

(2015) 11 KAR CK 0086

In the Karnataka High Court

Case No : Writ Petition Nos. 25915 and 26236-40/2011 (GM-RES)

B.S. Yeddyurappa

APPELLANT

Vs

The Principal Secretary to His Excellency the Governor
Karnataka and Others

RESPONDENT

Date of Decision : 24-11-2015

Acts Referred:

Constitution of India, 1950 — Article 163, 164(1), 174, 200, 239
Criminal Procedure Code, 1973 (CrPC) — Section 197
Penal Code, 1860 (IPC) — Section 405
Prevention of Corruption Act, 1988 — Section 13(1)(d), 13(1)(e), 19

Citation : (2016) 1 AKR 252 : (2016) CriLJ 778

Hon'ble Judges : Subhro Kamal Mukherjee, Actg. C.J. and Vineet Saran, J.

Bench : Division Bench

Advocate : C.V. Nagesh, Nageshwar, Sr. Advocates, and Sandeep Patil,
Advocate, for the Appellant; S. Vijaya Shankar, Senior Advocate and K. Krishna,
Advocate, for the Respondent

Final Decision : Partly Allowed

Judgement

Subhro Kamal Mukherjee, Actg. C.J.

1. We are invited to decide in this batch of writ petitions, the legality of the sanction order dated January 21, 2011 issued by His Excellency the Governor of Karnataka. By the order impugned before us, His Excellency, on the petition filed by the complainants, namely, Sirajin Basha and K.N. Balaraj, accorded sanction under sub-section (1) of Section 19 of the Prevention of Corruption Act, 1988, and under Section 197 of the Code of Criminal Procedure, 1973, to prosecute the petitioner for the alleged offence under Section 405 of the Indian Penal Code, and Section 13(1)(d) and Section 13(1)(e) of the Prevention of Corruption Act, 1988.

The former Chief Minister is the writ petitioner before this court.

2. The relevant facts for the purpose of disposal of these writ petitions are as

follows:

(a) On May 30, 2008, the petitioner was elected as the leader of Bharatiya Janata Party Legislative Party, and was sworn in as the Chief Minister of the State of Karnataka.

(b) On June 29, 2009, Shri H.R. Bharadwaj was appointed as His Excellency the Governor of the State of Karnataka.

(c) On December 9, 2009, the Governor addressed a letter to the Chief Minister, stating that the Karnataka Pradesh Congress Committee submitted a complaint before him on December 5, 2009, making certain allegations against some of the ministers, and demanded their resignations. The Governor asked for the details of utilization of the Central Government grants.

(d) On December 16, 2009, the Governor once again addressed a letter to the Chief Minister pointing that he received a representation from an organization known as Dr. Ramamanohara Lohia Thinkers Forum, Karnataka. The Governor suggested in the letter that the Ministers concerned should be dropped, as it would have a serious bearing on the administration, and also, asked the Chief Minister to inform him about the action taken on the Lokayuktha Report.

(e) The Governor, on February 2, 2010, writes another letter regarding appointment of Registrars to the Conventional Universities, and cautioned that the Government should not venture to violate laws.

(f) In the letter dated September 8, 2010, addressed to the Chief Minister, the Governor wrote as under:

"In order to divert public attention, I feel that you have chosen to use intemperate language against the Governor while ignoring the rampant corruption indulged in by some of your Ministers. Therefore, for dragging the Governor into this, in such objectionable manner, you owe me an unconditional public apology. In view of such grossly baseless and irresponsible public utterances against me indulged in by you, I also release this letter to the media to set the records straight."

(g) In the letter dated November 15, 2010, the Governor writes as under:

"Your Minister has committed serious Constitutional impropriety by making these uncalled for irresponsible statements. I advise you to take immediately remedial action in this regard."

(h) The State Government, on December 22, 2010, appointed Hon^{ble} Justice B. Padmaraj as one-man Commission to look into various alleged irregularities in denotification of lands, under the Commission of Inquiry Act.

(i) On December 28, 2010, a representation was submitted by the said two complainants (claiming themselves to be practicing advocates), before the Governor alleging misuse of office against the then Chief Minister, and sought for

permission for grant of sanction for prosecution.

(j) On December 31, 2010, the Chief Minister met the Governor concerning official business. In course of the said meeting, the Governor allegedly indicated to the Chief Minister that he had made up his mind to grant sanction to prosecute the Chief Minister.

(k) On January 3, 2011, a letter was addressed to the Chief Secretary, Government of Karnataka, through the Principal Secretary of the Governor of Karnataka, asking the authorities to hand over certified copies of the documents purportedly filed by the two aforesaid complainants.

(l) On January 19, 2011, the Chief Minister wrote a letter to the Governor requesting him not to accord sanction for prosecution, enclosing a copy of the resolution of the Council of Ministers giving the same advice.

(m) There was a press report in the daily newspaper DNA, disclosing certain alleged remarks made by the Governor against the Chief Minister.

(n) In the aforesaid background, on January 21, 2011, the Governor granted sanction for prosecution of the then Chief Minister for the alleged offences under Section 405 of the Indian Penal Code, and under Sections 13(1)(d) and 13(1)(e) of the Prevention of Corruption Act, 1988.

3. Without indulging in any controversy and without going into the details of the contents of the letters, we can see that there was an uneasy relationship between the then Governor and the then Chief Minister.

4. There is, also, an interlocutory application being I.A. No. 1 of 2012, seeking deletion of respondent No. 1 from the cause-title of the writ petitions. It is stated in the said application that respondent No. 1 in the writ petitions is the Principal Secretary to the Governor, and no relief was sought for against him nor was there any allegation against him. Therefore, it is prayed to delete respondent No. 1 from the cause title of the writ petitions.

5. It is pertinent to note here, that by order dated August 25, 2011, the State of Karnataka, represented by the Chief Secretary, was added as respondent No. 4.

6. Mr. Ravivarma Kumar, learned Advocate General, submitted, that in view of the addition of the State of Karnataka, respondent No. 1 is neither a necessary nor a proper party. He refers to the provisions of Article 361 of the Constitution of India, and submits that the said Article provides for absolute protection of the President, the Governors and the Rajpramukhs. In sub-article (1) of Article 361, it is, inter alia, provided that the Governor 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. Mr. Ravivarma Kumar cites the decision in the case of Parkash Singh Badal and Another Vs. State of Punjab and Others, , to submit that there is distinction between the absence of sanction and invalidity of the

sanction. The former question can be agitated at the threshold, but latter is a question, which has to be raised during trial.

7. Mr. C.V. Nagesh, learned senior advocate appearing for the writ petitioner, per contra, submits that the application for expunging respondent No. 1 becomes infructuous, as already, the Governor has entered appearance in the proceedings through a counsel, and Mr. Vijaya Shankar, learned senior counsel appearing for the Governor, submits that there is no bar for filing an affidavit by the Governor when he wants to file on his own. In support of such submission, Mr. Vijaya Shankar cites the well-known decision of the Apex Court in the case of Rameshwar Prasad and Others Vs. Union of India (UOI) and Another, . Mr. Vijaya Shankar specifically drew our attention to paragraph-173 of the said decision, and submits that the Supreme Court of India held that Article 361 did not bar filing of an affidavit if one wanted to file on his own. The bar was only against the power of the court to issue notice, or making the Governor answerable.

8. In view of the fact that the Governor himself appeared through a counsel, and made submissions before the court through his counsel, we, also, feel that there is no reason to expunge respondent No. 1 (Principal Secretary to the Governor), and it is better to consider the submissions of the counsel for the Governor, who has put in appearance of his own, for deciding the writ petitions. We feel that better justice is always done if a lis is decided after granting opportunity of hearing to all concerned.

9. Now, we propose to record the submissions made on merits on behalf of the parties. Mr. C.V. Nagesh, learned senior counsel for the writ petitioner, placed before us in detail the complaint lodged by the complainants against the Chief Minister. He submits that the allegations are mostly related to denotification of lands and allotment of a site by the Bengaluru Development Authority in favour of the son of the then Chief Minister, who was, also, a Member of the Parliament. Such allotment of site was made on the discretionary quota of the Chief Minister.

10. Mr. Nagesh placed in detail before us the provisions of Sections 13(1)(d) and 13(1)(e) of the Prevention of Corruption Act, 1988, and submits that Section 13(1)(d) provides that the public servant should have "obtained" a valuable thing or pecuniary advantage, and according to the learned counsel, "obtained" would mean to secure or gain something as a result of request or effort by the public servant, meaning thereby, there should be an initiative by the public servant by way of a demand or request for receiving something, and in the absence of there being any allegation of demand or request having been made by the petitioner, the sanction for prosecution under the aforesaid provision was wholly unwarranted.

11. He, further, contends that Section 13(1)(e) provides that a public servant should be in possession of pecuniary gains or assets "which the public servant cannot satisfactorily account", which, according to him, implies that the

Sanctioning Authority should call for an explanation from the accused to find out as to whether the accused could or could not satisfactorily account for; and the same has not been done in the present case, as there was neither opportunity given nor occasion for the petitioner-accused to submit his explanation. He submits that when there was no allegation that the petitioner was in possession of assets disproportionate to his known sources of income, sanction under the said provision could not have been accorded.

12. Mr. Nagesh submits that there was no material before the Governor to show that denotification of acquisition of land was for the benefit of the petitioner, as no property was entrusted to the petitioner and, thus, no offence can be said to have been made out under Section 405 of the Indian Penal Code, for which sanction has been accorded. It is, also, submitted that the denotification orders have not been set aside, or even stayed by any court of law.

13. Mr. Nagesh, further, submits that sanction was accorded by the Governor mechanically after accepting the allegations in the complaint, without there being any investigation by an independent Investigating Agency. The contention is that the Governor, being the Sanctioning Authority, could not himself assume the role of an investigator also. He submitted that all the cases which have till now been considered by the Supreme Court were such in which, after investigation by the police or any other Investigating Agency, a charge sheet had been submitted, where the statement of the accused was, also, recorded, and all such papers were produced before the Sanctioning Authority after which, the case for grant of sanction was considered by the Authority; whereas in the present case, no such investigation was carried out, and if the Governor was the one, who was conducting inquiry himself, then the minimum that was required was to call for an explanation from the petitioner, which was not done.

14. Mr. Nagesh contends that requirement for grant of sanction by the competent authority before prosecution, is for the protection of a public servant, which is not to be taken lightly or as a matter of course, and in support of such contention he cites the decision of the Apex Court in the case of Mansukhlal Vithaldas Chauhan Vs. State of Gujarat (1977) 7 SCC 622, wherein it has been observed in paragraphs 17, 18 and 19 that:

"17. Sanction lifts the bar for prosecution. The grant of sanction is not an idle formality or an acrimonious exercise but a solemn and sacrosanct act which affords protection to Government Servants against frivolous prosecutions. Sanction is a weapon to ensure discouragement of frivolous and vexatious prosecutions and is a safeguard for the innocent but not a shield for the guilty.

"18. The validity of the sanction would, therefore, depend upon the material placed before the sanctioning authority and the fact that all the relevant facts, material and evidence have been considered by the sanctioning authority. Consideration implies application of mind. The order of sanction must ex facie disclose that the sanctioning authority had considered the evidence and other

material placed before it. This fact can also be established by extrinsic evidence by placing the relevant files before the Court to show that all relevant facts were considered by the sanctioning authority.

"19. Since the validity of "sanction" depends on the applicability of mind by the sanctioning authority to the facts of the case as also the material and evidence collected during investigation, it necessarily follows, that the sanctioning authority has to apply its own independent mind for the generation of genuine satisfaction whether prosecution has to be sanctioned or not. The mind of the sanctioning authority should not be under pressure from any quarter nor should any external force be acting upon it to take decision one way or the other. Since the discretion to grant or not to grant sanction vests absolutely in the sanctioning authority, its discretion should be shown to have not been affected by any extraneous consideration. If it is shown that the sanctioning authority was unable to apply its independent mind for any reason whatsoever or was under an obligation or compulsion or constraint to grant the sanction, the order will be bad for the reason that the discretion of the authority "not to sanction" was taken away and it was compelled to act mechanically to sanction the prosecution."

He, thus, submits that grant of sanction is not a mere formality, and that the provisions with regard to sanction must be strictly observed, keeping in mind the public interest and the protection available to the accused against whom sanction is sought, and if the order of sanction does not disclose that the Sanctioning Authority had considered the evidence and other material, but merely repeated the contents of the complaint, as according to him is so in the present case, it would be a clear case for non-application of mind by the Sanctioning Authority.

15. It is lastly contended that a sanction order, which is the result of bias and prejudice, would be a nullity, and that mere ground of appearance of bias, and not actual bias, is enough to vitiate the order.

16. In support of his contention that the sanction order in the present case was a result of political vendetta, as well as bias or prejudice of the Sanctioning Authority, learned counsel has relied on the following instances:

(a) Letter dated January 19, 2011, written by the petitioner to the Governor wherein it was clearly stated that the Governor had indicated to the petitioner that he would accord sanction to prosecute the petitioner. In the said letter the Cabinet resolution for rejecting the sanction was also enclosed.

(b) Reply of the Governor dated January 21, 2011, wherein receipt of the Cabinet decision is acknowledged and opinion was expressed that a cloud over the personal integrity of the petitioner had been created, which shows that the Governor had, already, made up his mind against the petitioner.

(c) Letter dated September 8, 2010, of the Governor to the Chief Minister asking the petitioner to tender unconditional apology, showing prejudice against the petitioner.

(d) Communications dated May 18, 2011, by the petitioner to the Governor and the Governor to the petitioner whereby the request for approval for convening both Houses of Legislature for ten days was refused on the ground that the Governor had submitted a report to the President of India, the outcome of which was awaited.

(e) Newspaper reports dated 10 October 12, 2010 and December 5, 2010 indicating bias of the Governor as against the petitioner.

(f) Newspaper reports dated January 20, 2011 and January 21, 2011 wherein statement of the Governor to the effect of equating the petitioner with a thief (chor), clearly indicates the bias of the Governor.

17. Mr. Nagesh submits that from the above instances, it would be clear that the relationship between the petitioner (the then Chief Minister) and the then Governor was quite acrimonious, and the Governor decided the matter in hot haste, with a biased mind, without following the procedure, and without giving any valid reason for granting sanction, and that the sanction was not lawful but was tainted with bias, and was granted mechanically, with a predetermined mind, for political reasons.

18. In the end, it was contended that though the law did not require an opportunity to be granted to the accused prior to according sanction, but in the peculiar facts of this case, where there was no investigation carried out by any independent Agency, and no such investigation report was placed before the Governor (except that conducted by the complainants themselves), no action should have been taken by the Governor without calling for an explanation from the petitioner, and on this ground, also, the order of sanction deserves to be quashed.

19. The learned Advocate General produced in court the records in relation to the order impugned, running into 1,625 pages. He submits that the sanction order is on record and, thereafter, the sanction order in format was issued by the Governor. He submits that the Governor, on proper investigation and upon proper application of mind, accorded sanction for prosecution. He submits that a private complaint could be filed, and the Governor had to take his decision within three months as to whether sanction could be granted or not. Within the time limit, he satisfied himself, and, thus, accorded sanction for prosecution. It was not necessary for him to hold a parallel inquiry before according sanction. He submits that the writ petitioner is not remediless. He could challenge the order of sanction during trial, and therefore, at the threshold, the challenge in the form of writ petitions is not maintainable. Mr. Ravivarma Kumar places before us in detail the decisions of this court in relation to the revisional applications, when some of the accused had challenged initiation of cases pursuant to the impugned order of sanction. Therefore he has urged that these writ petitions are not maintainable.

20. Mr. Hasmath Pasha, learned advocate, appears for the complainants. He challenged the decision of the cabinet asking the Governor not to accord

sanction. He submits that the cabinet, without application of mind, decided and requested the Governor not to accord sanction. There was no enquiry insofar as the allegations made by the complainants were concerned. He submits that the entire case was based on documentary evidence collected from the public offices and, therefore, it was not necessary for the Governor to hold an investigation or inquiry before according sanction. The sanction was based on subjective decision of the Governor and such subjective satisfaction is not open to challenge before the court of law. He drew our attention in detail to the complaint lodged by the complainants, being Annexure R-1 to the statement of objections submitted by the complainants, and submits that the sanction is valid and lawful and it is not biased nor was it mala fide.

21. Mr. Vijaya Shankar, learned senior counsel appearing on behalf of the Governor, stated that he was not there to take side of any of the parties to the petition, but was appearing only to assist the Court. According to him, Article 163 of the Constitution provides for the Council of Ministers to aid and advise the Governor, but submits that there were exceptions where the Governor may act without the aid and advice of the Council of Ministers, and as illustration (which may not be exhaustive), learned senior counsel submitted that such advice of Council of Ministers would not be required under Article 200 relating to Assent of Bills; Article 164(1) relating to Appointment of Chief Minister; Article 239 relating to Administration of Union Territories; Article 356 relating to Failure of Constitutional Machinery in States; Article 174 relating to Sessions of the State Legislature, prorogation and dissolution; etc. He has, however, submitted that the decision making process in any of these cases would be subject to judicial scrutiny, just like the decision of the Governor under Article 356 is amenable to judicial scrutiny, which is settled law. However, according to him, in the case of grant of sanction by the Governor, the advice of the Council of Ministers may not be required to be taken, but once such advice is tendered, though the Governor is free to differ from the opinion of the Cabinet, but then, in the order of sanction, he ought to have discussed the reasons as to why he was not adhering to the advice of the Council of Ministers, which has not been done in the present case. He, also, draws our attention to the letter dated January 19, 2011, of the then Chief Minister (the petitioner) addressed to the Governor (enclosing copy of the resolution of the Council of Ministers), to submit that there is no reference of such letter in the order of sanction.

22. Having heard the learned counsel for the parties and on perusal of the record, we are of the opinion that, as the complaint was a private complaint, great care, caution and proper application of mind was necessary, particularly having regard to the uneasy relationship between the then Chief Minister (the petitioner) and the then Governor. If a crime was registered, followed by investigation for collection of evidence, both oral and documentary, the Governor could have in the hand materials for application of mind. The investigation agencies could have, also, recorded the statement of the accused, as the allegation was of acquisition of assets disproportionate to the known source of

income of the accused. With respect, the caution that ought to have been exercised is absent in this case.

23. We are of the opinion that refusal of the High Court rejecting the revisional application seeking stay of the cases filed pursuant to the order of sanction is not operating as *res judicata* in considering these writ petitions. The petitioner is not asking the identical relief in these writ petitions, as prayed for by other accused in the criminal revisional jurisdiction.

24. Section 197 of the Code of Criminal Procedure, 1973, is a protection to the public servant, so that his official acts do not lead to needless or vexatious prosecution. The section is intended to guard against vexatious proceedings against public servants, not to be prosecuted without the sanction of the higher authorities. Assuming for the sake of argument that the public servant has acted in excess of his duties, but there is reasonable connection between the act and the performance of the official duty, the excess will not be sufficient ground to deprive the public servant of protection. The question is not as to the nature of the offence, but whether it was committed by a public servant acting, or purporting to act as such in the discharge of his official duties.

25. Before Section 197 of the Code of Criminal Procedure, 1973 could be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty. The bar created by the said provision is absolute and, in the absence of sanction, cognizance of the offence is barred.

26. In a case where the accused failed to raise the question of valid sanction, the trial would proceed to its logical end by making a judicial scrutiny of the entire materials. In this case the accused has raised a serious doubt about the legality of the said sanction order. As such, we are unable to accept the contention of Mr. Ravivarma Kumar, learned Advocate General, that the question of sanction could only be agitated during trial. We are of the opinion that the sanction could be challenged at any stage.

27. The Supreme Court of India, in the case of Nanjappa Vs. State of Karnataka, reported in 2015 AIR SCW 4432, held that grant of proper sanction by a competent authority has been a *sine qua non* for taking cognizance of the offence. It has been, therefore, desirable that the question as regards sanction should be determined at an early stage.

28. We know our limitations in considering these writ petitions that we are not concerned with the decision, but we are concerned with the decision making process. We have carefully gone through the order of sanction. With respect, the Governor has quoted the complaint in detail in his order of sanction; virtually, there is no finding as to why he has accorded sanction in favour of the prosecution. There is no discussion as to why he was according sanction when his Council of Ministers have, already, appointed on December 22, 2010, Hon"ble Justice B. Padmaraj as one-man Commission to look into various irregularities in

denotification of lands.

29. The Supreme Court of India in *Madhya Pradesh Special Police Establishment Vs. State of Madhya Pradesh and Others*, , held that there could be matters where the Governor could act in his discretion, even though the Constitution has not expressly so provided. The Governor was, therefore, free to differ from his Council of Ministers, but no reason was mentioned as to why he was not accepting the opinion; there was, also, no reference to the said letter dated January 19, 2011, in the order of sanction. Such relevant considerations apparently, were absent in the mind of the Governor when the order granting sanction was passed.

30. Non-consideration of the relevant matters made the order of sanction illegal and resulted in failure of justice. We are thus of the opinion that the exercise of power by the Governor was not in accordance with well settled principles for sanctioning prosecution.

31. We, accordingly, set aside the order of sanction dated January 21, 2011, and remit the matter back to His Excellency the Governor for re-consideration in the light of our discussions above.

32. The writ petitions are, therefore, allowed in part.

33. We, however, direct the parties to bear their respective costs in this batch of writ petitions.