
(2003) 04 PAT CK 0135
In the Patna High Court
Case No : C.W.J.C. No. 31 of 2003

Dr. Sardar Deo Nandan Singh APPELLANT
Vs
The State of Bihar and Others RESPONDENT

Date of Decision : 22-04-2003

Acts Referred:

Citation : (2003) 04 PAT CK 0135

Final Decision : Allowed

Judgement

Chandramauli Kr. Prasad, J.—In both the writ applications common questions of law and facts arise and as such they are being disposed of together.

2. Dr. Sardar Deo Nandan Singh (Petitioner in CWJC No. 31 of 2003) was appointed as the Member of the Bihar State University (Constituent Colleges) Service Commission by notification dated 2nd of January, 1998 in exercise of the power conferred u/s 3 of the Bihar State University (Constituent Colleges) Service Commission Act, 1987 (hereinafter referred to as the Act) for a period of six years from the date of assuming the office or till the age of 62 years whichever is earlier. In pursuance of the said notification Petitioner assumed the office of the Member of the Commission on 2nd of January, 1998. Similarly Durga Prasad alias D. Prasad (Petitioner in CWJC No. 235 of 2003) was appointed as the Member of the Commission by notification dated 8th of March, 1999 for a period of six years or till the Petitioner attains the age of 62 years, whichever is earlier. In pursuance of the said notification this Petitioner assumed the office of the member of the Commission on 9.3.99.

3. Notifications appointing the Petitioners have been authenticated by the Deputy Secretary and Special Secretary of the State Government in the Higher Education Department and the notifications narrate that they have been appointed as Members in exercise of the power conferred on his Excellency the Governor of Bihar (hereinafter referred to as the Governor) u/s 3 of the Act. It is common ground that Petitioners have been appointed on the advise of the Council of Ministers.

4. While Petitioner Dr. Sardar Deo Nandan Singh was working as the Member of the Commission, a show cause notice was issued to him as to why he be not removed from the office of the Member. Petitioner submitted his reply and the Governor in purported exercise of his power u/s 4(1)(c) of the Act being satisfied that he had committed acts of omission and commission including misconduct, insubordination and is unfit to continue as Member of the Commission, removed him from his office with immediate effect. Similarly a show cause notice was issued to the Petitioner Durga Prasad alias D. Prasad dated 3.12.2002 in purported compliance of the provisions of Section 4 of the Act calling upon him to submit his show cause. This Petitioner submitted his show cause and on consideration of the same, the Governor in exercise of its power conferred u/s 4(1)(c) of the Act removed this Petitioner from office as a Member of the Commission. The term of office of this Petitioner was to come to an end a day later.

5. It is undisputed that show cause notice as also the notification of removal have been issued by order and in the name of the Governor of Bihar and has been signed by a Deputy Secretary in the Governor's Secretariat. It is further an admitted position that before issuing the show cause or removing the Petitioners, advise of the Council of Ministers was not taken and the Governor had exercised its power without any advise from the Council of Ministers.

6. These orders of removal have been impugned by the Petitioners in the present applications filed under Article 226 of the Constitution of India.

7. I have heard Mr. Indu Shekhar Pd. Sinha, Sr. Advocate and Mr. J.P. Shukla, Sr. Advocate! on behalf of the Petitioners whereas Mr. S.A. Narain, learned Advocate General has appeared on behalf of the State. Mr. Ram Balak Mahto, Sr. Advocate also assisted the Court and putforth the opposite view point.

8. Learned Counsel for the Petitioners submit that the impugned notifications have been issued by the Governor without the aid and advise of the Council of Ministers and this itself renders the impugned orders illegal in the eye of law. It has been pointed out that while exercising the power of removal u/s 4 of the Act the Governor is to take the aid and advise of the Council of Ministers and he having failed to do the same, the impugned orders are fit to be struck down on this ground alone. Submission of the learned Advocate General is in perfect tune with the stand of the Petitioners and he submits that under our Constitutional scheme the Governor is to act on the aid and advise of the Council of Ministers but unfortunately he has not chosen to do the same and consequently, he painfully submits that the notifications removing the Petitioners are illegal.

9. Mr. Ram Balak Mahto, however, sounds a different note. He submits that legislature while engrafting Section 4 of the Act specifically conferred power of removal to the Governor and in the face of the same, Governor is not to take aid and advise of the Council of Ministers while removing the Members of the Commission. He emphasises that the legislature had vested the Governor with

the absolute power of removal in its wisdom and as such the same has to be given effect to. He points out that whenever the legislature expects the Governor to exercise its power in consultation with the State Government, it is said so and in this connection he has drawn my attention to Section 10(2) of the Bihar State University Act and other similar provisions.

10. The rival submissions necessitates examination of provision of the Act as also the Constitutional scheme. Sections 3 and 4 of the Act which are relevant for the purpose read as follows:

3. Appointment of Chairman and members of the Commission.-

(1) The Commission will have a Chairman and maximum of six members and they shall be whole-timer.

(2) The Chairman and the Members of the Commission shall be appointed by the Governor and they shall hold office for a period of three years.

(3) The Governor shall have the power to re-appoint the Chairman or any member on the expiry of his term but in no case the tenure of the appointed or re-appointed Chairman or Member will continue after he attains the age of 62 years.

4. Resignation or removal of Chairman or member of the Commission.-

(1) The Chairman or Member of the Commission may, by writing under his hand addressed to the Governor, resign his office. The Chairman or Member of the Commission may be removed from the Qffice by the order of the Governor if he-

(a) is adjudged an insolvent; or

(b) engages himself during his term of office in any paid employment outside the duties of his office; or

(c) is in the opinion of the Governor, unfit to continue in office.

(2) The Chairman or any other member of the Commission may be removed from his office by the order of the Governor on the ground of misbehaviour after an enquiry is held in the manner prescribed by the Governor in the rules to be framed u/s 13.

(Underlining mine)

11. From a plain reading of Section 3 of the Act it is evident that the Chairman and the Members of the Commission are to be appointed by the Governor and the power of removal on the ground of misbehaviour after an enquiry Is held in the manner prescribed in the rules framed u/s 13 of the Act is also vested in the Governor. The Statute thus confers the power of appointment and removal upon the Governor. The question therefore is as to whether Governor is to exercise this power in its own discretion or is required to take the aid and advise of the Council of Ministers. This requires the examination of the constitutional provision.

12. The power of the Governor vis-avis the Council of Ministers has vexed the Supreme Court and the High Courts in the large number of cases. This question was examined by seven Judges Bench of the Supreme Court in the case of *Samsher Singh Vs. State of Punjab and Another*, in which A.N. Ray, C.J. (as he then was) and V.R. Krishna Iyer, J. (as he then was) wrote separate judgment. The judgment written by Krishna Iyer, J. was on behalf of P.N. Bhagwati, J. whereas Ray, C.J. wrote on behalf of other Judges. Ray, C.J. in paragraph 48 of the judgment wrote as follows:

The President as well as the Governor is the Constitutional or formal head. The President as well as the Governor exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Minister, save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion. Wherever the Constitution requires the satisfaction of the President or the Governor for the exercise by the President or the Governor of any power or function, the satisfaction required by the Constitution is not the personal satisfaction of the President or Governor but the satisfaction of the President or Governor in the Constitutional sense in the Cabinet system of Government, that is, satisfaction of his Council of Ministers on whose aid and advice the President or the Governor generally exercises all his powers and functions. The decision of any Minister or officer under rules of business made under any of these two Articles 77(3) and 166(3) is the decision of the President or the Governor respectively. These articles did not provide for any delegation. Therefore, the decision of Minister or officer under the rules of business is the decision of the President or the Governor.

13. Iyer, J. laid down the law in this regard in paragraph 153 of the judgment, which reads as follows:

We declare the law of this branch of our Constitution to be that the President and Governor, custodians of all executive and other powers under various Articles shall, by virtue of these provisions, exercise their formal constitutional powers only upon and in accordance with the advice of their Minister save in a few well-known exceptional situations. Without being dogmatic or exhaustive, these situations relate to (a) the choice of Prime Minister (Chief Minister), restricted though this choice is by the paramount consideration that he should command a majority in the House; (b) the dismissal of a Government which has lost its majority in the House but refuses to quit office; (c) the dissolution of the House where an appeal to the country is necessitous, although in these area the Head of the State should avoid getting involved in politics and must be advised by his Prime Minister (Chief Minister) who will eventually take the responsibility for the step. We do not examine in detail the constitutional proprieties in these predicament except to utter the caution that even here the action must be compelled by the peril to democracy and the appeal to the House or to the country must become blatantly obligatory. We have no doubt that de Smith's statement regarding royal assent holds good for the President and Governor in

India:

Refusal of the royal assent on the ground that the monarch strongly disapproved of a bill or that it was intensely controversial would nevertheless be unconstitutional. The only circumstances in which the withholding of the royal assent might be justifiable would be if the Government itself were to advise such a course—a highly improbable contingency—or possible if it notorious that a bill had been passed in disregard to mandatory procedural requirement; but since the Government in the latter situation would be of the opinion that the deviation would not affect the validity of the measure once it had been assented to, prudence would suggest the giving of assent.

14. Use of the expression "sanction of the Governor" in the Statute fell for consideration before the Supreme Court in the case of *State of Madhya Pradesh and others Vs. Dr. Yashwant Trimbak*, wherein it has been held as follows:

Mr. Jain's contention is solely based on the ground that in the Rule itself both the expressions "Governor" and "Government" have been used and, therefore, the expression "sanction of the Governor in Rule 9(2)(b)(i) would mean the personal sanction of the Governor. We are unable to accept this contention. The power to sanction is nothing but an executive action of the Government provided under the Rules. This is not a matter with respect to which the Governor is required under the Constitution to Act in his discretion. In this view of the matter, when the Governor has framed rules of business under Article 166(3) of the Constitution allocating his functions and it is the Council of Ministers which has taken the decision to sanction prosecution of the Respondent, we see no legal infirmity in the same. The Tribunal erred in law in coming to the conclusion that the sanction required under the rule is a sanction of the Governor.

15. Question as to whether satisfaction of the Governor would mean his personal satisfaction or that of the state Government came up before the Supreme Court in the case of *Bejoy Lakshmi Cotton Mills Ltd. Vs. State of West Bengal and Others*, in which it has been held as follows:

We are also in agreement with the views expressed by the High Court that the Governor's personal satisfaction was not necessary in this case, as this is not an item of business, with respect to which, the Governor is, by or under the Constitution, required to act in his discretion. Although the executive Government of a State is vested in the Governor, actually it is carried on by Ministers; and, in this particular case, under Rules 4 and 5 of the Rules of Business, referred to above, the business of Government is to be transacted in the various departments specified in the First Schedule thereof. Item 5 therein is the Department of Land and Land Revenue and the Governor has allotted the business of that Department to a Minister. We are further in agreement with the views of the High Court that the said Minister-in-charge, has got power to make Standing Orders regarding the disposal of cases, in his Department under the Rules of Business issued by the Governor on August 25, 1951, under Article

166(3) of the Constitution. In this case, there is no controversy that the Minister-in-Charge of the Department of Land and Revenue has made standing Orders on Nov. 29, 1951 by virtue of powers given to him under Rr. 19 and 20 of the Rules of Business.

16. In the case of State of U.P. and others etc. Vs. Pradhan Sangh Kshettra Samiti and others etc., while considering the use of expression "Governor" in Article 243(g) of the Constitution the Supreme Court held the expression to mean the State Government, which would be evident from the following passage of the judgment:

As regards the objection of the High Court whereas Article 243(g) requires, the Governor to specify the village, the Act gives this power to the State Government to do so, the High Court has failed to notice the provisions of the Constitution which equate the Governor with the State Government in exercise of his functions except where he is by or under the Constitution required to exercise the function in his discretion. In this connection, we may refer to provisions of Article 163 of the Constitution which state that 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 when they are to be exercised by him under the Constitution in his discretion. It is also not disputed that when a Minister takes action, according to the Rules of Business it is both in substance and in form the action of the Governor. Under the Constitution, therefore, while exercising the non-discretionary functions, the Governor cannot act without the aid and advice of the Council of Ministers. To do so will cut at the very root of the Cabinet system of Government we have adopted. In this connection, we may refer to the decision of this Court in *Samsher Singh Vs. State of Punjab and Another*, : *Samsher Singh Vs. State of Punjab and Another*, where the Constitution Bench of seven learned Judges had held that the executive power of the State is vested in the Governor under Article 154(1) of the Constitution. The expression. "State" occurs in Article 154(1) to bring out the federal principle embodied in the Constitution. Any action taken in the exercise of the executive power of the State vested in the Governor under Article 154(1) is taken by the Governor of the State in the name of the Governor as will appear in Article 166(1).

17. It is relevant here to state that the Governor of the State in exercise of its power u/s (Sic Article?) 166 had framed the rules of executive business and the business of the University Service Commission has been allocated to the Higher Education Department.

18. Article 163 of the Constitution provides for aid and advice to the Governor by the Council of Ministers, same reads as follows:

163. Council of Ministers to aid and advise 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.

19. From a plain reading of Article 163 of the Constitution and the judgments of the Supreme Court, it is evident that the Governor in the exercise of his function is to seek aid and advice of the Council of Ministers except those functions which are by and under the Constitution in his discretion. Article 163(1) of the Constitution provides for the aid and advice by the Council of Ministers to the Governor in exercise of his functions and those functions are not confined to the constitutional function. The question of exercise of function by the Governor in his discretion is in relation to such function enumerated in the Constitution. In my opinion, excepting the discretionary function of the Governor as enumerated in the Constitution, whenever any function is entrusted to the Governor he has to function with the aid and advice of the Council of Ministers, excepting in such cases when the Governor has to act on account of doctrine of necessity.

20. The discretionary power conferred to the Governor in the Constitution are the power to promulgate ordinance during recess of legislature under Article 213 of the Constitution, inflicting penalty of dismissal, removal or reduction in rank to a person belonging to civil service of the State or holder of the civil post under the State in the interest of security provided under Clause (c) of 2nd proviso to Article 311(2) of the Constitution and the power to suspend the Chairman or any other member of the Commission under Article 317(2) of the Constitution. In my opinion the power conferred on the Governor to appoint and remove under Sections 3 and 4 of the Act is not in the sphere where he is required to function in his discretion. Necessary corollary of the aforesaid conclusion is that the Governor has to act on the aid and advice of the Council of Ministers. The Governor has not done so and as such his order is completely without jurisdiction.

21. Mr. R.B. Mahto points out that in view of immunity to the Governor under Articles 163(2) and 361 of the Constitution the Governor's decision cannot be questioned in a court of law and on this ground alone no interference is called for by this Court. Neither the principle nor the precedents persuade me to accept this broad submission. As observed earlier the power of removal of the Member of the Commission is not within the individual judgment or discretion of the Governor, hence the bar is not attracted.

22. Reference in this connection can be made to a decision of the Supreme Court in the case of G. Krishna Goud and J. G. Krishta Goud and J. Bhoomaiah Vs. State of Andhra Pradesh and Others, in which it has been held as follows:

We must however sound a note of caution, absolute, arbitrary, law-unto-oneself mala fide execution of public power, if gruesomely established, the Supreme Court may not be silent or impotent. Assuming as proved the case of a President gripped by communal frenzy and directing commutation of all the penalties where the convict belongs to a certain community and refusing outright where the convict belongs to a different community, there may be, as Shri Garg urged, a dilemma for the Court. Assuming the Governor in exercise of his power under Article 161 refusing to consider cases of commutation where the prisoner is above 40 years of age as a rule of thumb or arbitrarily out of personal vendetta rejecting the claim of clemency of a condemned prisoner is the Court helpless? This large interrogation is highly hypothetical and whether the remedy is in Court or by impeachment in Parliament or by rising resentment in public opinion, it is not for us to examine now. Enough unto the day is the evil thereof.

23. Another case in which the power of judicial review fell for consideration before the nine Judges Bench decision of the Supreme Court in the case of S.R. Bommai and others Vs. Union of India and others etc. etc., and on perusal of separate judgments delivered by the Judges on this question what can be safely deciphered that proclamation under Article 356 of the Constitution is amenable to judicial review under Article 226 of the Constitution with a rider that subjective satisfaction of the President cannot be reviewed by court but material on which satisfaction is based upon. Power of judicial review on grounds of illegality, mala fide, extraneous consideration, abuse of power or fraud of power, irrelevance or irrationality is always available to the Court.

24. Yet another case in which the Court's power of judicial review in respect of the order passed by the Governor under the 2nd proviso (c) of Article 311(2) of the Constitution fell for consideration before the Supreme Court in the case of A.K. Kaul and another Vs. Union of India and another, in which in paragraphs 21 and 32 it has been held as follows:

21. It would thus appear that in S.R. Bommai though all the learned Judges have held that the exercise of power under Article 356(1) is subject to judicial review but in the matter of justiciability of the satisfaction of the President, the view of the majority (Pandian, Ahmadi, Verma, Agrawal, Yogeshwar Dayal and Jeevan Reddy, JJ.) is that the principles evolved in Barium Chemicals for adjudging the validity of an action based on the subjective satisfaction of the authority created by statute do not, in their entirety, apply to the exercise of a constitutional power under Article 356. On the basis of the judgment of Jeevan Reddy, J., which takes a narrower view than that taken by Sawant, J., it can be said that the view of the majority (Pandian, Kuldip Singh, Sawant, Agrawal and Jeevan Reddy, JJ.) is that:

(i) the satisfaction of the President while making a Proclamation under Article 356(1) is justiciable.

(ii) it would be open to challenge on the ground of mala fides or being based wholly on extraneous and/or irrelevant grounds;

(iii) even if some of the materials on which the action is taken is found to be irrelevant, the court would still not interfere so long as there is some relevant material sustaining the action;

(iv) the truth or correctness of the material cannot be questioned by the court nor will it go into the adequacy of the material and it will also not substitute its opinion for that of the President;

(v) the ground of mala fides takes in inter alia situations where the Proclamation is found to be a clear case of abuse of power or what is sometimes called fraud on power;

(vi) the court will not lightly presume abuse or misuse of power and will make allowance for the fact that the President and the Union Council of Ministers are the best judge of the situation and that they are also in possession of information and material and that the Constitution has trusted their judgment in the matter; and

(vii) this does not mean that the President and the Council of Ministers are the final arbiters in the matter or that their opinion is conclusive.

32. In our opinion, therefore, in a case where the validity of an order passed under Clause (c) of the second proviso to Article 311(2) is assailed before a court or a tribunal it is open to the court or the tribunal to examine whether the satisfaction of the President or the Governor is vitiated by malafides or is based on wholly extraneous or irrelevant grounds and for that purpose the Government is obliged to place before the court or tribunal the relevant material on the basis of which the satisfaction was arrived at subject to a claim of privilege under Sections 123 and 124 of the Evidence Act to withhold production of a particular documents or record. Even in cases where such a privilege is claimed the Government concerned must disclose before the court or tribunal the nature of the activities in which the government employee is said to have indulged in.

25. The Supreme Court had the occasion to consider the amenability of the order passed by the Governor in the case of Satpal and Another Vs. State of Haryana and Others, in which it has been held as follows:

There cannot be any dispute with the proposition of law that the power of granting pardon under Article 161 is very wide and does not contain any limitation as to the time on which and the occasion on which and the circumstances in which the said powers could be exercised. But the said power being a constitutional power conferred upon the Governor by the Constitution is amenable to judicial review on the certain limited grounds. The Court, therefore, would be justified in interfering with an order passed by the Governor in exercise of power under Article 161 of the Constitution if the Governor is found to have exercised the power himself without being advised by the Government or if the Governor transgresses - the jurisdiction in exercising the same or it is established that the Governor has passed the order without application of mind

or the order in question is a mala fide one or the Governor has passed the order on some extraneous consideration.

26. From the decisions of the Supreme Court referred to above, it is evident that the power of judicial review is available to this Court under certain circumstances. One of the circumstances in which the power of review can be exercised is, where the Governor has exercised the power himself without being advised by the Council of Ministers or if the Governor transgresses the jurisdiction in exercising the same. Here in the present case undisputedly the Governor had passed the order without the aid and advise of the Council of Ministers and thus transgressed his jurisdiction. In that view of the matter, the power of judicial review to set it right is available to this Court.

27. There is yet another reason which persuades me to hold the impugned orders to be illegal. As stated earlier the business of the University Service Commission has been conferred to the Higher Education Department of the State Government in accordance with the rules of executive business framed by the Governor under Article 166 of the Constitution. In fact these Petitioners were appointed as the Members of the Commission on the aid and advise of the Council of Ministers and the orders were authenticated by the officers of the Higher Education Department. However, while removing them the matter had not been dealt with by the Higher Education Department according to the rules of executive business. It is well settled that when a Minister takes decision in accordance with the Rules of Executive Business it is both in substance and form the action of the Governor. Thus the Petitioners have not been removed in the manner they were appointed.

28. Natural consequences of my holding the orders to be without jurisdiction is to set aside the impugned orders and direct for reinstatement of the Petitioners, who had not completed the term but in the facts of the present case, I am not inclined to do the same. Without going into the truth or otherwise of the finding recorded by the Governor in relation to the misdemeanour one thing is clear that the Head of the State had expressed his opinion in regard to unworthiness of the Petitioners for holding the office of the Members of the Commission. The State Government must take into consideration the opinion of the Governor and take decision in accordance with law as provided under the Rules of Executive Business. So long as said decision is not taken Petitioners, whose terms have not expired, shall not be re-inducted as Members of the Commission.

29. In the result, writ applications are allowed, impugned orders are quashed but that itself shall not entitle the Petitioners to be reinducted in the office and shall abide by the decision to be taken in accordance with law.