

(1966) 08 MAD CK 0030

In the Madras High Court

Case No : Writ Petition No. 2047 of 1966

V.G. Row

APPELLANT

Vs

A. Alagiriswamy and Others

RESPONDENT

Date of Decision : 17-08-1966

Acts Referred:

Constitution of India, 1950 — Article 124, 132(1), 217, 217(2), 233(2)

Citation : AIR 1967 Mad 347

Hon'ble Judges : Srinivasan, J

Bench : Single Bench

Judgement

(1) Sri Alagiriswami, the first respondent, to this petition, was appointed an Additional Judge of this High Court on 8th August 1966, On the 11th August 1966, this petition seeking the issue of a quo warranto calling upon the first respondent to show under what authority he holds the office in question was filed. The petitioner is a member of the High Court Bar and has been a practitioner before this Court for the last 34 years. He claims that as a member of the Bar, he is vitally interested in the purity of the administration of justice and for reasons that would be apparent from what follows, he finds it to be his duty to move this Court in this matter.

(2) According to the petitioner, Sri Alagiriswami does not possess the qualification prescribed by Article 217(2)(b) of the Constitutions. Secondly, it is contended that the appointment has been made virtually in the teeth of a Bench decision of this Court in which on an earlier occasion the propriety of the appointment of Sri Alagiriswami as Government Pleader was brought into question and it was held by this Court that that appointment was an act of favouritism intended to sphere the first respondent to a High Court Judgeship through the back door. Though this Court felt powerless to interfere with the first respondent's appointment as Government Pleader, the decision of that bench established that in making that appointment, the Government was moved by extraneous consideration, principally that of conferring upon the first respondent

a qualification solely for the purpose of enabling him to become a Judge of the High Court. It is said accordingly that the appointment of the first respondent as a Judge is the fulfillment of the scheme engineered by those in authority when the first respondent was some years ago appointed as Government Pleader, and on this ground his appointment is attacked as affected by mala fides and is fraud on power.

(3) There are two grounds broadly speaking that have been amplified in the lengthy affidavit accompanying the petition. I do not think it necessary to set out the contents of the affidavit in any great detail; but I shall refer to such portions thereof as may be required.

(4) Under Article 217(2)(b), a person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and has for at least ten years been an advocate of a High Court or of two or more such Courts, in succession. It is the contention of Mr. G. Vasantha Pai, learned counsel for the petitioner, that at the best it can be said that the first respondent has been an advocate of the High Court since the date of his appointment as Government Pleader on 1st July 1960, and not earlier. Before commenting upon this particular contention, the following facts are necessary to be set out. These facts appear in the affidavit itself. The first respondent was enrolled as an advocate for the High Court in 1936, but he chose to practice only in the mofussil Courts, principally at Madurai, at that time. In 1941, he was appointed as District Munsif, undoubtedly a judicial office, and served in that capacity between 1941 and 1947. It is said that he was functioning intermittently, but no precise dates are given which would indicate the length of that service. Simultaneously with this appointment to the Judicial service, he had necessarily to cease practice as an advocate. Between 1947 and 1959, he occupied various posts. They were not posts which could be regarded as judicial posts. For about a year, thereafter, he acted as Principal Judge of the City Civil Court, Madras. As stated already, on 1-7-1960, he was appointed as Government Pleader. The contention of Mr. Vasantha Pai is that the qualification prescribed by the above article as an advocate of a High Court requires the qualification of a "practising" advocate of a High Court, and not merely a person who has been enrolled as an advocate of the High Court, who for a variety of reasons practice elsewhere than before the High Court; that is to say, the expression "has for at least ten years, been an advocate of a High Court" means according to the learned counsel a person who has for that period been actively practising as an advocate in the High Court and not elsewhere. That an advocate normally means a practising advocate may be accepted without any difficulty. Learned counsel has referred to the history of legislation in his regard and pointed out that the Charter establishing the Supreme Court of Judicature at Madras, 1800, referred to persons enrolled and authorised to appear and plead and act for the suitors of the said Court. In the High Courts Act, 1861, in providing for the qualifications of persons to be appointed as Judges, Section 2 of 24-25 Vict. Ch. 104, says "Persons who have been pleaders of a Sadar Court or High Court for a period of not less than ten years, if such pleaders of a Sadar

Court shall have been admitted as Pleaders of a High Court". Learned counsel seeks to draw the inference from the form used herein that only pleaders who have been actually practising before the High Court are contemplated and it was in that sense that the earlier Acts dealt with the question. In the 1915 Act, u/s 96(2)(d), the qualification of a person to be appointed as a Judge was that he should have been a pleader of a High Court for a period of not less than ten years. The use of the word "pleader" in the earlier Acts, it is said, was for the reason that a person should have pleaded in the Indian sense, that is to say, should have actually appeared on behalf of the suitor and pleaded that cause. Learned counsel accordingly urges that Article 217(2)(b) equally requires that the expression "advocate of a High Court" should be so interpreted as to mean that the person should have been an advocate, not merely enrolled as an advocate of the High Court, but should have continuously practised as such advocate in the High Court for at least ten years.

(5) Pursuing this line of argument, it is further pointed out that where a person enrolled himself as an advocate, he is required under the relevant rule, the Bar Council Rules and the High Court Original Side and Appellate Side Rules, to indicate where he ordinarily desires to practice. This would also show that despite the fact that a person has been enrolled as an Advocate of the High Court, the venue of his practice is of importance and of the greatest importance when the question of an advocate's qualification for appointment as a Judge is concerned.

(6) In contrast to Article 217(2)(b), reference has been made in the course of the argument to Article 233(2) which relates to the appointment of District Judges. This provision states that a person not already in the service of the Union or of the State shall only be eligible to be appointed a District Judge, if he has been for not less than seven years an advocate or pleader and is recommended by the High Court for appointment. The use of the expression "an advocate" not qualified in the manner in which it is qualified in Article 217(2)(b) is relied on, on behalf of the petitioner to indicate the intention underlying the qualification of a person for High Court Judgeship.

(7) It is somewhat difficult to agree that this article of the Constitution interpreted as it stands compulsorily requires that the expression "has been an advocate of a High Court" should be taken to mean "has been practising before the High Court". If that was the underlying intention, it could have been so expressed. The difficulty insisted upon such a qualification is very apparent, for it is impossible to say whether an advocate who handles very few briefs in a year could be said to be actually practising. The makers of the Constitution could not have been unaware that a very many persons are enrolled as advocates of the High Court, but have little, or no work by way of pleading or acting. It is no doubt true that practising as an advocate is an essential requisite before those entrusted with the selection of a person to be a Judge would sponsor his case. But this is a matter which the Constitution makers apparently left to be

examined by the persons charged with the duty of selection. The colourless expression "has been an advocate of a High Court" has to my mind been designedly put in only to ensure the necessary legal qualification and standing as an advocate, leaving out other matters which may call for a practical approach, such as the assessment of the ability of the advocate, the volume of his practice, his standing at the Bar, and the like. In the absence of anything which would compel the particular construction which learned counsel seeks to put upon it, I am of opinion that the article does not require that the person should have practised before a High Court as an advocate and that if he has confined his practice to the Courts other than the High Court, he lacks the qualification prescribed. Learned counsel sought to support his argument by reference to some debates in the Constituent Assembly where apparently an attempt was made to amend the article regarding the qualification of a person for appointment as a Judge of the Supreme Court, by including a pleader practising for a certain minimum period, in a District Court and that amendment was rejected. That has only been relied upon for the purpose of showing that when reference is made in the Constitution to an Advocate, it refers to a practising advocate and when it is made to an advocate who has been practising before a High Court. As I said, I am unable to agree with this interpretation. It was pointed out by the learned counsel again that there is no case of an advocate who has practised in the mofussil being appointed as a Judge of the High Court. That to my mind will not be of assistance in interpreting the words of a written constitution.

(8) In a writ petition disposed of by Kailasam J., in which an identical question arose and precisely the same arguments appear to have been advanced by Mr. Vasantha Pai, the learned Judge observed, referring to the Bar Councils Act 1926, that a roll of the Advocates has to be prepared by the High Court u/s 8(2) of the Act, including all persons who were as advocates, vakils or pleaders entitled as of right to practice in that High Court and of other persons who have been admitted to be advocates of the High Court under the Act. The learned Judge held that an advocate of a High Court accordingly meant a person who was an advocate and had the right to practise in the High Court. He repelled the contention, that for the purpose of Article 217, advocates should be classified, one into a category of persons actually practising in the High Court, and another into one of persons not actually practising in the High Court. The decision in that case was accordingly that this article of the Constitution does not in terms require that before an advocate could be appointed as a Judge of the High Court, he should have been actually practising in that or in any other High Court for the requisite period, but that it would suffice if he were entitled to practise in a High Court. With respect, I agree with this view.

(9) Mr. Vasantha Pai's next contention is that at the best, the first respondent has been an advocate of the High Court only for six years since his appointment as Government Pleader in 1960. He claims that any earlier period during which the first respondent held judicial office cannot be included in the light of the

explanation to this article. The explanation thereto states that-

"In computing the period during which a person has been an advocate of a High Court, there shall be included any period during which the person has held judicial office after he became an advocate."

(10) The argument here is that since the first respondent became an advocate in the sense of practising advocate of the High Court only on 1-7-1960, when he was appointed Government Pleader, any period during which he held judicial office subsequent to that date can alone be included and not any period prior to 1-7-1960. I have already stated that in addition to have been an advocate of the High Court practising in the mofussil Courts between 1936 and 1941, Sri Alagiriswami held judicial office as District Munsif between 1941 and 1947. It is that latter period which Mr. Pai claims cannot be included under this Explanation as the interprets it. It will be noticed that even in this explanation, both the expressions "advocates of a High Court" and "an advocate" are used. Mr. Vasantha Pai claims that the expression "after he became ad advocate" occurring herein should be read "after he became an advocate of a High Court". that is to say, after he started practising in that High Court.

(11) The use of the two different expressions in the body of the same explanation is significant and in other parts of the Constitution, the word "advocate" alone has been used in a context, where Mr. Pai does not deny that that would include an advocate practising in a mofussil Court. The holding of the judicial office after he became an advocate referred to in the explanation cannot to my mind be so interpreted as to exclude the holding of such office by Sri Alagiriswami between 1941 and 1947. The two expressions "an advocate of a High Court" and "an advocate" are used in juxtaposition and grammatically construed must have different meanings. If that were otherwise, the Constitution could well have used the expression "after he became such advocate". What the explanation excludes is only the period when the person held judicial office, before he became an advocate. It is not and cannot be denied that when Sri Alagiriswami held judicial office as District Munsif (between 1951 and 1947) he did so after he had become an advocate, having been enrolled in 1936.

(12) Pursuing the same line of argument, Mr. Pai urges that the judicial office so held by Sri Alagiriswami was in the pre-Constitution period and at that time when the Government of India Act was in force, a judicial office such as that of a District Munsif was not an adequate qualification for appointment as a Judge of a High Court. It is true that, holding a judicial office lower than that of a Subordinate Judge was not within the scope of the qualification for appointment as a Judge of a High Court under the Government of India Act 1935. But that does not mean that we have to interpret the relevant provision in our Constitution in the light of that ineligibility under the Government of India Act. It will be noticed that in Article 124, Explanation II, any period during which a person has held judicial office not inferior to that of a District Judge after he became an advocate can be included in computing the period during which a

person has been an advocate for the purpose of that article. Clearly then, where it was thought necessary to specify the nature of the judicial office, the Constitution has taken care to do so. The Constitution designedly dropped the limitation upon the nature of the judicial office contained in the Government of India Act, in so far as the appointment to the High Court is concerned. I am unable to agree with Mr. Vasantha Pai that since the holding of the post of a District Munsif was not the holding of a judicial office for the purpose of appointment of a High Court Judge, under the Government of India Act, a like construction should be adopted in construing the explanation to Article 217.

(13) It is not denied that if this period is included and added to the period during which the first respondent has been Government Pleader, he has been an advocate of a High Court for at least ten years.

(14) The next contention of Mr. Pai is that in making the impugned appointment, the authorities have been guilty of the exercise of a fraud on power. This argument is put in this way. I have referred to the earlier proceeding before a Bench of this Court wherein the appointment of Sri Alagiriswami as Government pleader was questioned. Balakrishna Aiyar J. one of the Judges forming the Bench, thought that the Government misused their power and that the apparent suitability of Sri Alagiriswami to be appointed Government Pleader really concealed the true intention of the Government to confer a qualification on Sri Alagiriswami to be considered for the post of a Judge of the High Court in the future. Finally, however, the learned judges held that the rules for the appointment of Government Pleader as they stood only required that the person appointed should have been an advocate of the High Court as on the date of the appointment and nothing more, which qualification the appointee fulfilled. Mr. Vasantha Pai urges that what was schemed by those in authority who appointed Sri Alagiriswami as Government pleader has really been effectuated at the present time by the present appointment. He refers to *In Re: A.K. Gopalan*, wherein Satyanarayana Rao J. quoted the case of *Burghes v. Attorney General*, 1912-1 Ch. 173:

"It is the duty of the Crown and of every Branch of the Executive to abide by any obey the law. If there is any difficulty in ascertaining it, the Courts are open to the Crown to sue and it is the duty of the Executive in cases of doubt to ascertain the law in order to obey it, not to disregard it".

(15) Equally, it is said that when a Bench of this Court had in such categorical terms pronounced upon the appointment of Sri Alagiriswami as Government Pleader, decision cannot be ignored by those who close to appoint him as a Judge. In the affidavit accompanying the petition, it is further asserted that at about the time when the name of Sri Alagiriswami was proposed for appointment as an Additional Judge, the Executive took advantage of the fact that the post of the Chief Justice of this High Court was filled by an Officiating Chief Justice, and the permanent incumbent was acting as the Governor, and it was in those circumstances that the Executive managed to get the approval of the Governor

and the Officiating Chief Justice to the name of Sri Alagiriswami being sent upto the President for appointment. It what is claimed by Mr. Vasantha Pai is, that since the appointment of Sri Alagiriswami as Government Pleader was declared by this Court in a contested proceeding to have been made for an extraneous purpose, viz., to render him eligible for appointment as a Judge in the future, his name should not have been proposed at all or accepted for appointment, it seems to be to go far beyond the real effect of that decision. Whether this appointment as Government Pleader won judicial approval or not, that he was Government Pleader between 1960 to 1966 cannot be gainsaid, and that is undoubtedly a period during which Sri Alagiriswami was an advocate of the High Court, even in the sense of an advocate, practising in the High Court. I am unable to agree with Mr. Vasantha Pai that solely for the reason that the earlier decision impeached the property of Sri Alagiriswami's appointment as Government Pleader, his further chances of elevation to the bench should be forever lost, for that is in effect the argument advanced.

(16) Nor am I able to see how there can be said to be any fraud on power. "If the qualifications required by art. 217 obtain in the case, it was open to those in authority to suggest the name of Sri Alagiriswami for appointment as a Judge. Under Article 217, a Judge of a High Court is appointed by the President after consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court. Having regard to the wide publicity which the earlier decision of this Court had, that is, the proceeding in which the appointment of Sri Alagiriswami as Government Pleader was challenged, there is no doubt that the facts relevant thereto would have been within the knowledge of the appointing authority, the President. If the President took note of the qualifications prescribed by the Article and was satisfied that the first respondent did have those qualifications, I am unable to see how such an appointment could be said to be affected by any mala fides, whatever breach of good faith and propriety the earlier proceedings six years ago might have tended to show on the part of the State Government. This argument fails to convince me.

(17) I am satisfied that both the contentions advanced on behalf of the petitioner cannot be accepted. The petition is therefore dismissed.

(18) Mr. G. Vasantha Pai prays that a Certificate under Article 132(1) of the Constitution may be granted. In my opinion though the question raised is one of importance, it is not of such urgency that the normal venue of appeal to a bench of this Court should be side tracked. I decline to grant the certificate.

(19) Petition dismissed.