

(1981) 09 RAJ CK 0014
In the Rajasthan High Court
Case No : Civil Writ Petition No. 1304 of 1981

Arun Kumar

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 04-09-1981

Acts Referred:

Constitution of India, 1950 — Article 124(4), 155, 158(2), 159, 160

Citation : AIR 1982 Raj 67 : (1981) RLW 540 : (1981) WLN 290

Hon'ble Judges : M.L. Shrimal, J

Bench : Single Bench

Advocate : C.K. Garg and M.C. Surana, for the Appellant;

Final Decision : Dismissed

Judgement

M.L. Shrimal, J.—Shri Arun Kumar, former Secretary of the Janta Party has filed this writ petition under Article 226 of the Constitution of India challenging the order of the President of India and appointment of Mr. K.D. Sharma (Hon"ble the Chief Justice of Rajasthan) "to discharge the functions of the Governor of Rajasthan under the provisions of Article 160 of the Constitution of India. He has prayed that Mr. K.D. Sharma is an usurper of the office of Governor of Rajasthan and, therefore, a writ of quo-warranto or any other direction be issued against Hon"ble Chief Justice Mr. Sharma to vacate the office of the Governor. The contention of the petitioner is that formerly he was a journalist. Thereafter he became a member of the Janta Party. He was elected Secretary of the Janta Party for the year 1978-79, is interested in the social political upliftment of Rajasthan and is vitally interested in seeing that the provisions of the Constitution are implemented faithfully. The petitioner submits that Shri Raghukul Tilak was appointed as Governor of Rajasthan on 20-4-1977 by a warrant issued by the President of India. He resumed the office of the Governor on 12-5-1977. He was appointed for a period of five years from the date on which he entered upon his office. The Janta Party lost in general elections. The President of India without any authority of law asked Shri Raghukul Tilak to

vacate his office, which amounts to virtual dismissal of the Governor from the high office. The order of the premature termination is arbitrary, contrary to the principles of natural justice and violative of the provisions of the Constitution. There was no urgency to appoint a person merely to discharge the functions of the Governor under Article 160 of the Constitution. As regards Mr. K.D. Sharma, the petitioner argues that he has neither resigned, nor is deemed to have been removed from the office of Chief Justice, as the removal of the Judge of a High Court cannot take place otherwise than as Constitutionally provided in Article 217 Sub-clause (1) (b) read with Sub-clause (4) of Article 124 of the Constitution i. e. by impeachment. A Judge of a High Court discharging the functions of a Governor in pursuance to Article 160 of the Constitution does not cease to hold the office of the Chief Justice. The qualifications for the appointment of a Governor are; (i) a person must be the citizen of India; (ii) he must have completed the age of 35 years; (iii) he should not be the member of either house of the Parliament or house of Legislature; and (iv) he should not hold any other office of the profit. Learned counsel urged that a Chief Justice holds an office of profit and as Chief Justice Mr. Sharma has not relinquished the office of Chief Justice, he is the holder of the office of profit and is disqualified to be the Governor of the State. In the alternative the learned counsel argues that the basic features of the Constitution protecting the judiciary from encroachment of the executive will be disturbed if the Judges of the High Court and specially the Chief Justices are allowed to hold the office of the Chief Executive of the State. The Chief Justice, while discharging duties of the Governor, is expected to exercise his wisdom in taking important executive decisions on behalf of the State. He enjoys certain powers and privileges of the office of the Governor and this is likely to influence the mind of the Chief Justice prejudicially in favour of the Government. Therefore, whenever he resumes the office of Chief Justice, he would not be able to discharge his functions independently without any fear or favour. The appointment of the Chief Justice to discharge the functions of a Governor is a device by which an inconvenient Chief Justice of a State can be removed, if he proves himself to be inconvenient to the executive of the State or the Centre. The High Constitutional office of the Chief Justice in no way can be said to be lesser than the office of the Governor and it is derogatory for the Chief Justice to function as the Governor of the State. In support of the above contentions the learned counsel for the petitioner has cited a number of authorities which I propose to deal with at proper place while dealing with the argument *ad seriatum*.

2. A perusal of para 3 of the writ petition reveals that the petitioner does not want to challenge the constitutionality of the termination of the period of Shri Reghukul Tilak as Governor of the State of Rajasthan and as such I am not required to deal with this point in this case.

3. This point has been dealt with by me in detail in the connected Civil Writ Petn. No. 1308 of 1981, *Surya Narain Choudhary v. Union of India* decided on August 28, 1981, (reported in *Surya Narain Choudhary Vs. Union of India (UOI)* and

Others, wherein after making reference to the book of Mr. H.M. Seervai "Constitutional Law of India" Vol. II, 1976 Ed., page 1046 point 18.4, the well known book "Constitutional Development of India" by Alexandrowicz, Dr. M.C.J. Kagzi's book "Constitution of India" 1975 Ed., pages 261-262, Constituent Assembly Debates, Lord Goddard's judgment reported in (1953) 2 All ER 490 and various provisions of the Constitution, I have held that the Governor of a State holds office during the pleasure of the President, The President's pleasure contemplated in Article 156 of the Constitution is unjusticiable. In the absence of any regulatory provision, no restriction can be placed upon the power of the President to terminate the period of appointment of a Governor. The doctrine of pleasure envisaged by Article 156 of the Constitution has its origin in the Latin phrase *Durante-beneplacito* (during pleasure), meaning that the tenure of office of a person, except where it is otherwise provided by statute can be terminated at any time without cause assigned. In other words, the person concerned is liable to be dismissed without notice and there is no right of action for wrongful dismissal. This well known rule of English law has been incorporated in Article 156(1) of the Constitution. The Governor's appointment and also by necessary implication his removal is during pleasure of the President. Neither the Presidential order can be challenged in any Court, nor can it be refuted in any House of State legislature. Legally the President's order is conclusive. The pleasure condition of a Governor's term makes any proceeding or procedure or rules of natural justice for his removal unnecessary. The founding fathers in their wisdom provided in Article 61 of the Constitution for the removal of the President from office by impeachment, but as the Governor holds office during pleasure of the President, it was not felt necessary to make separate provision for the removal of the Governor. President enjoys unregulated, uncontrolled power to remove a Governor without any stated reason. The condition of his term of appointment being during pleasure any provision for his removal would be unnecessary and superfluous. He has no security of tenure, no fixed term of office which can be termed to be irrevocable.

4. Article 226 of the Constitution empowers the High Court to issue to any person or authority including the Government within its territorial jurisdiction, directions, orders or writs in the nature of mandamus, certiorari prohibition or quo-warranto for the enforcement of fundamental rights or for the enforcement of the legal rights and for any other purpose.

5. The founding fathers of the Constitution have couched the Article in comprehensive phraseology to enable the High Court to remedy injustice wherever it is found, but it is equally true that a person invoking the extraordinary jurisdiction of this Court should be an aggrieved person. If he does not fulfil the character of an aggrieved person and is a "stranger" the Court will, in its discretion, deny him this extraordinary remedy save in very special and exceptional circumstances. The petitioner challenging the order must have some specialised interest of his own to vindicate, apart from a political concern, which belongs to all. Legal wrong requires a judicial and enforceable right and the

touchstone to the justiciability is injury to legally protected right. A nominal, imaginary, a highly speculative adverse effect to a person cannot be said to be sufficient to bring him within the expression of "aggrieved person". The words "aggrieved person" cannot be confined within the bounds of a rigid formula. Its scope and meaning depends on diverse facts and circumstances of each case, nature and extent of the petitioner's interest and the nature and extent of the prejudice or injury suffered by him.

6. Any information in the nature of quo warranto would not be issued, and an injunction in lieu thereof would not be granted as a matter of course. It is in the discretion of the Court to refuse or grant it according to the facts and circumstances of each case. The Court would inquire into the conduct and motive of the applicant and where there are grounds for supposing that the relator was not the real prosecutor but was the instrument of other persons and was applying in collusion with stranger, the Court may refuse to grant a writ of quo warranto.

7. I have given my utmost consideration to the anxiety of the petitioner who claims himself to be a social and political worker interested in the uplift of the people of the country in general and Rajasthan in particular. It is true that the question whether respondent No. 2 is an usurper of the office and his appointment under Article 160 of the Constitution is valid or not, relates to interpretation of the Constitution, but what has to be borne in mind is that merely because a substantial question of law of general public importance arises, that does not mean this Court can adjudicate upon that question at the instance of a stranger, who is in no way connected with the dispute in question. If that were so, this High Court, in my view, would be flooded with writ petitions which could always raise some question of importance arising out of any provision of the Constitution and seek an adjudication thereof. Accordingly, the purpose of writ jurisdiction has never been understood to be so comprehensive. When I say this, I am fully conscious of the fact that in the case of writ of quo warranto the requirement that a person should be a person aggrieved is dispensed with to a great extent, but certainly not abandoned altogether. This Court cannot issue a command to respondent to show as to by what authority he holds the public office at the instance of a person who is not in a position to show as to how he feels aggrieved.

8. The main plank of the argument of the learned counsel for the petitioner is that respondent No. 2 prior to his taking oath as Governor of Rajasthan, on Aug. 8, 1981, was holding the office of the Chief Justice of Rajasthan High Court. His appointment to discharge the functions of the Governor of Rajasthan is invalid and unconstitutional and, ultra vires the powers of respondent No. 1 for the reason that Shri K.D. Sharma held and holds the office of the Chief Justice of Rajasthan notwithstanding the fact that he has been asked to discharge the functions of Governor of Rajasthan and as such respondent No. 2 suffers from the disqualification provided in Article 158(2) of the Constitution.

9. I do not find any substance in the above argument. Shri K.D. Sharma was appointed to discharge the functions of the Governor of Rajasthan with effect from Aug. 8, 1981. Shri D.P. Gupta by order of the President of India was appointed as Acting Chief Justice from the same date. This could have been done only under Article 223 of the Constitution. Under the Rajasthan High Court Ordinance, 1949, the definition of "Chief Justice" includes "Acting Chief Justice". Sub-clause D (11) (a) of Schedule II to the Constitution provides that expression "Chief Justice" includes "Acting Chief Justice". It is the requirement of Article 216 of the Constitution that every High Court shall consist of a Chief Justice and such other Judges as the President may deem it necessary to appoint. A close reading of Articles 216 & 223 read with Schedule II Sub-clause D (11) of the Constitution clearly reveals that there cannot be two Chief Justices in a High Court; and an Acting Chief Justice is appointed only when the Chief Justice is away and is unable to perform the duties of his office. After taking the oath under Article 159 of the Constitution to discharge the functions of the Governor, Shri K. D. Sharma cannot be said to continue to hold the office of the Chief Justice for the time being, while he discharges the functions of the Governor and as such it cannot be held that he suffers from the disqualification provided under Article 158(2) of the Constitution.

10. Viewed from another angle, Shri K.D. Sharma's appointment to discharge the functions of a Governor under Article 160 of the Constitution cannot be said to be invalid because the person asked to discharge the functions of a Governor of a State under Article 160 of the Constitution need not possess the qualifications provided under Article 157 or Article 158 of the Constitution, as he is not termed as Governor. The oath prescribed for the Governor and for a person discharging the functions of the Governor is different but it entitles the incumbent the same emoluments, allowances and privileges as that of the Governor, whose functions he discharges and for whom he acts. The functionary discharging the functions provided under Article 160 of the Constitution cannot be termed to be a Governor within the meaning of Article 155 of the Constitution. That is why provision for payment of emoluments was required to be separately made. The provisions of Article 160 of the Constitution are resorted to prevent an interregnum. Necessary corollary of that is that stop-gap functionary need not possess the necessary qualifications for being appointed as a Governor and also does not suffer from the disqualifications attached to that office. He resumes his old office as soon as the new Governor is appointed.

11. Dr. M.C.J. Kagzi in his book "the Constitution of India", 3rd Edn. (1975), at p. 262, while dealing with the office of Governor has observed :

"There is no provision for appointment of a Deputy Governor. In fact a proposal for it was negated by the Constituent Assembly. Accordingly any casual vacancy due to illness, death, long absence of a Governor should be filled in the manner the President may decide in accordance with the practice developed, since after the commencement of the Constitution. The established practice

requires the President to appoint the Chief Justice or in his absence the seniormost Judge of the State High Court as the Governor pro tempore."

12. The President (Discharge of Functions) Act, 1969 was enacted by the Parliament in the 20th year of the Republic of India. Section 3 provides that in the event of the occurrence of vacancy in the office of the President and Vice-President, by reason in each case of death, resignation or removal or otherwise, the Chief Justice of India, or, in his absence the seniormost Judge of the Supreme Court of India available shall discharge the functions of the President until a new President is elected in accordance with the provisions of the Constitution to fill the vacancy in the office of the President. A perusal of Article 58(2) of the Constitution reveals that a person holding office of profit is not eligible for election as President. Article 70 of the Constitution provides that the Parliament may make such provision as it thinks fit for the discharge of the functions of the President in any contingency not provided for in this Chapter and the Parliament has directed in this contingency by enacting the abovenoted "President (Discharge of Functions) Act". If the Chief Justice of India or the seniormost Judge of the Supreme Court can be validly appointed to discharge the functions of the President, there is no reason why the Chief Justice of a State cannot be asked to discharge the functions of the Governor of a State in a contingency not provided for in Chapter VI.

13. The second limb of the argument of the petitioner is that by virtue of the appointment of the Chief Justice to discharge the functions of a Governor of a State the executive can remove the Chief Justice without following the procedure provided under Sub-clause (4) of Article 124 of the Constitution which amounts to an encroachment of the executive on the judiciary. By appointing respondent No. 2 to discharge the functions of the Governor, the executive has made an attempt to favour the judiciary. If executive is allowed to do so, it is likely to provide a handle to the executive to remove a particular authority in case he is proving unsuitable or unwanted.

14. I have given a careful thought to the abovementioned argument. At the first sight it may appear to be attractive but in fact it is without any substance, The President while exercising the powers under Article 160 of the Constitution makes a stop-gap arrangement. Such an arrangement is made till a Governor appointed under Article 155 of the Constitution enters upon his office, The requirement of Article 153 of the Constitution is that there must always be a Governor for a State. In between the expiry of the term of the previously appointed Governor or his removal and the taking over the charge of the office by the newly appointed Governor there can be some time-lag and Article 160 of the Constitution is required to be used to cover only the time-lag before the successor enters upon his office. The appointment of the Chief Justice to discharge the functions of a Governor by no stretch of imagination can be said to be an inroad of the executive on the judiciary. In a given case if the President makes an attempt to remove a High Court Judge or the Chief Justice of a Court

and utilise the provisions of Article 160 of the Constitution as a device to remove an inconvenient Judge or the Chief Justice, the validity of such an appointment can be examined by the Court in a proper case, because then it can be said that the President had neglected to discharge his duties or has failed to act under the Constitution and the Court may find out a remedy for it. The case in hand does not satisfy the need for such an examination as there is nothing on record to hold that the respondent No, 2 is an inconvenient Judge to the Union Government or his appointment as a Governor has been made as a device to remove him once for all and as such there is no need for such an examination. The Courts are not required under Article 226 of the Constitution to examine hypothetical and imaginary questions.

15. For the reasons mentioned above, the writ petition fails and is dismissed in limine.