

(2003) 09 AHC CK 0251
In the Allahabad High Court
Case No : Writ Petition No. 4906 of 2003

Manendra Nath Rai and Another

APPELLANT

Vs

Virendra Bhatia and Others

RESPONDENT

Date of Decision : 24-09-2003

Acts Referred:

Constitution of India, 1950 — Article 165, 165(1), 217, 217(1)

Citation : AIR 2004 All 133

Hon'ble Judges : Pradeep Kant, J; M.A. Khan, J

Bench : Division Bench

Advocate : Party in Person, for the Appellant; C.S.C., for the Respondent

Final Decision : Dismissed

Judgement

1. This writ petition has been filed in the nature of Public Interest Litigation by two practising Advocates of this Court challenging the appointment of Sri Virendra Bhatia as Advocate General of the State. The petition has been argued by Sri Manendra Nath Rai, petitioner No. 1 in presence of Sri Sushil Kumar Singh, petitioner No. 2, who has stated that he adopt the arguments advanced by Sri Manendra Nath Rai.

2. On the formation of the present Government, Sri Virendra Bhatia has been appointed as Advocate General of the State on 16-9-2003.

3. While making a challenge to the aforesaid appointment of Sri Virendra Bhatia, the petitioner, Manendra Nath Rai has drawn attention of the Court to Article 217 of the Constitution of India. His submission is that even in the case of appointment to the office of the Advocate General the Governor has to consult or should consult the Chief Justice of the State. For elaborating the aforesaid argument, he has placed reliance upon Article 217(1) of the Constitution of India, which provides consultation with the Chief Justice of the State in the matter of appointment of a Judge of the High Court.

4. The other point is regarding the qualifications of a person for being appointed

as Judge of the High Court as given in Clause (2) of Article 217 of the Constitution.

5. Sri Rai though admitted that Sri Virendra Bhatia has been an Advocate for more than ten years period as is required in Sub-clause (b) of Article 217(2) of the Constitution but asserts that possession of this qualification only makes him eligible for being appointed as Advocate General but it does not necessarily mean that he is also suitable for being appointed as such. According to him, mere possession of the eligibility qualification would not be sufficient for the appointment of the Advocate General, but his suitability has also to be adjudged. His further argument is that for testing the aforesaid criteria, the Governor ought to have consulted the Chief Justice of the State before making the appointment, but no such consultation has been done and, therefore, the appointment cannot be said to have been made in accordance with the provisions of the Constitution,

6. The next argument, which has been advanced by the petitioner is that by making such an appointment the fundamental right as guaranteed under Articles 14 and 16 of the Constitution are violated. In Para 15 of the writ petition, it has been asserted and arguments have also been advanced that Sri Virendra Bhatia is a committed member of Samajwadi Party and has contested the election on its ticket at Lucknow though unsuccessfully and that he is President of National Forum of Lawyers of Samajwadi Party and that Sri Virendra Bhatia has also been associated with political parties since beginning, therefore, also he could not have been appointed as Advocate General.

7. In response Sri S. A. H. Rizvi, learned Chief Standing Counsel has submitted that reference to Article 217(1) of the Constitution is wholly out of context in the matter of appointment of Advocate General. He has further submitted that no fundamental right of the petitioners has been violated and there is no violation of Articles 14 and 16 of the Constitution nor the same are attracted in the circumstances of the case. With respect to the argument that Sri Virendra Bhatia has been associated with a political party since beginning and has contested the election on the ticket of the Samajwadi party, he has submitted that firstly, there is no bar under the Constitution to make a person as Advocate General, if he is associated with some political party; and secondly, the discretion exercised by the Governor cannot be questioned under Article 226 of the Constitution in the matter of appointment of Advocate General.

8. The appointment of Advocate General is to be made under Article 165(1) of the Constitution of India, which reads as under :

"165. Advocate General for the State :--(1) The Governor of each State shall appoint a person, who is qualified to be appointed a Judge of a High Court to be Advocate General for the State."

9. Clause (1) of Article 165 of the Constitution empowers the Governor of each State to appoint a person who is qualified to be appointed as a Judge of High Court as the Advocate General of the State.

10. It is the duty cast upon the Governor of each State, for appointing a person as Advocate General of the State, from amongst the persons, who are qualified to be appointed as a Judge of the High Court. The power of the Governor is discretionary and is not to be exercised on the aid and advice of the Council of the Ministers. It is the self-discretion or on his own discretion that the Advocate General is to be appointed by him. The only requirement or the consideration, which has to weigh with the Governor is that, that person, whom he is going to appoint as Advocate General, is qualified to be appointed as Judge of the High Court. Clause (3) of Article 165 of the Constitution of India makes it explicit that Advocate General shall hold office on the pleasure of the Governor. The appointment of the Advocate General has been made on the doctrine of pleasure viz. the pleasure of the Governor. The discretion so exercised under the Constitution in making the appointment of Advocate General by the Governor would not be open to the judicial review unless the appointment so made is grossly in violation of the provisions of the Constitution e.g. the person so appointed may not possess either of the qualifications as provided under Article 217(2)(a) and (b) of the Constitution or he attributes to himself any other disqualification, if any, either under the Constitution or under any other law. We have already observed that the petitioner does not dispute the eligibility qualification of Sri Virendra Bhatia for being appointed as Advocate General.

11. The argument that the provision of Sub-clause (1) of Article 217 of the Constitution should be followed in the matter of appointment of Advocate General is wholly misconceived. Article 217 of the Constitution deals with the appointment and conditions of the office of a Judge of a High Court. The consultation with the Chief Justice of the State in the matter of appointment of a Judge of the High Court cannot be made a requirement in the matter of the appointment of Advocate General. The appointment of Advocate General is not governed by the aforesaid Article which falls in Chapter-V Part-6 of the Constitution whereas Article 165, which deals with the appointment of Advocate General for the State falls in Chapter II of Part 6. The scheme of the Constitution for the appointment of Advocate General as well as for appointment of a Judge of the High Court is totally different.

12. Sub-clause (1) of Article 217 of the Constitution cannot be inserted or attracted for the appointment of the Advocate General under the Constitution. Reference can be made to the tenure of Advocate General as given in the Constitution and the tenure of the High Court Judge. While Advocate General holds office at the pleasure of the Governor, the High Court Judge holds office up to the age of 62 years as given in the Constitution itself. The two provisions thus operate entirely in two different fields and there cannot be overlapping or encroachment by either of the two provisions. Apart from this, the remuneration of the Advocate General has to be determined by the Governor in view of Clause (3) of Article 165 of the Constitution, whereas no such discretion vests in either of the authority under Article 217 of the Constitution with respect to High Court Judge.

13. In the case of *Atlas Cycle Industries Limited, Sonapat v. Their Workmen*, AIR 1962 SC 1100, the Apex Court had the occasion to consider as to whether in view of Section 7(3)(c) of Industrial Disputes Act Sri A. N. Gujral was not qualified for being appointed as member as he was over 60 years of age and therefore the Tribunal was not validly constituted. Reliance was placed on the qualification for being appointed member of the Tribunal, viz. a person should be eligible for being appointed as a High Court Judge. Since Sri A. N. Gujral on (he date of appointment had crossed the age of 60 years, therefore, it was said that he could not have been appointed as member. The Supreme Court as observed has under :--

"(9) We agree that there is implicit in Article 217(1) a prohibition against appointment as a Judge of a person who has attained the age of sixty years. But, in our view, that is in the nature of a condition governing the appointment to the office-not a qualification with reference to a person who is to be appointed thereto. There is manifest on the terms and on the scheme of the article a clear distinction between requirements as to the age of a person who could be appointed as a Judge and his fitness based on experience and ability to fill the office. Article 217(1) deals with the former, and in form, it has reference to the termination of the office and can therefore be properly read only as imposing, by implication, a restriction on making the appointment. In strong contrast to this is Article 217(2) which expressly refers to the qualifications of the person to be appointed such as his having held a judicial post or having been an advocate for a period of not less than ten years. We think that on a true construction of the article the prescription as to age is a condition attached to the duration of the office and not a qualification for appointment to it."

14. Prescribing the same eligibility criteria and qualification for appointment of a Judge of the High Court and that of the Advocate General of the State would not mean that the same procedure is to be adopted in making the two appointments. The appoint or a Judge of the High Court is to be made in consonance with the provisions of Article 217(1), whereas the Advocate General is appointed in accordance with the provisions of Article 165(1) of the Constitution. There is no ambiguity in either of the two provisions.

15. Sri Manendra Nath Rai has argued that Article 217(2) of the Constitution does not directly prescribe the qualification for being appointed as High Court Judge but as a matter of fact prescribes restriction and disqualification against a person, who cannot be appointed as High Court Judge. The effect is the same that a person, who does not possess either of the two qualifications, mentioned under Article 217(2) Sub-clause (a) and (b) would not be eligible and would not be qualified for being appointed as High Court Judge. The appointment of High Court Judge has nothing to do with the appointment to the office of the Advocate General.

16. We do not find any substance in the aforesaid argument.

17. We also do not find any substance in the arguments of the petitioner that by appointment so made the Fundamental Rights of any person guaranteed under Articles 14 and 16 of the Constitution are violated.

18. The concern shown by the petitioner about the appointment being made despite the incumbent having association with the political party is not of much relevance in the circumstances of the case, as we have already observed that there is no bar under the Constitution that such a person cannot be appointed as Advocate General of the State. It however, would always be the discretion of the Governor in the matter of appointment of the Advocate General, which discretion, we do not have any reason to believe or apprehend, would not be exercised in the manner, so that a right and better person is always appointed to this constitutional office.

19. We further hope and trust that any person who occupies the high seat of Advocate General, would make all endeavour to uphold the rule of law, irrespective of his leaning towards any party, if at all, there had been any such leaning before his appointment as Advocate General.

20. In the instant case, there is nothing on record to indicate that the appointment of Sri Virendra Bhatia as Advocate General was not made at the discretion of the Governor, but was made otherwise. Simply because as per allegation of the petitioners the person is associated with a political party, it would not necessarily mean that while such a person has been appointed, the discretion has not been exercised by the Governor under Article 165 of the Constitution. We do not find any good ground to record our observations to the contrary in this regard. No other point has been pressed.

21. For the reasons stated above, we do not find any merit in the challenge made to the appointment of Sri Virendra Bhatia as Advocate General of the State. The petition is hereby dismissed.

22. Before parting with the judgment, we are constrained to observe that the practising Advocate of the High Court before filing the petition ought to have looked into the provisions of Articles 217 and 165 of the Constitution of India on the basis of which they have filed this petition. We express our displeasure in the manner in which the petition has been filed.