

CASE NO.:
Appeal (civil) 3993 of 2002

PETITIONER:
T. FENN WALTER & ORS.

Vs.

RESPONDENT:
UNION OF INDIA & ORS.

DATE OF JUDGMENT: 12/07/2002

BENCH:
BY..NK.. KSiarbphaalr,wal, K.G. Balakrishnan.

JUDGMENT:

K.G. Balakrishnan, J.

Leave granted.

A group of advocates practicing in the High Court of Madras filed a writ petition alleging that a sitting Judge of that High Court ceased to be a Judge as he was appointed as President of the State Consumer Disputes Redressal Commission, Pondicherry, (for short 'the State Commission') and prayed for an appropriate writ or other directions. The writ petition was dismissed by a Division Bench of the Madras High Court and aggrieved by the same, the present appeal is filed.

The post of the President of the State Consumer Disputes Redressal Commission at Pondicherry was being manned by a retired High Court Judge. After the completion of his term of office, nobody else was willing to be considered for appointment as President of the State Commission. Pondicherry being a small Union Territory with limited financial resources could not afford to have a full-time President for the State Commission. The post was lying vacant for a considerable period. The correspondence produced in this case would show that a Judge of the Madras High Court, who was the administrative Judge for Pondicherry, was requested by the then Chief Justice of the High Court to take up the post of President of the State Commission at Pondicherry. As the Hon'ble Judge was willing to be the President of the State Commission, Pondicherry, his name was recommended by the Chief Justice and, the High Court, by D.O. letter dated 25.11.1998, informed the Pondicherry Govt. to initiate the process of appointment. It was pointed out that Section 2(1) (c) (i) of the High Court Judges (Conditions of Service) Act, 1954 necessitates the concurrence of the President of India in the appointment of a sitting Judge of the High Court. The Govt. of Pondicherry on 21.5.1999 issued a Notification appointing the sitting Judge of the Madras High Court as President of the State Commission. A communication also was issued from the Ministry of Law, Justice & Company Affairs, that the President of India was pleased to request the Judge to function as President under the Consumer Protection Act and that the time spent by him in the performance of the above functions would be counted as "Actual Service" within the meaning of Para 11(b)(i) of Part-D of the Second Schedule to the Constitution of India read with Section 1(1) (c) (i) of the High Court Judges (Salaries & Conditions of Service) Act, 1954. While the Judge was continuing as President of the State Commission, the present writ petition was filed and

the Judge resigned from the post of President of the State Commission. We are no longer concerned with the reliefs sought for in the writ petition; however, the matter is of some constitutional importance, as sitting Judges are quite often appointed to various posts and Tribunals and whether they can still discharge the duties as sitting Judges is a vexed question.

We heard Shri F.S. Nariman, learned Senior Counsel for the appellants and Shri K. Parasaran, learned Senior Counsel who appeared for the respondent. Learned Counsel for the appellants submitted that the Judge of a High Court occupies a high constitutional post and therefore, he shall not be expected to hold a post under any other authority. It was pointed out that in the instant case, a sitting Judge was appointed to a full-time post under the Govt. of Pondicherry and on such appointment, there came into existence a relationship of master and servant between the Pondicherry Govt. and the Judge who held the post of Chairman. It was argued that the State Commission is a regular statutory body and the Chairman of the State Commission was holding a post under the Govt. and that under Rule 6 (5) of the Rules framed under the Consumer Protection Act, 1986, the Govt. can remove the President for any of the reasons mentioned therein. The counsel for the appellants contended that these provisions will make serious inroads into the independence of the judiciary. It was also contended that members and the Chairman of the Commission cannot claim to be equal to a Judge of the High Court and that the superior courts are vested with the power of judicial review to determine the legality of Executive action and the validity of the legislation passed by the Legislature, and that being the solemn duty of the judiciary under the Constitution, the appointment of High Court Judges in various independent posts may create embarrassing situation.

Shri K. Parasaran, learned Senior Counsel for the respondent, on the other hand, contended that the Constitution contemplates that a Judge of a High Court may perform such other functions as he may be assigned at the request of the President, and that a practice has developed of sitting Judges of the High Courts being requested to perform other functions. It was submitted that there were series of instances in the past fifty years where the Judges of the superior court were being assigned various other assignments and that it has now become a part of a well recognized convention. Our attention was drawn to a series of Parliamentary enactments in which a provision has been made that the post of Chairman of the Tribunal/Commission can be filled up either by appointing a sitting Judge or a retired Judge or a person qualified to be a Judge of the High Court. Reference in this regard was made to Consumer Protection Act, 1986; Inter-State Water Disputes Act, 1956; Commission of Enquiry Act, 1952; Administrative Tribunals Act, 1985; Railway Claims Tribunal Act, 1987; Special Courts (Trial of Offences relating to Transactions in Securities) Act, 1992; Protection of Human Rights Act, 1993. Shri Parasaran, further submitted that the office of a Judge of the Supreme Court or a Judge of a High Court is such a high and majestic constitutional office that by accepting other offices which are whole-time offices they should not be allowed to derogate from the status and dignity of such an office. It was pointed out that there are functions like being a Member of a Commission of Inquiry under the Commissions of Inquiry Act and holding office as a member of other commissions may have to be performed by sitting Judges. It was submitted that it may not be practicable to provide an inflexible guideline that a sitting Judge should never hold another whole-time office and all possible contingencies which may occur in future cannot be anticipated.

While considering Article 103 of the Draft Constitution, one of the Hon. Members of the Constituent Assembly suggested that there should be a new Article, namely, Article 103A to the effect that a person who is holding or has held office of a Judge of the Supreme Court shall not be eligible for appointment to any office of emoluments under the Govt. of India or State other than that of the Chief Justice of India or the Chief Justice of a High Court. Various opinions were expressed by the Members of the Constituent Assembly. Replying to the various suggestions, Dr. B.R. Ambedkar stated as follows :

"I understand to be the idea underlying this particular amendment. For the purpose of understanding the main idea underlying this amendment, I think we have to take up three different cases. One case is the case of a Judge of the Supreme Court who has been appointed to an executive office with no right of reversion to the Supreme Court. That is one case. The second case is the appointment of a Supreme Court Judge after he has held that post to an executive office of a non-judicial character. The third case is the case of a executive office of a Supreme Court Judge being given or assigned duties of a non-judicial character with the right to revert to the Supreme Court. I understand that my friend Dr. Sen may correct me if I am wrong this amendment refers to the third proposition, viz., the assignment of a Supreme Court Judge to non-judicial duties for a short period with the right for him to revert to the Supreme Court.

With regard to the first case that I mentioned, viz., the appointment of a Supreme Court Judge to an executive office provided the Supreme Court Judge resigns his post as a Judge of the Supreme Court, I do not see any objection at all, because he goes out of the Supreme Court altogether.

With regard to the second case, viz., the assignment of duties to a Supreme Court Judge who has retired, we have just now disposed of it. There ought to be no limitation at all.

With regard to the third case, I think it is a point which requires consideration. We have had two cases in this country. One was the case which occurred during the war when a Judge of the Federal Court was sent round by the then Government of India on diplomatic missions. We have also had during the regime of this Government the case where the Chief Justice or a Judge I forget now one of the High Courts, was sent out on a diplomatic mission. On both occasions there was some very strong criticism of such action. My Friend, Mr. Chimanlal Setalvad, came out with an article in the Times of India criticizing the action of the Government. Personally I share those sentiments."

In Alok Kumar Roy vs. Dr. S.N. Sarma & Anr. (1968) 1 SCR 813, a sitting Judge of the High Court was appointed to head a Commission of Inquiry under the Commission of Inquiry Act, 1952. That particular Judge was nominated as the Vacation Judge of the High Court. While continuing as the head of the Commission under the Commission of Inquiry Act, the learned Judge entertained a writ petition and passed certain interim order. That interim order was challenged before the Division Bench and the Division Bench headed by the Chief Justice of the High Court held that the Vacation Judge, while performing the duties of the Commission of Inquiry could not also perform the duties of a Judge of the High Court. The judgment of the Division Bench was challenged before this Court and Wanchoo, C.J., held :

"Often times, Judges of High Courts are appointed under the Commission of Enquiry Act to head Commissions for various purposes. These Commissions are temporary affairs and many a time their sittings are not continuous. A Judge of the High Court when he is appointed to head a Commission of this kind does not demit his office as a Judge and when the Commission is not actually sitting he is entitled to sit as a Judge of the High Court. It is only where a Judge of the High Court is appointed to another post, which is a whole time post that it may be said that on such appointment he can no longer work as a Judge of the High Court for the time being, though even in such a case, when the work is over, he reverts as a Judge of the High Court without fresh appointment."

[Emphasis supplied]

The counsel on either side emphasized the importance of the independence of the judiciary and it was submitted that the appointment of sitting Judges as Commission/Tribunal shall not, in any way, affect the independence of the judiciary.

In a decision of this Court in *Union of India & Ors. vs. Pratibha Bonnerjea & Anr.* (1995) 6 SCC 765, Ahmadi, C.J., observed :

"Independence and impartiality are the two basic attributes essential for a proper discharge of judicial functions. A Judge of a High Court is, therefore, required to discharge his duties consistently with the conscience of the Constitution and the laws and according to the dictates of his own conscience and he is not expected to take orders from anyone. Since a substantial volume of litigation involves government interest, he is required to decide matters involving government interest day in and day out. He has to decide such cases independently and impartially without in any manner being influenced by the fact that the Government is a litigant before him. In order to preserve his independence his salary is specified in the Second Schedule, vide Article 221 of the Constitution. He, therefore, belongs to the third organ of the State which is independent of the other two organs, the Executive and the Legislature. It is, therefore, plain that a person belonging to the judicial wing of the State can never be subordinate to the other two wings of the State. A Judge of the High Court, therefore, occupies a unique position under the Constitution. He would not be able to discharge his duty without fear or favour, affection or ill will, unless he is totally independent of the Executive, which he would not be if he is regarded as a government servant. He is clearly a holder of a constitutional office and is able to function independently and impartially because he is not a government servant and does not take orders from anyone."

In the decision rendered by a nine Judge Bench in *Supreme Court Advocates-on-Record Association & Ors. vs. Union of India* (1993) 4 SCC 441, this Court reiterated the position that by various decisions of this Court, it has been made abundantly clear that the independence of judiciary is a part of the basic structure of the Constitution to secure the rule of law essential for the preservation of the democratic system. In an earlier decision rendered by this Court in *S.P. Gupta vs. Union of India* 1981 Supp. SCC 87, Pathak, J. (as he then was) observed in the following terms :

"While the administration of justice draws its legal sanction from the Constitution, its credibility rests in the faith of the people. Indispensable to that faith is the independence of the judiciary. Any independent and impartial judiciary supplies the reason for the judicial institution; it also gives character and content to the constitutional milieu."

.In the fashioning of the provisions relating to the judiciary, the greatest importance was attached to securing the independence of the Judges, and throughout the Constituent Assembly Debates the most vigorous emphasis was laid on that principle. The Framers of the Constitution took great pains to ensure that an even better and more effective judicial structure was incorporated in the Constitution, one which would meet the highest expectations of judicial independence."

Hon. Bernard L. Shientag in his Benjamin N. Cardozo Memorial Lectures, said :

"There can be no government of law without a fearless, independent judiciary. The independence of the judge is the chief of all the cardinal judicial virtues. He must be entirely free from all external influence and subservient only to his own conscience."

There are ever so many Statutes enacted by the Parliament which provide for a sitting Judge of the High Court to be appointed either as the President, Chairman, or Vice Chairman of any Tribunal or Commission. Under the Consumer Protection Act, 1986, under Section 16A, a person who is or has been a Judge of a High Court is eligible for being appointed as the President or Member of the State Consumer Disputes Redressal Forum. The Administrative Tribunals Act, 1985; Railway Claims Tribunal Act, 1987; Special Courts (Trial of Offences relating to Transactions in Securities) Act, 1992; National Commission for Backward Class Act, 1993 are some of the enactments which contain similar provisions where the Chairman, Member or President shall be either a sitting or a retired Judge of a High Court. Therefore, it cannot be said that a sitting Judge of a High Court shall neither be appointed to any other post nor shall be assigned any other judicial or quasi-judicial work. But, invariably, in all cases, the Chief Justice of the concerned High Court would be consulted in case the appointment is sought of a sitting Judge. Normally, a Judge who is to retire from service shortly may be desirous of accepting any other assignment either as a Chairman, Vice Chairman or Member of any Commission or Tribunal. But if a sitting Judge is appointed to a regular post of Chairman, Vice Chairman or Member of a Tribunal and the decision of that authority is subjected to judicial review of the High Court, it may not be an ideal situation.

Under the Constitution of India, security of judicial tenure has been provided to the Judges of the superior courts and they could be removed only as per the proviso prescribed under Article 124(4) of the Constitution on account of proved misbehaviour or incapacity. Sometimes, the sitting Judge who is appointed to the post of Chairman, Vice Chairman of any Tribunal or Commission would be liable to be removed by the appointing authority. This also is not desirable in view of the Constitutional position being occupied by the Judge.

Quite often sitting Judges are appointed as Inquiry Commissions. Generally it may not create any difficulty, if the inquiry itself can be conducted without prejudice to other judicial work as a Judge of the superior court. However, the appointment of Judges to head or chair a commission of inquiry or to perform other non-judicial work would create unnecessary burden on the Judges and it would affect the administration of justice. The work of these commissions takes considerable time and there are several instances where the work of the commission continued for years. If sitting Judge is appointed, considerable time is lost and the Judge would not be in a position to attend to his regular judicial work. In view of the mounting arrears of cases in superior courts, it would be difficult to lend services of a Judge for such commission work. Moreover, the report of the Commission of Inquiry is often stated to have only recommendatory value and the opinions expressed therein are not binding on the Government. Quite often the reports of the Commission are ignored and no follow-up actions are being taken by the Govt. In some matters, when political issues are also involved, even impartiality and objectivity of the court may sometimes be questioned due to some extraneous and oblique motives. The public image and prestige of the Court as guardian of the Constitution and rule of law has to be maintained. It is desirable that the Judges are not subjected to unwanted criticism on account of appointment as the Inquiry Commission. The Image and the authority of the Court, which is of utmost importance, has to be upheld. Justice Harlan F. Stone in a letter as far back as in 1953 wrote: "It has been a long tradition of our Court that its members do not serve on committees or perform other services not having a direct relationship to the work of the Court." (Harvard Law Review (Vol. 87 1953-54). Keeping in view all these aspects, the appointment of a sitting Judge as a commission of Inquiry has

to be made only on rare occasions if it becomes necessary for the paramount national interest of the country.

When a sitting Judge is appointed to another post, which is whole-time and if the decision taken in that capacity is subject to judicial review, it may not be in the best interests of the independence of the judiciary. Sometimes, the additional post held by the Judge may not be of equivalent status or may be under different situations, which may even spell out a master and servant relationship between the Judge and the appointing authority. Even though this may not create any conflict of duty or interest, in these days of multifarious litigation, it is always desirable for the Judge of the superior judiciary to keep away from areas of controversy so that the public confidence in our system is not hampered in any way.

Having regard to various constitutional issues raised by counsel on either side we are inclined to formulate some broad guidelines as to the manner in which the appointment of a sitting Judge of a High Court to a Commission should be dealt with.

(1) Appointment of a sitting Judge to the following offices may not be objectionable:

[a] As a commission of inquiry under the Commissions of Inquiry Act.

[b] Judicial office which is of such a high character and where it has to be filled up by a sitting Judge to fulfill the requirement of law, e.g. under Article 262 of the Constitution of India which provides for adjudication of any dispute with respect to the use, distribution or control of water or any inter-State river or river-valley, read with Inter State Water Disputes Act, 1956.

[c] Where expertise and experience of a sitting Judge is required to discharge the functions, a sitting Judge may be appointed, for example, as a Member of the Finance Commission or Law Commission.

(2) Appointment of sitting Judge to a Tribunal is not desirable where the adjudicating members are composed of other members who are not Judges or qualified to be appointed as Judges, such as bureaucrats, revenue officials, etc.

(3) So also, appointment of sitting Judge to a Judicial Tribunal is not desirable where the statute or the rules and regulations framed therein contemplate provisions for removal from such office or other disciplinary action by any authority.

(4) When a sitting Judge is appointed to a post or Tribunal, he shall be amenable to the disciplinary jurisdiction only in the manner provided for in Article 124(4) of the Constitution of India if he is a Judge of the Supreme Court or in the manner provided for in proviso (b) to Article 217(1) read with Article 124(4) of the Constitution of India if he is a Judge of a High Court.

(5) Where the post may not be a whole time post but the nature of duties are such that his order as a Tribunal or Commission would be subjected to the supervisory jurisdiction of the High Court under Article 226, 227, a sitting Judge of the High Court may not be appointed to such post, but if the sitting Judge concerned has only a short period to retire from service, he may be appointed, but after accepting the full-time post, he shall not sit as a Judge and discharge duties and functions [both judicial and administrative] as

a sitting Judge of High Court, even though he may not demit office consequent on his appointment to a full-time post.

(6) When the Chief Justice of a High Court is consulted for appointment of a sitting Judge as Member, Chairman, Vice Chairman or President of any Court, Commission or Tribunal and it is a whole time post, the Chief Justice shall bear in mind the relevant circumstances and shall not compromise the dignity of the office of the sitting Judge and shall strive to preserve the independence of judiciary.

(7). When a sitting Judge who has only a short period to retire from service is appointed to a post, he shall express his willingness to relinquish the remaining tenure as a Judge and then only his service shall be made available for such post.

The appeal is disposed of accordingly. No order as to costs.