

(2010) 08 KL CK 0030
In the High Court Of Kerala
Case No : Unnumbered W.P. (C) of 2010

Adv. D.B. Binu

APPELLANT

Vs

Governor of Kerala

RESPONDENT

Date of Decision : 17-08-2010

Acts Referred:

Constitution of India, 1950 — Article 154, 154(1), 161, 162, 163
Right to Information Act, 2005 — Section 10, 12(1), 15, 15(3), 9

Citation : AIR 2011 Ker 5 : (2010) 3 ILR (Ker) 969 : (2010) 4 KLT 115

Hon'ble Judges : S. Siri Jagan, J

Bench : Single Bench

Advocate : P.K. Ibrahim, for the Appellant; Renjit Thampan, A.A.G., for the Respondent

Judgement

S. Siri Jagan, J.—This unnumbered W.P.(C) has been placed before the Court for adjudication of the sustainability of a defect noted by the Registry since the petitioner maintains that there is no defect.

2. The Writ Petition is filed by the petitioner challenging the validity of the appointment of the 6th respondent as a member of the State Information Commission u/s 15(3) of the Right to Information Act. In the Writ Petition, the petitioner has impleaded the Governor of the State of Kerala as the first respondent, for the reason that the Governor is the appointing authority for appointing the members of the State Information Commission. The Registry raised an objection that by virtue of Article 361 of the Constitution of India, the Governor is not answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done purporting to be done by him in the exercise and performance of those powers and duties and therefore he cannot be impleaded as a respondent in this Writ Petition, since his action as the Governor is under challenge in the Writ Petition. The counsel for the petitioner maintained that u/s 15(3) of the Right to Information Act, the appointing authority of the members of the State Information Commission is the Governor

and the exercise of that power under the Act is under challenge in the Writ Petition. Therefore he is a necessary party, since without the Governor in the party array the order cannot be successfully challenged is his contention. He further submitted that the exercise of any power of the Governor under the Constitution of India is not in question and as such Article 361 is not attracted. Therefore he maintained that there is no defect. It is because of the said stand of the counsel for the petitioner in respect of the defect so noted, with which stand the Registry did not agree, that the Registry has placed the matter before the Court for adjudication of this defect.

3. The contention of the petitioner is that the protection and immunity under Article 361 of the Constitution of India is available only in respect of exercise of duties and functions of the Governor as provided under the Constitution of India and not in respect of any statutory functions exercised by the Governor as per statutes framed by the Legislature of the State and the Parliament. According to him, the members of the State Information Commission are appointed by the Governor on the recommendation of a committee consisting of the Chief Minister, who shall be the Chairperson of the Committee, the Leader of Opposition in the Legislative Assembly and a Cabinet Minister to be nominated by the Chief Minister and not by the Council of Ministers. Such an action is not referable to Article 163 of the Constitution of India and therefore is outside the purview of the protection and immunity granted by Article 361 of the Constitution of India is his contention. He heavily relies on a decision of a Division Bench of this Court in *Gopalakrishnan v. Chancellor, University of Kerala* 1990 (1) KLT 681 in support of his contention, in which, according to the petitioner, the proposition has been laid down that in respect of statutory functions exercised by the Governor, the immunity under Article 361 of the Constitution of India is not available. The counsel for the petitioner takes me through paragraphs 18, 25, 26, 28, 29, 34, 35 and 36 of the said decision, He also refers me to paragraph 10 of the decision of the Division Bench of the Madhya Pradesh High Court in *Dr. S.C. Barat and Another Vs. Hari Vinayak Pataskar and Others*, which has been quoted with approval by the Division Bench in *Gopalakrishnan's* case (supra).

4. On the other hand, the learned Additional Advocate General appearing for the State as requested by the Court, would contend that the protection and immunity under Article 361 of the Constitution of India is available to the Governor in respect of his functions and duties as a Governor whether under the Constitution or under a Statute and he would be outside the protection only when he exercises certain statutory functions not as a Governor, but otherwise. The learned Additional Advocate General would contend that the decision in *S.C. Barat's* case (supra) by the Madhya Pradesh High Court which has been quoted with approval by the Division Bench of this Court in *Gopalakrishnan's* case (supra) itself is an authority for that proposition. Even in . respect of statutory functions exercised by the Governor in his capacity as Governor, the protection and immunity under Article 361 of the Constitution of India is available is his contention. He takes me through paragraphs 5 and 6 of the decision in *S. C.*

Barat 's case (supra) in support of his contention He further points out that the decision of the Andra Pradesh High Court has been noted with approval in paragraph 31 of the decision of the Division Bench of this Court in Gopalakrishnan's case. The learned Additional Advocate General submits that the appointment of the members of the State Information Commission u/s 15(3) of the Right to Information Act is the action of the Governor in his capacity as Governor and not otherwise and therefore Article 361 is clearly attracted to the functions of the Governor u/s 15(3) of the Right to Information Act. He would therefore submit the Governor cannot be a party to the Writ Petition as a respondent as he enjoys the protection guaranteed by Article 361 of the Constitution of India in respect of that function of his.

5. I have considered the rival contentions in detail. I am of opinion that more than supporting the petitioner, the decision of the Division Bench in Gopalakrishnan's case (supra) is an authority for a proposition to the contra. In that decision, two questions were considered by the Division Bench. The first was as to whether, while making nominations to the Senate of a University, the Governor as Chancellor of the University is bound to act on the aid and advice of the Council of Ministers of the State and secondly as to whether the immunity under Article 361 is available to Governor while exercising statutory functions under Statutes framed by the Legislature. No doubt in that decision, the Division Bench held that while nominating members of the Senate, the Chancellor of the University is not bound to act on the aid and advice of the Council of Ministers. But in paragraph 39 of the judgment, the Division Bench actually held the other question as follows:

There was a fit argument that if the contention canvassed by the petitioner were not accepted, the Governor will be deprived of the immunity available under Article 361 of the Constitution. This aspect has been dealt with by the High Court of Madhya Pradesh in Dr. S.C. Barat and Another Vs. Hari Vinayak Pataskar and Others, . Article 361 gives personal immunity to the Governor for the exercise and performance of the powers of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties. This immunity is not in any manner whittled down or affected by exposing the statutory actions of the Chancellor open to challenge, if they are not in accord with the statute or are otherwise available in law. We do not accept this plea of the petitioner.

While holding so, the Division Bench noted with approval the decision of the Madhya Pradesh High Court in S.C. Barat's case (supra). Further in that judgment, the Division Bench quoted with approval, the report of the Sarkaria Commission on Centre-State relationship, wherein the question of immunity of the Governor in respect of statutory functions exercised by the Governor was also specifically considered. The Division Bench quoted the relevant paragraphs of the report of the Sarkaria Commission as follows:

4.11.36. The powers and duties conferred on the Governor by a statute fall in

two distinct categories. Those conferred on the Governor in his capacity as Governor constitute one such category. Such functions pertain to the office of the Governor, as provided for in Article 154(1) and are to be exercised by him on ministerial advice in accordance with Article 163(1). Further, by virtue of Article 361(1), the Governor enjoys personal immunity from answerability to any court for the exercise by him of such functions.

4.11.37. The other category of functions are those which a statute may confer on the Governor, not in his capacity as Governor but in a different capacity, as such as, for instance, the Chancellor of a University. Here, the Governor functions in pursuance of a statute in relation to the affairs of the University - not as Governor but as Chancellor, notwithstanding that he holds the office in the University in an ex-officio capacity. Even though the Governor is the Chancellor by virtue of his office and would cease to be the Chancellor on ceasing to be Governor, it does not necessarily follow that the functions assigned to him as Chancellor of the University are to be performed by him in his capacity as the Governor. In fact, University Acts generally confer certain powers on the State Government which are distinct and separate from those conferred on the Chancellor. It has been held (Dr. S.C. Barot and Another Vs. Hari Vinayak Pataskar and Others, that the immunity given to the Governor under Article 361(1) does not extend to the exercise of powers and duties falling under this category. The statutory functions of the Chancellor do not fall within the purview of Article 154(1) and cannot be regarded as "business of the Government of the State" under Article 166(3), the reason being that the office of Chancellor is distinct from that of the Governor.

4.11.38. In relation to exercise of executive power of a State, the word "Governor" can normally be equated with the State Government. However, the office of Chancellor, even though held by the Governor under a statute in an ex-officio capacity cannot be so equated. The former, being an officer of the University, is not obliged to seek the advice of the State Government in the matter of exercise of his functions such as the appointment of Vice-Chancellor. The same view has been taken by the Andhra Pradesh High Court in M. Kiran Babu v. Government of Andhra Pradesh (M. Kiran Babu. v. The State of Andhra Pradesh etc. AIR 1986 A.P. 275

4.11.39. Although there is no obligation on the Governor always to act on ministerial advice under Article 163(1), there is an obvious advantage in the Governor consulting the Chief Minister or other Ministers concerned, but he would have to form his own individual judgment. The Governor, in his capacity as Chancellor of a University may possibly be required by the University's statute (e.g. The Calcutta and the Bardwan University Acts) to consult a Minister mentioned in such statute on specified matters. In such cases, the Governor may be well advised to consult the Minister on other important matters also. In either case, there is no legal obligation for him to necessarily act on any advice received by him.

(underlining supplied)

6. As is clear from paragraph 4.11.36, the Sarkaria Commission noted that the powers and duties conferred on the Governor by a Statute fall in two distinct categories, namely those conferred on the Governor in his capacity as Governor and the other conferred on the Governor in his capacity not as Governor but in a different capacity such as that of Chancellor of a University under the relevant University Acts. The Sarkaria Commission categorically held that those powers conferred on the Governor to be performed by him in his capacity as Governor pertains to the office of the Governor as provided for under Article 154(1) and has to be exercised by him on ministerial advice in accordance with Article 163(1). The Commission further stated that by virtue of Article 361(1) of the Constitution of India, the Governor enjoys personal immunity in a Court for exercise by him of such functions. I am bound by the decision in Gopalakrishnan's case (supra), wherein the Division Bench categorically accepted the view of the Sarkaria Commission. I also note that the Division Bench has categorically approved the decision of the Madhya Pradesh High Court in S. C. Barat 's case (supra) therein. In paras. 5 and 6 of that decision, the Division Bench of the Madhya Pradesh High Court has held thus:

Taking Clause (1) first, it in plain terms gives complete immunity to the Governor in respect of the exercise and performance of the powers and duties of this office and for any act done or purporting to be done by him in the exercise and performance of those powers and duties. The immunity is not restricted during his term of the office but continues even after the Governor ceases to hold the office. It is thus personal. The extent of the immunity is to be found in the scope of the expression "the exercise and performance of the powers and duties of his office". On the very words of this expression, it is clear that the immunity is in respect of the exercise and performance of the powers and duties of the office of the Governor under the Constitution and for acts done thereunder and not merely in respect of the powers and duties under the Constitution of the office.

It is important to note the distinction between the powers and duties under the Constitution of the office of the* Governor and the powers and duties of the office under the Constitution. Now, the "powers and duties of the office" embrace the powers of the Governor expressly conferred by the constitution as well as those conferred by any law or statutory rules. There are several articles in the consequent conferring certain powers on the Governor. To name some, Article 161 dealing with the power of the Governor to grant pardons, reprieves etc., Article 164 under which the Chief Minister is appointed by the Governor, Article 165 giving to the Governor the power to appoint the Advocate General, Article 166(3) giving to the Governor the power to make rules for the more convenient transaction of the business of the Government of the State, Article 192 empowering the Governor to decide questions as to disqualifications of members of the Legislature, Article 200 dealing with the Governor's assent to a bill passed by the Legislature, Article 213 concerning the power of the Governor to

promulgate Ordinances, Article 309 giving to the Governor the power to make rules regulating the recruitment and conditions of service of persons serving the State, Article 316 which gives the Governor the power to appoint members of the State Public Service Commission. There are all powers expressly conferred by the Constitution. But besides these powers and duties of the office, there are some powers and duties of the office which though not expressly provided by any article of the Constitution, result from the working of several articles in the Constitution.

(6) Under Article 154 the executive power of the State is vested in the Governor and is exercised by him either directly or through the officers subordinate to him according to the Constitution. Article 162 lays down that the executive power of the State shall extend to the matters with respect to which Legislature of the State has power to make laws. Under Article 166(1) all executive action of the Government has to be expressed to be taken in the name of the Governor. The Constitution confers powers on the State Legislature to make laws with respect to any of the matters enumerated in Lists II and III in the Seventh Schedule. The State Legislature is not prevented from conferring by law any functions on the Governor. The effect of all these provisions is that certain powers, duties and functions may be conferred on the Governor qua Governor under any Act or rules made thereunder.

The powers and duties conferred by such Acts and rules on the Governor qua Governor are "the powers and duties of his office". They are not conferred in so many words by any article of the Constitution, but they flow from the working of several articles of the Constitution. Such powers and duties when conferred on the Governor qua Governor are also exercised by him on the advice of the Council of Ministers except in so far as he is by or under the Constitution required to exercise his functions in his discretion. The action taken by the Governor is the executive action of the Government which is expressed in the name of the Governor. The protection given by Clause (1) of Article 361 covers the exercise and performance of the powers and duties conferred on the Governor qua Governor by any law or rules made under any law. That the personal immunity extends not only to the exercise of his functions by the Governor in his discretion but also to the exercise of his functions on the advice of the Council of Ministers becomes further clear by the second proviso to Article 361.

(underlining supplied)

7. This decision also lays down the view that the immunity under Article 361(1) of the Constitution of India is attracted to statutory functions exercised by the Governor in his capacity as Governor. In view of the fact that the said view has been accepted by the Division Bench of this Court, the same becomes the law as laid down by the Division Bench of this Court also.

8. The challenge in this Writ Petition is the action of the Governor u/s 15 of the

Right to Information Act. The said section reads as:

Constitution of State Information Commission:- (1) Every State Government shall, by notification in the Official Gazette, constitute a body to be known as the... (name of the State) Information Commission to exercise the powers conferred on, and to perform the functions assigned to, it under this Act.

(2) The State Information Commission shall consist of:

(a) the State Chief Information Commissioner, and

(b) such number of the State Information Commissioners, not exceeding ten, as may be deemed necessary.

(3) The State Chief Information Commissioner and the State Information Commissioners shall be appointed by the Governor on the recommendation of a committee consisting of-

(i) the Chief Minister, who shall be the Chairperson of the committee:

(ii) the Leader of Opposition in the Legislative Assembly: and

(iii) a Cabinet Minister to be nominated by the Chief Minister.

Explanation - For the purposes of removal of doubts, it is hereby declared that where the Leader of Opposition in the Legislative Assembly has not been recognized as such, the Leader of the single largest group in opposition of the Government in the Legislative Assembly shall be deemed to be the Leader of Opposition.

(4) The general superintendence, direction and management of the affairs of the State Information Commission shall vest in the State Chief Information Commissioner who shall be assisted by the State Information Commissioners and may exercise all such powers and do all such acts and things which may be exercised or done by the State Information Commission autonomously without being subjected to direction by any other authority under this Act.

(5) The State Chief Information Commissioner and the State Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance.

(6) The State Chief Information Commissioner or a State Information Commissioner shall not be a member of Parliament or Member of the Legislature of any State or Union Territory, as the case may be, or hold any other office of profit or connected with any political party or carrying on any business or pursuing any profession.

(7) The headquarters of the State Information Commission shall be at such place in the State as the State Government may, by notification in the Official Gazette, specify and the State Information Commission may, with the previous approval of

the State Government, establish offices at other places in the State.

(underlining supplied)

9. As is clear therefrom, the Governor exercises functions u/s 15 of the said Act in his capacity as Governor, unlike in his capacity as Chancellor of a University. In the case of a University, the Governor acts not in his capacity as the Head of the State, but as the Chief Officer of the University in respect of the affairs of the University and not the affairs of the State. This distinction has also been clearly pointed out in paragraph 4.11.38 of the Report of the Sarkaria Commission quoted above. On this aspect also in Gopalakrishnan's case (supra) the Division Bench has quoted with approval a paragraph from a Division Bench decision of the Allahabad High Court in Joti Prasad Upadhyaya Vs. Kalka Prasad Bhatnagar and Others, thus:

the question relating to the functioning of Governor as Chancellor of the Agra University arose incidentally in an election petition. The Division Bench of the Allahabad High Court dealt with the matter as follows:

When the Governor exercises the executive power of the State, we may equate him with the State Government; but not when he exercises other powers. As already discussed above, while exercising the powers as Chancellor of the Agra University, the Governor exercises the power of the Chancellor, and not of the State Government and while functioning as Chancellor he cannot be deemed to be exercising the executive power of the State whether as Governor or the State Government. In other words, when the Governor, as Chancellor of the University, appoints a Vice Chancellor, he does not exercise the executive power of the State and the appointment made by him cannot be deemed to have been made by the State Government. The office of the Vice-Chancellor may be said to be under the Chancellor, but not under the Governor or the State Government.

While discussing the distinction between the powers of the Governor as Governor and as a Chancellor of a University the Division Bench again quoted with approval the decision of the Andhra Pradesh High Court in Kiran Babu v. Government of A.P. (AIR 1986 A.P. 275) thus:

The matter recently came up for exhaustive review by the High Court of Andhra Pradesh. The matter related to the appointment of the Vice Chancellor of the Venkiteswara University where the Chancellor exercised his own option in the matter de hors the aid and advice of the Council of Ministers. The question was dealt with by a Division Bench consisting of Raghuvir, J. and Seetharama Reddy, J. They differed in their opinion. Raghuvir, J. held on the basis of the decision in Samsher Singh's case that the Governor was bound to act only on the aid and advice of the Council of Ministers. Seetharama Reddy, J. differed to hold that while functioning as the Chancellor, Governor was not bound by such advice, and that he was entitled to act on his own. The matter was referred to a third Judge, Jeevan Reddy, J. All the three judgments are reported as Kiran Babu v. Government of A.P. AIR 1986 A.P. 275. Jeevan Reddy, J. dealt with the matter

exhaustively with reference to the decisions of the High Courts of Madhya Pradesh and Allahabad referred to above, the Kothari Commission Report and Ors. and agreed with the view of Seetharama Reddy, J. He observed:

It is true that according to Section 10, the Governor of Andhra Pradesh is to be the Chancellor by virtue of his office; but it is not possible to say that, while acting as the Chancellor, he acts as the Governor. The context of the Act does not permit such an interpretation. According to Section 9, Chancellor is one of the officers of the University. He has to preside at the meeting of the Senate and Convocations of the University, and exercise many other powers as Chancellor. It is difficult to envisage how he can act upon the aid and advice of the Council of Ministers, headed by the Chief Minister, while presiding at the meeting of the Senate. Indeed, the Act refers to "Governor" only once, i.e. in Section 10; at all other places it refers to the "Chancellor", and it confers several powers upon the Chancellor as such. As pointed out in Section (E)(i) of this judgment, the Act throughout makes a clear distinction between the Chancellor and the State Government, and confers distinct and separate powers upon them. In many cases, the very same Section, or the sub-section, as the case may be, refers to both the "Chancellor" and the "State Government" separately, for exercising identical powers, e.g. nominations to the Senate and Academic Council. In the face of this fact, I do not see any warrant to read the Chancellor as Governor, which in turn means "State Government". The autonomy of the University and the interest of higher education demand that there should be no political interference in the governance of the Universities, as also in the appointments of Vice-Chancellors. The Kothari Commission Report, and in particular the recommendations of the Committee of the Inter-University Board, composed of very eminent educationists of this country, clearly says that the appointment of Vice-Chancellor should be made by the Chancellor in his individual judgment and not by the State Government. It would be consistent with the spirit of the enactment to hold that, while appointing the Vice-Chancellor, the Chancellor should act in his individual discretion. While exercising the power u/s 12(2)(a), the Chancellor does not act as the Governor, and if so the very question of aid and advice of the Council of Ministers becomes irrelevant.

The very same decision was referred to in the Sarkaria Commission Report also. Therefore the action of the Governor u/s 15(3) as Governor himself comes within the ambit of the decisions of the Division Benches of the Madhya Pradesh High Court and this Court in S.C. Bharat's case and Gopalakrishnan's case respectively, as also para 4.11.36 of the report of the Sarkaria Commission. Therefore in the exercise of his powers u/s 15(3) of the Act, the Governor enjoys immunity and protection guaranteed by Article 361(1) of the Constitution of India and hence the Governor cannot be made a party to the Writ Petition as a respondent, while challenging an appointment made by him u/s 15(3) of the Right to Information Act.

10. The contention of the petitioner that since the Governor is the appointing

authority, without him in the party array the appointment made by him cannot be successfully challenged also does not find favour with me. The State of Kerala is a party to the Writ Petition and the Governor has acted only on behalf of the State of Kerala as its executive head. Since the Governor has acted on behalf of the State of Kerala as its executive head and the State is a respondent in the Writ Petition, there is no basis for the apprehension of the petitioner.

In view of the above findings, the defect noted by the Registry is upheld and the Registry is directed to return the Writ Petition to the petitioner for resubmission after curing the defect, if so advised.