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Court : Kerala

Decided On : Jul-15-1996

Reported in : AIR1997Ker35

Judge : K.G. Balakrishnan and; K. Narayana Kurup, JJ.

Acts : [Constitution of India](#) - Articles 212 and 222

Appeal No. : O.P. No. 10159 of 1996-H

Appellant : M.K. Sasidharan, Advocate Supreme Court and President

Respondent : The Hon'ble Chief Justice of India, Supreme Court of India and Ors.

Advocate for Def. : M.K. Damadaran, Adv.-General

Advocate for Pet/Ap. : K. Ramkumar, Adv.

Disposition : Petition dismissed

Judgement :

Balakrishnan, J.

1. Petitioner is an advocate of the Supreme Court of India and claims to be the President of the International Society for Preservation of Human Rights and Rule

of Law based in Delhi.

2. The 5th respondent was appointed as an Additional Judge of the High Court of Kerala under Article 217 of the [Constitution of India](#). He was sworn in as a Judge of this Court on 11th April, 1996. By virtue of powers vested in the President of India under Article 222 of the Constitution, 5th respondent was transferred to the High Court of Gujarat. He was given time till 9th May, 1996 to assume charge as Judge of the Gujarat High Court. Later, President of India in consultation with the Chief Justice of India granted time to the 5th respondent to assume office till 30-6-1996. On 4-7-1996, the 5th respondent was given further time to assume office till 22-7-1996.

3. Petitioner alleges that by virtue of the transfer order issued by the President of India under Article 222 of the Constitution, the 5th respondent ceased to be a Judge of the High Court of Kerala and therefore, there shall be a writ of quo warranto calling upon him to show cause under what authority he has been discharging the function as an Additional Judge of the High Court of Kerala.

4. In the original petition it is also alleged that the 5th respondent while continuing as a Judge of the High Court of Kerala threw a party in the premises of the High Court on 3-6-1996 to the members of the High Court Advocates Association and this, according to the petitioner, was in flagrant violation of the precedents governing the behaviour of the constitutional functionaries as the day on which the party was conducted was declared to be a public mourning in connection with the sad demise of our former Rashtrapathi Shri Neelam Sanjeev Reddy. Petitioner alleges that the national flag was flying half mast in the High Court and, therefore, the conduct of a party in the premises of the High Court was defiling the national flag and showing disrespect to the late President of India. The petitioner, therefore, seeks for a writ of mandamus directing the respondents 1 to 4 to take appropriate action against the 5th respondent.

5. Learned Judge, before whom the Original Petition came up for admission, thought it fit to hear the learned Advocate-General and taking into account of the important constitutional questions involved in this case, the original petition was referred to a Division Bench. We heard the petitioner's counsel Shri K.

Ramakumar and learned Advocate-General Shri M.K. Damodaran.

5A. Elaborate arguments were advanced by the petitioner's counsel and it was contended that once the transfer order is issued by the President of India under Article 222 of the Constitution, the Judge who is transferred shall cease to hold office as a Judge of the transferor Court. It was contended that the transfer order terminated the office of a Judge and the transferred Judge would be 'a Judge designate of the transferee Court. Learned Advocate-General, on the other hand contended that if the transfer order is issued by the President of India under Article 222 of the Constitution, it will not terminate the initial appointment as a Judge of the transferor Court and it is pointed out that Article 217(1)(c) of the Constitution only says that the Judge who is transferred shall vacate his office and as the 5th respondent has been given time till 22-7-1996, he does not cease to be a Judge of this Court.

6. Petitioner's counsel drew support for his contentions from the observations made by the Hon'ble Judge who delivered separate judgments in the celebrated case in S.P. Gupta v. President of India (AIR 1982 SC 149). Reliance was also placed on the decision in Union of India v. Gopal Chandra (AIR 1978 SC 694).

7. The decision reported in Union of India v. Gopal Chandra (AIR 1978 SC 694) related to the case of a Judge of the Allahabad High Court who submitted the resignation. But later he withdrew the resignation. The question arose whether while submitting the resignation the Judge ceased to be a Judge of the Allahabad High Court with effect from the date of his letter of resignation. In paragraph-19 at page 698 of the decision His Lordship Justice Sarkaria who gave the majority judgment held as follows :

'Article 217(1) fixes the tenure of the office of a High Court Judge. It provides that a Judge shall hold office until he attains the age of 62 years. The three clauses of the proviso to Article 217(1) indicate that this tenure can be terminated before the Judge attains the age of 62 years, in four contingencies, namely, where he--

(i) resigns his office in the manner laid down in its Clause (a);

(ii) is removed from this office in the manner provided in Article 124(4) (vide its Clause (b));

(iii) is appointed a Judge of the Supreme Court (vide its Clause (c));

(iv) is transferred to any other High Court in India.'

8. Learned counsel for the petitioner also relied on some of the observations made by the Hon'ble Judges who dealt with S.P. Gupta's case (AIR 1982 SC 149) (cited supra). In paragraph 286 at page 316:

'It is true that on being transferred to another High Court a Judge ceases to be a Judge but then he ceases to be a Judge of the transferor Court only and does not cease to be a Judge for all times to come so as to make his transfer in the transferee Court a fresh appointment.'

In paragraph-900 at page 543 :

'That being the position how then can the transfer of a Judge from one High Court to another High Court be viewed in law? A Judge appointed to a High Court is entitled to continue as a Judge of that High Court until he attains the age of 62 years, unless of course he resigns his office or is removed from it. His transfer to another High Court involves the vacation of his office in that High Court, that is to say, his appointment as a Judge of that High Court stands terminated. This is confirmed by Clause (c) of the proviso to Clause (1) of Article 217. Simultaneously, without anything more the transfer affects his appointment to the other High Court to which he is being sent. An order of transfer under Clause (1) of Article 222 therefore, is a transaction in two parts, the termination of the appointment as a Judge of the original High Court and the simultaneous appointment as a Judge of the other High Court.

That view is supported by the circumstance that the power of transfer is vested in the President. It is significant in this connection that the President is also the appointing authority in the case of appointment made under Clause (1) of Article 217 and is also vested with the power of removal in cases falling under Article 218 read with Clause (4) of Article 124. Therefore, it was necessary that the authority

who has been otherwise vested with the power to appoint a Judge and to terminate his appointment should also be the authority to transfer him. It may be added that inasmuch as the transfer constitutes an appointment of the Judge to the other High Court. Article 219 comes into play and, therefore, the transferred Judge must, before he enters upon his office in that High Court, make or subscribe an oath or affirmation according to the prescribed Form.'

9. It was also contended by the petitioner's counsel that a Judge who is transferred from one High Court to another High Court has to take a fresh oath in the transferee High Court before he enters upon his office and the oath which has already been taken by the Judge while assuming office in the transferor High Court ceases to have any effect and the transfer order issued by the President of India virtually takes away the oath which had already been taken by the Judge and this also indicates that the Judge ceases to be a Judge of the transferor High Court the moment the transfer order is issued.

10. The contentions raised by the petitioner's counsel, though it appears to have some force but on a deeper analysis of the various Articles in the Constitution, it is clear that the transfer order issued by the President of India under Article 222 of the Constitution is only a direction to the transferred Judge to lay down his office and to assume office in the new High Court and till he enters upon his office in the new 'transferee High Court he continues to be a Judge of the transferor High Court.

10A. At the outset, we may observe that the decision reported in *Union of India v. Gopal Chandra* (AIR 1978 SC 694) and the observation of the Hon'ble Judge in paragraph 19 which is quoted above is to be appreciated in the context in which it was made. That was not a case involving a transfer of Judge and whether the Judge ceased to be a Judge of the transferor Court or his being transferred to another High Court was not considered. Nor it was a matter in issue in that case. The Hon'ble Judge was only categorising the circumstances under which the tenure of office of the Judge could be terminated. The transfer order issued under Article 222 of the Constitution could also give rise to a situation that the Judge's appointment in the transferor High Court will be terminated. If the Judge who is

transferred does not take the office within the period stipulated by the President of India, he will certainly cease to be a Judge of the transferor High Court, as the mandate of Article 217(1)(c) of the Constitution is to the effect that the office of a Judge shall be vacated by the Judge on his being transferred by the President of India to any other High Court. The question is at what point of time he would cease to be a Judge of the transferor High Court was neither considered nor decided in *Union of India v. Gopal Chandra* (AIR 1978 SC 694).

11. In *S.P. Gupta's case* (AIR 1982 SC 149) (cited supra) four Original Petitions were considered by the Supreme Court. Transfer order of a Judge from one High Court to another High Court was matter in issue in some of the cases and transfer was challenged on various grounds. One of the grounds urged by the counsel who appeared for the petitioners is that the transfer order issued by the President of India under Article 222 of the [Constitution of India](#) amounts to fresh appointment of the transferred Judge in another High Court and, therefore, the consent of the particular Judge is necessary as no person could be appointed as a Judge of the High Court without his consent. The above argument was not accepted by the majority of Judges. It was held that the transfer cannot be treated as fresh appointment. The distinction between the word 'transfer' and 'appointment' used in Article 217 was clearly distinguished. The word 'appointment' is used when a Judge is elevated to the Supreme Court and in the case of transfer of a Judge from one High Court to another High Court the word 'transfer' is used in contradistinction to the word 'appointment'. This was considered in Paragraph-286 of the judgment rendered by His Lordship Justice S.M. Fazal Ali:

'It may also be pointed out that whenever a legislature or constituent assembly uses a particular phrase in contradistinction to another phrase it is not possible to read the two phrases so as to indicate the same purpose -- the instant case, the Constitution has used the word 'appointed' in the case of a Judge of the Supreme Court and 'transfer' in the case of a Judge of a High Court. A perusal of the language of Article 217(1) proviso (c) leads to the irresistible conclusion and logical inference that the Founding Fathers have made a clear distinction between transfer and appointment. It is true that in both cases the office held by a Judge is vacated in a fictional sense because there is a complete change in the life of the

Judge but that does not mean that the incidents of both these appointments are the same'.

12. Therefore, it is clear that the transfer of a Judge from one High Court to another High Court does not amount to a fresh appointment. If that be so, whether the transfer order issued under Article 222 of the Constitution by the President of India terminates the office of the Judge with effect from the date of the order. Article 217(1)(c) of the Constitution reads as follows:

'the office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.'

The above provision says that a Judge on his being transferred by the President of India to any other High Court shall vacate his office and if the Judge is given some time to assume office in the transferee High Court, does he continue to hold office or he ceases to be a Judge forthwith? This question did not arise in S.P. Gupta's case (AIR 1982 SC 149). Nor it was considered by the Supreme Court in that case. The observations of the Hon'ble Judges in paragraphs 286, 900 and other portions of the judgment were made in a circumstance where the question arose as to whether the transfer amounted to a fresh appointment and only under such circumstance it was held that the transfer order issued under Article 222 of the Constitution does not amount to a fresh appointment in the transferee High Court. Therefore, the observations made by the Hon'ble Supreme Court in paragraphs 286 and 900 of the judgment in S.P. Gupta's case cannot be considered as a finding to the effect that the transfer order ipso facto terminates the service of the Judge in the transferor Court.

This is evident from the various other observations made by the Hon'ble Judges in the very same case. In paragraph 1106 at page 613 it was held as follows :

'If a transferred Judge has therefore to take a fresh oath then it is urged that the order of transfer would become a fresh appointment for which his consent would be required by necessary implication as it is necessary in the case of a first appointment under Article 217(1). It is difficult to agree with this contention. What

is the object of an oath? An oath is taken by a Judge in order to show his allegiance to the Constitution and to affirm that he will duly and faithfully 'discharge his duties as a Judge without fear or favour, affection or ill will and that he will uphold the Constitution. The essential part of it is what he swears or affirms to do. The words 'having been appointed Chief Justice (or a Judge) of High Court at (or of)' in the form of oath are only descriptive of the person who takes the oath. The oath is not confined to the High Court where he enters his office. It will operate as long as he discharges judicial duties either in that High Court or in any other High Court to which he may be transferred under Article 222 of the Constitution or even when he discharges any other duty which he may be requested to do by the President as provided in para 11(b)(i) of the Second Schedule to the Constitution. The oath binds him even after his retirement.'

It was further held in the very same paragraph at page 614 :

'The position cannot be different when a Judge of a High Court is transferred under Article 222. On such transfer he may cease to be a Judge of the High Court where he was working before such transfer but he continues to be a Judge nonetheless and goes to the Court to which he is transferred as a Judge and not as a newly appointed person who is still to blossom into a Judge by taking the oath as prescribed by Article 219 of the Constitution.'

13. The question as to at what point of time the Judge shall vacate his office on his being transferred was not decided in S.P. Gupta's case (AIR 1982 SC 149). The question has to be decided on the basis of the words used in Article 217(1) of the Constitution and the surrounding circumstances of the case. The 5th respondent was transferred on 26th April, 1996 and time was granted to assume office till 9th May, 1996. Later it was extended till 30-6-1996 and subsequently till 22-7-1996. If the argument of the petitioner is accepted, the 5th respondent should be deemed to have ceased to hold the office of a Judge on 26th April, 1996. This contention cannot be accepted for various reasons. Article 217(1) of the Constitution only says that the Judge who is transferred shall vacate his office. The fact that the transferred Judge was given sufficient time to assume office in the transferee High Court is indicative of the fact that the transfer order does not abruptly terminate the

appointment as a Judge of the transferor High Court. In the instant case, the 5th respondent did not assume charge on 30-6-1996. On 4th July, 1996, another order was issued by the President of India in consultation with the Chief Justice of India extending the time to assume office till 22-7-1996. If the appointment of 5th respondent as a Judge of the Kerala High Court had come to an end, we do not think that President of India in consultation with the Chief Justice of India would have issued an order on 4th July, 1996 granting further time to the 5th respondent to assume office. It is clear that the 5th respondent continued to be a Judge of the transferor High Court and the majority decision in S.P. Gupta's case (AIR 1982 SC 149) is also to the effect that the transferred Judge continues to be a Judge of the transferor High Court till he assumes office in the transferee High Court.

14. If it is assumed that the Judge immediately ceases to be a Judge of the transferor High Court on his being transferred by the President of India under Article 222 of the Constitution, the cancellation of the said order will lead to a situation that the Judge is no longer a Judge of the transferor High Court and also of the transferee High Court. Till he enters upon his office at the transferee Court, he cannot be Judge of that Court. We do not think that this is a correct interpretation of Article 217(1)(c) of the Constitution.

15. However, we hasten to add that as we understand the consistent practice and convention among the various High Courts is that when a Judge is transferred from one High Court to another High Court, he vacates the office and makes preparation to assume office in the transferee High Court. Considering the dignity and decorum of this high constitutional office, it is just and fair that a Judge on his being transferred shall vacate his office at the earliest. If he continues to discharge the function as a Judge in the transferor High Court that may not be consistent with the constitutional spirit enshrined in Article 217(1) of the Constitution.

16. The petitioner has alleged that the 5th respondent has defiled the national flag by hosting a tea party in the High Court premises on a mourning day while the national flag was flying half mast. That was not an official dinner or party. We do not think that the 5th respondent had ever intended to defile the national flag. The prayer of the petitioner for issue of a mandamus is only to be rejected.

17. Learned Advocate-General contended that the petitioner is a lawyer of the Supreme Court and he is not an interested party and he has no locus standi to file a writ of quo warranto against the 5th respondent. We do not propose to consider this question as the Original Petition is not maintainable on other grounds.

18. The prayer of the petitioner to issue a writ of quo warranto is not maintainable as the 5th respondent was appointed as an Additional Judge of the High Court of Kerala by the President of India in consultation with the Chief Justice of India and the warrant of appointment still holds good and he had been given time to assume office till 22-7-1996. He continues to be a Judge of this Court for all practical purposes. The prayer of writ of quo warranto is rejected.

19. Learned single Judge passed an order on 26-6-1996 that the contends or any part of the proceedings of this Original Petition shall not be reported or published in any media either press or electronic, audio or visual. We do not think that there should be such an order as the questions agitated before us are, constitutional questions and no veil of secrecy is required in this matter. We vacate that order.

20. The Original Petition is without merit and it is dismissed.

21. Immediately upon pronouncing the judgment, counsel for the petitioner prayed that he may be granted leave to appeal on the question of interpretation of Article 217(1) of the Constitution. Leave declined.

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