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IN THE HIGH COURT OF JUDICATURE AT MADRAS
MUNISHWAR NATH BHANDARI, CJ; D.BHARATHA CHAKRAVARTHY, J.

W.P.No.13429 of 2018; 01.04.2022

V. Vasanthakumar vs The Union of India

Benami Transaction (Prohibition) Amendment Act, 2016; Section 32(2)(a) - Member of Indian Legal Service cannot be appointed as judicial member.

Summary: Petition filed under Article 226 of the Constitution of India praying for a Writ of Declaration to declare Section 9 of the Prohibition of Benami Property Transactions Act, 1988 (Act 45 of 1988, as amended by the Benami Transactions (Prohibition) Amendment Act, 2016) pertaining to qualification of appointment of Judicial Member and Section 32(2)(a) of the Prohibition of Benami Property Transactions Act, 1988 (Act 45 of 1988 as amended by the Benami Transactions (Prohibition) Amendment Act, 2016) as unconstitutional as it runs counter to the doctrine of Separation of Powers, which is the basic structure and in violation of Article 14 of the Constitution of India.

For the Petitioner: Mr.V.Vasanthakumar Party-in-person

For the Respondent: Mr.R.Sankaranarayanan Additional Solicitor-General

ORDER

(Order of the Court was made by the Hon'ble Chief Justice)

This writ petition challenges Sections 9 and 32(2)(a) of the Prohibition of Benami Property Transactions Act, 1988 [for brevity, "*the Act of 1988*"], as amended by the Benami Transactions (Prohibition) Amendment Act, 2016.

2. The petitioner, appearing in person, and learned Additional Solicitor-General appearing for the respondent submit that so far as the challenge to the constitutional validity of Section 9 of the Act of 1988 is concerned, the writ petition has become infructuous, as Section 9 of the Act of 1988 has been deleted.

3. In view of the above, the issue that now remains to be considered is the constitutional validity of Section 32(2)(a) of the Act of 1988.

4. The petitioner, appearing in person, submitted that the qualification for appointment as a Judicial Member of the Appellate Tribunal given under Section 32 of the Act of 1988 is now hit by the judgment of the Apex Court in the case of ***Union of India v. R.Gandhi, President, Madras Bar Association, (2010) 11 SCC 1***. It is precisely for the reason that for the post of Judicial Member of the Appellate Tribunal, under the Act of 1988, a Member of Indian Legal Service who has held the post of Additional Secretary or equivalent post has been made eligible, while as per the judgment of the Apex Court cited supra, the post of Judicial Member should be manned only by a person who served as a Judge or a member of the Bar and not by a member of Indian Legal Service. In view

of the above, the provision of Section 32(2)(a) of the Act of 1988 is hit by the said judgment and, thus, challenge to it has been made.

5. Referring to a judgment of the Division Bench on the same issue in **Shamnad Basheer v. Union of India and others, 2015 2 LW 941**, the prayer is reiterated because therein a similar challenge was made to Section 85 of the Trademarks Act, 1999, besides Section 116 of the Patents Act, 1970. Section 85 of the Trademarks Act was containing a similar provision for appointment of the Judicial Member as stipulated under Section 32(2)(a) of the Act of 1988. The provisions therein, i.e., Sections 85(2)(b) and 85(3)(a) of the Trademarks Act, 1999, were declared to be unconstitutional as those provisions made a member of the Indian Legal Service eligible for appointment for the post of Chairperson or Judicial Member of the Intellectual Property Appellate Board.

6. A further reference of another judgment of the Division Bench of this court in the case of **Revenue Bar Association v. Union of India, 2019 4 LW 689**, has been given. Therein, the challenge was to Sections 109 and 110 of the Central Goods and Service Tax Act, 2017. It was regarding the constitution of the Appellate Tribunal and qualification and appointment of the members. The provision making a member of Indian Legal Service eligible to be appointed as Judicial Member in the Goods and Services Tax Appellate Tribunal was held to be unconstitutional.

7. Accordingly, the prayer is to declare Section 32(2)(a) of the Act of 1988 to be unconstitutional and to suitably amend the provision so as to make a person who had served as a Judge or the member of the Bar to be eligible to be appointed as Judicial Member of the Appellate Tribunal.

8. The writ petition was seriously contested by the side opposite. It is submitted by learned Additional Solicitor General that the members of the Indian Legal Service can be appointed as Judicial Member of the Appellate Tribunal and Section 32(2)(a) of the Act of 1988 should not be declared to be unconstitutional merely based on the judgment of the Apex Court in the case of **Union of India v. R.Gandhi, President, Madras Bar Association**, supra.

9. Learned Additional Solicitor General further submitted that the provision under challenge does not offend any constitutional provision and that the government was empowered to legislate on the subject-matter. The challenge to the provision of the Act of 1988 has been made without raising the issue of the nature required for such challenge. A mere reference of judgment of the High Court and the Supreme Court for that purpose would not be sufficient to hold a provision to be unconstitutional. The prayer was made, accordingly, to dismiss the writ petition.

10. We have considered the rival submissions of the parties and perused the records.

11. A challenge has been made to Section 32(2)(a) of the Act of 1988. Thus, the said provision is quoted hereunder:

"32. Qualifications for appointment of Chairperson and Members of Appellate Tribunal.—

(1) A person shall not be qualified for appointment as Chairperson of the Appellate Tribunal unless he is a sitting or retired Judge of a High Court, who has completed not less than five years' of service.

(2) A person shall not be qualified for appointment as a Member unless he—

(a) in the case of a Judicial Member, has been a Member of the Indian Legal Service and has held the post of Additional Secretary or equivalent post in that Service;

(b) in the case of an Administrative Member, has been a Member of the Indian Revenue Service and has held the post of Chief Commissioner of Income tax or equivalent post in that Service.

(3) No sitting Judge of a High Court shall be appointed under this section except after consultation with the Chief Justice of the High Court.

(4) The Chairperson or a Member holding a post as such in any other Tribunal, established under any law for the time being in force, in addition to his being the Chairperson or a Member of that Tribunal, may be appointed as the Chairperson or a Member, as the case may be, of the Appellate Tribunal under this Act."

[emphasis supplied]

12. Section 32(2)(a) of the Act of 1988, quoted above, postulates the qualifications for appointment of a Judicial Member and, as per the said provision, a Member of the Indian Legal Service who held the post of the Additional Secretary or equivalent post in that service is eligible for appointment as a Judicial Member in the Appellate Tribunal. In view of the provision aforesaid, other than the member of the Indian Legal Service, none else other than given under sub-section (3) to Section 32 of the Act of 1988 would be eligible to be appointed as Judicial Member of the Tribunal.

13. The Apex Court while delivering the judgment in the case of **Union of India v. R.Gandhi, President, Madras Bar Association**, supra, had dealt with similar provisions so as the Division Benches in the two judgments, i.e., **Shamnad Basheer v. Union of India and others**; and, **Revenue Bar Association v. Union of India**, supra.

14. To analyze the issue, we need to understand the concept of separation of powers which was otherwise dealt with by the Apex Court in the case of **Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1**. It was held that Indian Constitution indeed does not recognize the doctrine of separation of powers in its absolute terms, but the function of the different parts or the branches of the government have been sufficiently differentiated and, consequently, it can very well be said that our constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another.

15. The aforesaid being the position, the concept of separation of powers is to be analyzed so as to hold that the powers that remain in the realm of the administration should be exercised by them and similarly the exercise of power by the Legislature should be within its sphere, making the judicial system independent. The independence of the judicial system remains a vital issue and for that emphasis was made that there would be separation of powers, so that independence of judiciary is maintained. It is after referring to the three organs which have been given in the constitution to provide basic

structure comprising the Executive, Legislature and the Judiciary. It is through each of these organs that the sovereign will of the people has to operate and manifest itself and not through only one of them. Keeping aforesaid in mind, the judgment was rendered by the Apex Court in ***Union of India v. R.Gandhi, President, Madras Bar Association***, supra, on an identical issue raised before us.

16. The constitution of the Selection Committee and for that even the qualification needs incorporation of such a provision which may keep the judicial independence. Qua the Technical Member of the Tribunal, appropriate qualification can be provided by the Legislature, but when the qualification for the post of Judicial Member is to be provided, it should be keeping in mind the independence of the judicial system and, accordingly, the Apex Court while delivering the judgment in the case of ***Union of India v. R.Gandhi, President, Madras Bar Association***, supra, held that only Judges and advocates can be considered for appointment as Judicial Member of the Tribunal. Paragraph 120 of the said judgment is quoted hereunder for ready reference:

120. We may tabulate the corrections required to set right the defects in Parts I-B and I-C of the Act:

(i) Only Judges and advocates can be considered for appointment as judicial members of the Tribunal. Only High Court Judges, or Judges who have served in the rank of a District Judge for at least five years or a person who has practised as a lawyer for ten years can be considered for appointment as a judicial member. Persons who have held a Group A or equivalent post under the Central or State Government with experience in the Indian Company Law Service (Legal Branch) and the Indian Legal Service (Grade I) cannot be considered for appointment as judicial members as provided in sub-sections (2)(c) and (d) of Section 10-FD. The expertise in Company Law Service or the Indian Legal Service will at best enable them to be considered for appointment as technical members.

(ii) As NCLT takes over the functions of the High Court, the members should as nearly as possible have the same position and status as High Court Judges. This can be achieved, not by giving the salary and perks of a High Court Judge to the members, but by ensuring that persons who are as nearly equal in rank, experience or competence to High Court Judges are appointed as members. Therefore, only officers who are holding the ranks of Secretaries or Additional Secretaries alone can be considered for appointment as technical members of the National Company Law Tribunal. Clauses (c) and (d) of sub-section (2) and clauses (a) and (b) of sub-section (3) of Section 10-FD which provide for persons with 15 years experience in Group A post or persons holding the post of Joint Secretary or equivalent post in the Central or the State Government, being qualified for appointment as Members of Tribunal, are invalid.

....

(vii) Only clauses (c), (d), (e), (g), (h), and the latter part of clause (f) in sub-section (3) of Section 10-FD and officers of civil services of the rank of the Secretary or Additional Secretary in the Indian Company Law Service and the Indian Legal Service can be considered for purposes of appointment as technical members of the Tribunal.

(viii) Instead of a five-member Selection Committee with the Chief Justice of India (or his nominee) as Chairperson and two Secretaries from the Ministry of Finance and Company Affairs and the

Secretary in the Ministry of Labour and the Secretary in the Ministry of Law and Justice as members mentioned in Section 10- FX, the Selection Committee should broadly be on the following lines:

- (a) Chief Justice of India or his nominee— Chairperson (with a casting vote);
- (b) A Senior Judge of the Supreme Court or Chief Justice of High Court—Member;
- (c) Secretary in the Ministry of Finance and Company Affairs—Member; and
- (d) Secretary in the Ministry of Law and Justice —Member.

....

(xii) The administrative support for all Tribunals should be from the Ministry of Law and Justice. Neither the Tribunals nor their members shall seek or be provided with facilities from the respective sponsoring or parent Ministries or Department concerned...."

[emphasis supplied]

17. The Apex Court while upholding the creation of the National Company Law Tribunal as well as the Appellate Tribunal held Chapters 1B and 1C of the Companies Act as unconstitutional. The principle laid down in the case of ***Union of India v. R.Gandhi, President, Madras Bar Association***, supra, has application to all the Tribunals and was not rendered on the fact situation alone. It is for that reason a specific direction was given that administrative support for all the Tribunals should be from the Ministry of Law and Justice. The principal issue decided qua the basic structure of constitution ensures the separation of powers and independence of the Judiciary from the clutches of the Executive.

18. The matter was examined by the Division Bench of this court in the case of ***Shamnad Basheer v. Union of India and others***, supra, and considering the issue that the proceedings before the Tribunal would be judicial in nature, the necessity for appointment of a member from the judiciary or the bar was realized. It was for the reason that prior to constitution of the Tribunal, the adjudication of the issue was by the courts. Therefore, with the constitution of the tribunals, they would be discharging the work earlier discharged by the courts and adopting the Westminster policy which prescribes the qualification akin to that of the judicial officer who has been dealing with such matters prior to the constitution of the tribunal. The necessity and importance of a judicial member and, that too, a person who served as a Judge or a member of the Bar was felt and, accordingly, the Division Bench of this Court held certain provisions of the Trademarks Act, 1999 and the Patents Act, 1970 to be unconstitutional. The relevant portion of the judgment in ***Shamnad Basheer v. Union of India and others***, supra, is quoted hereunder:

*"9.14. The concern expressed by the petitioner is only to Section 85(3)(a), which deals with appointment of judicial member. We find considerable force in the submission made. Both in S.P. Sampath Kumar v. Union of India ((1987) 1 SCC 124) and Union of India v. R.Gandhi, President, Madras Bar Association, ((2011) 10 SCC 1) this issue has been addressed. In fact, a specific direction has also been issued in R. Gandhi's case in this regard. **However high one may be in holding an Executive post, the role of a judicial member, being different, such a person***

*cannot be asked to exercise the function particularly as a Judicial Member without any experience. The matter can be looked at a very different angle as well. Even an experienced lawyer with specialised knowledge and expertise is treated only as a technical member under Section 85(4)(b). If that is the case, merely because someone holds the post in a Government Department he cannot be bestowed with the eligibility of being appointed as a Judicial Member sans experience. Also such a person cannot be treated on par with a Judicial Officer. We do not understand as to how an Officer working with the Executive would satisfy the requirement of legal training and experience. In other words, when such an Officer cannot become a judge, he cannot also act in the said capacity. We only reiterate the reasoning assigned by the Supreme Court in this regard. Therefore, we have no hesitation in holding that Section 85(3)(a) is unconstitutional, particularly, in the light of the directions (i) and (ii) rendered in **Union of India v. R. Gandhi, President, Madras Bar Association**, ((2011) 10 SCC 1). Insofar as Section 85(3)(b) is concerned, there is neither any challenge nor do we find any unconstitutionality in it."*

[emphasis supplied]

19. It is true that the extent of judicial review that can be exercised in a given case is quite limited. Though a constitutional court can declare a provision to be unconstitutional, it should not give any direction to the Legislature to make an amendment in a particular way. The judicial restraint is, therefore, being hailed as a virtue. However, in a case where a direction has been given by the Apex Court to have the judicial independence, it is required to be followed by the High Courts as well as the Executive.

20. In view of the position aforesaid, we hold Section 32(2)(a) of the Act of 1988 to be unconstitutional. The respondents are directed to frame the provision keeping in mind the directions of the Apex Court in the case of **Union of India v. R. Gandhi, President, Madras Bar Association**, supra. The amended provision may be brought in immediately.

With the aforesaid direction, the writ petition is disposed of. There will be no order as to costs.