* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 11th December, 2015

\+ **W.P.(C) 866/2010**

COMMON CAUSE ..... Petitioner
Through: Mr. Prashant Bhushan with Mr. Shyam Singh Chauhan, Advs.

Versus

THE UNION OF INDIA ..... Respondent
Through: Mr. Sanjay Jain, ASG with Mr. Dev P. Bhardwaj, Adv.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. This petition under Article 226 of the Constitution of India was filed as a Public Interest Litigation (PIL) seeking the reliefs, (a) that no retired Supreme Court Judge can give chamber advice to any party; and, (b) that no retired Supreme Court or High Court Judge will take up arbitration work while he / she is a Chairperson / Member of any Government appointed constitutional / statutory body, commission, commission of inquiry, tribunal or appellate body.

2. The petition was entertained only qua prayer (b).

3. An affidavit dated 19th July, 2011 was filed by the Under Secretary in

the Department of Legal Affairs, Ministry of Law & Justice, Govt. of India stating that the issue of taking up arbitration work by the Chairpersons / Members of Tribunals and Statutory Authorities, while so functioning was under consideration and it was proposed to formulate a 'Uniform Policy' regulating the terms and conditions of service of the Chairpersons / Members of Tribunals and Statutory Authorities. It was further informed that it was proposed that Chairpersons / Members of the Tribunals and Statutory Authorities appointed, after coming into force of the Uniform Policy will not be allowed to take up arbitration work, while functioning as Chairperson / Member of the Tribunal and Statutory Authority.

4. The matter was adjourned from time to time awaiting final decision by the government on the proposal aforesaid.

5. The counsel for the Union of India (UOI) on 29th August, 2012 informed that a proposal was mooted to the effect that persons appointed as Chairpersons / Presidents / Members of the Tribunals shall not be allowed to take up arbitration work while functioning as such and amendments for this purpose were proposed to 42 different statutes.

6. On 13th March, 2013, we were informed that the proposal aforesaid was pending consideration before an Intra-Ministerial Group. Though at

one time, we were also told that the Supreme Court is seized of the same question but on 14th May, 2013 it was clarified by the counsel for the UOI that the issue involved in this petition was not before the Supreme Court.

7. Thereafter we were on 26th February, 2014 informed that instead of amending 42 or more statutes whereunder the Chairpersons / Members of various Tribunals and Statutory Authorities were appointed, "The Tribunals, Appellate Tribunals and Other Authorities (Conditions of Service) Bill, 2014" had been drafted and was introduced in the Rajya Sabha on 19th February, 2014 and that Clause 7 of the said Bill provided that no person while holding office as the Chairman or Member shall act as an arbitrator save that he / she may with the permission of the Central Government complete his / her uncompleted arbitration work at the time of appointment. On 17th September, 2014, we were informed that the Bill had been referred for consideration by the Standing Committee of the Rajya Sabha.

8. The counsel for the petitioner on 25th February, 2015 contended that the delays on the part of the Legislature were resulting in the Chairpersons / Members of the Tribunals / Statutory Authorities / Commissions, even though employed full time, continuing to act as arbitrators to the prejudice and detriment of the full time office held by them; the counsel for the

petitioner called upon this Court to fill the vacuum.

9. The learned ASG informed that the Bill aforesaid is still under examination and report by the Department i.e. the Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice was awaited. We were further told that the Supreme Court on 7th November, 2014 in W.P. No.120/2012 titled ***Rajiv Garg Vs. Union of India*** had *inter alia* observed ".....we hope and trust that in the meantime, the respondent Union of India will request the concerned Parliamentary Affairs Minister to expedite the matter before the Parliamentary Standing Committee so that the matter may be placed before the Parliament on an early date."

10. The learned ASG otherwise states that the intent of the Government is also so, as is evident from the Bill aforesaid under consideration.

11. We have bestowed our thought to the matter.

12. We find that a number of statutes providing for appointment of Chairperson / President / Member of Tribunals / Statutory Authorities / Commission already contain a provision prohibiting the appointees from taking up any other work / assignment. We may also take notice of the fact that even in the absence of any such provision in the statute, the letters of appointment are often found to contain the same as a condition of service.

However, there is a lacuna in this regard vis-a-vis some of the statutes / appointments and which is now sought to be filled with the Bill aforesaid.

13. The same has resulted in appointees of some of the Tribunals / Statutory Authorities / Commissions being barred / not entitled to take up arbitrations, while others are entitled to the same and who otherwise are similarly placed. It is precisely to remedy such a situation that amendments to the existing legislations / new legislation are/is proposed. However, the said process, inspite of our waiting for the last nearly five years, has not yielded any fruit.

14. We find that otherwise it is a settled principle of law that a full time employee, as certainly full time Chairpersons / Presidents / Members of Tribunals / Commissions / Statutory Authorities are, is not entitled to take up any other employment or vocation and as certainly an arbitration would constitute. The reason therefor is obvious. A whole-time employee is expected to bestow all his time, energy and resources to the whole time employment and not to divert the same to any other job, work or vocation. Moreover, retired Judges appointed as Chairpersons or Members of Statutory Bodies, Tribunals and Commissions discharge judicial / quasi-judicial functions and their involvement in any other commercial legal

activity or as arbitrators would necessarily require them to interact, in all possibility, with the same set of people / professionals who appear before them in their capacity as Chairperson / Member of the Statutory Body / Tribunal of which they are whole time office holder, giving rise to speculation about their impartiality in discharge of their duty in such capacity. Reference in this regard may be made to:

(i). ***Sukumar Mukherjee Vs. State of West Bengal*** (1993) 3 SCC 723 where, in the context of challenge to the West Bengal State Health Service Act, 1990 and the West Bengal Health Service Rules, 1993 prohibiting private practice altogether when a doctor is posted to the health centers, rural hospitals and teaching hospitals, it was held that judicial notice can be taken of the fact that if the doctors were allowed private practice, patients visiting the health centers and rural hospitals would suffer. It was further held that no government doctor can claim right to private practice. The judgment of the High Court of Allahabad in ***Dr. Y.P. Singh Vs. State of U.P.*** AIR 1982 Allahabad 439 holding that such a restriction is in the interest of the public, was approved. It was held that such prohibition is for social good and there is sufficient material available to indicate that allowing the doctors of government hospitals to do private practice results in

neglect of essential parts of duties as a government doctor and as a teacher and distracts the attention and energy from the task assigned.

(ii). ***Prof. M. Gurunath Vs. State of Karnataka*** MANU/KA/0194/2003 negating a challenge to the Rule prohibiting teachers in government colleges from giving private tuitions, on the ground of being violative of Article 19(1)(a) of the Constitution of India, reasoning that if such restrictions are not imposed, it would seriously affect the morality of the society as it would reduce or dilute the moral value of the professors in an educational institution who would, in total disregard of their obligation to the students, be spending their time and energy only in giving private tuition with a view to earn more money and there is bound to be a conflict of interest between discharge of their duties and desire to earn more money by giving private tuition. It was further held that the professors are then likely to be tempted to give tuitions for monetary gain, as temptation to earn money has no bounds and this will seriously affect the academic programme and excellence in educational institutions. It was further held that it may send a message to the student community that if student takes tuition from a particular teacher, his prospect of passing and getting more marks in examination is more.

(iii). ***Lt. Col. K.C. Sud Vs. S.C. Gudimani*** 20 (1981) DLT 302 holding that a Public Prosecutor appointed in exercise of powers under Section 24(1) of the Code of Criminal Procedure, 1973 cannot as an advocate appear against the State. ***S. Naganna Vs. Krishna Murthy***, AIR 1965 AP 320 holding that a Public Prosecutor though a qualified legal practitioner is a whole time government servant and must suspend his practice upon entering in government service and cannot therefore appear for the accused in his capacity as a practicing advocate was relied upon.

(iv). ***Satish Kumar Sharma Vs. The Bar Council of Himachal Pradesh*** (2001) 2 SCC 365 upholding withdrawal of enrolment of the petitioner as an advocate with the Bar Council on the ground of the petitioner being employed as an Assistant (Legal) and ultimately as a Law Officer with the Himachal Pradesh State Electricity Board, reasoning that the petitioner as a full time salaried employee could not practice as an advocate.

(v). ***Dr Haniraj L. Chulani Vs. Bar Council of Maharashtra & Goa*** (1996) 3 SCC 342 observing that legal profession requires full time attention and would not countenance an advocate riding two horses or more at a time. Accordingly, it was held that a medical practitioner, even if gave an undertaking that he would not practice medicine during the Court hours

could not be enrolled as an advocate as he would be torn between two conflicting loyalties i.e. loyalty to his clients on the one hand and loyalty to his patients on the other.

(vi). ***Krishna Chandra Sharma Vs Sind Hyderabad National Collegiate Board*** MANU/MH/0507/1987 where a Division Bench of the High Court of Bombay accepted a challenge to the provision of the Bombay University Act, 1974 providing for appointment of Presiding Officers of the College Tribunal constituted thereunder on part time basis *inter alia* on the ground that the Presiding Officers would then not be in a position to devote complete attention to the work in hand and the same would also effect his independence and open him to influences. It was held that the appointment should be on full time basis.

(vii). ***Govind Martand Purandare Vs. State of Maharashtra*** MANU/MH/0971/1990 where another Division Bench of the High Court of Bombay observed that a full time employee of a school during vacation also is not entitled to take up employment elsewhere, except if permitted so.

(viii). ***Lal Bahadur Singh Vs. The State of Bihar*** MANU/BH/0377/1995 where a Division Bench of the High Court of Patna, dealing with the claim of part time lecturers to the same pay scale, observed that the mere fact that

both a part time lecturer and a full time lecturer engage classes and perform similar duties cannot be a ground for ignoring the basic difference in the nature of the appointments; while a full time lecturer is a whole time government servant who cannot take up any other employment under any employer, a part time lecturer is free to engage himself in any other activity and to seek employment under any other employer.

(ix) ***Osmania University Vs. A.V. Ramana*** 1992 Supp (1) SCC 535 where the Supreme Court was concerned with the question whether the Evening Law College conducts part time course of study. Finding that though called the Evening Law College and imparting tuition to the students during evening hours, the college was in all respects at par with the so-called day colleges and was offering the same course of same duration with the same syllabus, the Supreme Court set aside the judgment of the Full Bench of the High Court and *inter alia* held that the extent of time a student devotes to his study depends upon him and it is for the University to determine whether the course of study is a part time or a full time course.

15. It would thus be seen that it is no argument or consideration that the whole time Chairperson / Member would be acting as arbitrator only during the hours he / she is not working as Chairperson / Member. Not only would

pursuing such a vocation / occupation simultaneously with the office occupied, be at the cost of the work of the said office but may also jeopardise / appear to jeopardise the reputation of the said office. It is also a settled principle, that justice not only must be done but must seem to be done.

16. As would be obvious from the aforesaid, the relief sought in the petition has not been controverted by the UOI also. In fact the UOI has itself tried to grant the said relief but there are implicit delays in the same. The Courts though, whenever have found a vacuum in legislation and the need to fill the same, have immediately stepped in, as in (i) ***Vishaka Vs. State of Rajasthan*** (1997) 6 SCC 241; (ii) ***Vineet Narain Vs. Union of India*** (1998) 1 SCC 226; (iii) ***Mrs. Asha Sharma Vs. Chandigarh Administration*** (2011) 10 SCC 86; (iv) ***Court on its Own Motion Vs. Union of India*** MANU/SC/1094/2012; (v) ***Pravasi Bhalai Sangathan Vs. Union of India*** (2014) II SC 477, but here, we hesitate to do so, out of our deference to the legislature, which is seized of the matter and, respecting the doctrine of separation of powers. The subject, in our view, falls in the domain of legislature and we will be overstepping our limits if, while the legislature is debating the issue, pre-empt the legislature by issuing

directions.

17. We therefore dispose of the petition with a direction to the respondents to bestow special attention on the issue and to ensure that appropriate legislation is made at the earliest.

No costs.

RAJIV SAHAI ENDLAW, J.

CHIEF JUSTICE

DECEMBER 11, 2015
Bs/gsr..