

(2012) 07 BOM CK 0138

In the Bombay High Court

Case No : Public Interest Litigation No. 90 of 2012

Nitin Shankar Deshpande

APPELLANT

Vs

The President of India and Others

RESPONDENT

Date of Decision : 02-07-2012

Acts Referred:

Constitution of India, 1950 — Article 19(1)(g), 217, 217, 218, 219
Consumer Protection Act, 1986 — Section 16
General Clauses Act, 1897 — Section 17
Government of India Act, 1915 — Section 101
Government of India Act, 1935 — Section 222

Citation : (2012) 4 ALLMR 883 : (2012) 5 BomCR 729

Hon'ble Judges : R.D. Dhanuka, J;D.Y. Chandrachud, J

Bench : Division Bench

Advocate : Ashish N. Mehta, for the Appellant; Janak Dwarkadas with Mr. M.S. Karnik for Respondent Nos.1 to 4, Dr. Virendra Tulzapurkar with Mr. N.V. Walawalkar and Mr. Vikrant Walawalkar instructed by . Mr. P.S. Dani for Respondent No.5, Mr. V.A. Thorat with Mr. P.K. Dhakephalkar instructed by . Mr. P.J. Thorat for Respondent No.6, Mr. Aspi Chinoy with Mr. Zaal Andhyarujina, Farid Karachiwala and Mr. Bhavik Manek instructed by . Wadia Ghandy and Co. for Respondent No.7, Mr. Amit Borkar with Mr. Akshay P. Shinde for Respondent No.8, Mr. Srihari Aney with Mr. Vineet Naik and Ms. Deepa Ahuja for Respondent No.9 and Mr. Syed Ejaz Abbas Naqvi for Intervenor Samajwadi Legal Sabha (Cell)., for the Respondent

Final Decision : Dismissed

Judgement

Dr. D.Y. Chandrachud, J.—In these proceedings which have been filed in the public interest, the Petitioner has sought an appropriate writ, restraining Respondents 5 to 9 from pleading or acting before any Court or before any other authority in India, except the Supreme Court of India or any other High Courts, other than the High Court of Judicature at Bombay "in view of the provisions of the Constitution of India". Respondents 5 to 9 are enrolled as Advocates on the rolls of the Bar Council of Maharashtra and Goa. Each of them was appointed as

an Additional Judge of this Court. Each of them tendered his resignation during the course of the term of appointment as Additional Judge of the High Court of Judicature at Bombay. The most recent of the resignations was that of the Ninth Respondent on 8 May 2012, while the farthest in point of time, is that of the Fifth Respondent, who demitted office fourteen years ago. All of them have reverted to practise at the Bar. The central point involved in these proceedings turns upon the construction of Article 220 of the Constitution. According to the Petitioner, though Article 220 in its present form contains a prohibition on a person who has held office as a permanent Judge of a High Court from pleading or acting in any Court or before any authority in India except the Supreme Court and other High Courts, a purposive interpretation must be placed on those provisions so as to bring within their purview even Additional Judges who have before being confirmed in service relinquished office. Now, in this background, it would be necessary to record the submissions which have been urged on behalf of the Petitioner. Counsel appearing on behalf of the Petitioner submits that:

(i) Article 220 of the Constitution should be interpreted to include Additional Judges;

(ii) The object of Article 220 would be defeated if Additional Judges are excluded from the purview of the provision;

(iii) Additional Judges of the High Court are equivalent, in all respects, to permanent Judges. The position, functions and powers of Additional Judges are akin, in all respects, to permanent Judges and the Constitution prescribes the same qualifications for their appointment;

(iv) A literal interpretation of Article 220 is not desirable in the present scenario and would defeat the object and purpose of Article 220;

(v) As a matter of constitutional practice, it has now become conventional to appoint Judges as Additional Judges in the High Courts, in the first instance, and thereafter to appoint them as permanent Judges. Though the underlying rationale for Article 224 was to appoint Additional Judges when there was a temporary increase in work, that is not how the provision has been practically applied in the last several decades. Consequently, the interpretation that must be placed on Article 220 must have relevance in view of the constitutional practice;

(vi) The independence of the judiciary is sought to be protected by introducing a constitutional restraint, prohibiting persons who have held offices as permanent Judges from practicing in the same High Court. In the event that a person who has held office as an Additional Judge is allowed to practice before the same High Court, that would result in inroads on the independence of the judiciary. The perspective of the litigating public and of the community at large is of relevance in maintaining the independence of the judiciary and allowing a person, who has held office as Additional Judge, to practice before the same Court would result in an apprehension on the part of litigants and the community on whether a truly independent dispensation of justice has taken place;

(vii) The words "as a permanent judge" should be interpreted to mean "like a permanent judge" or "in the same capacity as a permanent judge".

2. These submissions have been opposed on behalf of Respondents 5 to 9 each of whom is represented by Counsel. Counsel appearing on behalf of the Fifth Respondent submits that:

(i) Articles 217 to 220 and 224 of the Constitution make a distinction between permanent and additional Judges of the High Court. The provisions of Articles 220 and 224 were brought in as a result of the Seventh Amendment to the Constitution in 1956, by which, on the one hand, while inserting a provision for appointing Additional Judges, the Constitution expressly introduced a prohibition on practice before the same Court only by persons, who have held office as permanent Judges. The expression "permanent" must be construed with reference to the tenure of a Judge;

(ii) The words of the Constitution are clear and unambiguous and there is no occasion for the Court to embark upon a purposive interpretation. The duty of the Court must be to adopt the ordinary and natural meaning to the words used by the constituent body;

(iii) The interpretation which has been suggested on behalf of the Petitioner would have the Court ignore the word "permanent" in Article 220. To accept the submission would be to rewrite the words of the Constitution by imposing a prohibition on an Additional Judge on the ground that the duties and functions which he performs are like a permanent Judge or similar to a permanent Judge of the High Court;

(iv) The construction which is to be placed on the provision of Article 220 should be governed by the decision of the Supreme Court in *N.Kannadasan Vs. Ajoy Khose*. (2009) 7 SCC 1

3. Counsel appearing on behalf of the Sixth Respondent submitted that:

(i) The right of an Additional Judge to practice upon demitting office was an accepted practice even prior to Independence;

(ii) Though the Constitution, as it was originally framed, sought to impose an absolute prohibition on any Judge, from practicing before any other Court or authority, that position was materially altered when the provision for appointment of Additional Judges was brought in by the Seventh Amendment in 1956;

(iii) The Petitioner, in substance, seeks restoration of the position as it existed prior to 1956, which is impermissible;

(iv) A person who has been appointed as an Additional Judge can never, in constitutional terms, be regarded as a permanent Judge though he may discharge the functions of a permanent Judge;

(v) Any restriction on the right to practise must be strictly construed and the bar that has been imposed by the Constitution, must be confined to what is expressly contemplated, namely, to the practice by a permanent Judge before the same Court.

5. Counsel appearing on behalf of the Seventh Respondent submitted that:

(i) Under Article 224, it was always within the contemplation of the Constitution that an Additional Judge would be entitled to go back to practise upon ceasing to hold office. The appointment of an Additional Judge under Article 224 was envisaged because of a temporary increase in work. Consequently, upon the rationale for the appointment ceasing to exist and the term of the Additional Judge coming to an end, the right of the holder of the office to revert to the Bar has been preserved;

(ii) The submission of the Petitioner seeks to disregard the constitutional distinction between the position of a Permanent Judge and an Additional Judge. The tenure of a Permanent Judge is until the holder of office attains the age of 62, while that of an Additional Judge, is for two years. What the Petition essentially seeks is that the Court must disregard the warrant of appointment, and the constitutional status and deem an Additional Judge to be a Permanent Judge. This, it is urged, cannot be achieved through a process of constitutional interpretation.

5. Counsel appearing on behalf of the Ninth Respondent submitted that the Constitution recognizes Permanent Judges and Additional Judges as two separate and distinct classes. It has been urged that there is no way in which this Court, in the exercise of its jurisdiction under Article 226 of the Constitution, can render a particular Article of the Constitution otiose or nugatory by placing an interpretation on another article of the Constitution contrary to the intendment.

6. Counsel appearing on behalf of the Eighth Respondent has adopted the submissions which were urged.

7. The rival submissions now fall for consideration.

8. The Constitution, as it was originally adopted, contained no provision for acting or Additional Judges. There were precedents before the adoption of the Constitution for the appointment of Additional Judges both in the Government of India Acts of 1915 and 1935. u/s 101 of the Government of India Act, 1915, there was a provision which authorised the Governor General in Council to appoint a person as an Additional Judge for a period not exceeding two years. Similarly, in Section 222 of the Government of India Act, 1935, there was a provisions for the appointment of an acting Judge where the office of any other Judge of the High Court became vacant or if any Judge was appointed to act temporarily as a Chief Justice. Similarly, Section 222 provided for the appointment of Additional Judges to deal with an exigency involving a temporary increase in the business of any High Court. When the Constitution was adopted in

1950, there was no provision for the appointment of Additional Judges. Article 217 provided for the appointment of a Judge of the High Court. Article 220, as it originally stood, contained an absolute prohibition against any person who had held office as a Judge of the High Court to plead or act in any Court or before any authority within the territory of India. Article 224, as it originally stood, empowered the Chief Justice of a High Court with the previous consent of the President to request any person who had held office of a Judge of that High Court or any other High Court to sit and act as a Judge of the High Court for that State.

9. The position as it originally obtained came to be altered by the Seventh Amendment to the Constitution in 1956. For the purposes of these proceedings, it would be of relevance to compare Articles 217, 220 and 224 as they stood before and after the amendment of 1956. For that purpose, it would be appropriate to extract the pre and post amendment articles in the form of a table which is as follows:

Pre amendment of 1956

Post amendment of 1956

217. (1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and shall hold office until he attains the age of sixty years.

217. (1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and shall hold office, in the case of an Additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty two years.

220. Prohibition of practicing in Courts or before Authority by Judge.

No person who has held office as a Judge of High Court after the commencement of this Constitution shall plead or act in any Court or before any Authority within the territory of India.

220. Restriction on practice after being permanent Judge.

No person after commencement of this Constitution who has held office as a Permanent Judge of a High Court shall plead or act in any Court or before any Authority in India except the Supreme Court and the other High Courts.

224. Notwithstanding anything in this chapter, the Chief Justice of a High Court for any state may at any time, with previous consent of the President, request any person who has held the office of a Judge of that court or any other High Court to sit and at as a Judge of High Court for that State, and every such person so requested shall, while so sitting and acting, be entitled to such

allowances as the President may by order determine and have all jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, a Judge of that High Court.

224. (1) If by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that the number of the Judges of that Court should be for the time being increased, the President may appoint any qualified persons to be Additional Judges of the Court for such period not exceeding two years as he may specify.

(2) When any Judge of a High Court other than the Chief Justice is by reason of absence or for any other reason unable to perform the duties of his office or is appointed to act temporarily as Chief Justice, the President may appoint a duly qualified person to act as a Judge of that Court until the permanent Judge has resumed his duties.

(3) No person appointed as an Additional or acting Judge of a High Court shall hold office after attaining the age of sixty years.

11. As a result of the Seventh Amendment of the Constitution in 1956, a provision was made in Article 224 for the appointment of Additional Judges by the President. The term of an Additional Judge is to be for a period not exceeding two years. Article 224 envisages the appointment of Additional Judges by reason of a temporary increase in the business of a High Court. Simultaneously, along with the substitution of clause (1) of Article 224, clauses (2) and (3) were also introduced so as to empower the President to appoint a duly qualified person to act as a Judge, where a Judge of the High Court other than the Chief Justice by reason of absence or for any other reason is unable to perform the duties of his office or is appointed temporarily as Chief Justice. Simultaneously with the substitution of Article 224, Article 217 was amended. The amendment of Article 217 in 1956 brought within the purview of the appointment power of the President, additional or acting Judges as provided in Article 224. As amended, Article 217 stipulates that a Judge of the High Court shall hold office until he attains the age of sixty two, whereas an additional or acting Judge shall hold office as provided in Article 224. Article 220 which dealt with the "prohibition of practicing in Courts or before Authority by Judge", prior to its amendment, was recast by the Seventh Amendment. The absolute prohibition on a Judge of the High Court, pleading or acting in any Court or before any authority within the territory of India, was substituted by the provisions of Article 220 as it now stands which is materially different in two respects. Firstly, after the amendment, the prohibition in Article 220 no longer applies to a person who holds office of a Judge of the High Court, but to a person who holds office as a permanent Judge of a High Court. Secondly, the prohibition, which prior to the amendment of 1956 was cast in absolute terms, is now a prohibition from pleading or acting in any Court or before any authority in India except the Supreme Court and the other High Courts.

11. The legislative history underlying the Seventh Amendment to the Constitution is significant. When the Constitution came to be amended so as to allow the appointment of Additional Judges, simultaneously, the prohibition which was imposed by Article 220 on a person who had held office of Judge, from pleading or acting in any Court or before any authority within the territory of India was modified. After 1956, the prohibition under Article 220 applied to a person who held office as a permanent Judge of the High Court. Conscious as Parliament in its constituent capacity was of the need for introducing a provision for appointment of Additional Judges, the legislature expressly modified the nature and extent of the prohibition on the right to practise before Courts or an authority in India. The wider prohibition which was attributed to every Judge was now substituted by a prohibition which applied only to a person who held office as a permanent Judge and the prohibition which was earlier absolute in its terms was restricted to one from practising in the same Court in which the holder of an office had held the position of a permanent Judge. The legislative history reinforces why it is but necessary that the Court must adopt a plain and ordinary connotation of the words used in Article 220. Besides, where the words of a statutory provision are clear, plain and unambiguous, the duty of the Court is to attribute to them their plain, ordinary and literal meaning. The Court cannot, it is well settled, obviate a recourse to the literal and plain meaning of the words used merely on the basis of consequences which the Court does not consider to be appropriate. (*Nelson Motis Vs. Union of India and another*, ; *Gurudevdatla VKSSS Maryadit vs. State of Maharashtra* (2001) 4 SCC 535 at para 26; and *Nathi Devi Vs. Radha Devi Gupta*,).

12. The submission, however, which has been urged on behalf of the Petitioner is that the expression "as" which precedes the words "a permanent Judge of the High Court" must be construed to mean "like a permanent Judge" or "similar to a permanent Judge". Reliance has been placed on a judgment of the Supreme Court in *Dr. Asim Kumar Bose Vs. Union of India (UOI) and Others*, In that case, the Appellant was appointed in a substantive capacity as a Radiologist in a teaching hospital and was treated as an Associate Professor of Radiology both by the University of Delhi as well as by the Medical College to which the Hospital was affiliated. The issue which fell for determination before the Supreme Court turned upon the construction of the Central Health Service Rules, 1963 and the question was whether the experience which the Appellant had acquired in his capacity as an exofficio Associate Professor could be taken into reckoning. The Supreme Court held that the expression "as" in the context of the Rule must be interpreted to mean "in the capacity of" and the Court underlined the need for imparting a broad and liberal meaning to the expression. The Supreme Court adverted to the dictionary meaning of the expression "as" which meant "something like, similar to, of the same kind, in the same manner or in the manner in which". The Supreme Court held that the expression "as" would mean "the same as, in the character, capacity, role of". Now it is necessary, while adverting to the judgment of the Supreme Court in *Asim Kumar Bose* to

emphasize that the rule there was a rule of eligibility and was not a rule which restricted the right of an individual to practise his or her profession. As a rule of eligibility, the Supreme Court was of the view that it would be necessary to impart a broad and liberal construction to a provision in the rules in determining as to whether experience of a medical professional as an exofficio Associate Professor should be taken into reckoning. This principle would have to be distinguished in the case at hand which the Court is called upon to decide presently. In the face of the legislative history underlying Article 220 of the Constitution, it would be impermissible for the Court to construe the words "held office as permanent Judge of a High Court" to mean "held office as a permanent Judge or equivalent to a permanent Judge of the High Court". To do so would be to rewrite the language of Article 220 which would be impermissible.

13. The provisions of Article 224 of the Constitution as they were amended in 1956, were intended to allow the appointment of an Additional Judge to a High Court where it was necessary to deal with a temporary increase in the business of a High Court. Since the decision in *S.P. Gupta Vs. President of India and Others*, the Supreme Court has taken note of the fact that since 1956, the true intendment and purpose of Article 224(1) has not been carried into effect. Justice P.N. Bhagwati (as the Learned Judge then was) speaking for the Supreme Court in *S.P.Gupta* emphasized this in the following observations in the decision :

But what happened in practice was that the true intendment and purpose of clause (1) of Article 224 was never carried into effect. The Government did not increase the strength of permanent Judges in different High Courts adequately so as to be able to cope with the normal institutions. ... Of course, it was not only the Government which was responsible for not increasing adequately the strength of permanent Judges but the Chief Justices of many High Courts were also remiss in looking after the interests of their High Courts, inasmuch they too did not ask the Government for increase in the strength of permanent Judges. ... The unfortunate consequence was that the Additional Judgeship became a gateway for entering the cadre of permanent Judges. Whenever a person was appointed as a Judge in a High Court, he would be first appointed as an Additional Judge and only when a vacancy occurred in the post of a permanent Judge, he would be confirmed as a permanent Judge in that vacancy in accordance with the seniority amongst the Additional Judges. The practice therefore grew up of a person being first appointed as an Additional Judge and then being confirmed as a permanent Judge in the same High Court."

The appointment of Additional Judges became, what is described as a gateway for entering the cadre of Permanent Judges.

14. This, however, cannot provide justification for the Court, while interpreting the provisions of Article 220, to rewrite a constitutional provision. Where the Constitution has specifically confined the prohibition on the right to practise before the same High Court only to a person who has held office as a permanent Judge of the High Court, there would be no reason or justification for the Court

to introduce such a restraint by a process of judicial interpretation upon Additional Judges. The view which we have placed on the plain language of Article 220 also accords with the observations of the Supreme Court in *N. Kannadasan vs. Ajoy Khose* (supra). In that case, the Supreme Court considered the provisions of Section 16 of the Consumer Protection Act, 1986 which provides that the State Commission shall consist of a person who is or has been a Judge of the High Court. The Supreme Court was of the view that the suitability of a person to be considered for appointment as a Chairman of a State Commission, having regard to Article 217 of the Constitution, would mean those Judges who have retired from service without any blemish whatsoever and not that merely a person who has been a Judge would be eligible for appointment. Significantly, in two observations in paragraphs 41 and 45 of the judgment, the Supreme Court noticed the distinction between an additional Judge and a permanent Judge of the High Court. In paragraph 41, the Supreme Court observed as follows :

41. An Additional Judge holding a tenure post *stricto sensu* does not retire. It is one thing to say that having regard to the constitutional embargo, he would not hold office after he attains the age of 62 years but it is another thing to say that for all other purposes, he can be equated with a sitting Judge.

Similarly, in paragraph 45, the Supreme Court noted that an Additional Judge, despite being a former Judge, "is entitled to practice in the same High Court which other Judges are not permitted to do.

15. Though Permanent Judges and Additional Judges of the High Court perform the same duties and functions, there is yet a cardinal distinction in the Constitution in the tenure of an Additional Judge as distinct from that of a Permanent Judge. A Judge of the High Court is a Permanent Judge on the basis of a guarantee of tenure which extends until the Judge attains the age of superannuation of sixty two. The tenure of an Additional Judge is for a period of two years. In imposing a prohibition on the right to practise and while curtailing the freedom under Article 19(1)(g), the Constitution draws a careful balance of the need to preserve the independence of the judiciary on the one hand and the right of a person who has held office of Judge of the High Court to practise upon demitting office, on the other. A Permanent Judge of the High Court cannot practise before the Court in which he held office as a Permanent Judge. A person who held office as an Additional Judge of the High Court is not subject to the constitutional prohibition of practise before the same High Court upon demitting office. That is a matter of a constitutional choice. There may be and there indeed is a cause of concern when a member of the Bar who has been appointed as a Judge of the High Court resigns and reverts to the Bar. But in so far as judicial review is concerned, the choice among competing considerations is made by the Constitution. The duty of the Court is to respect a conscious choice made by the constituent body. In the absence of a constitutional challenge, whether a constitutional provision should be revisited or altered is not for this Court to decide since the constitutional authority to do so vests in Parliament.

16. There is absolutely no merit in the contention that an Additional Judge who upon reverting to the Bar commences practise would be placed in an unequal position as compared to any other member of the Bar. Judges are vested with a solemn obligation of rendering justice in accordance with law; justice which is dispassionate and objective. If a person who is appointed as an Additional Judge reverts to the Bar at the end of his tenure of office or earlier, that person assumes the role of an Advocate before the Court. Every member of the Bar is entitled to the same treatment from the Bench and there is no basis in the apprehension that this would not be the case if an Additional Judge, upon ceasing to hold office reverts to the Bar. Judicial office is associated with the discharge of significant responsibilities. Training as Judge and the conventions of the Bench are important elements in the process of dispensing justice that is objective. Upon reverting to the Bar, such a person has the same position as that of any other member of the Bar.

17. There is absolutely no merit in the contention that the expression "Permanent Judge" in Article 220 of the Constitution must be held to include an Additional Judge in view of Section 17 of the General Clauses Act, 1897. What subsection (1) of Section 17 provides is that in any Central Act or Regulation, it shall be sufficient for the purpose of indicating the application of a law to every person executing the functions of an office, to mention the official title of the officer at present executing the functions. This by no stretch of logic can be pressed in aid to even suggest that the expression "Permanent Judge" for the purpose of Article 220 will include an Additional Judge. Having carefully considered therefore, the grievance of the Petitioner, we do not find any reason to exercise our extraordinary writ jurisdiction under Article 226 of the Constitution. The Petition shall stand dismissed. There shall be no order as to costs.