

(1997) 03 GAU CK 0004
In the Gauhati High Court
Case No : Writ Petition No. 51 of 1996

Nar Bahadur Bhandari

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 05-03-1997

Acts Referred:

Citation : (1998) CrLJ 3475

Hon'ble Judges : M.Sengupta, J

Bench : Single Bench

Judgement

1. It is a petition seeking a writ of mandamus or any other appropriate writ. The warring parties are two Chief Ministers, past and present, keeping the Governor of State in between.

2. Shri N. B. Bhandari is the petitioner. He served the State as its Chief Minister for about fifteen years with a break for a very small period. He is at present the President of an important political party of the State. Shri Bhandari lost the battle of strength in the State politics and had to lose his Chief Ministership and to remain content only with a membership in the State Assembly.

3. The respondent No. 3, Shri Pawan Kumar Chamling served Shri Nar Bahadur Bhandari's ministry for sometime and thereafter love between them was lost. He floated or joined a new party and successfully led his party in the Assembly Elections of 1994 and became the leader of the present cabinet.

4. We may take judicial notice of the fact that immediately after the last Parliamentary Election which was unsuccessfully contested by Shri Bhandari, these two political personalities of the State started scandalising each other through various media. This Court had nothing to do with those statements and counterstatements, but the quarrel has been brought to the arena of this Court in the form of the present writ petition by Shri Bhandari.

5. In the writ petition Shri Bhandari referred to a series of actions and events

alleged to have been committed by Shri Chamling directly or indirectly, reaping harvest for his own benefit and causing damage to the coffer of the State. Shri Bhandari contends that he made a representation to the Governor of the State (respondent No. 4) referring to such acts of corruption indulged in by Shri Chamling, the present Chief Minister. It was on 15/6/1996. Shri Bhandari waited for sometime and as no action appeared to him to have been taken by the Governor on the allegations, Shri Bhandari sent a notice demanding justice to the Governor on 31/2/1996 requesting him to accord sanction under Section 19 of the Prevention of Corruption Act, 1988 to prosecute Shri Chamling. Shri Bhandari gave the Governor 24 hours time to send a reply to him about the decision of the Governor. Since he did not get any reply nor any indication about action taken by the Governor, he came up to this Court with the instant writ petition on 10/12/1996.

6. The main contention of the petitioner in this writ petition is that the present Chief Minister is corrupt to the extremity and the State exchequer is not safe in his hands and that he should be prosecuted under the Prevention of Corruption Act, 1988. The petitioner has sought for a mandate on the Governor to accord necessary sanction under the Prevention of Corruption Act to prosecute the Chief Minister and, in the alternative, a direction on the Central Bureau of Investigation to investigate into the allegations against the present Chief Minister.

7. The submission of the petitioner is that the writ petition should be admitted straightway and final decision of the Court may be passed after going through the submissions made by the principal respondents (Chief Minister and the Governor) by way of filing affidavits. The respondents including the Central Bureau of Investigation (respondent No. 5) controvert this proposition and submit that this writ petition being frivolous in nature and having been filed with an idea of causing harassment to the persons in power should be nipped into the bud. Decision, reported in AIR 1971 SC 333, *Gyan Chand v. State of Haryana* has been referred to by the petitioner. We regret, the principle laid down in the decision above noted cannot have any application as the facts involved in that case differ widely from the fact of the case under our study. The High Courts in exercise of their power under Article 226 of the Constitution and the Supreme Court under Article 32 of the Constitution are to entertain writ petitions at the very initial stage only when bona fide is found prima facie in the petition itself. Otherwise it would be useless venture, rather undesirable exercise, to proceed with any writ petition which appears to be mala fide and vexatious. Decision of the Supreme Court *R. R. Srinivas v. R. M. Premchand*, reported in (1994) 6 SCC 620 and in *Chhetriya Pardushan Mukti Sangharsh Samiti v. State of U.P.*, reported in (1990) 4 SCC 449: (AIR 1990 SC 2060) may be referred to in this context. The observation of the Hon^{ble} Supreme Court in *S. P. Gupta v. Union of India* as reported in AIR 1982 SC 149 (at page 189) is more specific where the Court observed "But we must hasten to make it clear that the individual who moves the Court for judicial redress in cases of those kind, must be acting bona fide with a view to vindicating the cause of justice and if he is acting for personal

gain or private profit or out of political motivation or other public consideration, the Court should not allow itself to be activated at the instance of such person and must reject his application at the threshold." Therefore, we must hold that petitions of such nature must be rejected at the very initial stage obviously if the petition appears to be vexatious and politically motivated and if it is found to be so we should not hesitate to reject the same at the threshold. Rejection at the initial stage may be made where the petition appears to be not maintainable on the face of it.

8. In reply to the contention made by the respondents that the Writ Petition is premature, it was submitted on behalf of the petitioner that he had to take such a course as he was afraid of his plea being rejected on the ground of limitation. The new Criminal Procedure Code of 1973 prescribes period of limitation for initiation of any criminal proceeding. Section 468, Cr.P.C. prescribes the period of limitation after which no cognizance can be taken. But such stipulation applies only in cases where the maximum punishment prescribed for the offence is three years. But the maximum punishment for any offence under Section 13 of the Prevention of Corruption Act, 1988 is seven years and a fine. Therefore an offence under Section 13 of the Prevention of Corruption Act does not fall within the mischief of Section 468, Cr.P.C. The contention of the petitioner in this respect is, therefore, not acceptable.

9. There is no doubt that in cases coming under Section 13 of the Prevention of the Corruption Act, 1988, two preconditions have been prescribed; one is prior to the investigation and the other is prior to the prosecution which starts after completion of investigation. With regard to the first condition precedent Section 17 of the Act may be referred to which envisages that sanction or permission is to be obtained from the Magistracy only when investigation for any offence under Section 13, excepting any offence under Clause (e) of Section 13(1), is to be done by police officers below a particular rank. Section 17 does not contemplate prior sanction of the Magistracy before starting of the investigation. If the investigations are taken up by the Officers of the ranks mentioned in the section itself, permission from nobody is necessary. Only in cases when the offence is under Section 13(1)(e) previous order of police officer not below the rank of Supdt. of Police would be necessary to investigate into the same.

10. Sanction as contemplated under Section 19 comes only when the Court is approached to take cognizance which in other words would mean when the investigation by the Investigating Authority is complete. Investigation stage continues till the filing of chargesheet or final report in any particular case. We may refer to paragraph 8 of AIR 1969 Guj 362: (1969 Cri LJ 1503) M. B. Tharada v. State in this regard. Till that time, what to speak of sanction by the Governor or by any other statutory authority, the Court has no role to play. This matter was very elaborately dealt with by the Supreme Court in the case of Abhinandan Jha v. Dinesh Mishra, reported in AIR 1968 SC 117: (1968 Cri LJ 97) at paragraphs 9 and 18 and also in the case of State of W.B. v. Sampat Lal, AIR

1985 SC 195: (1985 Cri LJ 516). In Sampatlal's case reliance was placed on the observations of Justice Desai made in the case of State of Bihar v. J. A. C. Saldanna as reported in AIR 1980 SC 326: (1980 Cri LJ 98) Justice Desai observed at page 109 (of Cri LJ):

"There is a clear cut and well demarcated sphere of activity in the field of crime detection and crime punishment. Investigation of an offence is the field exclusively reserved for the executive through the police department, the superintendence over which vests in the State Government. The executive which is charged with a duty to keep vigilance over law and order situation is obliged to prevent crime and if an offence is alleged to have been committed it is its bounden duty to investigate into the offence and bring the offender to book. Once it investigate and finds an offence having been committed it is its duty to collect evidence for the purpose of proving the offence. Once that is completed and the Investigating Officer submits report to the Court requesting the Court to take cognizance of the offence under S. 190 of the Code its duty comes to an end....."

In Union of India v. Sushil Kumar Modi, reported in JT 1997(1) SC 679: (1997 Cri LJ 358) the Supreme Court quoted Lord Denning quite extensively to show that the Court has under normal conditions very little to interfere with the investigation of any case. Thus we see that up to the stage of taking cognizance the Magistracy, what to speak of the High Court or the Supreme Court, has very little to do.

11. We have already observed that Section 19 comes only at the time of taking cognizance and not before that. In the case which we have been dealing with no complaint has been lodged with any of the authorities, police or Magistracy, about the allegations made before the Governor. It is a well recognised principle in criminal jurisprudence that anyone can set the criminal law into motion except where the statute enacting or creating an offence indicates to the contrary. Locus standi of the complainant is a concept foreign to criminal jurisprudence save and except where the statute creating an offence provides for the eligibility of the complainant. The case of A. R. Antulay v. R. S. Nayak, AIR 1984 SC 718: (1984 Cri LJ 647) may be referred to in this context. A complaint in a case like the same as being dealt with by us could been lodged with the Police in the form of an FIR or before any competent Magistrate in the form of a complaint by the petitioner or by any of his comrades. But they decided to take a different course of action which does not appear to be thoroughly lawful. Personal grudge or political vendatta might be imputed as the motive behind. Hence, the action of the petitioner is deplored.

12. It has already been noted that the petitioner in the writ petition has asked for a mandate on the Governor to accord sanction under Section 19 of the Prevention of Corruption Act, 1988 to prosecute the Chief Minister for offences under Section 13(1)(d) and 13(1)(e) of the Prevention of Corruption Act, 1988. We should see what Section 19 contemplates. It contemplates the power of the

Governor to grant sanction for prosecution. There is no dispute that sanction of the Governor under Section 19 of the Prevention of Corruption Act, 1988 is a condition precedent to the prosecution of a Chief Minister. We must see the nature of such a power. It would be pertinent to refer to the decision of the Supreme Court in *State of Maharashtra v. Ramdas Srinivas Nayak*, reported in (1982) 2 SCC 463: (1982 Cri LJ 1581). In paragraph 10 of the aforesaid judgment it has been clearly observed that the Governor would, while determining whether sanction for prosecution of any Chief Minister or so should be granted or not under the Prevention of Corruption Act, as a matter of propriety, necessarily act in his own discretion.

13. We are now required to see what discretion is and what it amounts to. In *Gilmer's Law Dictionary* (6th edition) discretion has been defined as the use of private and independent judgment. Desmith while dealing with discretionary power observed "The legal concept of discretion implies to make a choice between alternative courses of action or inaction. If only one course can lawfully be adopted, the decision taken is not the exercise of a discretion but performance of duty. To say that somebody has a discretion presupposes that there is no uniquely right answer to a problem." Smith further observed "The crucial question, however, is in what circumstances and to what extent will Courts review the merits of the exercise of a statutory decision which is neither made subject to appeal, nor limited by the express provisions of the Act? The Courts have repeatedly affirmed their incapacity to substitute their own discretion for that of an authority in which the decision has been confided and there are many matters which the Courts are indisposed to question. Though they are the ultimate Judges of what is lawful and what is unlawful, there are certain questions which the Courts are illequipped to decide." In this context we may observe that a Court has no power to order use of discretion in a particular manner. The Courts repeatedly refused to exercise extraordinary jurisdiction in the cases where discretion has been used by a statutory authority unless the action is shown to be mala fide or arbitrary (vide *Tukaram G. Gaokar v. R. N. Shukla*, reported in AIR 1968 SC 1050 at para 5: (1968 Cri LJ 1234) and the same is capricious or arbitrary or in breach of the Rules (vide *D. D. Suri v. Union of India*, reported in AIR 1979 SC 1596: (1979 Lab IC 1124) at paras 17 and 18). Therefore we can invoke our authority under Article 226 of the Constitution only if we find mala fide on the part of the statutory authority.

14. Stress has been put on the immunity of the Governor as guaranteed under Article 361 of the Constitution of India. Much debate has been made over the issue and on the point of extent of immunity. It has been contended on behalf of the petitioner that the immunity is not absolute and action of the Governor is always justiciable and subject to judicial scrutiny. Both sides extensively quoted decisions of different Courts including Supreme Court, down from the decision of the Nagpur and Calcutta High Courts of 1952 to the decision of Supreme Court in 1994 and of Madras High Court in 1995. Sum and substance of these decisions is that the immunity of the Governor is not above judicial scrutiny. In extreme

cases of the decisions suffering from arbitrariness, dishonesty and bad faith, such action may be scrutinised by the Courts. In *Biman Chandra Bose v. Dr. H. C. Mukherjee*, reported in AIR 1952 Cal 799, a single Bench of Calcutta High Court observed "No Court can compel the Governor to exercise any power or to perform any duty. Nor can a Court compel him to forbear from exercising his power or performance of the duties. He is not amenable to the mandate or writs or directions issued by any Court." The then Madhya Bharat High Court in a case, reported in AIR 1953 Madhya Bharat 54 at para 5 *Laxman Singh v. Raj Pramukh* followed the above quoted decision of the Calcutta High Court. A Full Bench of Madras High Court in *K. A. Mathialagan v. Governor of Tamil Nadu*, reported in AIR 1973 Mad 198 at para 26 also concurred with the aforesaid views and also the views of Andhra Pradesh High Court in *Gnanani v. Governor of Andhra*, reported in AIR 1954 AP 9 that the immunity of the Governor extends not only to his official acts but also to acts purporting to be done by him in exercise of the powers conferred on him. But as the Constitution establishes the supremacy of laws and not of men, however high place they might be, the immunity might be guaranteed so long as the Governor is not guilty of dishonesty or bad faith. Same was the view expressed by a Division Bench of Nagpur in *G. D. Karkare v. T. L. Shevde*, reported in AIR 1952 Nag 330 at para 9. A nine Judges Bench of the Supreme Court dealt with such a point in *S. R. Bommai v. Union of India*, reported in (1994) 3 SCC 1: (AIR 1994 SC 1918) quite extensively and observed at para 96, "This can be done by Courts while confining themselves to the acknowledged parameters of the judicial review as discussed above, viz. illegality, irrationality and mala fides. Such scrutiny of the material will also be within the judicially discoverable and manageable standards." It would be very pertinent to see what has been noted at para 331 of the aforesaid judgment. It reads "Regarding the scope and reach of judicial review, it must be said at the very outset that there is not, and there cannot be, a uniform view applicable to all cases. It is bound to vary depending upon the subjectmatter, nature of the right and various other factors."

15. All the above noted cases relate to the situation where sanction was refused or granted. Judicial scrutiny was made with respect to the action of the Governor in according or rejecting the sanction. No case is known to have been dealt with by any Court of the land on the point of the competence of High Court to direct the Governor to accord sanction under Section 19 of the Prevention of Corruption Act. In that way this is the first of its kind, as we have been told. The point of competence of the Court in passing direction as above was obliquely raised in the case of *State of Maharashtra v. Ramdas Srinivas Nayak*, reported in (1982) 2 SCC 463: (1982 Cri LJ 1581), but the Supreme Court left the point undecided as it was not very much relevant for the purpose of the case before the Supreme Court. In any manner, in the instant case, we are to decide if there is any iota of mala fide, arbitrariness or bad faith on the part of the Governor to keep his decision over the question of sanction withheld.

16. Before we enter into that proposition we must deal with another point raised

on behalf of the petitioner. It was submitted by the petitioner that the Court can give direction upon the Governor. In support of such contention he referred to the decisions, reported in (1982) 2 SCC 463: (1982 Cri LJ 1581), *State of Maharashtra v. Ramdas Srinivas* and (1994) 3 SCC 1: (AIR 1994 SC 1918) *S. R. Bommai v. Union of India*. With regard to the 1982 case we have noted that no final decision was arrived at on the point of High Court's competence to pass any direction upon the Governor to exercise his discretion in a particular manner. So far as 1994 case is concerned we must note that the decision was not properly interpreted by the petitioner. A reading towards the end of paragraph 122 would lead us to hold that it was not a direction on the Governor. The Court simply drew the attention of the Governor for his consideration to a particular order of the Court which might have escaped the notice of the Governor. Thus we cannot accept the contention that any direction may be passed by the Court for observance of the Governor. We have already held that the Court in an appropriate case may cause review of the action of the Governor but cannot mandate on the Governor to do any particular act especially when the act falls within the discretionary power of the Governor.

17. Coming down to the question of mala fide, arbitrariness and other bad words attributed to the conduct of the Governor in withholding the sanction we must note that the Governor is to take his decision only after the Investigating Officer places all connected materials before him or only when he could satisfy himself after collection of necessary materials. We believe that the observations of the Supreme Court made in *Supdt. Police (C.B.I.) v. Deepak Chowdhary*, AIR 1996 SC 186: (1996 Cri LJ 405) is most pertinent in this context. The Supreme Court observed "What is material at that time is that the necessary facts collected during investigation constituting the offence have to be placed before the sanctioning authority and it has to consider the material. Prima facie, the authority is required to reach the satisfaction that the relevant facts would constitute the offence and then either grant or refuse to grant sanction." In the instant case, the investigation has not started as yet. Rather no scope has been given by the petitioner to set the investigating machinery into motion. Moreover at the time of hearing of the Writ Petition quite a number of documents were produced from the side of the Governor which indicate that the Governor started collecting materials, to ascertain the truthfulness of the allegations made, from different sources. The first of the correspondence is dated 29/6/96 and the last one is dated 21/9/97. Therefore, it cannot be said that the Governor had been sitting idle over the allegations.

18. Dishonesty or mala fide or badfaith on the part of the Governor has not been pleaded in the Writ Petition. What we find from the trend of the arguments advanced on behalf of the petitioner that the Governor has caused delay in taking action and had not sent any reply to the petitioner. These are the only allegation against the Governor. It would be very relevant to note that the first complaint was sent to the Governor on 15/6/1996. A reading of the same would show that no relief was sought for only certain malpractices alleged to have been

committed or encouraged by the present Chief Minister were brought to the notice of the Governor, nothing more nothing less. Thereafter on 3121996 the petitioner sent a notice demanding justice and there for the first time asked the Governor to accord sanction under Section 19 of the Prevention of Corruption Act, 1988 to prosecute Shri Chamling. After this, only six days elapsed and the instant writ petition was filed on 10121996. Therefore, it is clear that the Governor did not get any time whatsoever to examine the matter though he started collecting materials immediately after 1561996. With regard to sending of reply within 24 hours from 3121996 as demanded by the petitioner, we do not find any fault with the Governor. We have already noted that no mala fide other than inaction for a small period of time has been pleaded against the Governor. But we have found these allegations to be absolutely baseless. Though the Governor could wait for taking his discretionary decision till all necessary materials were produced before him by the investigating authority, here the Governor suo motu started collecting materials regarding the allegations. No time limit is fixed by any statute or practice for exercise of such discretionary power. It would not be out of context to note that in numerous cases, the Governor's took years to arrive at a decision and that too after materials collected during investigation having been placed before them. From all these, we do not find any mala fide or otherwise on the part of the Governor.

19. With regard to locus standi of the petitioner to file such a writ petition, the petitioner himself appears to be under confusion. In para 1 of the writ petition, he claims it as constitutional right and in para 2 he has stated that it was filed in the interest of general public and in a representative capacity. We have already observed that the petitioner could have initiated a criminal proceeding by way of filing FIR with the police or by filing a complaint before the trial Court with the allegations made by him and no question of locus standi would have stood on its way. There is no apparent reason as to why the petitioner avoided the normal channel.

20. Unlike criminal proceedings locus standi is an essential factor in writ petitions. The only exception is Public Interest Litigation where the concept of locus standi can be given a go by. In the matter of Public Interest Litigation, however, there are certain restrictions. One is not allowed to utilise the concept of Public Interest Litigation to feed fat ancient grudge and enmity. In the case of *Chhetriya Pardushan Mukti Sangharsh Samiti v. State of U.P.*, reported in (1990) 4 SCC 449: (AIR 1990 SC 2060) the Supreme Court observed, "While it is the duty of this Court to enforce fundamental rights, it is also the duty of this Court to ensure that this we upon under Article 32 should not be misused or permitted to be misused creating a bottleneck in the superior Court preventing other genuine violation of fundamental rights being considered by the Court. That would be an act or conduct which will defeat the very purpose of preservation of fundamental rights." It further observed "we must protect the society from the so called protectors." The Supreme Court in *S. P. Gupta v. Union of India*, reported in AIR 1982 SC 149 at page 195. In concurrence with the views of Dr.

S. N. Jain, observed "But we must be careful to see that the member of the public, who approaches the Court in cases of this kind, is acting bona fide and not for personal gain or private profit or political motivation or other oblique consideration. The Court must not allow its process to be abused by politicians and others to delay legitimate administrative action or to gain a political objective. Andre Rabie has warned that "political pressure groups who could not achieve their aims through the administrative process" and we might add, through the political process, "may try to use the Courts to further their aims". These are some of the dangers in Public Interest Litigation which the Court has to be careful to avoid." We must also quote from the decision of Supreme Court in K. R. Srinivas v. R. N. Premchand as was, reported in (1994) 6 SCC 620. At paragraph 7 of the said judgment it has been noted "It cannot be forgotten that a writ petitioner who comes to the Court for relief in public interest must come not only with a clean hand, like any other writ petitioner, but must further come with a clean heart, clean mind and a clean objective.

21. We have already talked about the political and social standing of the petitioner and of the present Chief Minister. They are no doubt at daggers drawn so far as achievement of political goal is concerned. If there was anything guanine in the mind of the petitioner he could have taken steps in the ordinary manner as prescribed by the laws of the land. Preference of writ petition without taking recourse to the other available means is indicative of the motive of the petitioner which should not get patronised from the Court. We cannot, therefore, entertain the writ petition in its present form.

22. From analysis of what we have discussed above, it is clear that the Courts cannot mandate the Governor to exercise his discretionary power in a particular manner. There is no mala fide or bad faith on the part of the Governor. Sanction for prosecution cannot be sought for before initiation of any criminal proceeding. The petitioner has no locus standi to ask for a Writ in the manner as it has been done. Moreover, the Writ Petition is prematured in all respect. Hence, the petition must fail.

23. We have already mentioned about the prayers made in the writ petition. So far we have dealt with prayer (a). The other prayer noted at (b) is for issuance of appropriate writ or order directing the Central Bureau of Investigation (respondent No. 5) to investigate cages against Shri Chamling. We have already noted that there is no case whatsoever and, therefore, question of any direction to investigate into such cases does not arise at all. The respondent No. 5 in their affidavit stated that the allegations made by the Petitioner are not of any complicated nature and investigation into the same could be made by normal agencies. They have further mentioned that they are already overburdened and will not be able to justify the investigation if the same is entrusted to them. It would not be out of place to refer once again to the decision, reported in AIR 1985 SC 195: (1985 Cri LJ 516) State of W.B. v. Sampat Lal. On the point of appointment of any agency outside the normal investigating hierarchy the view

of Supreme Court is available at para 15 of the judgment which reads, "The appointment of Special Officer with direction to enquire into the commission of an offence can only lie on the basis that there has not been a proper investigation. There is a well defined hierarchical administrative set up of the police in the State..... and to have a new channel of inquiry or investigation is likely to create an impression that everything is not well with the statutory agency and it is likely to cast a stigma on the regular polite hierarchy." It is not the case of the petitioner that this ExChief Minister of long standing was not entertained by police or the Court when he approached them with complaint or that the normal investigating agency has been showing apathy towards proper investigation. Taking this aspect together with the contention made on behalf of the Central Bureau of Investigation into consideration we find no reason to entertain such a prayer as made in para (b).

24. Before we draw the fullstop in this case, we must note that the prayers for issuance of appropriate writ and order as claimed by the petitioner suffers from vagueness. A Division Bench of Madhya Bharat (Gwalior) in *Laxman Singh v. Raj Pramukh* as was reported in AIR 1953 Madhya Bharat 54 observed, on placing reliance on a case, reported in AIR 1952 Cal 601, *Union of India v. Elbridge Watson*, that prayers in applications under Article 226 of the Constitution must be specific and precise and should not be couched in general words as the Court might be pleased to grant such writs as it might think fit. In our case the petitioner does not specifically mention the nature of the writ he prays to be issued. It is in general terms which is not permissible. Moreover, the affidavit of the petitioner is not in order. Reference in this connection may be drawn to the decisions, reported in AIR 1982 SC 65, *Sukhwinder Pal Bipin Kumar v. State of Punjab* and AIR 1967 SC 295, *Barium Chemical v. Company Law Board*.

25. With all these observations we decide to hold that the petition is not entertainable and dismiss the same in limine without any order as to costs.