
(2017) 04 AP CK 0078

In the Andhra Pradesh High Court

Case No : Writ Petition (PIL) No.70 of 2017

Sarsani Satyam Reddy

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 07-04-2017

Acts Referred:

Constitution of India, 1950 — Article 141, Article 226, Article 32

Citation : (2017) 3 ALT 468 : (2017) 3 AndhLD 663 : (2017) 2 SCT 720

Hon'ble Judges : V. Ramasubramanian and J. Uma Devi, JJ.

Bench : Division Bench

Advocate : Anand Kumar Kapoor, Advocate, for the Petitioner; S. Sriram, learned standing Counsel for the High Court, for the Respondents; B. Narayana Reddy, Asst. Solicitor General, for the Respondents

Final Decision : Disposed Off

Judgement

V. Ramasubramanian, J.—The petitioner, who is a designated Senior Advocate of this Court, has come up with the present writ petition complaining about the inaction on the part of the different stakeholders in (1) not appointing a regular Chief Justice for the past about 22 months; (2) not filling up of the vacancies to the sanctioned strength; (3) not maintaining the ratio of 2:1 for elevation from the Bar and the service; (4) not appointing any Member of the Bar of the State of Telangana for the past 4 years and (5) consequently not fulfilling the obligations imposed under various Articles of the Constitution.

2. Heard Mr. Anand Kumar Kapoor, learned counsel for the petitioner. Mr. B. Narayana Reddy, learned Assistant Solicitor General took notice on behalf of the 1st respondent and Mr. S. Sriram, learned standing counsel took notice on behalf of the High Court to the limited extent of examining the question as to whether the writ petition can be entertained in the facts and circumstances that we shall deal with.

3. The grievance of the petitioner can be summarised in simple terms as follows:

(i) After the retirement of the regular Chief Justice on 06-05-2015, this High Court, which became the common High Court for both the States of Telangana and the Andhra Pradesh after the bifurcation of the State, is administered only by successive Acting Chief Justices, contrary to the mandate of Article 216 of the Constitution, despite the restrictions on the role of the Acting Chief Justice as indicated by the Supreme Court in *Ashok Tanwar v. State of H.P.*, 2005 (2) SCC 104;

(ii) The sanctioned strength of the Combined High Court of Hyderabad is 61 and it is now functioning only with 27 Judges, leaving 60% of the posts within the sanctioned strength as vacant, leading to a huge pressure being mounted on the functioning Judges and also creating huge backlog and arrears;

(iii) Out of the working strength of 27 Judges, only 14 are from the Bar and the remaining 13 were elevated from the service. Even among the 14 Judges elevated from the Bar, 3 are from other States (including the author of this piece) having been transferred to this Court (as a boon or bane). Therefore, the ratio of 2:1 traditionally fixed and followed is distorted;

(iv) Since the last appointment of any member of the Bar took place in the year 2013, not a single appointment from among the members of the Bar in the State of Telangana has taken place in the past 4 years.

4. Since the issue of non-filling up of vacancies even within the sanctioned strength has already been held to be justiciable, in at least 2 decisions of the Supreme Court, one in *Subhash Chandra v. Union of India*, 1991 Suppl. (1) Supreme Court 574 and the other in *Supreme Court Advocate on Record Association v. Union of India*, 1993 (4) SCC 441 the petitioner claims that the respondents are answerable to this Court, nay, to the Constitution and the people of the 2 States as to why no regular Chief Justice has been appointed for the past 22 months and as to why a lot of vacancies are left unfilled for the past several years.

5. The above writ petition was first posted before us for orders as to maintainability on 23-03-2017. We pointed out at that time to the learned counsel appearing for the petitioner that the Supreme Court has already disposed of a writ petition seeking similar reliefs under Article 32, on 20-03-2017 and that therefore, propriety may demand that we wait. But the learned counsel for the petitioner pleaded that he was not aware of the order of the Supreme court and sought time to get a copy of the order passed by the Supreme Court on 20-03-2017. Therefore, we directed the Registry to number the writ petition and post it for admission and in the meantime directed the learned counsel to look into the order of the Supreme Court.

6. On 03-04-2017, when the writ petition was placed for orders as to admission before us, the learned counsel for the petitioner placed a copy of the order passed by the Supreme Court on 20-03- 2017 in a batch of 3 writ petitions W.P. (C) Nos.210, 624 and 625 of 2016. One of the issues raised in those writ

petitions related to the non-filling up of the vacancies in various High Courts. The Supreme Court indicated in its order that a rigorous process for filling up of the vacancies is in progress and that the relief prayed for were in the process of implementation.

7. In the light of the manner in which the 3 writ petitions before the Supreme Court were disposed of on 20-03-2017, we requested the learned counsel for the petitioner to address arguments on the limited question as to whether the present writ petition, at this juncture, is capable of being entertained. We also pointed out to the learned counsel for the petitioner that there can be no quarrel with the proposition (1) that there should be a regular Chief Justice for every High court; and (2) that ideally all the vacancies are to be filled up in the ratio of 2:1 from among members of the Bar and the Judicial Officers. Neither the respondents in the writ petition nor this Court can ever oppose a demand for the appointment of a regular Chief Justice at the earliest and the demand for filling up of all the existing vacancies. But would it be proper on our part to entertain a writ petition of this nature, especially when the Supreme Court had indicated in a judicial order, passed just 2 weeks ago, that a rigorous process for filling up the vacancies is in progress, is the question that we requested the learned counsel for the petitioner to ponder over.

8. In response to the above question, it was contended by the learned counsel for the petitioner (a) that the appointment of a regular Chief Justice to this Court was not in issue in the writ petitions before the Supreme Court; (b) that the Supreme Court did not lay down any law in its order dated 20-03-2017 in *Ashwini Kumar Upadhyay v. Union of India*, for this Court to feel constrained to entertain the writ petition; (c) that the jurisdiction of this Court under Article 226 of the Constitution is concurrent and as a matter of fact it is notwithstanding anything contained in Article 32 of the Constitution; (d) that in view of the decisions of the Constitution Benches of the Supreme Court in *L. Chandrakumar*, (1997) 3 SCC 261 and *I.R. Coelho*, (2007) 2 SCC 1 the jurisdiction under Article 226 forms the basic feature of the Constitution which cannot be taken away merely by the Supreme Court disposing of a writ petition without laying down any law and without issuing any directions under Article 142 of the Constitution; (e) that the question as to whether a High Court can issue a mandamus against a Supreme Court is no longer *res integra* in view of the decision of the Supreme Court in *Special Reference No.1 of 1998 Re*, 1998 (1) SCC 739; (f) that a High Court is not subordinate to the Supreme Court to feel diffident about issuing a mandamus to the Supreme Court, since any such reluctance, even if termed as "deference", would only tantamount to "servility" on the part of the High Court; and (g) that since judicial review alone is the only method of upholding the rule of law and since the supremacy of the Constitution mandates all bodies to function according to the Constitution, it is necessary that this Court should entertain the writ petition.

9. In response to the above submissions, it is contended by Mr. S Sriram, learned

standing counsel for the High Court that it is neither out of subordination nor out of lack of jurisdiction that this Court cannot entertain the writ petition. It is only a matter of judicial discipline and comity of courts that require this Court to take its hands off, when the highest court of the land has assured on the judicial side, that it is taking steps on the administrative side to fill up the vacancies. In support of his contention that restraint does not tantamount either to subordination or to surrender of jurisdiction but only tantamount to judicial discipline, the learned counsel for the Registry relied upon 2 decisions of the Supreme Court, one in TGN Kumar v. State of Kerala, (2011) 2 SCC 772 and another in Sunil Kumar Verma v. State of U.P., (2016) 1 SCC 397.

10. We have carefully considered the rival contentions.

11. As we have pointed out earlier, the grievance of the petitioner is four fold namely (1) non-appointment of a regular Chief Justice for 22 months; (2) non-filling up of the vacancies; (3) nonadherence to the ratio of 2:1 and (4) non-appointment of any member of the Bar from the State of Telangana for the past 4 years to the Bench of this Court.

12. In its order dated 20-03-2017, disposing of the 3 writ petitions W.P.(C) Nos.210, 624 and 625 of 2016, the Supreme Court dealt with, explicitly, at least one of the above four fold grievances of the petitioner. The order of the Supreme Court dated 20-03-2017 comprises of 15 paragraphs. The first 6 paragraphs deal with W.P.(C) Nos.295 of 2016 and 624 of 2016. Paragraphs 7 to 11 deal with W.P.(C) Nos.625 of 2016 and paragraphs 12 to 15 deal with W.P.(C) No.210 of 2016.

13. In paragraph 7 of its order, which apparently related to W.P.(C) No.625 of 2016, the Supreme Court extracted the prayers made in W.P.(C) No.625 of 2016. Prayer (a), in W.P.(C) No.625 of 2016, as extracted by the Supreme Court in its order reads as follows:

"a) a writ in the nature of mandamus may be issued directing the respondent to take immediate steps to facilitate filling up of the existing vacancies in the judiciary across the country; and....."

14. The aforesaid prayer was dealt with in paragraph 9 of its order, which reads as follows:

"In so far as prayer (a) is concerned, the same has been dealt with by us while disposing of W.P. (C) No.295 of 2016 and W.P. (C) No.624 of 2016, decided on 20.03.2017 (Ashwini Kumar Upadhyay v. Union of India and Anr.). As such, prayer (a) is disposed of, in terms of the order referred to hereinabove."

15. In paragraphs 4 and 5 of its order, the Supreme Court recorded the following:

"It is not in dispute, that a large number of unfilled posts of Judges, at various levels, are pending, and a rigorous process for filling them is in progress. The question of increasing the number of posts, as has been suggested in these petitions, will arise only after the existing vacancies have been filled up, and the

proposals made by this Court are adopted, which we are of the view, should be the first steps in the process of increasing the vacancies and filling them.

In the above view of the matter, we are satisfied, that the prayers made in the instant writ petitions are in the process of implementation. Such being the position, we find no reason to retain the same on the board of this Court. Accordingly, the instant petitions are disposed of. Liberty is granted to the petitioner (s) to approach this Court for a similar relief, after the implementation of the first step, indicated hereinabove....."

16. Therefore, it is clear that at least in so far as the non-filling up of the vacancies is concerned, the Supreme Court indicated that a rigorous process for filling up of the vacancies is in progress. It may not be out of place to mention that the aforesaid order was passed by a Three Member Bench of the Supreme Court headed by the Hon'ble the Chief Justice of India, who also happens to be the Head of the Collegium. Therefore, unless the petitioner thinks that the statement recorded in paragraph 4 of the order of the Supreme Court should not be given any credence, he cannot contend that we should entertain the present writ petition. As rightly pointed out by Mr. S. Sriram, learned standing counsel for the University, it is not a question of our sense of subordination or a shirking of constitutional responsibilities, but a question of reposing faith and maintaining discipline. In very many cases, the Supreme Court has lamented that judicial discipline has taken a beating in the recent past. In paragraph 22 of its decision in *Sunil Kumar Verma v. State of U.P.*, (2016) 1 SCC 397 the Supreme Court held:

"22. We have highlighted this aspect as we intend to ingeminate that this kind of unnecessary enthusiastic quest should be avoided. It is because it is contrary to the principles of judicial discipline. In this regard reference to *Official Liquidator v. Dayanand* (2008) 10 SCC 1 would be apt. In the said ruling, it has been observed thus: (SCC p.52, para 78)

"78. There have been several instances of different Benches of the High Courts not following the judgments/orders of coordinate and even larger Benches. In some cases, the High Courts have gone to the extent of ignoring the law laid down by this Court without any tangible reason. Likewise, there have been instances in which smaller Benches of this Court have either ignored or bypassed the ratio of the judgments of the larger Benches including the Constitution Benches. These cases are illustrative of non-adherence to the rule of judicial discipline which is sine qua non for sustaining the system."

17. Mixing up the question of discipline with deference, Mr. Anand Kumar Kapoor, learned counsel for the petitioner invited our attention to paragraphs 75 and 76 of the decision of the House of Lords in *R (on the application of Pro Life Alliance) v. British Broadcasting Corporation*, (2003) 2 All. E.R. 977 where the House of Lords pointed out that deference may at times tantamount to servility. In paragraph 75 of the report in the said decision, Lord Hoffmann indicated that although the word "deference" is very popular in describing the relationship

between the judicial and other branches of Government, its overtones of servility cannot describe what was happening on ground.

18. We do not know whether the above argument was advanced by the learned counsel for the petitioner to intimidate or insult us. But, we should point out that the case before the House of Lords was one where the request of a political party to broadcast a video that illustrated graphically the evils of abortion, was refused by the British Broadcasting Corporation, on grounds of "taste and decency". The House of Lords was concerned with a question whether judicial review was to be permitted. Before the Court of Appeals, a great deal of discussion took place around the question whether "deference" should be paid in matters of that nature to the decision makers. It was this issue that was dealt with by Lord Hoffmann in paragraphs 75 and 76 of the decision of the House of Lords. In other words the decision of the House of Lords actually dealt with the question of separation of powers and the deference of one wing for the other. But we are concerned in this case with a situation where the highest court of the land, which is seized of the very same issues raised in this writ petition on the administrative side, has recorded a promise in a judicial order. If we are not obliged to give any credence to what is recorded in the order of the Supreme Court, we do not know how the very constitutional scheme that the petitioner wants us to enforce will survive.

19. The learned counsel for the petitioner is thoroughly mistaken in his impression that we feel diffident or at least hesitant, to issue notice to the Supreme Court. Exercise of every power is coupled with responsibilities. The higher the power, the higher is the responsibility. Bravado has no place in the exercise of a constitutional responsibility/power. If restraint is sought to be mistaken as cowardice, so be it. The learned counsel is also thoroughly mistaken in his impression that we have any doubt about our concurrent jurisdiction under Article 226 of the Constitution. As a matter of fact the Supreme Court itself exhibits a sense of deference in many cases when the Supreme Court directs persons, who approach the Supreme Court under Article 32, to first go to the High Court invoking Article 226. In ever so many cases, we direct parties to a writ petition to go to quasi-judicial Tribunal or statutory authorities before whom they have an alternative remedy available. Therefore, it is not a question of our feeling subservient to the supreme Court, as is sought to be projected by the learned counsel for the petitioner.

20. Drawing our attention to the decision of the Constitution Bench of the Supreme Court in *Supreme Court Advocates-on Record Assn. v. Union of India*, (2016) 5 SCC 1 especially with reference to paragraphs 426 and 427 and the direction contained in para 478 (14), it was contended by the learned counsel for the petitioner that in order to protect its own existence and independence, the High Court should exercise its jurisdiction under Article 226. In fact the learned counsel for the petitioner went to the extent of contending that if the jurisdiction under Article 226 is to be curtailed in this fashion, there was no justification for

the court to be in existence. But we do not think that we should respond to such intimidatory arguments. If people mistake discipline to be subservience or servility or weakness, we cannot help it.

21. Coming to the contention that the issue of appointment of a regular Chief Justice as well as the issue of non-appointment of any member of the Bar from the State of Telangana for the past 4 years were not the subject matter of the writ petitions in *Ashwini Kumar Upadhyay v. Union of India*, it should be pointed out that the order of the Supreme Court dated 20-03-2017 is to the effect that a rigorous process for filling up large number of unfilled vacancies at various levels is in progress. Therefore, there is no reason to doubt whether the Supreme Court on its administrative side will or will not take up the issue of appointment of a regular Chief Justice also along with the issue of filling up of the vacancies.

22. In so far as the issue relating to non-appointment of any member of the Bar from the State of Telangana for the past 4 years is concerned, we should point out that the State of Telangana itself was born only on 02-06-2014. After 02-06-2014 the Collegium of this Court recommended the names of 6 members of the Bar and 4 members from the service. These recommendations made in May, 2016, bore fruit partially, when 4 appointments were made in January, 2017.

23. An interesting averment is made in the affidavit in support of the writ petition to the effect that as on date there are only 2 Judges elevated from the Bar and 2 Judges elevated from the service, who belong to the State of Telangana. In other words, according to the petitioner, all other Judges of this Court (barring those from outside the State) belong to the State of Andhra Pradesh.

24. The above averment of the writ petitioner assumes significance for several reasons. In this court, there are several Judges who were born and brought up only in Hyderabad. But it appears that the petitioner (and he is not alone in thinking so) does not consider them as belonging to the State of Telangana, for the simple reason that their forefathers hailed from areas which now form part of the bifurcated State of Andhra Pradesh. In other words, unless the DNA of the Judges indicate their ancestry to Telangana, they are not to be considered as belonging to Telangana, despite their birth, growth and assimilation into the city of Hyderabad for decades. This opinion stands in contrast to the Presidential Orders issued in exercise of the power conferred by Article 371 D of the Constitution, which allow persons who are domiciles of a particular area to claim the benefit of the reservation for local candidates. In other words, it is the firm conviction of a few, that persons aspiring to get elevated to the High Court either from the bar or from the service, cannot even have the benefit that may be available to other people under the Presidential Orders issued in terms of Article 371 D of the Constitution. An issue related to this core dispute is also pending consideration before the Supreme Court in a writ petition filed under Article 32 as well as in a Special Leave Petition filed by the very same petitioner herein before the Supreme Court against a judgment of this Court. Therefore, we are conscious

of the fact that as and when the exercise of filling up of the vacancies is undertaken, many obstacles may be posed on grounds of nativity, ancestry, origin etc., (apart from the usual obstacles that every other High Court normally faces) on the basis of the aforesaid divisions. It is very likely that this court may face an uphill task while recommending names for elevation.

25. In such circumstances, we are of the considered view that the grievances of the petitioner are not capable of being remedied by the wave of a magic wand. The appointment of Judges, which is to take place through a "participative consultative process" involving 4 partners namely (i) the collegium of the high court (ii) the State (iii) the collegium of the Supreme court and (iv) the Union of India, in view of its special angularities, is prone to be time consuming. Two out of these 4 partners belong to the same family and the head of that family has gone on record, not on the administrative side, but on the judicial side, that a rigorous process is in progress. Therefore, we are bound to give credence to what was recorded by a Three Member Bench of the Supreme Court presided over by the Hon"ble the Chief Justice of India in Ashwini Kumar Upadhyay, not on account of any diffidence, servility or subordination and certainly not on the ground of lack of jurisdiction or maintainability, but on account of the faith that a member of the same family/fraternity should repose in the other members, especially the head of the same system/family. If a member of the judicial fraternity himself does not repose faith and trust in what is recorded in an order of the highest court of the land, we do not know who else will do so. After all, this is not an adversarial litigation and we are conscious of our Constitutional responsibilities. Assuming that we entertain the writ petition and issue notice to the respondents, we do not think any of them is going to come and file a counter contending that the reliefs prayed for are not to be granted. The respondents may simply place an assurance to complete the process in a time frame. This assurance is already found in the order of the Supreme court and hence there is no necessity to entertain the writ petition.

26. In view of the above, we refuse to entertain the writ petition and it is accordingly dismissed.

27. As a sequel thereto, miscellaneous petitions, if any, pending shall stand closed.