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IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
IN

WRIT PETITION (Civil) NO.678 OF 2013

(KAB CASE)

IN THE MATTER OF :

Common Cause

..... Petitioner

Versus

Union of India and Anr

... Respondents

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FILED BY

B.K. PRASAD

ADVOCATE FOR RESPONDENT NO.1

- ① Keshri swami — Extends beyond judicial Q7
- ② Only CJI's case approved, CVC JT
- ③ Large number of pipelines, still engaged in ^{inference}
- ④ False statement to protect Raja & NRC Unit
- ⑤ Inquiry is by SC, not Govt

Court Count

- ① CBIOT says no evidence given
- ② Mere allegations, not "Proven Mischances"
- ③ Allegation related to his tenure & Co.

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IN THE SUPREME COURT OF INDIA

(CIVIL ORIGINAL JURISDICTION)

Writ Petition (Civil) No. 678 of 2013

IN THE MATTER OF:

Common Cause

... Petitioner

Versus

Union of India and Anr

... Respondents

COUNTER AFFIDAVIT ON BEHALF OF RESPONDENT NO.1

I, P.K. Ahuja, Working as Deputy Secretary, Government of India, Ministry of Home Affairs, (Human Rights Division), 4th Floor, NDCC-II Building, Jai Singh Road, New Delhi-10001, do hereby solemnly and sincerely affirm and state as follows:-

- A. That in my official capacity as mentioned above, I am fully conversant with the facts of the case and competent to swear the present reply affidavit on behalf of the respondent.
- B. I have gone through the contents of the Writ Petition (Civil) No. 678 of 2013 and the annexures filed with the application and have understood the contents thereof. I am filing this reply-affidavit to the show cause in the above Writ Petition.

PRELIMINARY SUBMISSIONS:

1. At the outset the answering respondent denies each and every statement, allegation, averment and submission made by the Petitioner herein, that are contrary to the present affidavit, and the answering respondent shall not be deemed to have admitted any allegation, averment and submission which have not been specifically traversed or denied herein.

2. The answering Respondent submits that Justice K.G. Balakrishnan (hereinafter referred to as Respondent No.2 herein) was appointed as a Judge of this Hon'ble Court on 08-06-2000. He held the post of Chief Justice of India from 14-01-2007 till his retirement on 12-05-2010. Subsequent to his retirement Respondent No. 2 was appointed as the Chairperson of the National Human Rights Commission on 07-06-2010 and continues to hold the post as on date.
3. On 04-04-2011 an organization by the name "Campaign for Judicial Accountability and Reform" submitted a representation to the Hon'ble President of India requesting her to make a reference to this Hon'ble Court for inquiry into alleged acts of misbehaviour of the Respondent No.2 in terms of Section 5(2) of the Protection of Human Rights Act, 1993(hereinafter referred to as the 'Act').
4. The matter was referred to Ministry of Finance, Department of Revenue and the Central Board of Direct Taxes (CBDT), which gave a supplementary status note dated 18-04-2012 on income tax investigation in respect of allegations against the Respondent No.2 and his relatives. In the said note it was mentioned that on the basis of evidence collected during the course of inquiries it could not be established that the properties were held Benami on behalf of Respondent No. 2. Despite there being no allegations regarding professional receipts they were nevertheless examined, and it was found that there was no material to link such payments to any cases pending in the concerned court.
5. The answering Respondent submits that the said supplementary note was prepared so as to place it before this Hon'ble Court in Writ

Where is the report of CBDT?

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Petition No. 35 of 2012. The said writ petition was a public interest litigation seeking a mandamus requiring the President of India to make a reference to this Hon'ble Court under Section 5(2) of the Act for holding an inquiry against the present Respondent No.2.

6. The answering Respondent submits that Writ Petition No. 35 of 2012 was disposed off by this Court on 10-05-2012 (reported as Common Cause v. Union of India, 2012 (11) SCC 600) in the following terms:

"13. In the peculiar facts noticed hereinabove, we are satisfied, that the instant Writ Petition deserves to be disposed of by requesting the competent authority to take a decision on the communication dated 4.4.2011 (addressed by the Campaign for Judicial Accountability and Reforms, to the President of India). If the allegations, in the aforesaid determination, are found to be unworthy of any further action, the petitioner shall be informed accordingly. Alternatively, the President of India, based on the advice of the Council of Ministers, may proceed with the matter in accordance with the mandate of Section 5(2) of the 1993 Act."

7. The answering Respondent submits that in terms of the Order dated 10-05-2012 of this Hon'ble Court the matter was referred to the Department of Legal Affairs, Ministry of Law and Justice on the question whether the provisions of the Act will apply when allegations pertain to the period when respondent No.2 was functioning as Chief Justice of India and not to his current tenure as Chairperson of NHRC.

8. On 17-05-2012 the Ministry of Law and Justice furnished its opinion after examining this Court's observations in the case of Krishna

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Swami v. Union of India, 1992 (4) SCC 605 wherein it was observed as under:

*“63... So long as one holds the judicial office, the above conduct remains germane and relevant. Any imputation of misbehaviour through a valid motion admitted by the Speaker needs investigation. **The elevation of a High Court Judge to the Supreme Court is only an elongation of the judicial functions in the apex court with the same judicial fervor.***

From this perspective, the alleged misbehaviour of the learned Judge, if proved, would remain germane, even while the learned Judge is a Judge of this Court. It would thus not be difficult to discount the contention of the learned advocate as of no substance”

9. The Ministry found that the functions of Chairman, National Human Rights Commission cannot be said to be an elongation of the judicial functions which the Respondent No.2 discharged in this Court as the Chief Justice of India. Accordingly it was opined that Respondent No.2's conduct as Chief Justice of India did not appear to be a ground for making a Presidential reference to this Court under section 5(2) of the Act.
10. It is submitted that vide letter dated 29-01-2013, the Petitioner was informed by the Ministry of Home Affairs about the opinion from the Ministry of Law and Justice, and it was stated that all the original papers relevant in the case had been sent to the Ministry of Law and Justice for appropriate action.

11. On 14-04-2013 the Advocate for the Petitioner addressed a letter to the Ministry of Home Affairs contending that the stand taken by the Ministry was untenable and referred to the Judgments of this Court in CPIL v. Union of India, 2011 (4) SCC 1 and N. Kannadasan v. Ajay Khose, 2009 (7) SCC 1. (Pr 77)

12. The answering respondent submits that in the afore mentioned circumstances the only question before this Court is whether the conduct of the Respondent No.2 as Chief Justice of India could be considered to invoke section 5(2) of the Act and seek his removal. ?

13. According to Section 3(2)(a) of the Act, the Chairperson of NHRC shall be a person '*who has been a Chief Justice of the Supreme Court*'. Section 5(2) prescribes the grounds for removal of a Chairperson and member 'from his office' on proved misbehaviour or incapacity. Both the grounds 'misbehaviour' and 'incapacity' have to be read in conjunction with the word *office*. It is submitted that a conjunctive reading of the grounds and the word 'office' would show that Section 5(2) targets 'proved misbehaviour' or 'incapacity' while holding the office. It is submitted that the words 'proved misbehaviour' cannot be construed to include within their ambit allegations pertaining to conduct in the previous office.

14. It is submitted that at the time of the Respondent No.2's appointment there was no controversy, nor were there any allegations or established misbehaviour on his part. The allegations against Respondent No.2 cannot be described as 'proved misbehaviour' as required by section 5(2) of the Act. It is submitted that the

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appointment of Respondent No.2 as NHRC Chairperson was never
challenged.

PARA WISE REPLY:

15. With respect to Para 1 it is submitted that there was no question of reversing the stand of the Respondent No.1 as informed to the petitioner vide letter dated 29-01-2013. It is submitted that the Respondent No.2's conduct as Chief Justice of India cannot be a ground for making a Presidential reference to this Court under section 5(2) of the Act.

16. Paras 2 to 4 do not call for any reply being factual position as stated by the Petitioner.

17. Para 5 does not call for any comment as the contents thereof are based on a news report dated 26-02-2011.

18. Paras 6 to 9 do not call for any reply being factual position as stated by the Petitioner.

19. With respect to para 10 it is denied that the reply dated 29-01-2013 is based on a wrong interpretation of this Court's judgment in Krishna Swamy v. UOI (Supra).

20. With respect to para 11(i) it is submitted that the case of Justice Soumitra Sen is distinguishable as the allegations against Justice Sen pertained to the period when he was an advocate and the misconduct had continued while he was a judge. The case at hand cannot be compared to that of Justice Sen's as the Respondent No.2 is not holding a judicial office.

21. With respect to para 11(ii) it is submitted that the post of Chairperson, NHRC cannot be described as the same as that or equal to the post of Chief Justice of India. The functions of the Commission are laid down in section 12 of the Act, from which it is amply clear that these functions cannot be said to be an elongation of Supreme Court's judicial functions with the same judicial fervour.

22. With respect to para 11(iii) it is submitted that the decision in CPIL v. Union of India, 2011(4)SCC 1 is not applicable to the matter at hand as there this Court was concerned with legality of appointment of the Central Vigilance Commissioner on the basis of an 'established' fact that there were pending criminal proceedings and the file notings recommending disciplinary action were not considered by the High-Powered Committee before making its recommendation.

23. With respect to para 11(iv) it is submitted that in the case of N. Kannadasan v. Ajay Khose, 2009 (7) SCC 1 this Court was concerned with a challenge to the appointment of a President of a State Consumer Commission on the ground that as an Additional Judge of the High Court he had been found unfit to continue as Judge and accordingly not made permanent. There the challenge was based on an undisputed fact. N. Kannadasan's case is not applicable to the matter at hand because there was no challenge to the Respondent's No.2's appointment nor is there an established fact concerning his alleged behaviour.

24. With respect to para 11 (v) and (vi) it is submitted that the mandate of section 5(2) of the Act cannot be invoked unless there is "proved misbehaviour". It is submitted that mere allegations against

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Respondent no.2 is insufficient to make a reference to this Court under section 5(2).

25. The answering respondent submits that the grounds stand answered by the submissions made hereinabove and the arguments of law would be made at the time of hearing.

26. Based on what has been stated hereinabove, the answering respondent prays that this Hon'ble Court may be pleased to dismiss the Writ Petition with exemplary costs.

VERIFICATION:

Verified at New Delhi on this 30th day of September, 2013, that the contents of the above Counter-Affidavit are true and correct on the basis of information derived from the record of the case.


DEPONENT
(पी. के. आहुजा)
(P. K. AHUJA)
उप-सचिव/Deputy Secretary
गृह मंत्रालय
Ministry of Home Affairs
भारत सरकार/Govt. of India


DEPONENT
(पी. के. आहुजा)
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