

(2014) 07 AHC CK 0203
In the Allahabad High Court

Case No : Misc. Bench No. 6349 of 2014 and Misc. Bench No. 2246 of 2012

Ashok Pande (P.I.L.)

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 21-07-2014

Acts Referred:

Constitution of India, 1950 — Article 132, 134-A, 155, 156, 157

Citation : (2014) 106 ALR 120

Hon'ble Judges : Dhananjaya Yashwant Chandrachud, C.J.;Devendra Kumar Upadhyaya, J

Bench : Division Bench

Advocate : Alok Mathur, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Dr. Dhananjaya Yeshwant Chandrachud, C.J. and Devendra Kumar Upadhyaya, J. —In a petition invoking the jurisdiction of this Court in the public interest, the petitioner seeks a writ of certiorari for quashing the appointment of Sri Ram Naik as the Governor of Uttar Pradesh. The petitioner seeks a mandamus directing and commanding the respondents to Consult the Chief Minister of Uttar Pradesh before appointing a new Governor. The first respondent to the petition, the Union of India has been impleaded "through Secretary to President, Rashtrapati Bhawan, New Delhi".

2. Article 361 of the Constitution provides inter alia that the President shall not be answerable to any Court for the exercise and performance of the powers and duties 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.

3. In the earlier writ petition before this Court (Misc. Bench No. 2246 of 2012) instituted by the petitioner, a counter-affidavit has been filed by the Union Government specifically stating that under the Allocation of Business Rules of the Union Government framed under Article 77(3) of the Constitution, responsibility

in regard to the appointment, resignation and removal of Governors and related matters has been entrusted to the Union Ministry of Home Affairs.

4. Despite the clear mandate of Article 361, what the petitioner has now attempted to do is to circumvent those provisions by impleading the Secretary to the President of India as a person through whom the Union of India is sought to be represented. This, in our view, is clearly impermissible. To permit this would be to circumvent the provisions of Article 361 of the Constitution. The Secretary to the President, it must be noted, is not sought to be brought within the array of parties for an act personal to him but obviously in a capacity of representing the office of the President of India. Thus, at the outset, we direct that the Union of India which is the first respondent shall remain in the array of parties but the words "through Secretary to President, Rashtrapati Bhawan, New Delhi" shall stand excised and deleted from the record.

5. The basis of the petition is that, according to the petitioner, the executive head of the State should be appointed after consulting the Chief Minister on the ground that the Chief Minister enjoys the confidence of the voters of the State. The petitioner has sought to rely upon the Debates of the Constituent Assembly in support of the submission that the Governor of the State must be acceptable to the province, that he must be acceptable to the Government of the province and yet be detached from the party machinery of the province.

6. During the course of the hearing, and in support of the submissions, reliance has been placed on the report of the Sarkaria Commission on Centre-State Relations. The Sarkaria Commission, it is urged, recommended that the Governor should always be appointed after consultation of the Chief Minister of a State and there has never been any difference of opinion in political or public circles as to the desirability of such consultation. Moreover, it has been submitted that when the Union Government in the Ministry of Home Affairs filed a counter-affidavit in response to the earlier petition, it has been stated that there is an established convention to consult Chief Ministers prior to the appointment of Governors. In the present case, it has been urged that in breach of the convention, the Chief Minister of the State was not consulted.

7. A supplementary-affidavit has been filed by the petitioner to explain his source of information where he states that he asked "his friend working as Additional Advocate General" to ascertain from the Chief Secretary as to whether the Chief Minister was consulted, upon which he was informed by the person to whom the query was made that no consultation has been done with the Chief Minister.

8. Article 155 to the Constitution provides that the Governor of a State shall be appointed by the President by warrant under his hand and seal. Clause (1) of Article 156 defines that the Governor shall hold office during the pleasure of the President. Article 157 defines the qualifications for appointment as Governor. These are (i) citizenship of India; and (ii) the completion of the age of thirty-five years. Article 158 specifies that the Governor shall not be a member of either

House of Parliament or of a House of the Legislature of any State, and if he is a member of either House of Parliament or of a House of the Legislature, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as Governor. Under Article 158(2), the Governor shall not hold any other office of profit.

9. The petitioner has sought to place reliance on the Debates of the Constituent Assembly on 31 May, 1949 referring therein to the speech of Pt. Jawahar Lal Nehru that it would be better if a Governor were to be "a more detached figure, a figure that is acceptable to the province."

10. The Sarkaria Commission on Centre-State Relations recommended in paras 4, 6, 16 of its report that "the Governor should always be appointed after consultation with the Chief Minister of the State." This was based on the speech of Pt. Jawahar Lal Nehru in the Constituent Assembly that the Governor "must be acceptable to the Government of the Province." However, the Sarkaria Commission was cognizant of the fact that this would require an amendment to Article 155 and, in paras 4, 6, 25 specifically recommended that a procedure for ensuring effective consultation with the Chief Minister in the selection of a person to be appointed as Governor should be prescribed in the Constitution and that Article 155 should be suitably amended to give effect to this recommendation.

11. A Constitution Bench of the Supreme Court in *B.P. Singhal Vs. Union of India* (UOI) and *Another*, while referring to the report of the Sarkaria Commission on Centre-State Relations, also adverted to the recommendations of the National Commission to review the working of the Constitution. The Constitution Bench held that these recommendations, however salutary, remained recommendations and cannot either override the provisions of the Constitution or assist in interpreting Article 156. The Supreme Court held as follows:

These recommendations howsoever logical, or deserving consideration and acceptance, remain recommendations. They cannot override the express provisions of the Constitution as they stand. Nor can they assist in interpreting Article 156. The very fact that such recommendations are made, shows that the position under the existing Constitutional provisions is otherwise. They are suggestions to be considered by those who can amend the Constitution. They do not assist in interpreting the existing provisions of the Constitution.

12. The issue in *B.P. Singhal* (supra) was the justiciability of a decision of the Union Government to remove a Governor from office. The Supreme Court held that while there is no need to assign reasons and any removal as a consequence of withdrawal of pleasure would be assumed to be valid, it would be open to only a limited judicial review. If the aggrieved person is able to demonstrate prima facie that the removal of the Governor was arbitrary, mala fide, capricious or whimsical, the Court would call upon the Union Government to disclose the material upon which the President had taken the decision to withdraw his pleasure. If the Union Government does not disclose any reason, or if the

reasons disclosed are found to be irrelevant, arbitrary, whimsical, or mala fide, the Court would interfere. The Supreme Court has clarified that the Court would not interfere merely on the ground that a different view is possible or that the material or reasons are insufficient.

13. The entire basis of the petition is misconceived. No enforceable or justiciable right can arise on the basis of the Debates in the Constituent Assembly nor, for that matter, can the recommendations of the Sarkaria Commission be elevated to the position of an enforceable constitutional guarantee, which they are not. As the Supreme Court observed, howsoever desirable the recommendations are, the path to their implementation must lie in an amendment of the Constitution and not by invoking the power of judicial review.

14. The petitioner has earlier filed a writ petition, namely, Writ Petition No. 2246 (M/B) of 2012, in which he has sought a mandamus directing the Union of India to consult the Chief Minister of Uttar Pradesh before appointing the Governor. In pursuance of an order passed by the Court in the earlier proceedings, a counter-affidavit has been filed. The counter-affidavit states that while prior consultation with the State has not been mandated before the appointment of a Governor by the President, it is an established convention to consult the Chief Ministers prior to the appointment of Governors.

15. The issue before the Court however is whether a convention, can be enforced by the Court either by striking down an appointment or by issuing a mandamus, as the petitioner seeks/to the effect that the appointment of the Governor be made only after consulting the Chief Minister of the State. Plainly, in our view, neither is permissible. The remedy for the breach a convention is not through the invocation of the writ jurisdiction where the convention is not a specific and enforceable part of the text to the Constitution. The Constitution in Article 155 does not incorporate any such requirement. In a constitutional polity, every remedy must not necessarily lie in the invocation of the power of the judicial review. Judicial review lies where legislation or executive action is in breach of enforceable constitutional guarantees.

16. For these reasons, we are of the view that there is no merit in the writ petition which has been filed by the petitioner.

17. The petition shall, accordingly, stand dismissed.

18. The petitioner shall pay costs quantified at Rs. 15,000/- to the U.P. State Legal Services Authority. On the conclusion of the judgment, the petitioner, in person, prays for a certificate under Article 132 read with Article 134-A of the Constitution. As we have observed earlier in the substantive part of this judgment, the basis of the petition is that there has been a breach of "an undertaking" furnished to the Constituent Assembly. The submission has also been based on the report of the Sarkaria Commission. The judgment of the Constitution Bench in B.P. Singhal (supra) clearly holds that these recommendations are recommendations and neither the Debates in the

Constituent Assembly nor the recommendations of a Commission can override the express provisions of the Constitution. Hence, no case for grant of a certificate is made out. The prayer for the grant of a certificate is, therefore, refused.