
(2002) 05 JH CK 0026

In the Jharkhand High Court

Case No : Writ Petition (PIL) No. 2475 of 2001 with CWJC No. 1894 of 2001

Ajit Kumar etc.

APPELLANT

Vs

State of Jharkhand and Others etc.

RESPONDENT

Date of Decision : 10-05-2002

Acts Referred:

Constitution of India, 1950 — Article 143, 154, 156, 163, 166
Jharkhand Lokayukta Act, 2001 — Section 2, 3, 4, 6, 7

Citation : (2002) 05 JH CK 0026

Hon'ble Judges : S.J. Mukhopadhaya, J;M.Y. Eqbal, J

Bench : Division Bench

Advocate : Mihir Kumar Jha, Ajit Kumar and Biren Poddar, for the Appellant;
M.M. Banerjee, AG. and A. Sen, JC to AG, for the Respondent

Final Decision : Allowed

Judgement

M.Y. Eqbal, J.—In these writ applications filed in the nature of Public Interest Litigation the petitioner, who is advocate of this Court approached this Court for issuance of mandamus upon the respondents to appoint "Lokayukta" for the State of Jharkhand in terms of the provisions of Bihar Lokayukta Act, which has also been adopted by the State of Jharkhand. It is alleged in the writ petition that the Government of Jharkhand is not taking keen interest in the matter of appointment of Lokayukta and as per news item published in the newspaper, the matter of appointment of Lokayukta has been kept pending before the Chief Minister of Jharkhand.

2. For better appreciation of the facts and for deciding the issue with regard to procedure for appointment of "Lokayukta". it would be useful to State hereinafter the sequence of development which took place after filing of the writ petitions.

3. The writ petition being W.P. (PIL) No. 2475 of 2001 was filed on 14.6.2001 and thereafter this Court adjourned the case on several dates enabling the respondents to file their counter affidavits.

4. The first affidavit was filed by the Secretary, Personnel Administrative Reforms and Raj Bhasha Department on 16.8.2001 making vague statement that the State Government is taking necessary action to appoint "Lokayukta" at the earliest. Another affidavit was filed by the Secretary, Personnel Administrative Department on 24.8.2001 stating inter alia that the procedure for consultation already begun and the concerned file was sent to the Leader of Opposition on 22.8.2001. The matter was taken up on 13.9.2001 and this Court observed that in normal circumstances, it was expected that the person to whom the file was sent for consultation should have completed the consultation process within the shortest possible time. The Advocate General was therefore, directed to get in touch with the Leader of Opposition and to convey to him the observation made by the Court. The matter was adjourned with the hope that by the next date, final decision would be taken in the matter of appointment of "Lokayukta". On 21.9.2001, another affidavit was tiled by the Secretary, Personnel. Administrative Reforms and Raj Bhasha Department, stating that the Government has already initiated the procedure for the appointment of "Lokayukta" by way of consultation and the concerned file which was sent to the Leader of Opposition has since returned which was resubmitted to the Chief Minister. The Chief Minister will take further steps including consultation with the Hon"ble the Chief Justice of Jharkhand High Court, Ranchi and the Leader of Opposition. On 4.1.2001, another affidavit was filed by the Deputy Secretary. Department of Personnel and Administrative Reforms, stating inter alia that the Collegium of Members for selection of "Lokayukta" (the Chief Minister, Hon"ble the Chief Justice of Jharkhand High Court and the Leader of Opposition) Unanimously agreed to the proposal of appointment of Mr. Justice A.K. Srivastava, retired Justice of Allahabad and Delhi High Court to the post of "Lokayukta", Jharkhand. It was further stated that the formal approval in the concerned file was obtained from the Leader of Opposition. Hon"ble the Chief Minister and the file was endorsed to Department of Cabinet Co-ordination to obtain approval of Cabinet as per Schedule III (1) of the Rules of Executive Business. It was further stated in the affidavit that the Cabinet in its meeting dated 8.12.2001 deferred the matter with direction to request the collegium to recommend a person who is a domicile of Jharkhand to be appointed as "Lokayukta". Accordingly, the matter was again referred to the Hon"ble Chief Minister for initiating reconsultation in this regard. This Court taking into consideration the aforesaid affidavits passed order on 4.1.2002 directing the Secretary, Department of Personnel and Administrative Reforms. Jharkhand to file affidavit and ensure this Court as to within what time Government shall come with notification. When nothing was done in the matter of appointment of "Lokayukta", this Court was compelled to pass order for personal appearance of Principal Secretary of Hon"ble the Chief Justice, Jharkhand High Court, Personal Secretary to the Hon"ble Chief Minister, Jharkhand and the Personal Secretary to the Leader of Opposition with a direction to obtain instruction from their respective members and file affidavit as to by which date the recommendation shall be made.

5. Pursuant to the aforesaid order, the Principal Secretary to the Hon"ble the Chief Justice filed affidavit on 22.1.2002 stating that after a number of meetings held between the Hon"ble Chief Minister, Hon"ble the Chief Justice and the Hon"ble Leader of Opposition, it was unanimously resolved and agreed amongst the three Collegium Members that Mr. Justice Ashok Kumar Srivastava a retired Judge of Allahabad and Delhi High Courts and presently working as Chairperson. Debts Recovery Appellate Tribunal, Delhi, be appointed as the "Lokayukta" for the State of Jharkhand and that the name of Sri Ashok Kumar Srivastava be proposed and recommended to his Excellency the Governor of Jharkhand for his concurrence and approval so that formal appointment order may be issued. It is stated that since then the Hon"ble Chief Justice has not received any communication from any quarters whatsoever. It was further stated in the counter affidavit that after the Collegium agreed in the matter of appointment of "Lokayukta", there was no requirement at all in law for placing the recommendation of the Collegium before the State Cabinet inasmuch as power of appointment of "Lokayukta" is vested in the Governor which is exercisable by him and in consultation with the aforesaid Collegium.

6. On 15.2.2002, another affidavit was filed by the Secretary, Department of Personnel and Administrative Reforms informing the Court that the meeting of the Collegium was held on 13.2.2002 attended by the Hon"ble Chief Minister, Jharkhand. Hon"ble the Chief Justice. Jharkhand High Court and the Hon"ble Leader of Opposition but no decision could be taken in order to recommend the name of a suitable person for appointment as "Lokayukta" for the Jharkhand State. Similar affidavit was filed on 15.2.2002 on behalf of Leader of Opposition stating that the meeting was held on 13.2.2002, but no consensus could be arrived at and therefore meeting was adjourned for the next date. In the affidavit dated 20.2.2002 filed by the Principal Secretary to the Hon"ble the Chief Justice, it was stated that in the meeting on 13.2.2002 the Hon"ble Chief Justice reiterated that he stood by the earlier recommendation and that according to him no one other than Mr. Justice A.K. Srivastava be considered for appointment to the office of "Lokayukta". It was further stated that the Hon"ble Chief Justice has sent a top secret/confidential letter to the Chief Secretary. Jharkhand with respect to the deliberation in the meeting held on 13.2.2002.

7. On 25.2.2002, another affidavit was filed by the Secretary, Personnel Administrative Reforms and Raj Bhasha Department. Jharkhand challenging the very Constitution of the Collegium on the ground that there is no express provision for constitution of collegium and as per the Act, only the Hon"ble Governor has to appoint "Lokayukta" in consultation with the Hon"ble Chief Justice of Jharkhand High Court and the Leader of Opposition of the State Legislative Assembly. It was further stated that there is no requirement under the Act for consultation with the Chief Minister under the Rules of Executive Business. The matter relating to appointment of "Lokayukta" is to be placed before the Council of Ministers for decision.

8. On 1.3.2002, another development took place when one affidavit was filed by the Secretary. Personnel Administrative Reforms and Raj Bhasha Department stating that pursuant to decision taken by the Cabinet in its meeting dated 8.12.2002, a new name has been sent for consultation as per the provisions of Section 3 of the Act and a confidential letter dated 28.2.2002 in this regard has been sent to the Principal Secretary to the Hon"ble Chief Justice and the Personal Secretary to the Leader of Opposition. Another affidavit was filed on 1.3.2002 by the Principal Secretary to the Hon"ble the Chief Justice, stating inter alia that in the letter dated 28.2.2002, it was mentioned that the Government, is in contemplation of appointing Mr. Justice Loknath Prasad, a retired Judge of Patna High Court as Lokayukta for the State of Jharkhand. In another affidavit filed by the Secretary, Personnel Reforms Department, it was stated that the letter dated 1.3.2002 in reply to the letter dated 28.2.2002 was received by the Government, written by the Registrar General of the Jharkhand High Court in which views of the Hon"ble Chief Justice was recorded. The aforesame views was conveyed to the Hon"ble Leader of Opposition. It was therefore stated that there has been effective consultation in respect of the appointment of "Lokayukta" and necessary action shall be taken for appointment of "Lokayukta" expeditiously.

9. Now, I shall refer some of the notings of the Government file which was produced in course of argument by the learned Advocate General. On 29.5.2001, Bihar Lokayukta Act was adopted and the notification was issued and thereafter, the Chief Secretary gave a note to the Chief Minister on 9.6.2001 for suggesting the names for appointment on the post of "Lokayukta". On 21.8.2001, the Chief Minister suggested two names, namely, the Hon"ble Justice Bhuvneshwar Prasad. a retired Judge of Patna High Court and the Hon"ble Justice Choudhary S.N. Mishra, a retired Judge of Jharkhand High Court. On 1.9.2001, the Leader of Opposition put a note disagreeing with the proposal of the Chief Minister on the ground that they are not suitable for such post and that they are the domicile of outside the State. No further discussion was held on the aforementioned names proposed by the Chief Minister and the file was returned by the Leader of Opposition to the Chief Minister. Thereafter, on 19.9,2001 the Chief Secretary gave a note to the Chief Minister for holding meeting with the Hon"ble the Chief Justice of Jharkhand High Court and the Leader of Opposition of State Assembly. On 4.12.2001. Mr. S.K. Choudhary, Secretary. Personnel Administrative Department put a note that meeting of the Collegium was held on 29.11.2001 and all the three members unanimously agreed to the name of Mr. A.K. Srivastava, a retired Judge Allahabad High Court fur appointment on the post of "Lokayukta". On the same day, the Leader of Opposition puts an endorsement of approval and by another affidavit dated 4.12.2001, Secretary. Personnel Administrative Department put a note for placing the note before the Council of Ministers for approval, On 5.12.2001, the Chief Minister put a note for placing the matter before the Council of Ministers. On 8.12.2002, there is a note to the effect that Council of Ministers in the meeting took a resolution that a person who is domicile of Jharkhand be appointed on the post of "Lokayukta" and

request was made to the Collegium for reconsideration in the matter of appointment of "Lokayukta". On the basis of said resolution. Secretary, Personnel Administrative Department put a note on 11.12.2001 to the Chief Secretary for sending the file to the Collegium for reconsideration. On 28.2.2002, the Chief Minister gave a note in the file stating that as per the suggestion of the Council of Ministers on the name of Hon"ble Mr. Justice Loknath Prasad, a retired Judge of Patna High Court, let the view of Hon"ble the Chief Justice and the Leader of Opposition be obtained by correspondence. It appears that correspondence was made with the Hon"ble the Chief Justice and the views of the Chief Justice was placed on the note by the Personnel Administrative Department on 5.3.2002 mentioning that the Hon"ble the Chief Justice disagreed with the proposed name of Hon"ble Justice Loknath Prasad and stood on his earlier name unanimously agreed. However, another note was put in the file on 14.3.2002 mentioning the letter received from the Leader of Opposition agreeing with the name of Hon"ble Mr. Justice Loknath Prasad.

10. Mr. M.K. Jha, learned counsel for the petitioner at the very outset urged before this Court that once the members of the Collegium namely, the Hon"ble Chief Minister, Jharkhand, Hon"ble the Chief Justice of Jharkhand High Court and the Hon"ble Leader of Opposition. Unanimously agreed and decided to appoint Hon"ble Justice A.K. Srivastava, a retired Judge of Allahabad High Court, the Council of Ministers have no jurisdiction to sit over the decision taken by the Collegium. Learned counsel made the following submissions :

(i) Scheme under the Lokayukta Act does not envisage consultation with the Council of Ministers and it is the Chief Minister whose consultation with other two members of the Collegium is sufficient.

(ii) Once the Chief Minister agreed with the two members of the Collegium, it is not open to the Council of Ministers to negate that consensus decision and refer the matter to the Collegium for reconsideration. The Council of Ministers cannot reject unanimous proposal agreed by the three functionaries inasmuch as limited role of Council of Ministers is to sent recommendation to the Governor.

(iii) When the entire process under the Act was completed after the three functionaries came to a unanimous decision for the appointment of Mr. Justice A.K, Srivastava, this Court has no option but to direct the respondents to appoint Mr. A.K. Srivastava, a retired Judge of Allahabad High Court on the post of "Lokayukta".

(iv) The Governor is not bound to act on the advise of Council of Ministers. The Governor can only proceed with the advise of Council of Ministers.

(v) The condition put by Council of Ministers that a person havign domicile can only be appointed on the post of "Lokayukta" is wholly unconstitutional.

11. Learned counsel in support of his contention relied upon the decisions of the Supreme Court in the case of Sarwan Singh Lamba and others Vs. Union of India

and others, , in the case of Ashish Handa Vs. Chief Justice of High Court of Punjab and Haryana and others, in the case of Binod Kumar Jain v. Dr. Ramautar Shukla and Ors 1981 PLJR 450 in reference case made by the President of India under Article 143 of the Constitution In Re: Appointment and Transfer of Judges, .

12. On the other hand. Mr. M.M. Banerjee, learned Advocate General urged that the Governor has to act with the aid and advice of Council of Ministers as according to him, the power of appointment of "Lokayukta" is the executive function of the Governor. Learned counsel referred various articles including Article 163 of the Constitution and submitted that Governor means Council of Ministers. Learned counsel then submitted that it is head of the Personnel and Administrative Reforms Department who will move the proposal of the Council of Ministers and will recommend the names for the appointment of "Lokayukta" and the Governor shall make consultation with the Hon"ble the Chief Justice and the Hon"ble Leader of Opposition. Learned counsel mainly relied upon the decision of the Supreme Court in the case of Samsher Singh Vs. State of Punjab and Another, in the case of State of Madhya Pradesh and others Vs. Dr. Yashwant Trimbak, , in the case of Ram Nagina Singh and Others Vs. S.V. Sohni and Others, and in the case of .

13. Having regard to the facts stated in the affidavits and the stand taken by the Government and the Hon"ble Chief Minister and the submissions made by the learned counsel, the following important points fall for consideration and adjudication by this Court :

(i) Whether appointment of "Lokayukta" as envisaged in Section 3 has to be made by the Governor with the aid and advice of the Council of Ministers who has an important role to play in the matter of appointment of "Lokayukta".

(ii) Whether the procedure adopted by the respondents in the matter of recommendation for the name of Justice A.K. Srivastava or Justice Loknath Prasad for appointment on the post of "Lokayukta" is in accordance with law."

14. The State of Jharkhand adopted the Bihar Lokayukta Act and it was notified on 31.5.2001 as Jharkhand Lokayukta Act, 2001. For better appreciation of the issue involved in the case, it would be useful to refer some of the relevant provisions of the said Act. The term "Lokayukta" has been defined u/s 2(e) of the, said Act, which term means a person appointed as the Lokayukta of Jharkhand u/s 3 of the said Act. Section 3 of the Act reads as under :--

"Appointment of Lokayukta..--For the purpose of conducting investigations in accordance with the provisions of this Act, the Governor shall by warrant under his hand and seal appoint a person to be known as the Lokayukta of Bihar :

Provided that the Lokayukta shall be appointed after consultation with the Chief Justice of the Patna High Court and the Leader of Opposition in the State Legislative Assembly or if there be no such leader a person elected in this behalf by the members of the opposition in the State Legislative Assembly in such

manner as the Speaker may direct.

(2) The person appointed as the Lokayukta shall, before entering upon his office make and subscribe, before the Governor, or some persons appointed in that behalf by the Governor, an oath or affirmation in the form set out for the purpose in the First Schedule."

15. Section 4 provides that the Lokayukta shall not be a member of Parliament or a member of Legislature or any State and shall not hold any office of Trust of profit or be connected with any political party or hold any post of Chairman or Secretary of the Managing Committee of any Institution. Corporation, Board or Society. According to Section 5 of the said Act, the appointment of the Lokayukta shall be for a term of five years from the date on which he enters upon his office. Section 6 lays down the procedure for removal of Lokayukta, which reads as under :--

"Removal of Lokayukta.--(1) Subject to the provisions of Article 311 of the Constitution, the Lokayukta may be removed from his office by the Governor on the ground of misbehaviour or incapacity and on no other ground:

Provided that inquiry inquired to be held under Clause (2) of the said Article before such removal shall be held by a person appointed by the Governor, being a person who is or has been the Chief Justice of a High Court or a Judge of the Supreme Court of India.

(2) A person appointed under the proviso to Sub-section (1) shall submit the report or his inquiry to the Governor who shall, as soon as may be, cause it to be laid before each House of the State Legislature.

(3) Notwithstanding anything contained in Sub-section (2), the Governor shall not remove the Lokayukta unless an address by each House of the State Legislature supported by a majority of the total membership of that house and majority of not less than two-thirds of the members of that House present and voting has been presented to the Governor in the same session for such removal.

16. It is also worth to refer Section 7 of the said Act, which confer power upon the Lokayukta in the matter of investigation. Section 7 reads as under :--

"Matters which may be investigated by Lokayukta.--Subject to the provisions of this Act, the Lokayukta may investigate any action which taken by or with the general or specific approval of--(i) A Minister or a Secretary; or (ii) Any other public servant; in any case where a complaint involving a grievance or an allegation is made in respect of such action or such action can be or could have been, in the opinion of the Lokayukta, the subject of a grievance or an allegation."

17. From reading the aforesaid provisions of the Act, it is manifest that Lokayukta shall be appointed by the Governor, by issuance of warrant under his hand and seal. For the appointment of a Lokayukta the Governor has to make

consultation with the Hon"ble Chief Justice of the High Court and the Leader of Opposition of the State Legislative Assembly. A question therefore falls for consideration is as to whether the Governor at his own discretion proposed the name of person for appoint of "Lokayukta" and then make consultation with the aforementioned two functionaries or the Governor shall exercise power on the aid and advice of the Council of Ministers. At this stage it is very important to note that Section 3 of the Act only speaks about the consultation with the Chief Justice and the Leader of Opposition and nowhere it is provided that Chief Minister is to be consulted.

18. Now 1 shall refer some of the relevant provisions of the Constitution. Part VI of the Constitution deals with the State and its functionaries. Article 154 provides that the Executive Power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution, Article 154 reads as under :--

"Executive power of State.--(1) The executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

(2) Nothing in this article shall--(a) be deemed to transfer to the Governor any junctions conferred by any existing law on any other authority; or

(c) prevent Parliament or the Legislature of the State from conferring by law functions on any authority subordinate to the Governor."

19. The expression "executive power" is very wide and it includes all acts necessary for carrying on or supervision of the general administration of the State. Even the executive power of a State shall extent to the matter with respect to which Legislature of the State is empowered to make laws. Article 162 speaks about the manner of exercise of executive power by the Governor of the State. Por better appreciation, Article 163 is quoted herein below :--

"Council of Ministers to aid and advice Governor.--(1) There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.

(2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion.

(3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any Court,"

20. The next relevant provision is Article 166, which deals with the conduct of business of the Government. This article empowers the Governor to make rules

for the more convenient transaction of the business of the Government of the State and for the allocation among Ministers of the said business, Article 166 reads as under :--

"Conduct of business of the Government of a State.--(1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion."

21. In order to correctly appreciate the provisions of Article 163 of the Constitution, it would be useful to refer Article 174 of the Constitution which deals with the Council of Ministers of the Union. Article 174 provides that the Council of Ministers with the Prime Minister on the head to aid and advise the President who shall in exercise of its function act in accordance with such advise. The provisions of the aforesaid article says that the President may require Council of Ministers to reconsideration of such advise either generally or otherwise, and the President shall act in accordance with the advise tendered after such reconsideration. The basic difference between these two provisions is that under Article 163(1), the Governor shall exercise his function on the aid and advice of the Council of Ministers headed by Chief Minister, except in those cases where the Constitution required the Governor to exercise his function in his discretion. The issue with regard to the extent of power to be exercised by the Governor has been discussed at length by the Apex Court in the case of *Samsher Singh v. State of Punjab*, (supra). Their Lordship observed that in all cases in which the President or the Governor exercises his functions conferred on him by or under the Constitution with the aid and advice of the Council of Ministers" and wherever Constitution required the satisfaction of the President or the Governor for the exercise of any powers such satisfaction required by the Constitution is not personal satisfaction of the President or of the Governor but is the satisfaction of the President or of the Governor in the constitutional sense: in the Cabinet system of the Government. It is the satisfaction of the Council of Ministers on whose aid and advice the President or the Governor generally exercises all his powers and functions. Their Lordships further observed :--

"The executive power is generally described at the residue which does not fall within the legislative or judicial power. But executive power may also partake of legislative or judicial actions. All powers and functions of the President except his

legislative power as for example in Article 123 viz. ordinance making power and all powers and functions of the Governor except his legislative power as for example in Article 213 being ordinance making powers are executive powers of the Union vested in the President under Article 53(1) in one case and are executive powers of the State vested in the Governor under Article 154(1) in the other case. Clause (2) or Clause (3) of Article 77 is not limited in its operation to the executive action of the Government of India under Clause (1) of Article 77. Similarly, Clause (2) or Clause (3) of Article 166 is not limited in its operation to the executive action of the Government of the State under Clause (1) of Article 166. The expression "Business of the Government of India" in Clause (3) of Article 77, and the expression "Business of the Government of the State" in Clause (3) of Article 166 includes all executive business."

22. Their Lordship after referring to the several previous authorities further observed :--

"For the foregoing reasons we hold that the President or the Governor acts on the aid and advice of the Council of Ministers with the Prime Minister of the head in the case of the Union and the Chief Minister at the head in the case of State in all matters which vest in the executive whether those functions are executive or legislative in character. Neither the President nor the Governor is to exercise the executive functions personally."

23. The aforesaid ratio of Samsher Singh's case was again followed by the Apex Court in the case of State of Madhya Pradesh and others Vs. Dr. Yashwant Trimbak, and held that under Article 163(1) of the Constitution excepting functions required by the Constitution to be exercised by the Governor in his discretion, the Governor acts on the aid and advice of the Council of Ministers. Any function vested in the Governor, whether executive, legislative or quasi-judicial in nature and whether vested by the Constitution or by a statute be delegated by Rules of Business unless the contrary is clearly provided for by such constitutional or statutory provision,

24. As noticed, Article 166(3) of the Constitution confer power on the Governor to make rules for more convenient transaction of business of the Government of the State. In exercise of all power Governor of Bihar has framed rules called the Rules of executive business which has been made applicable in the State of Jharkhand. The business of the State is complicated one and necessarily to be conducted through the agency of a large number of officials and authorities. It is true that the Governor of State shall exercise his power with the aid and advice of Council of Ministers but the Council of Ministers are no more than an advisor. It is for the Governor of the State to accept or not to accept the advice of the Council of Ministers specially while deciding the power vested in him under the special statute. The Supreme Court in the case of Bachhittar Singh Vs. The State of Punjab, , while considering the question as to when the aid and advice of the Council of Ministers will become the action of the State observed :--

"The business of State is a complicated one and has necessarily to be conducted through the agency of a large number of officials and authorities. The Constitution, therefore, requires and so did the Rules of Business framed by the Rajpramukh of Pepsu provided, that the action must be taken by the authority concerned in the name of the Rajpramukh. It is not till this formality is observed that the action can be regarded as that of the State or hereby the Rajpramukh. We may further observe that, constitutionally speaking the Minister is no more than an advisor and that the head of the State, the Governor or Rajpramukh, is to act with the aid and advice of his Council of Ministers. Therefore, until such advice is accepted by the Governor whatever the Minister or the Council of Ministers may say in regard to a particular matter does not become the action of the State until the advice of the Council of Ministers is accepted or deemed to be accepted by the head of the State. Indeed, it is possible that after expressing one opinion about a particular matter at a particular stage a Minister or the Council of Ministers may express quite a different opinion, one which may be completely opposed to the earlier opinion, which of them can be regarded as the "order" of the State Government ? Therefore, to make the opinion amount to a decision of the Government it must be communicated to the person concerned."

25. Now I shall refer some of the relevant rules contained in the Rules of Executive Business framed by the Governor in exercise of power under Article 163(3) of the Constitution. Rule 10 provides that subject to the order of Chief Minister under Rule 15, all cases referred under Third Schedule to the Rules shall be brought before the Council of Ministers. According to Rule 15, all cases referred to the Third Schedule shall be submitted to the Chief Minister through the Secretary to the Council after consideration by the Minister Incharge, with a view to obtaining his orders for circulation of the case or for bringing it up for consideration at the meeting of the Council under Rule 6. In case of extreme urgency the order of the Chief Minister shall be obtained for authorising the action in anticipation of approval of Council of Ministers. However, Rule 16 provides that the Chief Minister may direct that any case referred to in Third Schedule instead of it can be brought up for discussion at a meeting of the Council of Ministers by circulating to the Ministers for opinion and if Ministers are unanimous and the Chief Minister thinks that discussion at the meeting of the Council of Ministers is unnecessary, the cases shall be decided without such discussion.

26. Reading Articles 163 and 166 of the Constitution and the Rules of Executive Business, it is therefore clear that any function vested in the Governor, whether Executive, Legislative or quasi-judicial in nature and whether vested by the Constitution or by the Statute may be delegated by the Rules of Business unless contrary is clearly provided by such constitutional or statutory provisions. The phrase "Governor in his discretion" as referred under Article 163 of the Constitution, in my opinion, does not come within the purview of Section 3 of Lokayukta Act for the reason that the Governor has got this special power under a special statute, i.e. Lokayukta Act. Power conferred upon the Governor under

the said Act has to be exercised in accordance with the procedure provided under the Rules of Executive Business. In other words, Governor while exercising power u/s 3 of the Act has to act on the aid and advice of the Council of Ministers.

27. In the case of *Ram Nagina Singh v. S.V. Sohni*, (supra), the writ petitioner had challenged the appointment of "Lokayukta" mainly on the ground that the Lokayukta was appointed by the Governor without the aid and advice of the Council of Minister which is not legally and constitutionally permissible. The Division Bench after considering various authorities of the Supreme Court held that when a power is vested, even by a Statute, in the Governor, he is to act on the aid and advice of the Council of Ministers. It docs not cease to be an executive power merely because it is conferred by a Statute. It would be defeating the constitutional scheme if it was to be held that the mere use of the word "Governor" in any Statute would be imputing an intention to the Legislature of conferring a power "eo nimine". Indeed the presumption should be otherwise. It was held that when the Governor is under the constitutional scheme to act on the aid and advice of the Council of Ministers the use of expression Governor in any Statute or, in any event and unless a strong contrary intention can be inferred mean Governor acting on the aid and advice of the Council of Ministers. Any other interpretation would upset the constitutional scheme. Their Lordships then observed :--

"In order to come to a conclusion that the Governor has been invested with powers by the Legislature eo nomine very strong indications will have to be there in the relevant Statute since as already explained, in one sense it goes against the concept of Parliamentary form of Government, which is one of the basic postulates of the Constitution. In the present Statute, I find no such indication. On the other hand, indications are to the contrary Section 3 of the Ordinance states that the Governor shall by a warrant under his hand and seal appoint the Lokayukta in consultation with the Chief Justice of the High Court and the Leader of Opposition. If the Governor is to act eo nomine it would mean that although leader of Opposition will have an effective role to play, the State Government would have no hand in the appointment. It appears to be inconceivable unless there was something in the statute which could irresistibly lead to the conclusion that the Legislature had not contemplated aid and advice of the Council of Ministers in the making of the appointment. I am further of the opinion that the use of the word Governor in Section 3 of the Ordinance was appropriate for a reason that the Section contemplates the issue of warrant under the hand and seal of the Governor. Taking all these into consideration, I am of the view that the appointment of Lokayukta, as envisaged in Section 3 has to be made by the Governor with the aid and advice of the Council of Ministers."

28. Recently similar question arose before the Orissa High Court in the case of *Rama Chandra Nayak v. State of Orissa*, (supra), where the appointment of Lokayukta was challenged on the ground inter alia that the procedure provided u/s 3 of the Orissa Lokpal and Lokayukta Act, 1995 and the requirement of the

Constitution has not been fulfilled while deciding question the Division Bench held that the Governor while appointing a person as Lokayukta is to be act on the aid and advice of the Council of Ministers with the Chief Minister at the head. There is no question of exercising power in personal capacity or discretion.

Contention No. (1):

Or constitution envisages a Parliamentary System of Government both at the Union and State levels. The President is the constitutional or formal head of the Executive at the Union and the Governor is the constitutional or formal head of the executive at the State level. We need not deal with the constitutional provisions dealing with the powers and functions of the President as they are not relevant for our purpose. The Governor exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers except in areas where the Governor is required by under the Constitution to exercise his functions in his discretion. Wherever the Constitution requires the satisfaction of the Governor for the exercise of any power or function, the satisfaction required by the Constitution is not his personal satisfaction but the satisfaction of his Council of Ministers on whose aid and advice he exercises all his powers and functions, except in the tiny strips covered by Articles 163(2), 371(2), 371A(1)(b), 371C, 371F(g) and reporting to the President under Article 356(1) and reserving a bill for consideration of President under Article 200(1). [See *Samsher Singh Vs. State of Punjab and Another*, .

In view of what has been stated above, we have no hesitation to hold that u/s 3(1) of the Act, the Governor while appointing a person as Lokpal is to act on the aid and advice of the Council of Ministers and with the Chief Minister at the head. There is no question of exercising power thereunder in his personal capacity or discretion."

29. In the case of *Ashish Handa v. Chief Justice, Punjab and Haryana High Court*, (supra), the appointment of the President of the Haryana State Consumer Disputes Redressal Commission was challenged on the ground that it was not in accordance with Section 16 of the Consumer Protection Act, 1986. Section 16 of the Act provides that a sitting or retired Judge shall be appointed by the State Government as President. The proviso to the said section says that no appointment under this clause shall be made except after consultation with the Chief Justice of the High Court. The ratio decided by the Supreme Court in this case, in my view does not apply in the facts of the present case.

30. Mr. M.K. Jha, learned counsel also put reliance on the decision of *Bimal Kumar Jain case* (supra). In that case validity of appointment of Vice-Chancellor of the Patna University by the Chancellor was questioned. Under the Patna University Act, 1951, it is the Chancellor who shall appoint Vice-Chancellor in consultation with the State Government from amongst persons having qualification mentioned in that section. The ratio decided by the Patna High Court in the said case, in my view, is equally not applicable in the present case.

31. Having regard to the entire facts and circumstances of the case and the law discussed hereinabove, I am of the view that the appointment of Lokayukta as envisages u/s 3 has to be made by the Governor with the aid and advice of the Council of Ministers. The first issue is answered accordingly.

32. The second point that falls for consideration is as to whether the procedure adopted by the respondents in the matter of recommending the names of Justice A.K. Srivastava and then Justice Loknath Prasad (both retired Judge) for the office of Lokayukta is in accordance with law. Firstly, I will take up the case of Justice A.K. Srivastava. As noticed hereinabove. At the first instance, the Chief Minister had suggested two names namely, Justice Bhuneshwar Prasad, a retired Judge of Patna High Court and Justice Choudhary S.N. Mishra, a retired Judge of Jharkhand High Court for appointment on the post of Lokayukta. The Leader of Opposition put a note in the Government file disagreeing with the proposal of the Chief Minister on the ground that they are not suitable for such post and that they are domicile of outside the State. No further discussion was held on the aforementioned names proposed by the Chief Minister and the matter was dropped without any consultation with the Hon"ble Chief Justice. All of a sudden the Secretary, Personnel Administrative Department put a note on 4.12.2001 in the file that all the three members namely, Hon"ble Chief Minister, Hon"ble the Chief Justice and the Hon"ble Leader of Opposition unanimously agreed to the name of Mr. A.K. Srivastava, a retired Judge of Allahabad High Court for appointment on the post of Lokayukta. The Chief Minister then directed the matter to be placed before the Council of Ministers. The Council of Ministers in a meeting took a resolution that a person who is domicile of Jharkhand be appointed on the post of Lokayukta and request was made to the Collegium for reconsideration. It is very pertinent to mention here that it does not appear from the Government file or from the affidavits filed by the parties as to who proposed the name of Justice A.K, Srivastava and how many persons were under consideration before the Collegium on 29.11.2001 when all the three unanimously agreed to recommend the name of Justice A.K. Srivastava for the post of Lokayukta. It is also not clear as to at whose instance the name of Justice A.K. Srivastava germinated and came for consideration before the Collegium. While unanimously taking a decision, the Chief Minister admittedly did not act on the aid and advice of the Council of Ministers, which is evident from the fact that after the said unanimous decision was taken the Chief Minister put a note in the file for placing the recommendation before the Council of Ministers. This shows that the Chief Minister before holding the meeting with the two functionaries and before agreeing with the proposal did act on the advice of the Council of Ministers. The contention of the learned counsel for the petitioner is that after unanimous decision taken by the Collegium there was no requirement of sending it to the Council of Ministers cannot therefore be accepted. Since the Chief Minister on behalf of the Governor made consultation with the two other functionaries without aid and advice of the Council of Ministers, any decision taken by them cannot be said to be in accordance with the provisions of the Act

and Articles 163 and 166 of the Constitution of India.

33. Similar irregularity has been committed by the respondents the Chief Minister while proposing the name of Justice Loknath Prasad for the post of Lokayukta. As stated above, the Council of Ministers by Resolution requested the Collegium to reconsider the matter again and the matter was deferred. On the basis of said resolution, the Secretary, Personnel Administrative Department put a note on 11.12.2001 through the Chief Secretary for sending the file to Collegium for reconsideration. Instead of doing so on 28.2.2002, the Chief Minister gave a note in the file stating that as per the suggestion of the Council of Ministers the name of Justice Loknath Prasad, a retired Judge of Patna High Court is recommended for the post of Lokayukta and accordingly view of Hon"ble the Chief Justice and the Leader of Opposition be obtained by correspondence. This practice of recommending a single name by the Chief Minister on the suggestion of Council of Ministers for consultation with other two functionaries by correspondence is totally unhealthy and unconstitutional.

34. The law has been well settled that the word consultation does not mean concurrence but it is not an empty formality. Suggesting one name by the Chief Minister on behalf of the Governor and for holding consultation on the said name will defeat the very purpose and object of consultation. As noticed above, at the instance of the Chief Minister the consultation process begun by sending letter to the Chief Justice in the name of Justice Loknath Prasad and the Hon"ble Chief Justice disagreed with the said name. In such situation it cannot be inferred that there has been effective consultation in the name of Justice Loknath Prasad by applying the principle that "consultation does not mean occurrence". The very procedure adopted by the Chief Minister in recommending one name and directed consultation with the two other functionaries by correspondence is against the settled principle of law and the procedure. The Chief Minister on the advice of the Council of Ministers ought to have come with few names and initiated the procedure by effective consultation with two other consultants namely, Hon"ble the Chief Justice and the Leader of Opposition.

35. Having regard to the entire facts and circumstances of the case and the law discussed herein above, I am of the definite view that the procedure adopted by the respondents in recommending the name of Justice A.K. Srivastava, retired Judge of Allahabad High Court or Justice Loknath Prasad, a retired Judge of Patna High Court is wholly unconstitutional and against the spirit of Section 3 of the Lokayukta Act.

36. One more important point that needs consideration by this Court is with regard to a very peculiar stand taken by the Council of Ministers in the Government that a Lokayukta should be a domicile of the State of Jharkhand. In other words, the Council of Ministers suggested that a person to be appointed on the post of Lokayukta must be a domicile of the State of Jharkhand. Nowhere in the Bihar Lokayukta Act or Jharkhand Lokayukta Act, it is provided that a person of domicile of Jharkhand be appointed as Lokayukta. Section 3 of the Act, as

quoted herein above, in a very clear term provides that Governor shall in consultation with the Chief Justice and the Leader of Opposition appoint a person to be known as "Lokayukta". It is well settled that there is one domicile of a person that is domicile in the Territory of India. The domicile of a person cannot be determined on the basis of the State where he or she resides. Their Lordship of the Supreme Court in the case of Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others, , has taken a serious view in using the word "domicile" in relation to particular state. Their Lordship held :--

"Now it is clear on a reading of the Constitution that it recognises only one domicile, namely, domicile in India, Article 5 of the Constitution is clear and explicit on this point and it refers only to one domicile, namely, "domicile in the Territory of India". Moreover, it must be remembered that India is not a federal State in the traditional sense of that term. It is not a compact of sovereign states which have come together to form a federation by ceding a part of their sovereignty to the federal State. It has undoubtedly certain federal features but it is still to a federal state and it has only one citizenship, namely, the citizenship of India. It has also one single unified legal system which extends through out the country. It is not possible to say that a distinct and separate system of law prevails in each State forming part of the Union of India. The legal system which prevails throughout the territory of India is one single indivisible system with a single unified justicing system having the Supreme Court of India at the Apex of the hierarchy, which lays down the law for the entire country. It is true that with respect to subjects set out in List II of the Seventh Schedule to the Constitution, the States have the power to make laws and subject to the overriding power of Parliament, the States can also make laws with respect to subjects enumerated in List III of, the Seventh-Schedule to the Constitution, but the legal system under the rubric of which such laws are made by the States in a single legal system which may truly be described as the Indian Legal System. It would be absurd to suggest that the legal system varies from State to State or that the legal system of a State is different from the legal system of the Union of India, merely because with respect to the subjects within their legislative competence, the States have power to make laws."

37. In the light of the law laid down by the Supreme Court. I have no hesitation in holding that the condition put by Council of Ministers that a person having a domicile of Jharkhand State be appointed on the post of Lokayukta is wholly unconstitutional and unjustified.

38. Taking into consideration the entire facts of the case and the law discussed herein above, these two writ applications are allowed and the respondents are directed to initiate the process afresh for appointment of Lokayukta in the State of Jharkhand in accordance with the provisions of the Constitution and provisions of the Lokayukta Act and also in accordance with the directions and observations made herein above. The process must be completed within two months from today and a final notification shall be issued appointing a person on the post of

"Lokayukta".

S.J. Mukhopadhaya, J.

Both the Public Interest Litigations have been preferred by the petitioners for appointment of Lokayukta for the State of Jharkhand as per the provisions of the Bihar Lokayukta Act, 1973 (now read "Jharkhand" in place of "Bihar").

39. Initially, this Court was informed that the consultation process with the Chief Justice of the High Court and the Leader of Opposition of the State has been completed and final decision would be taken within few weeks. However, the matter is being lingered on the ground that, the Council of Ministers did not agree to the proposal of appointment of the person which was unanimously agreed by the Chief Justice of the High Court, Leader of Opposition and the Chief Minister. The Council of Ministers proposed to appoint a person who is a "domicile of State", whereinafter the Chief Minister suggested another name.

40. Earlier the Court directed the Principal Secretary to the Chief Justice of the High Court; the Principal Secretary to the Chief Minister and the Private Secretary to the Leader of Opposition to obtain instructions from the members of the Collegium, the time frame by which the consultation will be completed. At that stage, affidavits were filed by them and an idea was given that the consultation was complete. After the stand taken by the State that the Council of Ministers did not agree to the name consulted and proposed, the Principal Secretary to the Chief Justice in his affidavit raised the question of jurisdiction of Council of Ministers in the matter of appointment of Lokayukta.

41. Similar question of jurisdiction of Council of Ministers was raised by Mr. Mihir Kumar Jha, the counsel on behalf of the petitioners in the matter of appointment of Lokayukta.

In this background, as suggested by the parties, the Court took up the matter to decide the issue relating to jurisdiction of Council of Ministers.. The issues, in short, are as follows :--

(i) Whether the scheme under Lokayukta Act envisages any consultation with the Council of Ministers or not:

(ii) Whether the consultation as made, in the cases at hand, with the Chief Justice and the Leader of Opposition by the Chief Minister amounts to consultation made with the two dignitaries as per Lokayukta Act by the Chief Minister on behalf of the Council of Ministers or not.

42. The questions aforesaid have already been determined by brother Eqbal, J. who discussed the facts, in detail, and come to a definite conclusion which I have perused and am in total agreement with the views, as expressed by him.

43. However, I may add that the manner in which the appointment of Lokayukta was dealt is peculiar, not only against the provisions of law. but also against, the spirit.

The power of appointment of Lokayukta is vested with the Governor of the State. It is to be made as per Section 3 of the Lokayukta Act, 1973 by the Governor by issuance of warrant under his hand and seal after necessary consultation with the Chief Justice of the High Court and Leader of Opposition. Nowhere, under the Act any stipulation has been made to have any consultation with the Chief Minister of the State.

Though such consultation is made with the Chief Justice and Leader of Opposition, can it be stated that the creature of the law intended to exclude the Chief Minister from the purview of consultation ? Obviously, the answer will be in "negative", for the reasons as discussed hereunder.

The Chief Minister is the head of the Council of Ministers. As per Article 163 of the Constitution of India, the Council of Ministers with the Chief Minister at the head is to aid and advice the Governor in the exercise of all his functions. The exceptions so far as the Governor is by or under the Constitution requires to exercise functions or any of them in his discretion.

The power of Governor to appoint Lokayukta under the Lokayukta Act, 1973 is not an exceptional Act to be exercised by the Governor under the Constitution. Therefore, the Chief Minister as a Head of the Council of Ministers will automatically figure in the matter of appointment of Lokayukta, which is to be made by the Governor in the aid and advice of the Council of Ministers being not an exceptional power delegated under the Constitution.

44. It is not necessary to discuss case laws etc. having dealt in detail by brother Eqbal, J.

45. It has already been mentioned that the matter was dealt in peculiar manner. The Chief Minister on behalf of the State seems to have recommended the names of two retired Judges of High Court on 21st August, 2001, namely, Mr. Justice Bhuvaneshwar Prasad, retired Judge of Patna High Court and Mr. Justice Chy. S.N. Mishra, retired Judge of Jharkhand High Court, at present Chairman of the Jharkhand State Consumer Forum, Ranchi.

It was ordered to have consultation only with the Leader of Opposition. Mr. Stefen Marandi, the Leader of Opposition did not agree with any of the name mainly on the ground that the persons belong to other State than the State of Jharkhand. Thereafter, even the matter was not placed before the Chief Justice of Jharkhand High Court to complete the process of consultation and then to forward the matter to the Governor of the State for his decision with the aid and advice of the Council of Ministers.

Thereafter, the name of a third retired Judge, namely, Mr. Justice A.K. Srivastava stated to have been consulted with the members of the collegium in presence of the Chief Minister of the State. However, there is nothing on the record as to how the name of Mr. Justice A.K. Srivastava, a retired Judge of Allahabad High Court fell for consultation, when there was no proposal in the file in respect to him.

The Council of Ministers seems to have disapproved the name of Mr. Justice A.K. Srivastava, as it took a decision to appoint a domicile of the State of Jharkhand as a Lokayukta. Thereafter, the fourth name of Mr. Justice Loknath Prasad, a retired Judge of Patna High Court seems to have been forwarded to the Chief Justice of Jharkhand High Court and Leader of Opposition of State Assembly for consultation by circulation, in which the Chief Justice disagreed.

46. There is no provision laid down under the Lokayukta Act, 1973 debarring the outsiders of a State for appointment as Lokayukta nor any statutory provision made to appoint only the local resident of the State to the post. In absence of such provision, the Council of Ministers cannot reject a name on the ground of outsider nor can direct to appoint only a local resident of the State, which will be not only against the provisions of the Lokayukta Act, 1973 but also against the spirit.

There is nothing like domicile of State but there is only domicile of the country as envisaged under Article 5 of the Constitution of India. The matter has been dealt, in detail, by brother Eqbal, J.

47. In the aforesaid background, while I agree with the findings given by brother Eqbal, J., am of the opinion that the matter of consultation should not be dealt in the like manner as dealt in the present case, as the consultation with the high dignitaries like Chief Justice of a High Court and Leader of Opposition of the State Assembly should not be negated on unreasonable ground giving a colour that the Council of Ministers who will fall within the domain of the Lokayukta do not like to have a Lokayukta or intend to have a Lokayukta of their choice, which is against the spirit of Lokayukta Act, 1973.

48. In such a situation, it is desirable to have names of certain persons that should be discussed initially by the Council of Ministers with the Chief Minister as its head and only thereafter to forward such names for consultation with the Chief Justice and Leader of Opposition.

49. Further, according to me, once a consultation made, the matter should not have been sent back to the Council of Ministers, but in accordance with the provisions of the Lokayukta Act, 1973, it should be referred to the Governor of the State. If initially, the aid and advice of the Council of Ministers taken the Governor is not required to take again the aid and advice of the Council of Ministers, but to act taking into consideration the consultation as made. On the other hand, where no initial aid or advise taken from the Council of Ministers, like the present one, the Governor before issuance of warrant of appointment, should take aid and advice of the Council of Ministers.

For the reasons aforesaid, the matter requires reconsideration.

50. In the cases, in question, as names of all the four persons were taken up at one or other stage, as has been disclosed in this order, but process having not completed by forwarding the name of any one or other person to the Governor of

the State, in my opinion, it will be desirable if the competent body/person consider(s) the cases of the aforesaid persons, apart from others if they intend to add.

51. The respondents are, accordingly, directed to complete the process of selection so that the Lokayukta for the State of Jharkhand is appointed within two months, as already ordered by brother M.Y. Eqbal, J.

52. Both the writ petitions are allowed with the aforesaid observations and directions of this Bench.