

(1994) 09 MAD CK 0034

In the Madras High Court

Case No : Writ Petition No. 7996 of 1994

Dr. Subramanian Swamy

APPELLANT

Vs

Deciding Authority and others

RESPONDENT

Date of Decision : 22-09-1994

Acts Referred:

Constitution of India, 1950 — Article 163, 356, 356(1), 361, 361(1)
Criminal Procedure Code, 1973 (CrPC) — Section 197
Negotiable Instruments Act, 1881 (NI) — Section 19
Prevention of Corruption Act, 1988 — Section 19, 19(2)

Citation : (1995) CriLJ 3380

Hon'ble Judges : J Kanakaraj, J

Bench : Single Bench

Advocate : Subramanian Swamy, for the Appellant; Mohan Parasaran, K. Parasaran for R. Muthukumarasamy and M. Vellaiswami A.G.P., for the Respondent

Judgement

1. The petitioner is the Chairman of the Tamizhaga Nallatchi Iyakkam. He is also a former Union Cabinet Minister for Commerce, Law and

Justice. He is a well-known figure in politics. He has filed this writ petition for the issue of a writ of mandamus to direct the first respondent to grant

necessary sanction for prosecuting the second respondent under the provisions of Section 19 of the Prevention of Corruption Act, 1988, in

compliance with his request made on 2-11-1993. The first respondent is described as ""the Deciding Authority and his Excellency the Governor of

Tamil Nadu, Mardas."" The second respondent is the Hon"ble Chief Minister of Tamil Nadu and the third respondent is the State of Tamil Nadu

represented by the Chief Secretary to Government. When the writ petition came up for admission on 29-4-1994, I entertained a doubt regarding

its maintainability. Therefore, I ordered notice of motion returnable by 14-6-1994. All the respondents are now represented by counsel and counter-affidavits have been filed by the second and third respondents. All of them raised the plea that the writ petition as framed is not maintainable against the first respondent. Since this question has been raised as a preliminary issue based on a Division Bench judgment of this Court in *Dravida Munnetra Kazhagam, The etc. v. The Governor of Tamil Nadu* 1994 1 MLW 145, I asked the petitioner as to how he can get over the said binding authority.

2. The petitioner argues that he has not committed the mistake of impleading the Governor and thus incurring wrath of Article 361 of the Constitution of India and on the other hand he has only impleaded the Deciding Authority u/s 19(2) of the Prevention of Corruption Act, 1988. He relied on the judgment of *Naga People's Movement for Human Rights (NPMHR) Vs. Union of India (UOI) and Others*, and *Dr. S.C. Barat and Another Vs. Hari Vinayak Pataskar and Others*, . He also buttresses his argument by comparing the power of the Authority u/s 19(2) of the Prevention of Corruption Act, 1988 with the power of the Speaker under the Tenth Schedule to the Constitution of India. He refers to *Shri Kihota Hollohon Vs. Mr. Zachilhu and others*, for the proposition that judicial review is possible in the case of the power of the Speaker while acting on a petition for disqualification and argues that consequently the power of the Deciding Authority u/s 19(2) of the Prevention of Corruption Act, 1988 is also justiciable. According to him the Governor while acting as Deciding Authority exercises his discretion under Article 163 of the Constitution of India. In other words he is not acting on the aid and advise of the Council of Ministers. He adds that the charges referred to by him in his petition dated 2-11-1993 are not frivolous and the Deciding Authority cannot sit over the matter for such a long time without passing orders one way or the other. He also refers to the recent trend of the law, as laid down by the Supreme Court in the writ petitions relating to the dismissal of certain Governments based on Ayodhya disputes. The Supreme Court has pointed out that in a fit and proper case it will be possible for the Court to examine the correctness of the exercise of the power of the President of India while invoking the Article 356(1) of the Constitution of India. He

has referred to a letter addressed by the first respondent to the Hon'ble the Prime Minister of India on 18-3-1994 which amply establishes the seriousness of the charges contained in his petition dated 2-11-1993.

2A. Mr. K. Parasaran, learned Senior Counsel appearing for the second respondent says that none of the arguments advanced by the petitioner

can give any scope for this Court to escape the binding judgment of the Division Bench in the case above cited. He also affirms that the Governor

while acting u/s 19(2) of the Prevention of Corruption Act, 1988 exercises his discretion and is not assisted by the aid and advice of the Council of

Ministers. He points out that there is no authority as Deciding Authority either in the Prevention of Corruption Act or in the Constitution of India.

That word has been coined by the petitioner himself. So far as the sanction for prosecution of the second respondent, he admits that it is the

Governor who can pass orders and this question has been set at rest by the Supreme Court in *State of Maharashtra Vs. Ramdas Shrinivas Nayak*

and Another, . While doing so, he no doubt exercises his function as Governor in his own discretion. He points out the difference between Article

74 and Article 163 of the Constitution of India, and says that Article 361 of the Constitution of India gives immunity to the Governor while he acts

at his own discretion. Where he acts on the aid and advice of the Council of Ministers, his actions may be questionable by resorting to the second

proviso to Article 361(1) of the Constitution of India.

3. After giving my careful consideration to the rival submissions I have absolutely no doubt in my mind that the judgment of this Court in *Dravida*

Munnetra Kazhagam, etc. v. The Governor of Tamil Nadu (1994) 1 Mad LW 145 is squarely applicable to the facts of the present case. In the

said judgment the Division Bench was concerned with an order of the Governor rejecting the request for sanction to prosecute the Chief Minister

u/s 197 Criminal Procedure Code and the Section 19 of Prevention of Corruption Act, 1988. The only difference in this case is that the Governor

has not passed any orders on the complaint made by the petitioner on 2-11-1993. As rightly pointed out by Shri K. Parasaran, whether the

Governor has passed an order or has not passed any orders, the ratio is the same, namely, the Governor cannot be called into question, on his

silence over the matter. It is open to the Governor to exercise his power and

perform his duties in any particular manner. Article 361(1) of the Constitution of India says that he "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." I have already indicated that the distinction sought to be raised by the petitioner by referring to the Governor as the Deciding Authority is not based on any legal foundation. As rightly pointed out by the respondents there is no such an authority as the Deciding Authority in the Prevention of Corruption Act. The Division Bench has elaborately considered all the relevant authorities on the subject and has given a clear and cogent verdict on the issue. In my opinion, it will be a judicial waste of time to go through the exercise once over again. The verdict of the Division Bench is as follows :-

In the result, the present petition which impleads the Governor of Tamil Nadu as a party and seeks the issue of a writ as against him besides quashing of the order is not maintainable. Consequently, the writ petition is dismissed as not maintainable.

I will only refer to the arguments of the petitioner to distinguish his case from the said judgment. The first reference is to Naga People's Movement for Human Rights (NPMHR) Vs. Union of India (UOI) and Others, . That case related to the power of the Governor exercised u/s 3 of the Armed Forces (Special Powers) Act, 1958, declaring certain Districts as disturbed area. The Court only held that the validity of the declaration could be decided without the Governor as a party to the case. The Court found that the correctness of the declaration could be ascertained from the materials to be supplied by the State Government. Therefore, they directed the deletion of the Governor from the array of parties. I do not see how this judgment will help the petitioner. The Gauhati High Court itself points out the following three kinds of act which are performed by a Governor and under what circumstances immunity can be claimed under Article 361 of the Constitution of India and whether such immunity cannot be claimed. The following passage is apposite at page 6 of AIR :-

Thus, we find three kinds of acts that may be performed by the Governor in exercise of his powers. First, the powers exercised or acts performed with the aid and advice of the Council of Ministers. Second, those powers

exercised or acts performed in exercise of his discretion. Third, those which he may exercise being the ex officio head of any institution, e.g. the University of which the Governor is the Chancellor. It has been held in a number of cases that when the Governor acts as the ex officio head of such an institution he cannot claim immunity under Art. 361 because he exercises a special power and he is not required to act with the aid and advice of the Council of Minister.

4. Dr. S.C. Barat and Another Vs. Hari Vinayak Pataskar and Others, relates to the power of the Governor while acting as a Chancellor of a

University. It is now well known that the Governor exercises his power as the Chancellor under different provisions of the University Acts. While

doing so, he does not act "in the exercise and performance of the powers and duties of his office." Therefore, this judgment will not also help the

petitioner. So far as the judgment of the Supreme Court in Shri Kihota Hollohon Vs. Mr. Zachilhu and others, , the same relates to the power of

the Speaker under the Tenth Schedule of the Constitution of India. The Supreme Court has pointed out that power relates to an adjudicatory

function of the Speaker. It is in that context that the apex court observed as follows :-

It is, therefore, inappropriate to claim that the determinative jurisdiction of the Speaker or the Chairman in the Tenth Schedule is not a judicial

power and is within the non-justiciable legislative area.

Similarly, the judgment of the supreme Court extending the judicial review in the areas relating to the power of the President under Article 356 of

the Constitution of India are different and totally inapplicable while considering the scope of Article 361 of the Constitution of India. It has to be

remembered that the President when he acts under Article 356 of the Constitution of India is assisted by the aid and advice of the Council of

Ministers under Article 74 of the Constitution of India. I have already held that such actions of the President or the Governor can be challenged

under the second proviso to Article 361 of the Constitution of India.

5. Therefore, on one of the points raised by the petitioner takes this case out of the ratio and purview of the decision of the Division Bench of this

Court in Dravida Munnetra Kazhagam, etc. v. The Governor of Tamil Nadu, 1994 1 Mad LW 145. I was inclined out of curiosity, to ask the

Counsel for the first respondent as to why no orders have been passed, one way or the other on the petition dated 2-11-1993. Shri K. Parasaran, rightly cautions me that once I hold that I have no jurisdiction over the matter such a question is totally improper and inappropriate. I do see considerable force in this argument and therefor, I do not propose to go into the merits of the case nor even the letter dated 18-3-1994 addressed by the Governor to the Hon''ble the Prime Minister of India.

6. In fine, the writ petition is dismissed as not maintainable. No costs.

7. Petition dismissed.