalf of the State of Tamil Nadu submitted that both these writ petitions are not maintainable

inasmuch as the Chief Justice, by the notification of transfer, has been directed to assume charge on or before the 4th of September, 2001 and till

that time, he continues to be the Chief Justice of this Court. He does not cease to be the Chief Justice of this Court the moment he received the

notification. The High Court cannot be without a Chief Justice or Acting Chief Justice and there cannot be a vacuum. As a Chief Justice, he is

entitled to function both judicially and administratively until he hands over the charge to an incumbent or he joins another High Court.

6. I have heard the counsel, the Additional Solicitor General and the Advocate General and considered the matter carefully.

7. Article 216 of the Constitution of India provides for the constitution of a High Court. According to this provision, every High Court shall consist

of a Chief Justice and such other Judges as the President may, from time to time, deem it necessary to appoint. Article 217 dealing with the

appointment and conditions of office of the Judge of a High Court or the Chief Justice says that he shall hold office until he attains the age of 62

years subject to three contingencies.

1. resignation,

2. removal;

3. by being appointed as the Judge of the Supreme Court or by being transferred to any other High Court. The relevant clause is extracted for

better appreciation, proviso (c) to clause (1) of Article 217 is as follows:

(c) the office of a Judge shall be vacated by his being appointed by the President to be a judge of the Supreme Court or by his being transferred

by the President to any other High Court within the territory of India

(emphasis added.)

8. Article 222 deals with the transfer of a Judge from one High Court to another. Article 223 provides for appointment of Acting Chief Justice. The

said Article is reproduced below:

223. When the office of a Chief Justice of a High Court is vacant or when any such Chief Justice is, by reason of absence or otherwise, unable to

perform the duties of his office, the duties of his office shall be performed by such one of the other Judges of the Court as the President may

appoint for that purpose

(emphasis added).

Yet another clause which is relevant for the purpose of this case is clause (11) to Schedule II of the Constitution of India dealing with the service

and salary of the judges of the High Courts says that the expression "'actual service'" includes:-

(1).....

(2)

(3) Joining time on transfer from a High Court to the Supreme Court or from one High Court to another.

Now, the crucial point that arises for consideration is as to when a judge vacates his office on his being transferred, whether it is on the immediate

receipt of the transfer notification or on his own volition while handing over the charge and joining in the other transferee High Court.

9. In so far as the other two contingencies contemplated under Article 217 are concerned, it is clear that a Judge cannot hold office the moment he

resigns or is removed from the office. In case of transfer, he shall vacate the office on his being transferred. The expression "'being transferred"

indicates a present continuous action of transfer taking place. The Judge vacates his office while the process of transfer is on or he is subjected to a

transfer process. An Acting Chief Justice is appointed when the office of the Chief Justice of a High Court is vacant. By a combined reading of

Articles 216, 217 and 223, the provisions do not support the conclusion that the

office of a Chief Justice stands vacated the moment the Chief

Justice receives the order of transfer for the following reasons:

(1) There shall be a Chief Justice for every High Court:

(2) The Office of a Chief Justice is vacated not on transfer but by being transferred, indicating a reasonable time for its operation:

(3) When the office of the Chief Justice of a High Court is vacant, the duties of the office shall be performed by such one of the other Judges of the

Court as the President may appoint for that purpose:

10. In this context, the Constitution Bench of the Supreme Court in *Supreme Court Advocates-On-Record Association v. Union Of India* [1999

(4) S.C.C. 441], dealing with the transfers, has held that a High Court cannot function without a Chief Justice. Their lordships observed as follows:

Care must be taken to ensure that no Chief Justice is transferred without simultaneous appointment of his successors-in-office. and ordinarily,

acting arrangement should not exceed one month, the maximum period needed usually for the movement of the Chief Justices to their new

positions. This is essential for proper functioning of the High Courts for a significant period which adversely affects the functioning of judiciary in

that State

(emphasis added).

In *M.K. Sasidharan v. Honourable Chief Justice Of India* [1996 (2) K.L.T. 843], a Division Bench of the Kerala High Court has taken the view

that the transfer order does not abruptly terminate the appointment as a Judge of the transferor High Court. He continues to be a Judge of the

transferor High Court till he enters upon his office in the transferee High Court. The fact that the transferred Judge was given sufficient time to

assume office in the transferee High Court is indicative of the fact that the transfer order does not abruptly terminate the appointment as a Judge of

the transferor High Court. Any argument of cessation will lead to a situation that the Judge is no longer a Judge of the transferor High Court and

also of the transferee High Court. Their Lordships have also observed as follows:

However, we hasten to add that we understand the consistent practice and convention among the various High Courts is that when a Judge is

transferred from one High Court to another High Court, he vacates the office and

makes preparation to assume office in the transferee High Court.

Considering the dignity and decorum of this high constitutional office, it is just and fair that a Judge, on his being transferred, shall vacate his office

at the earliest. If he continues to discharge the function as a Judge in the transferee High Court, that may not be consistent with the constitutional

spirit enshrined in Article 217 (1) (c) of the Constitution.

11. A reference was made to a judgment of a learned judge of the Rajasthan High Court (Justice N.K. Jain, as he then was) in *Ritu Parekh v.*

Union Of India & others [R.L.R. 1996 (1) 225J] wherein it was held that a Judge, after appointment and joining the post as Chairman, Central

Administrative Tribunal, should be deemed to have vacated/demitted the office of a Judge and thereafter, he cannot come back and join as Chief

Justice. That was a case where a Chief Justice resigned his office and joined as the Chairman of the Central Administrative Tribunal and on that

basis, his pension papers and other accounts related thereto were taken, meaning thereby that he had no intention to come back as he had

demitted the office. His resignation becomes effective on the date from which he chose to quit office and therefore, it was held that he cannot be

allowed to resume charge as Chief Justice of Rajasthan. This judgment has no application to the facts of the present case Before the Constitution

Bench of the Supreme Court in *S.P. Gupta & others v. The President of India & others* (A.I.R. 1982 S.C. 149), this question did not arise. The

observations of the Honourable Judges in the said judgment were made in the circumstances on the consideration of the question whether transfer

amounted to a fresh appointment. It was held that the transfer order under Article 222 of the Constitution of India does not amount to a fresh

appointment in the transferee High Court. As rightly, pointed by Dr. Rajendra Prasad in the Constituent Assembly many things which cannot be

written by the Constitution are done by conventions and hoped that the people in office will show those capabilities and develop those functions.

12. It is not in dispute that there were instances of simultaneous notifications of transfer of Chief Justices and appointment of Acting Chief Justices.

There were also instances where the office of the Chief Justice became vacant and the Acting Chief Justices were appointed thereafter. Therefore,

these precedents in both ways do not help the situation. It cannot be stated that

unless the office becomes vacant, the Acting Chief Justice can be appointed and that no simultaneous appointments can be made. Similarly, even if simultaneous appointments are made, the Acting Chief Justices do not immediately enter office unless the Chief Justices hand them over the charge of office. By going through these precedents of appointments, it is clear that in none of these cases it can be stated that the Chief Justice ceased to be a Judge of this Court and that the Acting Chief Justice assumed office immediately after the transfer of the Chief Justice or the appointment of the Acting Chief Justice. From the provisions it is clear that the Chief Justice continues to hold the office of a Judge until he vacates his office either by handing over charge to the Acting Chief Justice or joins the transferee High Court.

13. I fully concur with the view taken by the Kerala High Court that considering the dignity and decorum of the high constitutional office, it is just and fair that a Chief Justice, on his being transferred, shall vacate his office at the earliest, and that he shall refrain from dealing with substantial or sensitive matters while he is ""being transferred"" in tune with the scheme and the spirit of the relevant provisions of the Constitution and in order to maintain the dignity of the office.

14. For all these reasons. I hold that there is no infringement of law when a Chief Justice continues in office and therefore, no writ for a Mandamus is maintainable. Similarly, the Chief Justice does not cease to be a Chief Justice on his ""being transferred"". Hence, both these writ petitions/SRs are not maintainable and are accordingly rejected. Consequently, W.M.P. SR. Nos. 75703, 75716 and 75717 of 2001 are also rejected.