

IN THE HIGH COURT OF DELHI AT NEW DELHI

(CIVIL ORIGINAL JURISDICTION)

Writ Petition (Civil) No. 866 of 2010

COMMON CAUSE Vs UNION OF INDIA

PUBLIC INTEREST LITIGATION

SYNOPSIS

That the petitioner is filing the instant writ petition in public interest highlighting how Article 124(7) of the Constitution of India is being violated in both letter and in spirit because of post-retirement activities of the former judges of the Hon'ble Supreme Court of India. The said provision forbids a person who has held office as a Judge of the Supreme Court from pleading or acting in any court or before any authority. The purpose of the said provision has been defeated and it has been rendered nugatory because of an extremely narrow interpretation. This petition seeks a declaration from this Hon'ble court for a correct interpretation of this provision which would safeguard the reputation of high Constitutional offices of the judges of the Supreme Court. This petition seeks a declaration that giving written advice which is tendered in a court of law also comes within the mischief of the Article 124(7).

This petition also shows how retired judges holding Constitutional, statutory posts or are Chairpersons/Members of various Commissions take up arbitration work in violation of established legal and ethical norms. Such practice does a disservice to both the high offices these judges have held and the posts or body to which they have been appointed. Therefore, this petition also seeks a declaration from this Hon'ble Court that no retired judge will take up arbitration work while he is holding Constitutional/statutory post, or is Chairperson/Member of any government appointed Commission or is the Chairperson/Member of any Tribunal.

LIST OF DATES & EVENTS

- 26.01.1950 Constitution of India comes into force. The Constitution forbids a retired judge of the Supreme Court from acting or pleading before any court of law, tribunal or any authority.
- 1964 Central Civil Services (Conduct) Rules, 1964 are framed. They prohibit a government servant who gets remuneration & perks out of exchequer to have any other part-time or full-time employment or business activity.
- 15.07.2009 Petitioner files two RTI applications. One seeks the names of PSUs that have secured the legal opinion of retired Supreme Court judges and the fees paid to them. The other application seeks details as to retired Supreme Court or High Court judges who have taken up arbitration work while heading a Commission of Inquiry.
- August'09 Petitioner receives response to its RTI Applications. The response shows a large number of retired SC judges are giving legal opinion for high fees. The response also shows that a large number of retired SC/HC judges have taken up arbitration work.
- 1950-2010 Despite repeated call to the conscience of the judges by Hon'ble former Chief Justice of India J. S. Verma, retired SC judges are violating the objective and spirit behind Article 124(7) and a number of retired SC/HC judges are taking up arbitration work despite being a Chairperson/Member of various constitutional/statutory bodies, various commissions, commission of inquiry, and various tribunals and appellate bodies.
- 08.02.2010 Hence the instant writ petition.

IN THE MATTER OF:

COMMON CAUSE

THROUGH ITS CHIEF EXECUTIVE,

MR. KAMAL KANT JASWAL

5, INSTITUTIONAL AREA, NELSON MANDELA MARG

VASANT KUNJ, NEW DELHI

...THE PETITIONER

VERSUS

THE UNION OF INDIA

THROUGH ITS SECRETARY

MINISTRY OF LAW AND JUSTICE

4TH FLOOR A WING, SHASTRI BHAVAN

NEW DELHI-110001

... THE RESPONDENT

A WRIT PETITION IN PUBLIC INTEREST UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA HIGHLIGHTING HOW THE IMPORTANT OBJECTIVES OF ARTICLE 124(7) ARE BEING DEFEATED, AND BASIC CONSTITUTIONAL, LEGAL AND ETHICAL NORMS ARE BEING VIOLATED BECAUSE OF CERTAIN POST-RETIREMENT ACTIVITIES OF THE FORMER JUDGES OF THE HON'BLE SUPREME COURT AND HON'BLE HIGH COURTS. THIS PETITION SEEKS CERTAIN DECLARATORY RELIEFS FROM THIS HON'BLE COURT SO THAT SUCH ACTIVITIES ARE STOPPED IN FUTURE

To,

**THE HON'BLE CHIEF JUSTICE OF DELHI AND HIS COMPANION JUDGES OF
THE HON'BLE HIGH COURT OF DELHI, AT NEW DELHI**

The Humble Petition of the
Petitioner above-named

MOST RESPECTFULLY SHOWETH: -

1) That the petitioner is filing the instant writ petition in public interest highlighting how Article 124(7) of the Constitution of India is being violated in both letter and in spirit because of post-retirement activities of the former judges of the Hon'ble Supreme Court of India. The said provision forbids a person who has held office as a Judge of the Supreme Court from pleading or acting in any court or before any authority. The purpose of the said provision has been defeated and it has been rendered nugatory because of an extremely narrow interpretation. This petition seeks a declaration from this Hon'ble court for a correct interpretation of this provision which would safeguard the reputation of high Constitutional offices of the judges of the Supreme Court. This petition seeks a declaration that giving written advice which is tendered in a court of law also comes within the mischief of the Article 124(7).

2) This petition also shows how retired judges holding Constitutional, statutory posts or are Chairpersons/Members of various Commissions take up arbitration work in violation of established legal and ethical norms. Such practice does a disservice to both the high offices these judges have held and the posts or body to which they have been appointed. Therefore, this petition also seeks a declaration from this Hon'ble Court that no retired judge will take up arbitration work while he is holding Constitutional/statutory post, or is Chairperson/Member of any government appointed Commission or is the Chairperson/Member of any Tribunal.

THE PETITIONER

1) The Petitioner 'Common Cause' is a registered society that was founded in 1980 by late H. D. Shourie for the express purpose of ventilating common problems of the people and securing their resolution. It has brought before the Hon'ble Supreme Court of India and this Hon'ble Court various Constitutional issues and has established its reputation as a bona fide public interest organization.

THE RESPONDENT

1) The Respondent is the Union of India through its Secretary to the Ministry of Law and Justice.

THE CASE IN BRIEF

1) Article 124(7) of the Constitution of India is clear and express: “No person who has held office as a Judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India.” (Hereinafter the ‘said provision’).

2) The purpose of this Constitutional provision is three fold:

(i) Preserve the dignity of the Supreme Court

(ii) To avoid embarrassment to the Court/Tribunal before whom he may appear

(iii) To prevent allurements by post-retirement benefits so as to preserve the independence of the judiciary

3) Clearly, all the above three are salutary purposes which are being defeated by a wrong interpretation of the said Constitutional provision. In the absence of a correct judicial interpretation of the said provision, it is left to individual interpretation which seems to be divergent on this issue. That is why it is fit and proper that, firstly, a correct interpretation is rendered and secondly, it is done so by the judiciary itself.

4) In recent times, the practice of retired Supreme Court judges to give advice on their letterheads for a price to a party which is then tendered in a court of law has become all too pervasive and needs to be checked before it causes further damage. All this has been happening despite the repeated calls to the conscience of retired judges by the most respected former Chief Justice of India J. S. Verma who has emerged as the key conscience keeper of the judiciary in recent times. Constitutional expert and Former Attorney General of India Soli Sorabjee has also written against such practice. The only exception should be pro bono advice rendered by the retired judges to the Government or in matters of public interest.

5) The Petitioner, to gauge the extent of this problem, filed an RTI Application with Department of Public Enterprises to find out the names of central public sector enterprises that have secured legal opinion of retired Supreme Court judges from 2006-09 along with the names of judges and the fees paid to them. The said RTI application is annexed and is marked as **Annexure P1**.

6) The Petitioners received responses under RTI from various public sector enterprises which show that a number of retired Supreme Court judges including former CJIs are giving advice for a huge fee to these enterprises. The said replies are annexed and are marked as **Annexure P2** (colly). The number of private parties who have secured the advice of retired Supreme Court judges is likely to be much higher but their record as such is not available.

7) Former CJI and Chairman of NHRC, J S Verma has repeatedly spoken against such activities. He has said:

“In my view, even the post-retirement activity of judges and the Chief Justice of the Supreme Court are within the sphere of judicial accountability, which need to be prescribed by an appropriate amendment of article 124(7) to prevent varying interpretations by the concerned individuals. Obviously, that impacts the image and credibility of the higher judiciary. Having chosen to come to the Supreme Court, we cannot claim to free ourselves from such regulation of the post-retirement conduct and behaviour. We continue to get that honour and respect, which must go with the corresponding obligation. The prevalence of a few activities of individuals perceived generally as inconsistent with the desired post retirement behaviour are attracting public criticism. This needs to be prevented. The need is to interpret the prohibition in article 124(7) widely to accord with its spirit. Any activity that can be related to, and considered as a likely benefit derived from our tenure in office must be considered forbidden.”

The said speeches and articles of Hon’ble Justice Verma are annexed and are marked as **Annexure P3 (colly)**. The article written by jurist Soli Sorabjee in Indian Express expressed grave concern at former CJIs filing affidavits on behalf of private litigants. The said article is annexed and is marked as **Annexure P4**.

8) It is a settled principle that Constitution should be interpreted in a manner which does justice to its spirit and not just to its strict letter. A Constitution is a document containing basic principles and it is the courts that fill them with meaningful content. A narrow interpretation of the Constitution should be eschewed in favour of a liberal and purposive interpretation since a Constitution is written for all times to come. In *M. Nagaraj (W.P.C. 61/2002)*, the Supreme Court observed:

“Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crisis of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. A Constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges.”

That is why the Petitioner has moved this Hon’ble Court so that expression “act and plead” used in Article 124(7) can be given its true and logical meaning.

9) Constituent Assembly, which debated this provision (and the analogous provision of Article 220 of the Constitution), was weighed by the opinion of Dr. Tej Bahadur Sapru, the stalwart of legal profession in India. He stated:

“I think the rule in future should be that any barrister or advocate, who accepts a seat on the bench, shall be prohibited from resuming practice anywhere after retirement... I am also of the opinion that temporary or acting judges do greater harm than permanent judges, when after their seat on the bench for a short period they revert to the bar. A seat on the bench gives them pre-eminence over their colleagues and embarrasses the subordinate judges who were at one time under their control and thus instead of their helping justice, they act as hindrance to free

justice...There is a long standing convention in England to the effect that no member of the Bar should do anything which gives rise to the impression that he has pull over his opponent by reason of having held a judicial post.”

Our Supreme Court judges hold a very high judicial post. To give advice for huge fees which is then tendered in a court or tribunal goes against established principles and is in conflict with the spirit behind the Constitutional provision.

10) Law Commission of India in its 72nd report titled, “Restriction on practice after being a permanent judge,” discussed this issue in detail and concluded that such a provision is necessary in the interest of independence of judiciary, dignity of courts and administration of justice. The said report is annexed and is marked as **Annexure P5**.

11) A second issue which has also been repeatedly raised by Justice Verma is the spectacle of retired judges taking up arbitration work while they are working as Chairperson/Member of a commission, tribunal or a Constitutional/statutory body. Such a conduct is in violation of legal rules and ethics. They are bringing considerable disrepute to the judiciary and to the institutions to which the said retired Supreme Court and High Court judges belonged.

12) The Petitioner filed an RTI application in the Ministry of Law & Justice asking whether there is a policy in respect of allowing retired SC and HC judges to take up arbitration work while heading a Commission of Inquiry instituted by the Union Government. The application also asked the names of retired SC and HC judges who were permitted to take up arbitration work while heading such a commission of inquiry. The said application is annexed and is marked as **Annexure P6**.

13) The Ministry of Law and Justice in its reply to the above RTI application said that there is no policy as such. It, however, listed out the names of various judges who were nominated for arbitration work. The Ministry said that whether these retired judges were also heading any Commission of Inquiry can be obtained from different Ministries. The said reply of the Law Ministry is annexed and is marked as **Annexure P7**.

14) There are large number of tribunals, appellate bodies, Constitutional & statutory bodies and commissions of inquiry in this country today. Many of the Chairperson/Members of them are retired Supreme Court or High Court judges. These retired judges also take up high paying arbitration work even though they are in full time work with full salary and perks. Recently, at the instance of the Prime Minister, the Law Ministry is reported to be contemplating a ban on such activities. A news report to this effect was published in Hindustan Times. The said report is annexed and is marked as **Annexure P8**. It is in the interest of the judiciary not to let this issue fester and set appropriate principles which do not bring any discredit to the institution. Former Chief Justice Verma has referred to this conduct as ‘inexplicable’.

15) The Government of India 'Central Civil Services (Conduct) Rules 1964' prohibit a civil servant from taking up any other full-time or part-time employment for remuneration. Exactly the same principle should apply to retired judges while they are working as Chairperson/Member in any Government appointed body. The said rules are annexed and are marked as **Annexure P9**.

16) Former Chief Justice Verma in his recent Lecture at Madras High Court on 29.01.2010 has sounded the warning that these activities are a threat to judicial independence which must be averted. He said:

"Post-retirement conduct of the superior judges, particularly those of the Supreme Court is also relevant enough in this context to require mention. In addition to the system providing for the appointment of persons of proven integrity as guardian of constitutional values, there is the need for constitutional safeguards to insulate them also from possible executive influence, through temptations in subtle ways, to preserve judicial independence. One such method to penetrate the resolve of even a few of the best is the temptation of lucrative post-retiral benefits given by the executive to a favoured few. The obverse of the constitutional guarantee of security of tenure and conditions of service is the obligation of such constitutional functionaries to the observance of a code of post-retiral conduct eschewing any such temptation. To the extent possible, the needed constitutional prohibitions should also be enacted, to enable the development of healthy conventions. The environment of eroding ethical values calls for this preventive measure. Some instances of post-retirement activity of judges of the Supreme Court (including the CJI) are attracting public disapproval, even if voiced privately. Chamber practice of giving written opinions by name to be used by litigants/parties before court/tribunal or any authority; arbitrations for high fees; doing arbitrations even while heading Commissions/Tribunals and availing the salary, perquisites and benefits of a sitting Judge/CJI are some activities inviting adverse comments and seen as eroding judicial independence. This too is a threat to judicial independence, which must be averted."

17) The Petitioner has not filed any other writ, complaint, suit or claim in any manner regarding the matter of dispute. The Petitioner has no other better remedy available.

18) The Petitioner seeks liberty from this Hon'ble Court to produce other documents and records as and when required in the course of the proceedings.

GROUND

A. That giving written opinions on a point in issue to be produced in a court of law is a form of practice which falls within the mischief of Article 124(7) of the Constitution which prohibits a retired Supreme Court judge from acting or pleading before any court or tribunal.

B. That taking up arbitration work by a retired Supreme Court or High Court judge while being a Chairperson/Member of a Government appointed commission, tribunal or body is in violation of legal and ethical norms.

PRAYER

In view of the facts & circumstances stated above, it is most respectfully prayed that this Hon'ble Court in public interest may be pleased to: -

- a. Hold that henceforth no retired Supreme Court judge can give chamber advice to any party.

- b. Hold that henceforth 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.

- c. Issue or pass any writ, direction or order, which this Hon'ble court may deem fit and proper under the facts and circumstances of the case.

Petitioner

Through

New Delhi

Prashant Bhushan

Dated: February 10, 2010

(Advocate for the Petitioner)