

(1994) 02 SC CK 0070

Supreme Court Of India

Case No: Civil Appeal No. 140 of 1994.

K. Ashok Reddy

APPELLANT

Vs

The Government of India

Harikesh Singh (H.K. Singh)

RESPONDENT

Vs Union of India and Others

Date of Decision: Feb. 7, 1994

Acts Referred:

- Constitution of India, 1950 - Article 222

Citation: AIR 1994 SC 1207 : (1994) 1 JT 401 : (1994) 1 SCALE 377 : (1994) 2 SCC 303 : (1994) 1 SCR 662 : (1994) 2 UJ 61 : (1994) 1 UPLBEC 434 : (1994) 1 UPLBEC 424

Hon'ble Judges: S. P. Bharucha, J; Kuldeep Singh Singh, J; J. S. Verma, J

Bench: Full Bench

Advocate: Party in Person in C.A. No. 140/1994, for the Appellant; Milan K. Banerjee, Attorney General, A.K. Ganguli, A. Subhashini, C.V.S. Rao and P. Parmeswaran, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

J.S. Verma, J.

These matters are a sequel to the decision by a nine-Judge Bench in 279971 (hereinafter called the "Judges Case-H"), and relate to the question of transfer of Judges of the High Courts under Article 222 of the Constitution of India.

2. Civil Appeal No. 140 of 1994 by special leave is against the judgment of the Andhra Pradesh High Court dismissing a writ petition filed by the appellant, K. Ashok Reddy. In substance, the relief claimed in the writ petition was a declaration that judges of the High Courts are not liable to be transferred from one to another High Court. It was contended that the transfers were likely to be influenced by extraneous considerations leading to arbitrariness resulting in erosion of the

independence of judiciary. Another contention was that the decision by the nine-Judge Bench in the Judges" Case-II excludes the power of judicial review and is, therefore, in conflict with the decision of a larger Bench in His Holiness Kesavananda Bharati Sripadaqalavaru v. State of Kerala, [1973] (Supp.) S.C.R. 1. The Andhra Pradesh High Court rejected these contentions taking the view that such misapprehensions result from a misreading of the decision of the nine-Judge Bench in the Judges Case-II. Civil Appeal No. 140 of 1994 has been filed by special leave against that judgment.

3. When the aforesaid civil appeal came up for hearing, it was reported that a writ petition raising similar questions had been filed in the Allahabad High Court and, therefore, it was considered appropriate to withdraw that writ petition from the Allahabad High Court and to hear and decide the same along with the said civil appeal. Accordingly, that writ petition withdrawn from the Allahabad High Court is Transferred Case No. 1 of 1994 and is also decided along with the civil appeal. The reliefs claimed in Transferred Case No. 1 of 1994 relate essentially to Judges of the Allahabad High Court and their transfer.

4. Notice was issued to the Central Government as well as the Attorney General of India in both these matter.

5. We have heard the appellant, K. Ashok Reddy, a Practising Advocate from Andhra Pradesh. The petitioner, Harikesh Singh in Transferred Case No. 1 of 1994 is a practising Advocate from Allahabad. In spite of sufficient prior notice of the date of hearing, Harikesh Singh chose to remain absent and took no steps for appearance on his behalf. We have, therefore, examined his case with the assistance of the learned Counsel appearing in these matter. We also heard the learned Attorney General and Shri A.K. Ganguli on behalf of the Central Government and Ms. Indira Jaising who appeared on behalf on Sub-committee on Judicial Accountability.

6. The appellant, K. Ashok Reddy submitted that Article 222 of the Constitution of India is in substance a dead letter since the power there under is incapable of exercise in the absence of guidelines provided in the Constitution itself. He also submitted that judicial review is a basic feature of the Constitution as held in Kesavananda Bharati by a larger Bench and, therefore, the holding by a nine-Judge Bench in the Judges Case- II excluding judicial review in the matter of transfers is not good law. Shri Reddy expressed his concern at the likely arbitrariness in the transfer of High Court Judges emphasising the fact that his concern was about the proper implementation of that policy and not of its effect on any individual High Court Judge. According to him, the Judges Case-II should be clarified to prevent any arbitrariness.

7. The learned Attorney General submitted that the misapprehensions of Shri Reddy are unfounded since the Judge Case-II has dealt with these aspects and also indicated the guidelines to exclude any arbitrariness in the transfer of Judges. The

learned Attorney General also submitted that the Judges" Case-II does not conflict with the decision in *Kemvanda Bharati* inasmuch as it does not exclude judicial review but merely emphasises the limited area thereof in view of the nature of that exercise, the discretion being vested in the highest constitutional functionaries. Shri Ganguli, on behalf of the Central Government made the same submission with reference to portions of the decision in the Judges" Case-II to indicate that these matter are covered by that decision. Submissions of Ms. Indira Jaising were substantially to the same effect with the addition that some more guidelines for effectuating the transfer policy could be indicated herein to ensure uniformity in its working. The points raised in the transferred case from Allahabad are also covered by these submissions and do not require separate consideration.

8. Having given our anxious consideration to the matter, we are satisfied that the points raised in the civil appeal as well as the transferred case are adequately covered by the decision in the Judges" Case-II. It would be appropriate to advert particularly to some portions of that decision which are material for the present purpose, before dealing with the submissions made.

9. The material portions of the majority opinion in 279971 , are as under:

The rule of law envisages the area of discretion to be the minimum, requiring only the application of known principles or guidelines to ensure non-arbitrariness, but to that limited extent, discretion is a pragmatic need. Conferring discretion upon high functionaries and, when ever feasible, introducing the element of plurality by requiring a collective decision, are further checks against arbitrariness. This is how idealism and pragmatism are reconciled and integrated, to make the system workable in a satisfactory manner,....

The norms developed in actual practice, which have crystallized into conventions in this behalf, as visualised in the speech of the President of the Constituent Assembly, are mentioned later.

(Paras 468 and 469)

Transfers

Every power vested in a public authority is to subserve a public purpose, and must invariably be exercised to promote public interest. This guideline is inherent in every such provision, and so also in Article 222. The provision requiring exercise of this power by the President only after consultation with the Chief Justice of India, and the absence of the requirement of consultation with any other functionary, is clearly indicative of the determinative nature, not mere primacy, of the Chief Justice of India's opinion in this matter. The entire gamut in respect of the transfer of Judges is covered by 283340 and 279525 . It was held by majority in both the decisions that there is no requirement of prior consent of the Judge before his transfer under Article 222. This power has been so exercised since then, and transfer of Chief

Justices has been the ordinary rule. It is unnecessary to repeat the same.

(Para 470)

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The power of transfer can be exercised only in "public interest" i.e. for promoting better administration of justice throughout the country. After adoption of the transfer policy, and with the clear provision for transfer in Article 222, any transfer in accordance with the recommendation of the Chief Justice of India cannot be treated as punitive or an erosion in the independence of judiciary. Such Judges as may be transferred hereafter will have been, for the most part, initially appointed after the transfer policy was adopted and judicially upheld by this Court. There will be no reason for any of them to even think that his transfer is punitive, when it is made in accordance with the recommendation of the Chief Justice of India. In his case, transfer was an obvious incident of his tenure. This applies equally to all Judges appointed after the adoption of the transfer policy, irrespective of whether they gave an undertaking to go on transfer or not.

The Constituent Assembly Debates indicate that the High Court Judges were intended to constitute an All-India Cadre. This position cannot now be doubted after adoption of the policy of appointing Chief Justices from outside and the maintenance of an all-India seniority based on the date of initial appointment, treating all High Courts as equal. If the transfer of a Judge on appointment as Chief Justice is not punitive, there is no occasion to treat the transfer of any other Judge as punitive.

There is nothing in Article 222 to require the consent of a Judge/Chief Justice for his first or even a subsequent transfer. Since his consent is not read as a requirement for the first transfer there is no reason to require his consent for any subsequent transfer, according to the same provision. The power under Article 222 is available throughout the tenure of a High Court Judge/Chief Justice, and it is not exhausted after the first transfer is made. The contrary view in S.P. Gupta has no basis in the Constitution. It is reasonable to assume that the Chief Justice of India will recommend a subsequent transfer only in public interest, for promoting better administration of justice throughout the country, or at the request of the concerned Judge. As indicated, at least now, after the lapse of more than a decade since the decision in S.P. Gupta, there is no reason to treat any transfer as punitive; and, therefore, the observation in S.P. Gupta that a punitive transfer is impermissible has no application any more. As indicated by us later, a transfer made in accordance with the recommendation of the Chief Justice of India, is not justiciable.

Promotion of public interest by proper functioning of the High Courts and, for that reason, the transfer of any Judge/Chief Justice from one High Court to another must be the lodestar for the performance of this duty enjoined on the Chief Justice of

India, as the head of the Indian Judiciary. Suitable norms, including those indicated hereafter, must be followed by the Chief Justice of India, for his guidance, while dealing with individual cases.

(Paras 472 to 475)

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NORMS

The absence of specific guidelines in the enacted provisions appears to be deliberate, since the power is vested in high constitutional functionaries and it was expected of them to develop requisite norms by convention in actual working as envisaged in the concluding speech of the President of the Constituent Assembly. The hereinafter mentioned norms emerging from the actual practice and crystallized into conventions - not exhaustive - are expected to be observed by the functionaries to regulate the exercise of their discretionary power in the matters of appointments and transfers.

(Para 477)

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Transfers

(1) In the formation of his opinion, the Chief Justice of India, in the case of transfer of a Judge other than the Chief Justice, is expected to take into account the views of the Chief Justice of the High Court from which the Judge is to be transferred, any Judge of the Supreme Court whose opinion may be of significance in that case, as well as the views of at least one other senior Chief Justice of a High Court, or any other person whose views are considered relevant by the Chief Justice of India. The personal factors relating to the concerned Judge, and his response to the proposal including his preference of places of transfer, should be taken into account by the Chief Justice of India before forming his final opinion objectively, on the available material, in the public interest for better administration of justice.

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(4) It may be desirable to transfer in advance the senior-most Judge due for appointment as Chief Justice to the High Court where he is likely to be appointed Chief Justice, to enable him to take over as Chief Justice as soon as the vacancy arises and, in the meantime, acquaint himself with the new High Court. This would ensure a smooth transition without any gap in filling the office of Chief Justice. In transfer of puisne Judges, parity in proportion of transferred Judges must be maintained between the High Courts, as far as possible.

(5) The recommendations in the Report of the Arrears Committee (1989-90) mention certain factors to be kept in view while making transfers to avoid any hardship to the transferred Judges. These must be taken into account.

(Para 479)

JUSTICIABILITY

Appointments and Transfers

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 in formation 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.

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 or 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.

This is also in accord with the public interest of excluding these appointments and transfers from litigative debate, to avoid any erosion in the credibility of the decisions, and to ensure a free and frank expression of honest opinion by all the constitutional functionaries, which is essential for effective consultation and for taking the right decision. The growing tendency of needless intrusion by strangers and busybodies in the functioning of the judiciary under the garb of public interest litigation, in spite of the caution in *S.P. Gupta* while expanding the concept of locus standi, was adverted to recently by a Constitution Bench in 288239 . It is, therefore, necessary to spell out clearly the limited scope of judicial review in such matters, to avoid similar situations in future. Except on the ground of want of consultation with the named constitutional functionaries or lack of any condition of eligibility in the case of an appointment, or of a transfer being made without the recommendation of the Chief Justice of India, these matters are not justiciable on any other ground including that of bias, which in any case is excluded by the element of plurality in the

process of decision making.

(Paras 480 to 482)

Pandian, J. In his separate concurring opinion has expressed his entire agreement on this point, as under:

Transfer of Judges

With regard to the interpretation of Article 222 regarding transfer of Judges from one High Court to another, I entirely agree with the reasoning and conclusion arrived at by learned brother, J.S. Verma, J.

(Para 252)

Conclusions

Though I have given my reasons separately, as indicated even at the threshold of the judgment, I am in agreement with the conclusions of my learned brother, J.S. Verma, J. regarding the process of appointment of Judges, initiation of the proposal for appointments and the right of primacy to the opinion of Chief Justice of India in the matter of appointment of Judges, transfer of High Court, Judges/Chief Justices of the High Courts, fixation of Judge- strength, the summary of which is given under Point Nos. (1) to (8), (12) and (13).

(Para 253)

One of us (Kuldip Singh, J.) While concurring with the majority, stated thus:

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.

(Para 407)

On the basis of the reasoning and discussion on various issues, we conclude and hold as under:

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(10) A Chief Justice/Judge may be transferred from one High Court to another - Article 222 in public interest. A transferred Chief Justice/Judge can be transferred

again and the power is not exhausted after the first transfer. The consent of the Chief Justice/Judge concerned is not required under the Constitution. S.P. Gupta case stands overruled to the extent.

(11) A proposal for transfer of a Chief Justice/Judge under Article 222 has to be initiated by the Chief Justice of India and the ultimate recommendation in that respect is binding on the executive.

(12) The transfer of a Chief Justice/Judge is not justiciable in the court of law except on the ground that the transfer was made without the recommendation of the Chief Justice of India.

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(Para 411)

10. Ahmadi, J. in his separate opinion, on this point, has taken substantially the same view by saying that a High Court Judge can be transferred in public interest and such a transfer is not punitive. Punchni, J. in his opinion has generally agreed with Ahmadi, J. In short, there is no disagreement on this aspect in the opinion of any learned Judge in the Judges" Case-II.

11. It is, therefore, clear that exercise of power of transfer under Article 222 of the Constitution is to subserve a public purpose and to promote "public interest" for better administration of justice throughout the country, which is the inherent guideline implicit in Article 222 as held in the Judges" Case-II. The expression "public interest" has a legal connotation well known and properly understood and so also the requirement of promoting better administration of justice throughout the country, which is the guideline held to be implicit in Article 222 of the Constitution.

12. The expression "public interest" in the context of the Premature Retirement Rules was held to be an expression having the well settled meaning that it refers to the interests of public administration. (See 292872 and 287780 .

13. In our opinion, the guideline of "public interest, i.e., "for promoting better administration of justice throughout the country is sufficient guideline for proper exercise of the power and to ensure exclusion of the possibility of any arbitrariness in the exercise of power of transfer under Article 222 in accordance with the recommendation of the Chief Justice of India as indicated in the Judges" Case-II; and its application to individual cases is a question of fact in each case. Laying down exhaustive guidelines in this behalf is neither expedient nor pragmatic. It has also been indicated in the Judges" Case- II that "suitable norms, including those indicated ..., must be followed by the Chief Justice of India, for his guidance, while dealing with individual cases". The application of the broad guidelines to individual cases according to norms evolved in practice has to be left to the discretion of the Chief Justice of India which is to be exercised in consultation with this colleagues

whose opinion is required to be taken for this purpose. The factors" which may be relevant for promoting better administration of justice throughout the country to subserve the public interest contemplated by such transfers would depend on the myriad situations which might have to be met. Some such relevant factors would be - shifting of a Judge from one High Court to another for improving the functioning of either High Court; avoiding embarrassment to the Judge on account of close relations practising ordinarily in the same High Court or any court subordinate thereto; the likelihood of embarrassment to the Judge on account of any litigation or property interest in the same State; if the Judge, for any reason, has become controversial so that his continuance in the same High Court is not conducive to his interest or to the image of the judiciary or to the proper functioning of that High Court, or any other similar situation. The transfer of any Judge with his consent can, of course, be always made. The factors indicated are not an exhaustive list of all the relevant factors in this behalf and are merely illustrative.

14. The Chief Justice of India, as the pater familiar of the judiciary, can be safely relied upon in his wisdom, to ensure that transfer of a judge is so effected as to cause him the minimum inconvenience and to take into account such personal factors as might be involved. Indication to this effect is also to be found in the Judges" Case-II.

15. The myth of non-transferability of High Court Judges, notwithstanding Article 222, was blown in 283340 . Thereafter, the constitutional validity of the transfer policy was judicially upheld in 279525 . The conferment of that power by Article 222 and the proper manner of its exercise to exclude any arbitrariness has then been indicated in the Judges" Case-II, wherein the trust reposed by the President of the Constituent Assembly in the constitutional functionaries was recalled and adverted to. Dr. Rajendra Prasad had said:

Many things which cannot be written in the Constitution are done by conventions. Let me hope that we shall show those capacities and develop those conventions.

16. It is for this reason, that detailed guidelines are not to be found in the Constitution and they have to emerge in the working of Article 222. It has been made known that after the Judges" Case-II, the Chief Justice of India constituted a Peer Committee comprising of the two seniormost puisne Judge of the Supreme Court and two Chief Justice of High Courts to make suggestions for transfers and the Chief Justice of India is to make his recommendations on that basis and in accordance with the broad guidelines indicated in the Judges" Case-II. In our view, this is sufficient safeguard against any likely arbitrariness or bias. There is no room left for any apprehension of arbitrariness or bias in the transfer of any Judge/Chief Justice of a High Court. It is same that the men at the apex level of the Indian judiciary are permitted to manage the affairs of the judicial family and look after its welfare and interest instead of permitting repeated intrusions by some in the guise of "public interest" thereby rendering the Judges vulnerable to avoidable

controversy involving them. We are constrained to observe that the Allahabad case before us is of that kind. We have no doubt that the Chief Justice of India acting on the institutional advice available to him is the surest and safest bet for preservation of the independence of judiciary.

17. Judicial review of transfers of members of transferable services is exceptional and is made only in extraordinary cases on limited grounds. This is so even in the case of transfer of subordinate Judges by the High Court, independence of subordinate Judges being equally important. This being so, the cry for a larger area of justiciability in the case of transfer of High Court Judges is incongruous when the power is to be exercised by the highest constitutional functionaries of the Indian judiciary, with the case and circumspection indicated in the Judges" Case-II and herein.

18. The Judges" Case-II does not exclude judicial review but merely limits the area of justiciability to the constitutional requirement of recommendation of the Chief Justice of India for exercise of the power under Article 222 by the President of India. The power under Article 222 of the Constitution is to be exercised by the highest constitutional functionaries in the country in the manner indicated which provides several inbuilt checks against the likelihood of arbitrariness or bias. In S.P. Gupta (supra), even though the concept of locus standi for challenging the transfer policy was liberalised and the standing to sue in public interest litigation has been considerably widened, yet the validity of individual transfers was examined only at the instance of the transferred Judge and not at the instance of anyone else. The need for restricting the standing to sue in such a matter to the affected Judge alone has been reiterated in the Judges" Case-II. It is, therefore, made clear that the transfer of a High Court Judge is justiciable only on the ground indicated in the Judges" Case-II and only at the instance of the transferred Judge himself and not anyone else. This emphasis is necessary to prevent any transferred Judge being exposed to any litigation involving him except when he chooses to resort to it himself in the available limited area of justiciability.

19. A useful passage from Craig's Administrative Law (Second Edition) is as under:

The traditional position was that the courts would control the existence and extent of prerogative power, but not the manner of exercise thereof The traditional position has however now been modified by the decision in the G.C.H.Q. case. Their Lordships emphasised that the review ability of discretionary power should be dependent upon the subject-matter thereof, and not whether its source was statute or the prerogative. Certain exercises of prerogative power would, because of their subject-matter, be less justiciable, with Lord Roskill compiling the broadest list of such forbidden territory....

(at page 291)

In Council of Civil Service Unions and Ors. v. Minister for the Civil Service, [1985] A.C. 374, Lord Roskill stated thus:

But I do not think that right of challenge can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as other are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process....

(at page 418)

20. The same indication of judicial self-restraint in such matters is to be found in De Smith's Judicial Review of Administrative Action, thus:

Judicial self-restraint was still more marked in cases where attempts were made to impugn the exercise of discretionary powers by alleging abuse of the discretion itself rather than alleging non-existence of the state of affairs on which the validity of its exercise was predicated. Quite properly, the courts were slow to read implied limitations into grants of wide discretionary powers which might have to be exercised on the basis of broad consideration of national policy....

(at page 32)

21. It is for this reason that the reduced area of justiciability has been indicated in the Judges' Case-II. When it was said in the Judges' Case-II that the ground of bias also is not available for challenging a transfer, it was to emphasise that the decision made by the collective exercise of several Judges at the apex level on objective criterion on which the recommendation of the Chief Justice of India is based, is an inbuilt check against arbitrariness and bias indicating absence of need for judicial review on those grounds. This is how the area of justiciability is reduced in the sphere of judicial review of transfer of Judges.

22. Ms. Indira Jaisingh also submitted that any such litigation should lie only in the Supreme Court of India and not in any other court to prevent embarrassment to High Court Judges. We consider it sufficient to observe that the limited area of justiciability in this sphere being clearly declared in the Judges Case-II and also herein while making it clear that no one other than the transferred Judge himself can question the validity of a transfer, it is unnecessary to provide any further safeguard. We have no doubt that if any other court in the country is called upon to decide such a matter, it would promptly consider the option of requesting this Court to withdraw the case to this Court for decision to avoid any embarrassment.

23. For the aforesaid reasons, we must hold that there is no merit in any of the points raised in these matters. Accordingly, both matters are dismissed.