

V. B. Raju

Vs

State of Gujarat and Another

Civil Appeal No. 1134 of 1974

(CJI Y. V. Chandrachud, Syed M. Fazal Ali, A. D. Koshal JJ)

04.09.1980

JUDGMENT

A. D. KOSHAL, J. -

1. This appeal by certificate granted under Article 133(1)(c) of the Constitution of India by the High Court of Gujarat is directed against its judgment dated August 2, 1973 and the sole point requiring decision therein is as to whether an order passed by the President of India under sub-section (1) of Section 29 of The Bombay Reorganisation Act, 1960 (hereinafter referred to as 'the Act') and determining that the appellant shall on May 1, 1960 cease to be a Judge of the High Court of Bombay and become a Judge of the High Court of Gujarat is to be regarded as an order of transfer under Article 222(1) of the Constitution.

2. The appellant was appointed an Additional Judge of the High Court of Bombay on June 29, 1959. After the Act came into force the President of India passed the said order (hereinafter referred to as 'the impugned order') under Section 29(1) of the Act in respect of the appellant, who was still an Additional Judge of the High Court of Bombay (and 4 other Judges of that Court) so that with effect from May 1, 1960 the appellant became an Additional Judge of the High Court of Gujarat. Claiming that the impugned order amounts to an order of transfer within the meaning of Article 222(1) of the Constitution the appellant brought a petition under Article 226 thereof with the prayer that the Governments of the Union of India and the State of Gujarat be directed to pay him an allowance to which, according to him, he had become entitled under Article 222(2) of the Constitution with effect from October 1963. Another prayer was also made in the petition but therewith we are no longer concerned as the same was withdrawn at a later stage.

3. In order to appreciate the contention raised by the appellant before a learned Single Judge of the Gujarat High Court and again in the letters patent appeal before the Division Bench which passed the judgment now under appeal, it is necessary to set out the provisions of clause (1) of Article 217 and those of Article 222 of the Constitution :

217. (1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and shall hold office, in the case of an additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty-two-years :

Provided that -

(a) a Judge may, by writing under his hand addressed to the President, resign his office;

(b) a Judge may be removed from his office by the President in the manner provided in clause (4) of Article 124 for the removal of a Judge of the Supreme Court;

(c) 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.

222. (1) The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court.

(2) When a Judge has been or is so transferred, he shall, during the period he serves, after the commencement of the Constitution (Fifteenth Amendment) Act, 1963, as a Judge of the other High Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law and, until so determined, such compensatory allowance as the President may by order fix.

According to the appellant's contentions the High Court the only source of power conferred on the President to effect the transfer of a Judge from one High Court to another was Article 222 read with Article 217(1)(c) and the impugned order which was an order flowing from that source of power, therefore, amounted to an order of transfer even though it was passed under Section 29(1) of the Act which runs thus :

(1) Such of the Judges of the High Court of Bombay holding office immediately before the appointed day as may be determined by the President shall on that day ceased to be Judges of the High Court at Bombay and become Judges of the High Court of Gujarat.

The High Court noted that the Act was passed in pursuance of the powers vested in Parliament under Articles 3 and 4 of the Constitution. Article 3 provides, inter alia, for the formation of new States. Under clause (a) thereof Parliament may by law form a new State by separation of territory from any existing State or by uniting two or more existing States or parts thereof or by uniting any territory to a part of any State. Under Article 4(1) any law referred to in Article 3 shall contain such provisions for the amendment of the First Schedule and the Fourth Schedule as may be necessary to give effect to the provisions of such law and may also contain such supplemental, incidental and consequential provisions (including provisions as to representation in Parliament and in the legislature or legislatures of the State or States affected by such law) as Parliament may deem necessary. Under clause (2) of Article 4 no such law shall be deemed to be an amendment of the Constitution for the purposes of Article 368. The learned single Judge held that an order under Section 29 of the Act was an order of "allocation" of Judges of the High Court of Bombay to the two new High Courts and that such allocation did not amount to a transfer within the meaning of Article 217(1)(c) or 222(1) of the Constitution. It was in that view of the matter that he dismissed the petition presented by the appellant. In letters patent appeal the Division Bench was of the opinion that although the impugned order amounted to an order of transfer, the transfer effected by it was of a type entirely different from that contemplated by Article 222(1). In effect, however, the reasons for dismissal of the appeal were the same as those for which the petition could not succeed before the learned Single Judge. According to the Division Bench the transfer envisaged by Article

22 was a transfer in a situation when a Judge of a High Court was sent to another existing High Court for reasons which had nothing to do with the bifurcation or reorganisation of a State and the setting up of a new High Court in consequence, while Section 29 of the Act was part of the provisions which were supplemental, incidental or consequential to the formation of the State of Gujarat.

4. It was also argued before the Division Bench that the Government of Gujarat itself had, during the course of its correspondence with the appellant, treated his appointment to the High Court of Gujarat as a transfer from the High Court of Bombay, a fact which was not denied but which, the High Court held, had no bearing on the matter in dispute as there was no plea of estoppel raised in the petition presented by the appellant.

5. After hearing the appellant in person and learned counsel for the respondents we find no substance in the appeal and, broadly speaking, our reasons for so holding coincide with those given by the learned Single Judge and the Division Bench of the High Court. Articles 3 and 4 of the Constitution deal with a special situation and so long as a provision of law promulgated by Parliament can be considered as supplemental, incidental or consequential to the formation of a new State it would be enforceable even though it might amount to an amendment of certain provisions of the Constitution. The provision contained in Section 29 of the Act is clearly consequential to the formation of the State of Gujarat and the establishment of a High Court for it. It was for the purpose of setting up that High Court that Judges then serving in the Bombay High Court were, so to say, "allotted" to the High Court of Gujarat; and although their appointment to the Gujarat High Court may partake of some of the characteristics of a transfer, we do not think that they can be said to have been transferred from the Bombay High Court of the Gujarat High Court within the meaning of Article 222(2) of the Constitution. The entitlement to compensatory allowance under Article 222(2) is conditional upon the Judge being "so transferred", that is, transferred as envisaged by Article 222(1). Since the appellant was "allotted" to the Gujarat High Court on the setting up of that Court, he will not be entitled to claim the compensatory allowance.

6. In the result the appeal fails and is dismissed but there will be no order as to costs.

</html