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Court : Kolkata

Decided On : Oct-29-2004

Reported in : (2005)1CALLT507(HC),2005(1)CHN483

Judge : Ashim Kumar Banerjee and ;Aniruddha Bose, JJ.

Acts : [Constitution of India](#) - Article 226

Appeal No. : A.S.T. No. 3036 of 2004

Appellant : Subhash Datta and Anr.

Respondent : Hon'ble Chief Justice of the Supreme Court of India

Advocate for Pet/Ap. : Sardar Amjad Ali appeared in person;Party-in-Person;Subrata Mukherjee, Adv.

Disposition : Petition dismissed

Judgement :

Ashim Kumar Banerjee, J.

1. This Public Interest Litigation has been filed by Sri Subhas Datta and Another inter alia challenging the transfer of two Hon'ble Judges of this Court to other High

Courts.

2. The petitioners have prayed for stay of such transfer orders as according to them they are entitled to have information under Section 6 of the Freedom of Information Act, 2002 as to why the said two Hon'ble Judges of this Court are transferred to other High Courts.

3. According to the petitioners one of the Hon'ble Judges passed an order by stopping public rallies on the working days to mitigate the immense hardship suffered by commoners. As a retaliation one political leader of the State made a statement against the learned Judge before the media which has resulted in a contempt proceeding now pending before a Division Bench of this Hon'ble Court.

4. According to the petitioner the other learned Judge presiding over the Division Bench taking Public Interest Litigation and Environment matters passed various orders embarrassing the State Government.

5. The petitioners believe that these might be the reason for their transfer to the other State.

6. The Apex Court decided the identical issue in a 9 Judges Constitution Bench in the case of Supreme Court Advocate on Record Bar Association v. Union of India reported in : AIR 1994 SC268 being relevant herein are quoted below :

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423. So far as the interpretation of Article 222 of the Constitution regarding transfer of a Judge from one High Court to another, we entirely agree with the reasoning and the conclusions reached by Verma, J. We reiterate that the power vested under Article 222 can only be exercised in 'public interest'. It is only the Chief Justice of India who can examine the circumstances in a given case and reach a conclusion as to whether it is in public interest to transfer or re-transfer a Judge from one Court to another. Concept of 'public interest' when read in Article 222 makes it obligatory that the views of the Chief Justice of India are accepted by the executive. We also agree with Verma, J. that a transfer made in public interest on the recommendation of the Chief justice of India is not

justiciable.....

502. The primacy of the judiciary in the matter of appointments and its determinative nature in transfers introduces the judicial element in the process, and is itself a sufficient justification for the absence of the need for further judicial review of those decisions, which is ordinarily needed as a check against possible executive excess or arbitrariness. Plurality of Judges in the formation of the opinion of the Chief Justice of India, as indicated, is another inbuilt check against the likelihood of arbitrariness or bias, even subconsciously, of any individual. The judicial element being predominant in the case of appointments, and decisive in transfers, as indicated, the need for further judicial review, as in other executive actions, is eliminated. The reduction of the area of discretion to the minimum, the element of plurality of Judges information of the opinion of the Chief Justice of India, effective consultation in writing, and prevailing norms to regulate the area of discretion are sufficient checks against arbitrariness.

503. These guidelines in the form of norms are not to be construed as conferring any justiciable right in the transferred Judge. Apart from the Constitutional requirement of a transfer being made only on the recommendation of the Chief Justice of India, the issue of transfer is not justiciable on any other ground, including the reasons for the transfer of their sufficiency. The opinion of the Chief Justice of India formed in the manner indicated is sufficient safeguard and protection against any arbitrariness or bias, as well as any erosion of the independence of the judiciary.....

7. The Apex Court in the said decision in most unequivocal terms observed that transfer of Judges cannot be a subject-matter of a judicial review. Their Lordships observed that such transfer is effected after a thorough scrutiny by the appropriate body consisting of the Chief Justice of India as well as other Hon'ble Judges of the Supreme Court being the member of Collegium. Sitting in a Division Bench we are not competent enough to entertain this application following the decision of the Apex Court quoted supra.

8. We would have dismissed this petition in this backdrop. However, we feel that we should deal with the allegation made in the petition on merits to some extent otherwise it would give a wrong signal to all concerned.

9. If we look to the Constitution we would find that judiciary is independent in all respect. It is true that the Constitution provides for some interlink and/or relation between the judiciary and executive. However, appointment, transfer, elevation of Hon'ble Judges of the High Court as well as Supreme Court depend on the Collegium of Hon'ble Judges of the Supreme Court presided over by the Hon'ble Chief justice of India. The Collegium of Hon'ble Judges must have thought fit to adopt the transfer policy in the past, those were upheld by the 9 Judges Bench quoted (supra). The Supreme Court by another 9 Judges Bench decision in the case of In Re: Presidential References reported in : AIR 1999 SC1 prescribed the method of transfer of Hon'ble Judges of the High Courts.

10. It might be a coincidence that two Hon'ble Judges passed orders against the State Government. They must have done so as those cases deserved such orders. We being the Judges are supposed to speak through our conscience and we do speak through our conscience. One of us (the Hon'ble Mr. Justice Ashim Kumar Banerjee) was a party to the Division Bench taking up Public Interest Litigation matters and Environment matters for about a year and the said Division Bench passed several orders against the State Government, We are the watchdog of the Constitution dispensing justice within the framework of the Constitution and the laws enacted under it. Hence, we do not have any hesitation to say that the apprehension of the petitioners is totally misconceived. The Apex Court through Collegium being authorized, if considers it fit to recommend transfer of Hon'ble Judges from one High Court to the other High Court, the Division Bench of the High Court is not competent to examine the same in a judicial review.

11. In the present writ petition, there is another aspect which we should highlight. Apart from a newspaper reporting the petitioners have not been able to assert whether the appropriate body has in fact passed any such transfer order. We have not been shown any such order. In any event, this issue cannot be gone into and examined by this Division Bench.

12. In course of hearing, Sardar Amjad Ali, President of the Bar Association, Calcutta wanted to intervene in his personal capacity. We have granted him leave to intervene. Mr. Ali submits that he is really hurt by reading the newspaper reporting concerning transfer of Hon'ble Judges of this Court and supported the case of the petitioners. We honour the sentiment of Mr. Ali. At the same time we are unable to entertain this application on the ground mentioned above.

13. Hence, the writ petition fails and is hereby dismissed.

14. There would be, however, no order as to costs.

15. Urgent xerox certified copy would be given to the parties, if applied for.

Aniruddha Bose, J.

16. I agree.

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