

(2014) 09 DEL CK 0367

In the Delhi High Court

Case No : W.P.(C) No. 6037/2014 and CM No. 14713/2014 (for stay)

Kamran Siddique

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 26-09-2014

Acts Referred:

Constitution of India, 1950 — Article 163(2), 226, 239AA
Delhi Lokayukta and Upalokayukta Act, 1995 — Section 3, 5, 5(5)

Citation : (2014) 09 DEL CK 0367

Hon'ble Judges : G. Rohini, C.J.;Rajiv Sahai Endlaw, J

Bench : Division Bench

Advocate : Kamran Malik, Advocate for the Appellant; Sanjay Jain, ASG, R.D. Bhardwaj, Rahul Jain and Hashmat Nabi, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

Rajiv Sahai Endlaw, J.—This petition under Article 226 of the Constitution of India, filed as a Public Interest Litigation, avers that the respondent no. 5 Shri Asif Mohd. Khan, Member of the Legislative Assembly of Delhi from the Okhla Constituency is misusing public funds of Rs.2.8 crores belonging to the MLA-Local Area Development Fund, for beautification of graveyard in / at Batla House as luxury project by demolishing the existing boundary wall thereof (which was not in need of any repair or reconstruction) and in rebuilding the same. It is further the averment that though the sewer lines, roads, streets in the said Constituency are in a poor condition, resulting in water logging, and though there are no government dispensaries, public toilets in the locality and the primary schools existing have very poor infrastructure but instead of using the public monies on the same, they are being wasted as aforesaid. Averments are also made of a nexus between the respondent no. 5 MLA and the contractors, of receiving kickbacks from the contractors engaged to do the aforesaid work which will benefit none of the residents of the Constituency.

2. It is further the case in the petition that the respondent no. 5 MLA has also

indulged in encroachment over public land and inquiries in that regard pending before the Lokayukta, Delhi are held up owing to there being a vacancy since 5th November, 2013 in the Office of the Lokayukta, Delhi. Other complaints against the respondent no. 5 MLA are also stated to be pending at final stage in the Office of the Lokayukta, Delhi.

3. Reliefs of (i) restraining the misuse of the said funds; (ii) direction for Court monitored investigation by Special Investigation Team or the CBI into misuse of public funds and abuse and misuse of power by public functionaries and the contractors; (iii) direction for extension of the term of the last holder of the Office of the Lokayukta, Delhi till the formation of new Government of NCT of Delhi; and, (iv) a direction to the Union of India and Govt. of NCT of Delhi for allotting land for graveyard in Shaheen Bagh, Okhla, are claimed.

4. The petition had come up first before this Court on 10th September, 2014 when we had asked the learned ASG appearing on advance notice to obtain instructions on the aspect of filling up of the vacancy in the Office of the Lokayukta, Delhi.

5. The learned ASG on 17th September, 2014 contended that as per Section 5 of the Delhi Lokayukta and Upalokayukta Act, 1995 a person appointed as a Lokayukta can hold office for a term of five years only and is not eligible for re-appointment thereafter and has vide sub-Section (6) of Section 5 been expressly made ineligible for further appointment as Lokayukta. He has further drawn our attention to Section 3 of the said Act which provides for the appointment of the Lokayukta by the Lt. Governor, with the prior approval of the President and after consultation with the Chief Justice of the High Court of Delhi and the Leader of Opposition in the Legislative Assembly and if there be no such leader, a person selected in this behalf by the Members of the Opposition in that House in such manner as the Speaker may direct. He has contended that owing to the status of the Delhi Legislative Assembly, there is difficulty in appointment of the Lokayukta.

6. We may notice that sub-Section (5) of Section 5 of the said Act requires a vacancy in the Office of the Lokayukta to be filled up "as soon as possible but not later than six months from the date of occurrence of such vacancy". Here, what to talk of six months, more than ten months have already elapsed since the date of the Office of the Lokayukta, Delhi having fallen vacant. The legislative mandate, of the vacancy in the said office being filled up "not later than six months" is clearly being violated.

7. Though, owing to none of the contesting political parties getting the requisite majority in the elections to the Legislative Assembly of Delhi held in December, 2013, there undoubtedly is a hiatus in the Legislative Assembly of Delhi with there being no government and no opposition and though the Supreme Court in *State of Gujarat and Another Vs. Hon"ble Mr. Justice R.A. Mehta (Retd.) and Others*, has held that the Governor in the matter of appointment of Lokayukta must act in accordance with the aid and advice tendered to him by the Council of

Ministers but we are still of the view that the Office of the Lokayukta cannot be so kept vacant and the said circumstances also do not justify the legislative mandate contained in Section 5(5) to be subverted and defeated. The statutory provisions make it mandatory on the part of the State to ensure that the Office of the Lokayukta is filled up without any delay.

8. The Office of the Lokayukta is very significant for the people of the State, as it provides for a mechanism through which the people of the State can get their grievances heard and redressed against maladministration; in a State where society suffers from moral denigration and simultaneously from rampant corruption, there must be an effective forum to check the same (Ref. Justice R.A. Mehta *supra*) . The prevalent scenario, has resulted in a situation where though there is a Legislative Assembly and its Members, but the Office of Lokayukta which was meant to be a watchdog *inter alia* over them, being non- functional and / or having ceased to exist and which situation cannot be permitted, at least by this Court, to prevail for long. Today, the citizens of Delhi though have their elected representatives in office in the form of Members of Legislative Assembly of Delhi and who continue to enjoy the perks and benefits of their office, as is evident from their also availing of the Local Area Development Scheme Funds but owing to the said MLAs failing to form a Government, the Office of the Lokayukta, constituted to inquire into allegations against them, remains vacant. The Supreme Court recently in *K. Saravanan Karuppasamy Vs. State of Tamilnadu* , though in relation to the Office of the Chairperson of the State Human Rights Commission, has held that having regard to the benevolent provisions of the Protection of Human Rights Act, 1993 and the effective mechanism for redressal of grievances of citizens against human rights violations provided therein, the Office of the Chairperson cannot be allowed to remain vacant for a long time.

9. The situation however, we find, is not irremediable. The Supreme Court in *Justice R.A. Mehta (Retd.) (supra)* itself has held that an exception to the rule, of the Governor in the matter of appointment of Lokayukta acting in accordance with the aid and advice of the Council of Ministers, will have to be made when there is no Council of Ministers in existence or the Legislative Assembly stands dissolved or suspended. Referring to Article 163(2) of the Constitution, it was held that it would be permissible for the Governor to act without ministerial advice in certain situations depending upon the circumstances, even though they may not specifically be mentioned in the Constitution as discretionary functions; there may be circumstances where ministerial advice is not available at all; moreover *vide* Article 163(2) , the Governor himself is the final authority to decide upon the issue whether he is required by or under the Constitution to act in his discretion. It was yet further held that the Governor is called upon to act upon his own discretion where the Council of Ministers, because of some incapacity or other situation, is disentitled from giving advice or in the case of complete breakdown of democracy or where one Ministry has resigned and the other alternative Ministry cannot be formed.

10. The Supreme Court in *Mr. Justice Chandrashekaraiah (Retd.) Vs. Janekere C. Krishna and Others etc.*, has also held that though the Executive is responsible for appointment of the Lokayukta but the same does not preclude the Chief Justice from initiating the appointment process, particularly in the event of the failure of the Executive to take necessary steps. Therefrom also, we draw strength to observe that the Lt. Governor, Delhi, even without the aid and advice of the Council of Ministers would be entitled in the present situation to proceed with the filling up of the vacancy in the Office of the Lokayukta, Delhi.

11. The aforesaid principles, though pronounced by the Supreme Court in relation to the Gujarat Lokayukta Act, 1986 and Karnataka Lokayukta Act, 1984, in our opinion apply squarely to the situation which has developed in Delhi. It cannot also be lost sight of that Delhi, as distinct from the States of Gujarat and Karnataka to which the judgments aforesaid pertain, enjoys a special status under Article 239AA of the Constitution of India and the Lt. Governor, Delhi enjoys certain special powers as noticed by a Division Bench of this Court as far back as in *Om Parkash Pahwa and Others Vs. State of Delhi and Others*, .

12. The doctrine of necessity, as invoked by the Supreme Court in *State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another*, , reiterated in *Madhya Pradesh Special Police Establishment Vs. State of Madhya Pradesh and Others*, , though in the context of grant of sanction for prosecution under the Prevention of Corruption Act, 1947, to hold that the advice of the Council of Ministers can be dispensed with, can also be beneficially applied in the present scenario to enable the Lt. Governor, Delhi to fill up the vacancy in the Office of the Lokayukta, Delhi.

13. We therefore request the Lt. Governor, Delhi to forthwith initiate the process of filling up of the vacancy in the Office of the Lokayukta, Delhi.

14. As far as the other grievance is concerned, the petitioner himself along with the petition has filed the "Guidelines for Member of Legislative Assembly Local Area Development Scheme" as available on the website of the Govt. of NCT of Delhi and a perusal whereof reveals:-

(i) that the MLAs are required to recommend the work to be carried out in their constituencies;

(ii) the said work is to conform to the general pattern of programmes and projects being implemented by the local bodies / departments of Govt. of NCT of Delhi;

(iii) such works are to be sanctioned and implemented in the same manner as the other works of those bodies are being sanctioned and implemented;

(iv) technical and administrative sanction for the works for which the MLAs have exercised their choice is to be given after following the normal departmental procedures applicable to the local bodies and other Government Departments;

(v) parameters laid down of the works which can be carried out under the said

scheme and the non-permissible works have also been specified;

(vi) the MLAs while recommending any work are required to also submit detailed cost estimate thereof to be prepared as per Delhi Schedule of Rates-2012 (DSR-2012) as adopted by GNCTD vide Pr. Secretary(Finance) Order No. 8/2/2007-A/CD-01295543/2012- 13/Exp-4/854-73 dated 12th September, 2012;

(vii) the funds are to be released and placed at the disposal of the executing agency on the basis of the said information;

(viii) the implementing agencies / departments are to utilize the funds in accordance with CPWD Manual and the General Financial Rules; and,

(ix) there is an obligation to ensure that the works to be executed should have a public purpose and not a private purpose.

15. It is thus not as if the funds under the scheme are disbursed to the MLA or that the MLA has an absolute discretion in the matter. The spending of the said funds on works, though recommended by the MLA, has been made subject to the same checks and balances as applicable to any other government work.

16. As far as the contention of the petitioner, of the works recommended by the respondent no. 5 MLA being not needed and not in public interest and the area/ constituency being in need of other works, there will always be a difference of opinion / perception. However the scheme and to which there is no challenge having vested the choice, of which work is to be carried out, in the MLA who is the elected representative of the residents of the area / constituency, this Court cannot lightly interfere in the same.

17. As far as the contention of the petitioner, of a nexus between the MLAs and the contractors and the MLAs receiving kickbacks from the contractors, is concerned, the petitioner claims to have made a representation dated 23rd August, 2014 to the Lt. Governor in this regard. The learned ASG assures us that the same shall be duly considered.

18. We accordingly dispose of this petition by requesting the Lt. Governor in terms of para 13 hereinabove, including by calling a Special Session of the Legislative Assembly of Delhi for nominating a person in place of the Leader of Opposition to be consulted in the matter of appointment of the Lokayukta, Delhi and further, in the face of the vacancy in the Office of the Lokayukta, also give due consideration to the representation of the petitioner and take appropriate action if necessary thereon.