

---

**(2008) 11 AHC CK 0099**  
**In the Allahabad High Court**  
**Case No : Writ Petition No. 6700(MB) of 2008**

Mohd Ashgar Khan

APPELLANT

Vs

State of U.P.and others

RESPONDENT

---

**Date of Decision :** 15-11-2008

**Acts Referred:**

Constitution of India, 1950 — Article 226, 361(1)  
Right to Information Act, 2005 — Section 17(1), 17(2)

**Citation :** (2008) 11 AHC CK 0099

**Hon'ble Judges :** Pradeep Kant, J and Ved Pal, J

**Final Decision :** Allowed

---

## Judgement

Pradeep Kant, J.—This writ petition raises very important and serious issues arising out of the provisions of The Right to Information Act, 2005 (hereinafter referred to as RTI Act), i.e. the scope thereof, its implementation, the functioning of the Chief Information Commissioner in due discharge of his duties under the Act, the control of the Governor over his functioning including the power to make reference under Section 17(1) of the RTI Act to the Supreme Court for holding an enquiry and the power to suspend and restrain the Chief Information Commissioner from attending the office during enquiry under Section 17(2) of the Act.

2. RTI Act is an Act providing for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith or incidental thereto.

3. The purpose and object of the Act is to bring transparency in the Government functioning so as to minimize the corruption and to have check on the arbitrary decisions and actions of the Government and their instrumentalities, who are accountable to the public. In furtherance of the aforesaid object and for

removing the mischief, the Act prescribes detailed procedure for seeking information from public authority through the Public Information Officer. The Act provides constitution of a Central Information Commission or the State Information Commission, as the case may be, of which the Chief Information Commissioner is the head.

4. The Act consciously prescribes that an information which is not exempted under the provisions of the Act cannot be refused to be supplied nor the person who is seeking the information is required to give reasons for having, such information. It also balances and harmonises the conflicting interest with other public interest.

5. For the purpose of the present controversy the provisions of subsection (1) of Section 17 and subsection (2) of Section 17 of the Act are the only provisions on which arguments have been advanced on behalf of the learned counsel for the petitioner as well as the State. Provisions of Section 17(1) and 17(2) of the Act are being quoted below:

"17(1) Subject to the provisions of subsection (3), the State Chief Information Commissioner or a State Commissioner shall be removed from his office only by order of the Governor on the ground of proved misbehaviour or incapacity after the Supreme Court, on a reference made to it by the Governor, has on inquiry, reported that the State Chief Information Commissioner or a State Information Commissioner, as the case may be, ought on such ground be removed.

(2) The Governor may suspend from office, and if deem necessary prohibit also from attending the office during inquiry, the State Chief Information Commissioner or a State Information Commissioner in respect of whom a reference has been made to the Supreme Court under subsection (1) until the Governor has passed orders on receipt of the report of the Supreme Court on such reference."

6. The cause of action for the petitioner for filing the present petition is the order passed by the Governor suspending the Chief Information Commissioner (petitioner) vide order dated 9th July, 2008 and also restraining him from coming to the office. The writ petition, though, besides claiming writ of certiorari against the aforesaid order also seeks declaration for declaring the Section 17(1) and 17(2) of the Act as ultravires the provisions of Articles 13 and 14 of the Constitution.

7. The petitioner, Justice M.A. Khan (Retired) was appointed Chief Information Commissioner on 20th March, 2006. He was administered the oath of his office on 22nd March, 2006. Besides other pleas of malice in the aforesaid action, it is the specific allegation that since the petitioner required the State Government to disclose certain information which caused inconvenience to the State Government, therefore, by taking recourse to the aforesaid provisions of Section 17(1) and 17(2) of the Act, the action has been taken so as to restrain the petitioner from discharging his official duties as Chief Information Commissioner.

8. We need not enter into these questions and about the validity of the reference, at this stage as Sri S.M.A. Kazmi, learned Senior Advocate, appearing for the petitioner has very categorically stated that he does not press the aforesaid issue at this stage since the enquiry is pending before the Supreme Court. He however, submits that the order being malafide, not being supported by any cogent and reliable material, are liable to be quashed on this ground alone.

9. The points which have been urged are that Section 17(1) of the Act is ultravires the constitutional provisions of Articles 13 and 14 and that Section 17(2) is also unconstitutional for the same reason as it gives wholly uncanalized, unguided and undefined powers to the Governor to suspend the Chief Information Commissioner. Further argument is that if the Governor is taken to be empowered to order suspension of the Chief Information Commissioner on every matter where a reference has been made, and is also authorized to restrain the Chief Information Commissioner from attending the office, it would mean in substance, the exercise of the same powers which had been given under Section 17(3) to the Governor for removing the Chief Information Commissioner which is not the intention of the Act.

10. In support of the plea it has been urged that the post and office of the Chief Information Commissioner is an office which has been kept immune and insulated from the influence of the political parties or the political leaders in power or so to say in other words, the Chief Information Commissioner is under a legal obligation to provide information as may be asked for, against the State Government without fear and favour irrespective of the fact that whether such disclosure suits the party in power or the State Government or not.

11. Elaborating the aforesaid argument it has been submitted that, if any, fetter is placed upon the impartial functioning of the Chief Information Commissioner by subjecting him to suspension, merely because he has asked the State Government to disclose certain information which it does not want to be supplied it will not only overshadow the office of the Chief Information Commissioner but it will also negate the very object and purpose of the Act.

12. In regard to subsection (1) of Section 17 it has also been submitted that whenever a reference is made by the Governor to the Supreme Court the Court can see the validity of the reference as well as the material on the basis of which such a reference has been made, as it is not the authority of the Governor to make the reference on any ipsedixit of complaint made, unless it is not found to be groundless and prima facie makes out some serious charge of misbehaviour or incapacity of the Chief Information Commissioner in discharge of his duties so in case of such a charge being proved, he can be removed.

13. Inline with the aforesaid argument, it has been greatly emphasized that subsection (2) of Section 17 though gives power of suspension of the Chief Information Commissioner and also the power to restrain him from attending the

office during enquiry to the Governor but this power can only be exercised when there is material to the effect, to show that a charge of misbehaviour is made out which may result into removal of Chief Information Commissioner, if found proved. Even in such a case it has been argued that the Governor has no power to suspend unless an enquiry is initiated by the Supreme Court. Merely on making the reference to the Supreme Court, the Governor would not have any power to either suspend the Chief Information Commissioner or to restrain him from attending the office.

14. An argument has also been raised that in fact the power of suspension of the Chief Information Commissioner and restraining him from attending the office during enquiry is bereft of any guidelines and rather gives arbitrary powers to the Governor which are absolutely uncanalized and unguided, the provision therefore, is ultravires, the constitutional provisions.

15. A reference in the instant case by the Governor under Section 17(1) of the Act was made sometimes in May 2008 with respect to the allegations made in various complaints received by the State Government.

16. It had come during the arguments that because of some procedural irregularity in forwarding the reference, the Supreme Court earlier sent back the reference to the Governor for being sent through proper channel and later on the said reference was received in the Registry of Supreme Court on 10th July, 2008. The Supreme Court under the signatures of the Registrar (Judicial), issued notice to the petitioner on 12th July, 2008 fixing 29th August, 2008 as the date for appearance of the petitioner before the Supreme Court to participate in the enquiry. The suspension order by the Governor was passed on 9th July, 2008 itself alongwith an order of restraint directing the petitioner not to attend the office of the Chief Information Commissioner.

17. Leaving aside the various pleas for the purpose of interim relief, the learned counsel for the petitioner has submitted that even assuming that the power of suspension could have been exercised by the Governor, the order of suspension could not have been passed on 9th July, 2008 as by that date no enquiry was initiated by the Supreme Court nor was pending; submission is that mere reference by the Governor of the complaints received from the State Government to the Supreme Court would not mean "initiation of enquiry" or "pendency of the enquiry."

18. Section 17(2) says that the Governor may suspend the Chief Information Commissioner and if finds necessary may prohibit him also from attending the office "during enquiry" in respect of whom a reference has been made to the Supreme Court under Section 17(1).

19. Learned counsel has also pleaded and urged that the entire action of making the reference and suspending the petitioner with restraint from attending the office are, as a result of malafide action based on no material otherwise for a collateral purpose, i.e. of getting rid of the petitioner, who had asked the Chief

Secretary of the State, to supply certain information which caused inconvenience to the State Government, and therefore, also the order is bad in law.

20. In response Sri Jai Deep Narain Mathur learned Additional Advocate General submitted that neither the provision of Section 17(1) of the Act or 17(2) of the Act is ultravires of any constitutional provision nor the provision of Section 17(2) suffers from the vice of excessive delegation; submission is that the power to suspend has been vested with the constitutional authority namely; the Governor of the State, and therefore, it cannot be presumed that the Government would act maliciously or that he would suspend the Chief Information Commissioner for no valid reason only on whims and fancy. The power of suspension and restraint from attending the duties having been vested with the Governor of the State, a constitutional functionary the question of arbitrary exercise of power would not arise.

21. In response to the plea that the suspension order has been passed on 9th July, 2008 by which date the Supreme Court had not taken cognizance of the reference nor had issued any notice and thus, there was no enquiry pending, it has been argued that on making the reference recourse to the provisions of Section 17(2) can be taken as making reference to the Supreme Court, itself would mean "initiation of enquiry" and therefore, the moment, Governor makes a reference he assumes the jurisdiction and authority to take recourse to the provisions of Section 17(2) as per his discretion and satisfaction.

22. Defending the impugned order of suspension an argument has also been raised that the Governor or his action is immune from scrutiny by the Court in view of Article 361 (1) of the Constitution and therefore, neither the plea of malafide nor the invalidity of the order can be looked into by the Court. Corollary to the aforesaid argument is that the discretion which is exercised by the Governor for passing an order either in making a reference under Section 17(1) or suspending the Chief Information Commissioner under subsection (2) is an order passed on his personal discretion and not on the aid and advice of the Council of Ministers and therefore, such personal discretion exercised by the Commissioner is immune from judicial scrutiny. He relies upon the case of *Shamsher Singh v. State of Punjab and another*, (1974) 2 SCC 831.

23. Sri Mathur also submitted that if a reference is made by the Governor to the Supreme Court, the Supreme Court cannot refuse to enquire into the matter as it is acting as an Inquiring Authority and therefore, the technical pleas, that till a notice is issued or enquiry is initiated by issuing chargesheet by the Supreme Court which in fact is not required to be issued and therefore, the enquiry cannot be treated to be pending unless such a notice is issued, is in essence, reading the provision beyond its scope.

24. From the arguments, the questions which arise for consideration can be summarized as follows:

(i) Whether the Court can look into the validity of reference made by the

Governor to the Supreme Court or to say in other words the Court would be at liberty to test as to whether there was any such material which, prima facie constitutes serious misconduct or misbehaviour or incapacity of the Chief Information Commissioner that in case of the same having proved, may entail in removal of the Chief Information Commissioner or the matter is to be left solely on the discretion of the Supreme Court to adjudicate upon this issue also.

This point has arisen looking to the defence of the State that the Supreme Court cannot reject the reference and it has to hold an enquiry, if a reference is made by the Governor, which means that irrespective of the fact, whether the complaint made or charges levelled, do constitute even on their face value, any misbehaviour or incapacity or not, but if a reference is made by the Governor, the Supreme Court will be bound to enquire and submit a report on the charges levelled, and if such charges are found to be proved the Governor will have the authority to remove him though at no point of time the gravity of the charges may be enquired into or adjudicated upon.

(ii) What is the nature of the reference which is made to the Supreme Court and the nature of the power which is exercised by the Supreme Court in dealing such a reference as according to the petitioner it is not a judicial power which is being exercised under the Constitution but a power which has "been conferred by the RTI Act only for making an enquiry, which may be referable to Article 258 of the Constitution.

This point gains importance in view of the argument of the counsel for the petitioner that even if on the report submitted by the Supreme Court, an order of removal of the Chief Information Commissioner is passed by the Governor, the said order is still open to judicial review by the High Court under Article 226 of the Constitution.

(iii) Whether protection under Article 361(1) of the Constitution will be available to the Governor, while exercising his power under the provisions of the RTI Act.

Corollary to the aforesaid argument is that likewise, if any order under Section 17(2) of the Act is passed that would also be open to judicial review and therefore, none of the action as provided in Section 17(1) and 17(2) are immune from judicial scrutiny.

25. Sri S.M.A. Kazmi, learned Senior Advocate, appearing for the petitioner has also argued that irrespective of the fact that Governor cannot be impleaded as a party, yet his action/order is open to judicial review, even on the allegation of malafide, though notices cannot be issued to him.

26. In support of this plea he has also submitted that when the Governor acts under the RTI Act he is not exercising power under the Constitution but he exercises power which has been conferred upon him under the Central Act namely; RTI Act. Consequently the power so exercised by the Governor cannot be discriminatory, arbitrary malafide and has to be based on cogent relevant

material evidence besides the fact that he will exercise the power only within the parameters as provided under the provisions of Section 17(2) of the Act and any exercise of power beyond the scope of the aforesaid provisions would be bad in law and totally arbitrary.

27. In response to the plea that the Governor exercised his personal discretion in the matter, the learned counsel has drawn the attention of the Court to the contents of the reference made to the Supreme Court of India showing that all the allegations mentioned therein have been brought to the notice of the Governor by the State Government and it is on the instance of the State Government that the Governor has made a reference and therefore, to say that he exercised his personal discretion is not correct and as a matter of fact, he has relied upon the satisfaction of the State Government and not on his own satisfaction.

28. He has also submitted that the order of suspension thus has been passed not on any material on independent exercise of discretion by the Governor but only on the complaint which has been processed through the State Government, apparently reflecting his satisfaction but in fact is based merely on the complaints and view expressed by the State Government which has forwarded the complaints giving reasons for making reference.

29. In the case of *Rameshwar Prasad v. Union of India*, (2006) 2 SCC 1, the Supreme Court while considering the scope of Article 361 (1) of the Constitution, observed as under:

"There is a complete bar to implement/issuance of notice to President or Governor in their personal capacity as they are not answerable to any Court for the exercise and performance of the powers and duties of their offices, or for any act done or purported to be done in exercise and performance of those powers and duties. Words "purported to be done" are of wide amplitude. Immunity extends even to charges of mala fides."

30. The Court also observed that the allegation of legal malafide against the Governor and Central Government are within the ambit of judicial review. In the case of *S.R. Bommai v. Union of India*, (1994) 3 SCC 1, the Supreme Court observed as under:

"Judicial review is the basic feature of the Constitution. The Supreme Court/High Courts have constitutional duty and responsibility to exercise judicial review as sentinel on the qui vive. The judicial review having been expressly entrusted to the Supreme Court as a constituent power, to review the acts done by the coordinate branches, the executive or the legislature under the Constitution, or under law or administrative orders within the parameters applicable to a particular impugned action. This Court has duty and responsibility to find the extent and limits of the power of the coordinate authorities and to find the law. It is the province and duty of this Court, as ultimate interpreter of the Constitution, to say what the law is. This is a delicate task assigned to the Court to determine

what power Constitution has conferred on each branch of the Government, whether it is limited to and if so what are the limits and whether any action of that branch transgresses such limits. Judicial review is not concerned with the merits of the decision, but with the manner in which decision was taken ."

31. The Court further observed as under:

"It is not possible to accept that even the Constitution provides preconditions for exercise of power by the constitutional authority, the Court cannot examine whether the preconditions have been satisfied. There is also no authority to support the proposition that if the powers are entrusted to a constitutional authority for achieving a particular purpose and if the authority concerned under the guise of attaining the said purpose, uses the powers to attain an impermissible object, such use of power cannot be questioned. Many of the parameters of judicial review developed in the field of administrative law are not antithetical to the field of constitutional law, and they can equally apply to the domain covered by the constitutional law, that is also true of the doctrine of proportionality."

32. In the case of *State of Rajasthan v. Union of India*, (1977) 3 SCC 592, the Supreme Court observed as under:

"So long as question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its constitutional obligation to do so. It is necessary to assert in the clearest terms, particularly in the context of recent history, that the Constitution is Supreme lex, the paramount law of the land and there is no department or branch of Government above or beyond it."

33. In the case of *A.K. Kaul v. Union of India*, (1995) 4 SCC 73, the Supreme Court said that every order is subject to judicial review on the ground of satisfaction of the President/Governor being vitiated by mala fides or being based on wholly extraneous or irrelevant grounds.

34. Besides the aforesaid pronouncement of the Apex Court it is also matter of consideration that no order passed by any authority may be a constitutional functionary, if it adversely effects statutory or any fundamental right or any other legal right of any person, may be the holder of an office under a particular Act, Central or State or it has the effect of removal of such person from the said office, including the cession of exercise of his power from the said post for the time being and restrain him from attending the office, it cannot be said that such a person is not aggrieved by such an order or that such an order cannot be subjected to judicial review within the prescribed parameters and jurisdiction of the Court.

35. If a person is effected by an order passed by any constitutional functionary, he cannot be left remediless nor the order passed or action taken by such constitutional functionary is immune from judicial review. If any contrary

interpretation is given it would mean negation of all rights, may be constitutional, statutory or otherwise legal rights of the person concerned who though shall be punished but would not be heard in any legal forum. This is not the constitutional scheme.

36. Since it has already been submitted by the learned counsel for the petitioner Sri Kazmi that the circumstances, the facts, the material in the complaints and the manner in which reference has been made are such questions which need not be addressed at this stage which question he says would be addressed at the time of final hearing, we do not enter into these questions for the present. But the questions do require consideration which if necessary would be or may be considered after the exchange of the affidavits.

37. Likewise the jurisdiction of this Court to look into the validity of reference and the nature of enquiry which is to be conducted by the Supreme Court, its effect and immunity and that whether such an enquiry can be subjected to any judicial review, are, also such questions which may require serious consideration at the latter stage of hearing.

38. For the present we thus, confine ourselves only to the plea whether the Governor could have passed an order of suspension and restrained the Chief Information Commissioner from attending the office on 9th July, 2008 when admittedly by that date the Supreme Court had not issued notice to the petitioner and therefore, it further requires consideration as to whether merely making a reference to the Supreme Court, the Governor became empowered to suspend and to restrain the Chief Information Commissioner from attending the office; or it could have been done only when the cognizance of the reference has been taken by the Supreme Court i.e. when the enquiry became pending or would stand initiated.

39. In what manner the enquiry has to be conducted by the Supreme Court has not been provided in the Act, nor any procedure for the same has been laid down. Whether the notice issued under the signatures of the Registrar (Judicial) would mean, initiation of enquiry proceedings, for the purpose of Section 17(2) is also a question raised by the petitioner.

40. There cannot be any quarrel that the scheme of the RTI Act has been made with a view to further the object of the Act and the Court is to interpret and implement the provision in a manner so that it gives full effect to the purpose and object for which it has been enacted. Giving of information under the Act undoubtedly at times requires the party in power or the State Government to supply such information which otherwise is sought to be kept under secret cover. Every effort is made in such case to desist the Chief Information Commissioner from having such information and not to let such information be leaked or supplied to the person asking for such information, for which matter the same may be either not provided or may be delayed. This is not the intention of the Act nor can be said to be effective implementation of the Act.

41. The Chief Information Commissioner has been made the head of the Department. Immunity has been given to him to a large extent from being overawed or being influenced from any quarter whatsoever including the party in power and with a view to give him full discretion and necessary required protection from powerful lobbies, it has been provided that he can be removed only on proved misbehaviour or incapacity after a report to that effect is sent by the Supreme Court on a reference being made by the Governor on the charges levelled against him.

42. The legislative intent of the provisions of Section 17(1) and 17(2) of the Act is not to hamper or obstruct the functioning of the Chief Information Commissioner, if the information asked for, is not exempted under the Act, nor such a power can be used for preempting the information, nor for any collateral or designed purpose. Recourse to such a provision can only be taken if a grave charge is made out as the Chief Information Commissioner can be removed only on "proved misbehaviour" or "incapacity" after receiving the report on the reference made to the Supreme Court by the Governor. The said provision has been consciously incorporated so as to have a control over the malfunctioning of the Chief Information Commissioner and to remove him on proved misbehaviour and incapacity on one hand and on the other hand, this provision gives sufficient protection to the Chief Information Commissioner from undue influence of outside agencies including the State Government, and the ruling political party which provision cannot be used as a tool for removing him on the whims and caprice of those who are in power.

43. The aforesaid provision, thus appears to have been made forgiving strength to the Chief Information Commissioner to act truly and impartially in the implementation of the scheme of the Act, consequently on complaints which do not have any seriousness or an iota of truth, even if they appear to be serious, but without there being any material or evidence, cannot be used for either removal of Chief Information Commissioner or for suspending him.

44. The Governor has to satisfy himself about the gravity of the charges and the genuineness and seriousness of the complaints before making a reference. It is not every and any charge, that would be sufficient for removing the Chief Information Commissioner, even if, it stands proved, unless the charge is grave and if proved, would fall in the category of "misbehaviour" or "incapacity".

45. In the case of R/O Dr. Ram Ashray Yadav, Chairman Bihar Public Service Commission, (2004) 4 SCC 309, while considering the charge of misbehaviour of the Chairman of the Bihar Public Service Commission, found that although most sensitive standard of behaviour is expected of such a constitutional trustee, on facts, their Lordships held that occasional omissions to exhibit exemplary behaviour or conduct expected of the Chairman, although amounted to lapse but did not amount to misbehaviour within the meaning of Article 317 so as to warrant his removal.

46. The apex Court considered the judgment in the case of Urmila Kumari v. State of Bihar, (1993) 1 Patna Law Journal 226 and held as follows:

"There is no specific indictment of the Chairman, Dr. Yadav, as such. There is no finding that Dr. Yadav had in any manner influenced the selection of respondent No. 3 in that case. It would be wholly conjectural to hold that merely because Dr. Yadav had signed the final select list as Chairman (which he was obliged to do in discharge of his official duties), he should be deemed to have influenced other members of the Selection Committee including the outside experts. The indictment, even otherwise was of the procedure which was followed by the Commission and not of any action of the Chairman. We are informed that after the judgement in Urmila Kumari case the procedure for selection has been modified and corrected. In the absence of any indictment of Dr. Yadav, in his personal, official or individual capacity or any other material to show that he had personally influenced the Interview Committee (where he was not even present) to act in a particular manner, it would be unfair to hold that Dr. Yadav had committed any misbehaviour in that selection process. We agree with Dr. Dhavan that no misfeasance on the part of Dr. Yadav has even been remotely established insofar as this charge is concerned."

47. It thus can safely be said, that not every lapse or misconduct, would constitute misbehaviour within the meaning of Section 17(1) so as to remove the Chief Information Commissioner, even if such a charge is proved nor on every reference made or on Supreme Court entering into the enquiry, will give unbridled power to the Governor to pass an order under Section 17(2). Passing of such an order will depend upon the facts and circumstances of each case, where judicial review would be permissible within prescribed limits of jurisdiction of the High Court.

48. The Chief Information Commissioner has to have some "play in the joints" so as to be able to extract from the public authority may be the Government or its instrumentalities even the inconvenient information asked for. Of course, the Chief Information Commissioner is not at liberty to misuse his power and if he does so he can be proceeded with in accordance with the said provision.

49. Likewise the power of suspension or restraint from attending the office can also not be exercised lightly on merely making a reference as the Supreme Court may or may not find it expedient to hold enquiry for one reason or the other as it happened in this case when this reference was made for the first time in May 2008 it was not entertained and returned, though allegedly on some procedural irregularity nonetheless, the Supreme Court did not take cognizance. If the argument of the learned Additional Advocate General that on mere making the reference to the Supreme Court the Governor gets power to suspend the Chief Information Commissioner or restrain him from attending office, is taken as correct then in the instant case, the petitioner could have been suspended in May 2008 when the reference was made and if such an order had been passed, the same would have been obviously in violation of the specific provision, as no

enquiry could have been said to be initiated or pending before the Supreme Court as the Supreme Court had returned the reference.

50. The Illustration from the language used in Article 317 of the Constitution which deals with the removal and suspension of a member of the Public Service Commission will make it abundantly clear that had the intention of Section 17(1) and (2) been that on mere making a reference to the Supreme Court, the Governor would assume jurisdiction for suspending the Chief Information Commissioner and restraining him from attending the duties, the language should have been akin to the language used in Article 317. Article 317(1) says almost in identical terms that the Chairman or any other member of the Public Service Commission can be removed only after the Supreme Court on reference being made to it by the President has, on inquiry held in accordance with the procedure prescribed in that behalf under Article 145, reported that the Chairman or such other member, as the case may be, be removed.

51. Subclause (2) of Article 317 is the power of suspension with the President or a Joint Commissioner of the Governor, as the case may be, for suspending the Chairman from the office or any member of the Commission in respect of whom a reference has been made to the Supreme Court under clause (1).

52. The aforesaid provision thus, gives power of suspension to the President or the Governor, as the case may be, on merely making a reference i.e. the moment, a reference is made to Supreme Court, the power to suspend can be exercised by such constitutional authorities but in the case of Chief Information Commissioner, such a power cannot be exercised unless the Supreme Court takes cognizance of the reference and enquiry is initiated.

53. In regard to the plea that the Governor can suspend the Chief Information Commissioner on merely making a reference, on looking to the provisions aforesaid carefully it clearly transpires that had the intention of the aforesaid provision was that on mainly making a reference, the Chief Information Commissioner can be suspended under subsection (2) of Section 17 and he can be restrained from attending the office, there would have been no occasion for the law framers for using the word "during enquiry" in subsection (2) of Section 17 of the Act.

54. A bare reading of subsection (2) apparently deals with a situation where an enquiry has commenced by the Supreme Court and during enquiry, the Governor has the power to suspend the Chief Information Commissioner and also pass an order restraining him from attending the office. This is also supported by the phraseology used in subsection (1) where the word "reference" and "enquiry" have been used separately and distinctly. Subsection (1) says that removal of Chief Information Commissioner from his office can be done only by order of Governor on the ground of proved "misbehaviour" or "incapacity" after the Supreme Court, on a reference made to it by the Governor, has on inquiry, reported that the State Chief Information Commissioner or a State Information

Commissioner, as the case may be, ought on such ground be removed.

55. The two words namely; the "reference" and "on inquiry" thus have been used, to mean, two different stages covered under sub section (1) of Section 17 of the Act. The first stage is making of a reference by the Governor to the Supreme Court and the second is the stage of enquiry initiated and conducted by the Supreme Court. If merely making reference is taken to be an enquiry within the meaning of words "during inquiry" used in subsection (2) it would make the aforesaid words "on inquiry" used in subsection (1) as redundant. The aforesaid words cannot be assumed to have been incorporated superficially and for no purpose.

56. This interpretation would also be in consonance with the object of the Act and the protection given to the Chief Information Commissioner in discharging his duties without fear and favour, for which he is administered oath.

57. It was only when the reference was again received in the Registry of Supreme Court on 10th July, 2008, the notice was issued on 12th July, 2008 to the petitioner and therefore, it remains undisputed that right from May 2008 the Governor was not satisfied apparently to suspend the Chief Information Commissioner or to restrain him from attending the office on the same reference but suddenly felt satisfied later on, for passing the impugned order.

58. It has also been brought to the notice of the Court by the learned counsel for the petitioner that reference made is undated, in support of the plea that the entire action is a concocted designed only to remove the petitioner from office, as he was inconvenient to the persons in power.

59. We are thus, *prima facie*, satisfied that the suspension order and the restraint order dated 9th July, 2008 could not have been passed by the Governor on the said date, as by that time neither the "inquiry" has commenced nor was "pending". The enquiry, as envisaged in subsections (1) and (2) of Section 17 of the Act can be said to have commenced, only when the Supreme Court takes cognizance of the reference and enter upon, into the enquiry.

60. The learned Additional Advocate General, lastly made an argument that even if, it is accepted for argument sake that on the day when the impugned suspension order was passed, there was no enquiry but since now the Supreme Court has taken cognizance and enquiry is continuing, therefore, this Court would have no jurisdiction when the alleged illegality stands cured by lapse of time.

61. We are not satisfied with the said argument as an order which is *per se* bad and against the statutory provisions would not become effective and would not survive because of the fact that at some later point of time the enquiry became pending. An order which is nonest cannot revive by a subsequent event.

62. Reference can be made of the case *Mehar Chand Mehta v. City Board, Shahjahanpur* and another, AIR 1959 All 230. In this case the Education

Superintendent of the Municipal Board was suspended and the question arose whether under the provisions of Section 69A of the U.P. Municipalities Act he could have been suspended before framing of the charges. The High Court found that the suspension was permissible only pending enquiry. There must therefore, be an enquiry started when the person is suspended.

63. A plea was also taken in this case that whether such an order can be saved since the chargesheet has been framed against the petitioner and will it now be proper to quash the order suspending the petitioner on the ground that at the time when it was passed no chargesheet had been framed. The Court opined that the order of suspension has been passed in excess of jurisdiction and was wholly an illegal order and it cannot be legalised by the framing of the charges 15 days after the suspension order is passed, the order being without jurisdiction, it must be quashed by a writ of certiorari.

64. We, therefore, being *prima facie* satisfied that the impugned order of suspension and restraint from attending office, has been passed by the Governor in violation of provisions of subsection (2) of Section 17 read with Section 17(1) of the Act, without jurisdiction and authority, stay the operation of the order dated 9th July, 2008 till further orders of the Court.

65. The respondents are granted two weeks time to file counter affidavit.

66. List immediately thereafter.