
(2011) 06 BOM CK 0073
In the Bombay High Court
Case No : Writ Petition No. 3206 of 2011

Mr. V.P. Patil

APPELLANT

Vs

Mr. Justice N.D. Deshpande and Others

RESPONDENT

Date of Decision : 30-06-2011

Acts Referred:

Constitution of India, 1950 — Article 217, 226
Consumer Protection Act, 1986 — Section 16
Maharashtra Universities Act, 1994 — Section 58(4)

Citation : (2011) 6 BomCR 783

Hon'ble Judges : Ranjana Desai, J; D.Y. Chandrachud, J

Bench : Division Bench

Advocate : Party in Person, for the Appellant; D.J. Khambatta, S.K. Shinde, for Respondent 2, Vijay Patil, Government Pleader for Respondent 3 and Anamika Malhotra, for Respondent 4., for the Respondent

Final Decision : Dismissed

Judgement

1. On 11 October 1991, Respondent 1 was appointed as Additional Judge of the City Civil & Sessions Court, Mumbai. On 16 April 2008, he was elevated as a Judge of this Court. His appointment as Additional Judge was continued from 17 April 2010 to 16 April 2011. On 7 April 2011, the Principal Secretary & R.L.A. wrote a letter to the Registrar General of this Court intimating to him that the Higher and Technical Education Department of the State Government wanted him to make a request to the Chief Justice to recommend the name of a person for appointment as Presiding Officer of the Bombay University and College Tribunal, Mumbai ("the College Tribunal") u/s 58 of the Maharashtra University Act, 1994 as the post was vacant. On 8 April 2011, Respondent 1 conveyed his willingness for being appointed to the post. On 8 April 2011, on the recommendation of the Chief Justice, Respondent 1 was appointed to the said post.

2 In this petition under Article 226 of the Constitution of India, the Petitioner, who is a practicing advocate, challenges the appointment of the first Respondent.

3 The Petitioner, who appears in person has submitted that he does not want to peruse the record relating to the first Respondent and has no objection to this Court perusing it. Accordingly, we have perused the record.

4. The Petitioner has tendered an additional affidavit dated 24 June 2011. Mr. Patil submitted that (i) Two judges of this Court who are junior to Respondent 1 were made permanent judges on 15 April 2011; and an inference has to be drawn that Respondent 1 was not made a permanent judge because he was unsuitable to hold the post; (ii) Section 58(4)(a) of the Act states that a person shall not be qualified for appointment as a Presiding Officer of a Tribunal unless he is or has been a judge of the High Court. A person who was found by the Chief Justice and the collegium of the Supreme Court to be unsuitable to hold the post of judge of this Court does not fall in the category of a person "who is or has been a judge of the High Court"; (iii) Since Respondent 1 was not confirmed as he was found unsuitable, he also does not fall u/s 58(4)(b) namely, a person "who is qualified to be appointed as a Judge of High Court"; (iv) The relevant record containing the reasons why Respondent 1 was not confirmed as a judge of this Court was not placed before the Chief Justice and, therefore, the decision making process is vitiated, as held by the Supreme Court in N. Kannadasan v. Ajay Khose & Ors¹ and (v) Since the report of the I.B. is considered while making an additional judge a permanent judge, the Central Government should have filed affidavit on this point. None of the Respondents have filed an affidavit in reply.

5. Mr. Khambatta, learned Additional Solicitor General on the other hand, submitted that (i) this case is not covered by Kannadasan because (a) In that case, the judge was not confirmed because of a lack of probity; Such are not the facts here; (b) In Kannadasan, the Chief Justice of the Madras High Court had not gone through the relevant files and the decision making process was hence vitiated. In this case, the Hon'ble the Chief Justice is a part of the process of non-confirmation of Respondent 1, it must be presumed that all relevant facts were known to the Chief Justice; (ii) The decision of the Chief Justice is not open to judicial review.

6. Section 58(4) of the Maharashtra Universities Act, 1994 is as follows:

58. University and College Tribunal:

(1) xxx xxx xxx

(2) xxx xxx xxx

(3) xxx xxx xxx

(4) A person shall not be qualified for appointment as a Presiding Officer of a Tribunal, unless, -

(a) he is or has been a Judge of High Court; or

(b) he is qualified to be appointed as a Judge of High Court.

Provided that a person to be appointed under Clause (b) shall be from amongst the panel of three persons recommended by the Chief Justice of High Court of Judicature at Bombay.

7. The first Respondent was appointed as Additional Judge of the City Civil & Sessions Court on 11 October 1991. On 16 April 2008, he was appointed as judge of this Court. He communicated his willingness to be appointed as Presiding Officer of College Tribunal by a letter dated 8 April 2011 and was appointed to that post on 8 April 2011. When his appointment was made, he was a judge of this Court. Therefore, his case falls within the purview of Section 58(4) (a) of the Maharashtra Universities Act, 1994, which prescribes the qualification of a person for appointment as a Presiding Officer of a Tribunal as a person "who is or has been a Judge of the High Court". Hence, it is not necessary to go to Section 58(4)(b) because Clause (b) of Sub-section (4) of Section 58 is separated from Clause (a) by the disjunctive phrase "or".

8. The judgment of the Supreme Court in Kannadasan arose in a situation which was materially different. There, the Appellant was a practicing advocate of the Madras High Court prior to his appointment as Additional Judge of the High Court, for two years. When he was an Additional Judge, a representation was made by the Bar alleging lack of probity against him. As he was not appointed as a Permanent Judge, he demitted his office and resumed practice in the Madras High Court. On resuming practice, he was appointed Additional Advocate General. Thereafter, the Chief Justice of the Madras High Court recommended his name for appointment as President of the Tamil Nadu State Consumer Disputes Redressal Commission u/s 16 of the Consumer Protection Act, 1986. Section 16 of the said Act relates to composition of the State Commission. It states that each Commission shall consist of a person who is or has been a judge of a High Court, appointed by the State Government, who shall be its President. The proviso to the section states that no appointment under the clause shall be made except after consultation with the High Court. The High Court set aside the appointment on the ground that the Appellant not having been confirmed on the basis of allegations touching upon his integrity and honesty, he was not eligible for being considered for the post of President and that the decision making process stood vitiated because the relevant records were not placed before the Chief Justice. The Supreme Court confirmed the finding.

9. A careful reading of Kannadasan indicates that what weighed with the Supreme Court was the allegation of a lack of probity against Kannadasan. In fact, the Supreme Court clarified that the question which it was called upon to consider was whether an Additional Judge whose services were tainted or having regard to his general reputation or lack of integrity where for he had had not been made permanent, could be considered for appointment as Chairperson of a Tribunal. In paragraph 40 of the said judgment, the Supreme Court observed as follows:

40. The words "is or has been" refer to the person holding the office of a Judge

or who has held the said office. It maybe said to have the same meaning so far as eligibility is concerned. Suitability of a person to be considered for appointment as a Chairman of a State Commission having regard to the provisions contained in Article 217 of the Constitution of India has been assumed by this Court to be available for the eligible persons who are retired Judges which would mean that those Judges who had retired from service without any blemish whatsoever and not merely a person who "has been a Judge"[See *Ashish Handa Vs. Chief Justice of High Court of Punjab and Haryana and others*,].

The Supreme Court further observed that "a person lacking probity would not be a person who could be found fit for appointment as a High Court judge" and a case where no reappointment was made or an Additional Judge despite the existence of vacancy was not made a permanent judge required serious consideration (at paragraph 71, p. 39).

10. In this case, Respondent 1 worked as a judge of the City Civil and Sessions Court from 11 October 1991 to 16 April 2008 on which day he was appointed judge of this Court. He was a judge of this Court from 16 April 2008 till 11 April 2011 when he was appointed as Presiding Officer of the College Tribunal. There are no allegations of lack of probity against him. His integrity and character is not in doubt. Moreover, unlike the Appellant in *Kannadasan*, the first Respondent had not demitted office. When Respondent 1 was appointed as a Presiding Officer of the College Tribunal, he was a judge of this Court. His case is, therefore, covered by Section 58(4)(a) of the Maharashtra Universities Act, *Kannadasan* is not applicable to this case.

11. Another important point of distinction between the two cases is that in *Kannadasan*, the Chief Justice had joined the Madras High Court in July 2008. The name of *Kannadasan* was included in the list of retired judges by a resolution of the Full Court on 11 July 2008. A letter of the State Government requesting that names of eligible candidate for appointment to the post of President of the Commission be forwarded was received by the Madras High Court in July 2008. Except these facts, no other facts were brought to the notice of the Chief Justice. Noticing that relevant material was not before the Chief Justice, the Supreme Court observed that when a recommendation of a former judge of a High Court is made for appointment as Chairman of a Commission ordinarily, a judicial review shall not lie. His opinion touching upon the merits of the decision will not be the subject matter of judicial review, but the decision making process is subject to judicial review. Inasmuch as the relevant material/information was not made available to the Chief Justice, the Supreme Court held that the decision making process was flawed.

12. In this case, the Chief Justice was a part of the process of non-confirmation of Respondent 1. All the relevant material was placed before him. It must be presumed therefore, that he knew all the relevant facts. Judicial review of the merits of the decision of the Chief Justice is, therefore, not permissible, if it is covered by the relevant provision of the Maharashtra Universities Act, 1994. As

the Supreme Court observed in Kannadasan "what is not the subject matter of judicial review is the opinion of the Chief Justice touching upon the merit of the decision but the decision making process is subject to judicial review" (paragraph 108 at p.51). In the present case, the decision making process is not vitiated. Once that be so, the merits of the opinion formed by the Chief Justice is not open to judicial review. Even independently, we have come to the conclusion that the appointment of the first Respondent is sustainable u/s 58(4)(a).

13. There are no allegations in the petition that Respondent 1 lacks probity. In the additional affidavit of Mr. Patil, however, it is stated that the I.B. Report is considered while making a judge permanent and, therefore, the Central Government should have filed an affidavit. Mr. Patil had at the outset informed us that he did not wish to see the record and that we should peruse it. We have accordingly, perused it. There is no adverse report of any agency against Respondent 1. After a careful perusal of the record, we are of the opinion that there is no need to direct the Respondents to file affidavits in reply as the petition deserves to be dismissed in limine.

14. The petition is dismissed. No order as to costs.