

(2013) 04 KL CK 0072

In the High Court Of Kerala

Case No : Writ Petition (C) . No. 27844 of 2012

Natarajan

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 12-04-2013

Acts Referred:

Right to Information Act, 2005 — Section 17(2)

Citation : AIR 2013 Ker 169 : (2013) 2 ILR (Ker) 848 : (2013) 2 KHC 516 : (2013) 3 KLJ 183 : (2013) 2 KLT 800

Hon'ble Judges : P.R. Ramachandra Menon, J

Bench : Single Bench

Advocate : K.R.B. Kaimal, Thirumala P.K. Mani and B. Unnikrishna Kaimal, for the Appellant; K.P. Dandapani, Advocate General and Roshan D. Alexander, Government Pleader, for the Respondent

Judgement

P.R. Ramachandra Menon, J.—How the power of the Governor under S. 17(2) of the Right to Information Act ("RTI Act" in short) is to be exercised, for suspending the Chief Information Commissioner or the State Information Commissioner, pending inquiry by the Supreme Court on a Reference and what are the essential ingredients to be satisfied for the same, form the subject matter of consideration in this Writ Petition. The petitioner herein joined the Kerala State Police Service in the year 1985 and got elevated to the Indian Police Service (Kerala Cadre) in 1995. While working as Dy. Inspector General of Police holding the post of Vigilance Officer in the Department of Co-operation, he voluntarily retired from service on 9.2.2011 and was appointed by the Governor of the State as State Information Commissioner vide Ext. P1 order dated 21.2.2011. The petitioner assumed charge as the State Information Commissioner on 23.4.2011 and was continuing as above.

2. While so, there were allegations that the petitioner was frequently interacting with one Mr. Kunjan, Dy. Superintendent of Police, who was investigating the vigilance case registered against Mr. V.S. Achuthanandan, Leader of the

Opposition, Kerala Legislative Assembly and the former Chief Minister of Kerala, in the matter of assignment of some Government Land to a relative of the latter. It was alleged that the aforesaid Investigating Officer was contacted by the petitioner on many a time, and the former was allegedly instructed to absolve Mr. V.S. Achuthanandan from the insinuation/accusation. It is seen from the pleadings and proceedings, that the Additional Director General of Police (Vigilance and Anti-Corruption Bureau) was required to check the correctness of the information and to submit a "Quick Verification Report". Verification was conducted and based on the report, the Government put up the matter before the Governor to take appropriate action against the petitioner.

3. The report and other relevant proceedings were considered by the Governor, who found that there was prima facie a case against the petitioner and that if the same was proved, the petitioner was liable to be removed from the office. It was in the said circumstance, that the matter was decided to be referred to the Hon"ble Supreme Court as contemplated under S. 17(1) of the Right to Information Act. In view of the said decision taken on 9.11.2012, the petitioner was placed under suspension vide Ext. P3 order dated the same day, and it was served on the petitioner on 12.11.2012 by special messenger deputed from the Kerala Raj Bhavan. Ext. P3 order of suspension is under challenge in this Writ Petition on many a ground, including maintainability. It is stated that Ext. P2 representation preferred by the petitioner on the previous day was not considered by the Governor and no opportunity of hearing was given to him before passing Ext. P3.

4. The respondent has filed a counter affidavit referring to the facts and figures. Besides rebutting the averments and allegations in the Writ Petition, it has been asserted in the counter affidavit that, the idea and understanding of the petitioner as to the scope of the power under S. 17(2) of the R.T.I. Act and the manner of exercising the same by the Governor is wrong and misconceived. It is stated that, the discretion to refer the matter to the Supreme Court for inquiry is exclusively vested with the Governor and it is made with reference to the information/materials placed before him. It is stated therein that the said power is vested with the Governor to ensure the dignity of the office of the Information Commissioner, appointed by the Governor. Ext. P3 order of suspension was stated as passed by the Governor based on such materials, particularly the "Quick Verification Report" of the Additional Director General of Police (Vigilance and Anti-Corruption Bureau), who was deputed to check the correctness of the information.

5. As a matter of fact, Mr. V.S. Achuthanandan, Leader of the Opposition of the State Legislative Assembly, is an accused in Vigilance case No. VC 1/12/KSD, which is being investigated by the concerned Deputy Superintendent of Police (Mr. V.G. Kunjan). The "Quick Verification Report" submitted by the Additional Director General of Police reveals that the petitioner, by virtue of his authority and power, tried to influence the investigating officer in the corruption case and

hence has failed to maintain absolute integrity and that his conduct was quite unbecoming of the State Information Commissioner. The conversation between the petitioner with the concerned Deputy Superintendent of Police/Investigating Officer over phone is stated as recorded in a CD by the Officer himself and it was submitted before the Additional Director General of Police, who prepared the "Quick Verification Report. "The allegations of misbehaviour as disclosed from the "Quick Verification Report" are stated to be of grave nature, enough for justifying removal from service and it was in the said circumstance, that the Government thought it fit and proper to place the same for consideration before the Governor for further steps under S. 17 of the Act.

6. Heard Mr. K.R.B. Kaimal, learned Senior Counsel appearing for the petitioner as well as Mr. K.P. Dandapani, learned Advocate General assisted by Mr. Roshan D. Alexander, learned Government Pleader appearing for the respondent, at length.

7. The main contentions raised by the petitioner against Ext. P3 order of suspension are in the following terms:

a)-that the appointment of the State Chief Information Commissioner and the State Information Commissioner is governed by S. 15(3) of the Right to Information Act, to be made by the Governor, on the recommendation of a Committee consisting of the Chief Minister, Leader of Opposition in the Legislative Assembly and a Cabinet Minister nominated by the Chief Minister. As such, the appointment is not on the basis of advice given by the council of Ministers, but on the recommendation of the Committee constituted under S. 15(3) of the Act and hence the respondent/Government has absolutely no role in the removal/suspension of the petitioner.

b)-that "commencement of inquiry" by the Hon"ble Supreme Court on a reference made by the Governor, is a condition precedent for placing the Information Commissioner under suspension and that it is for the Hon"ble Supreme Court to consider the report forwarded by the Governor and decide whether there is a prima facie case for ordering an inquiry.

c)-that Ext. P3 order has been passed by the Governor entirely on the recommendation of the respondent based on the inquiry report of the Additional Director General of Police (Vigilance and Investigation). The "R.T.I. Act" does not confer any power on the Government or other Officers to conduct any inquiry against a State Information Commissioner and hence the inquiry itself is unauthorised and illegal.

d)-that the power of removal/suspension of State Information Commissioner conferred on the Governor under S. 17 of the Right to Information Act does not come within the ambit of the executive power of the State under Art. 154 of the Constitution of India.

e)-that the inquiry leading to the Quick Verification Report by the Additional

Director General of Police was conducted behind the back of the petitioner and Ext. P3 order was passed by the Governor without even considering Ext. P2 representation preferred by the petitioner and hence is in violation of the principles of natural justice.

f)-that the suspension casts a stigma affecting the reputation of the petitioner and it has been passed quite in a mechanical manner, merely on the recommendation of the Government. As mentioned hereinbefore, these contentions have been sought to be rebutted by the respondent in the counter affidavit and both the sides addressed the Court accordingly.

8. There is no factual dispute as to the sequence of events. The crucial question to be considered is, whether Ext. P3 order of suspension could have been passed by the Governor, immediately upon taking a decision to have the matter referred to the Hon''ble Supreme Court for inquiry under S. 17(1), or, whether it could be effected only "during the inquiry", i.e., after commencement of the inquiry by the Hon''ble Supreme Court.

9. Seeking to canvas such a proposition, the petitioner has filed some additional documents as well, along with I.A. No. 16920/2012. It is contended that, the reference and the relevant proceedings dated 9.11.2012 were forwarded to the Resident Commissioner, Kerala House, New Delhi, by the Secretary to the Governor of Kerala to be filed before the Hon''ble Supreme Court, vide Exts. P4 to P6 and that they were filed before the Apex Court only on "19.11.2012". Ext. P8 is a copy of the acknowledgment on Ext. P5, given by the Registry of the Hon''ble Supreme Court, as to the receipt of the proceedings on 19.11.2012. The Registry of the Hon''ble Supreme Court as per Ext. P9 proceedings dated 20.11.2012 informed the Secretary to the Governor, State of Kerala, that the proceedings were defective in some respects, which was sought to be clarified/rectified as specified therein.

10. With reference to the above documents, the learned Senior Counsel for the petitioner asserted that the reference/proceedings reached the hands of the Hon''ble Supreme Court only on 19.11.2012 and as such, inquiry had not been commenced by the Hon''ble Supreme Court, as on the date of Ext. P3 order of suspension, i.e., on 9.11.2012, to have it sustained. On this score alone, the suspension is liable to be intercepted, submits the learned counsel.

11. The proposition is sought to be controverted from the part of the respondent, stating that, S. 17(2) does not contemplate or even suggest the need to have the inquiry started by the Hon''ble Supreme Court as a pre-requirement so as to place the Officer under suspension. Whether the Officer should be suspended from service or should he be kept away from the office during the pendency of the inquiry/proceedings, is a matter to be considered by the Governor, who is the Appointing Authority. Once a decision is taken by the Governor, to have an inquiry conducted by the Apex Court under S. 17(1) of the Act, it is open for the Governor to invoke the power under S. 17(2) and hence the suspension is within

the four walls of law. It is also stated that, no violation of any principle of natural justice is involved. Reliance is sought to be placed on some decisions rendered by the Apex Court with reference to the circumstances contemplated under Art. 317(1) of the Constitution of India and such other circumstances (which would be referred to, in the due course).

12. For convenience of reference, Section 17 of the "R.T.I. Act" is extracted below:

S. 17. Removal of State Chief Information Commissioner and State Information Commissioner--(1) Subject to the provisions of sub-section (3), the State Chief Information Commissioner or a State Information 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 sub-section (1) until the Governor has passed orders on receipt of the report of the Supreme Court on such reference.

(3) Notwithstanding anything contained in sub-section (1), the Governor may by order remove from office the State Chief Information Commissioner or a State Information Commissioner if a State Chief Information Commissioner or a State Information Commissioner, as the case may be,--

(a) is adjudged an insolvent; or

(b) has been convicted of an offence which, in the opinion of the Governor, involves moral turpitude; or

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

(d) is, in the opinion of the Governor, unfit to continue in office by reason of infirmity of mind or body; or

(e) has acquired such financial or other interest as is likely to affect prejudicially his functions as the State Chief Information Commissioner or a State Information Commissioner.

(4) If the State Chief Information Commissioner or any State Information Commissioner is in any way, concerned or interested in any contract or agreement made by or on behalf of the Government of the State or participates in any way in the profit thereof or in any benefit or emoluments arising therefrom otherwise than as a member and in common with the other members

of an incorporated company, he shall, for the purposes of sub-section (1), be deemed to be guilty of misbehaviour.

Sub-section (11) of S. 17 deals with the power of the Governor to remove the State Chief Information Commissioner or any State Information Commissioner from his office on the ground of "proved misbehaviour or incapacity". This is possible, only if such a report is given by the Apex Court after conducting an inquiry, on the reference made to it by the Governor, to the effect that such Officer ought to be removed on such ground.

Sub-section (21) of S. 17 deals with the power of the Governor to suspend the Officer, and if deemed necessary, prohibit him also from attending the office during inquiry, on reference made to the Supreme Court under sub-section (1), until the Governor has passed orders on receipt of the report of the Supreme Court.

Sub-section (3) starts with the non obstante clause pointing out that, even without any reference to the Supreme Court and report under S. 17(1), the Governor can remove the State Chief Information Commissioner or the State Information Commissioner, if such officer has invited the adverse circumstances, mentioned under Clauses "a to e" of the said sub-section.

The last Sub-section i.e., sub-section (41) of S. 17 refers to the particular circumstance, whereby the Officer concerned can be deemed to be guilty of misbehaviour, for the purpose of sub-s. (1) of S. 17.

13. On analysing the case projected by the petitioner, in the above background, it is seen that discretion is vested upon the Governor, whether to suspend the Officer or not; and if deemed necessary, also prohibit him from attending the office during the inquiry, until the Governor has passed orders on receipt of the report of the Hon'ble Supreme Court. This discretion is not qualified by commencement of the inquiry by the Hon'ble Supreme Court, primarily for the reason that there is nothing suggestive in this regard in the said provision and secondly, that the Governor may not be aware of the proceedings before the Hon'ble Supreme Court and cannot be a party to the inquiry.

14. Of course, there is some obscurity in the terminology/wording of sub-s. (2) of S. 17, when it says that the Governor may suspend from office and if deemed necessary prohibit also from attending the office during inquiry. Once an order of suspension is passed, it goes without saying that the Officer cannot attend the office during inquiry. If it be so, the conjunction "and" used in the said sub section, may actually have to be read as "or", on which event, there may not be any ambiguity. This, in turn, would mean that, suspension may not be necessary in all cases and even if the Officer is not suspended pending inquiry by the Apex Court, if the Governor deems it necessary, His Excellency can prohibit the Officer from attending the office during inquiry.

15. The contention of the petitioner does not appear to be correct or sustainable

for another reason as well. "Commencement of the inquiry by the Apex Court need not be with intimation to the Governor. The provision does not say, that suspension shall be restricted to the period from the date of commencement of the inquiry, till date of completion of the same. On the other hand, it is clearly discernible from the provision, that the suspension will continue until the Governor has passed orders, on receipt of the report of the Supreme Court on such reference. It virtually means that, even after receipt of the report of inquiry from the Supreme Court, it is still open for the Governor to take sufficient time to pass orders and suspension will continue till such time. In other words, suspension is not intended to be till the completion of inquiry by the Supreme Court. As a corollary, it also means that, "commencement" of the inquiry by the Supreme Court does not have any relevance or significance to the suspension which has to be with reference to the decision taken by the Governor to make a reference to the Supreme Court for conducting an inquiry under S. 17(1). This is more so, when the power to take a decision, whether to make a reference or not for conducting inquiry by the Apex Court, is exclusively vested on the Governor.

16. There is yet another contention for the petitioner that, he has not pursued any act, so as to constitute a "misbehaviour". It is stated that, sub-s. (1) of S. 17 has to be read together with sub-s. (4), so as to have an idea as to the scope of inquiry and the ground of misconduct. The attempt of the petitioner is to make out that, a person can be deemed to be guilty of misbehaviour, only on satisfaction of the requirements under sub-s. (4) of S. 17 of the Act. This Court finds it difficult to accept the said proposition. S. 17(1) refers to the inquiry on the ground of "proved misbehaviour or incapacity"; while the word "incapacity" does not appear in sub-s. (4). This virtually means, S. 17(1) implies such other circumstances over and above the circumstance mentioned under sub-s. (4) as well. That apart, sub-s. (4) of S. 17 refers to a particular situation, where the State Chief Information Commissioner or State Information Commissioner, in any way, becomes concerned or interested in any "contract or agreement" made by, or on behalf of the Government of the State or participates in any way in the profit thereof or in any benefit or emoluments arising therefrom, otherwise than as a member and in common with the other members of an incorporated Company; shall be deemed to be guilty of misbehaviour, for the purposes of sub-s. (1). To put it more clearly, the circumstance mentioned in sub-s. (1) is not solely restricted to instances of "misbehaviour" alone, so as to invoke the power and procedure under S. 17(1) of the Act. The contention raised by the petitioner, to the contrary, is without any pith or substance.

17. There is a contention for the petitioner that, the purpose of suspension under S. 17(2) of the Act during the inquiry by the Supreme Court, is with the object that the concerned Information Commissioner does not interfere with the inquiry to be conducted under the orders of the Supreme Court. The said contention does not appear to be attractive to this Court, obviously for the reason that, the Information Commissioner cannot have any access to the proceedings before the Supreme Court, except with the express/permission/opportunity, if any, given by

the Apex Court. For that matter, the Governor need not suspend the Officer. On the other hand, the purpose of suspension is primarily to preserve transparency and to see that the system of administration of justice in the office of the Information Commissioner is not tainted in any manner.

18. With regard to the contention of the petitioner that, the Additional Director General of Police (Vigilance and Investigation) could not have conducted any enquiry or submitted any report, and that the Government could not have made any "recommendation" in this regard so as to cause the petitioner to be suspended, the fact remains that Mr. V.S. Achuthanandan, happens to be an accused in the Vigilance case No. VC 1/12/KSD, which is being investigated by the concerned Deputy Superintendent of Police. The incriminating circumstances including the conversations over phone are stated as put on record. In view of the alleged intervention of the petitioner with the investigation and the instruction stated as given by the petitioner to absolve Mr. V.S. Achuthanandan, a complaint was preferred by the said Investigating Officer before the higher authorities, which was subjected to verification. It was accordingly, that a "Quick verification Report" was submitted by the Additional D.G.P., virtually in support of the complaint preferred by the Investigating Officer. All these aspects were considered by the Government, who in turn thought it fit and proper to place it for consideration before the Governor, for further action under S. 17(1) of the Act.

19. The terms "recommendation by the Government", used does not appear to be of much significance, so as to mean that the Governor has simply accepted the version of the Government and has mechanically placed the petitioner under suspension. On the other hand, the materials on record, particularly Ext. P3 order of suspension and Ext. P6 addressed to the Supreme Court, clearly reveal that there is proper application of mind. The role of the Government was only to place the relevant materials before the Governor, who in turn has considered the same and a "conscious decision" has been taken on the basis of such materials, to have the matter inquired into by the Supreme Court; for which necessary reference was made under S. 17(1) of the Act. It was pursuant to the said decision, that power was invoked under sub-s. (2) of S. 17 and the petitioner was suspended accordingly, vide Ext. P3. As it stands so, this Court finds that Ext. P3 order is not assailable under any circumstance and the suspension can continue till final orders are passed by the Governor, after receipt of the report from the Supreme Court, on completion of the inquiry.

20. Regarding the contention of the petitioner that, Ext. P2 representation has not been considered before passing Ext. P3 order of suspension, it is to be noted that, the said petition itself is dated 8.11.2012; i.e., the previous day of passing Ext. P3 order of suspension. The petitioner has conceded that he had gone to the "Raj Bhavan" on 8.11.2012. But the Governor was not available there, having gone to Bangalore. In the said circumstance, the petitioner readily made over a copy of the said representation to the office and also sent the same by "fax" and "e-mail" to the Governor at Bangalore, on the same day. Even though no proof

has been produced by the petitioner in this regard, the fact remains that Ext. P3 order was passed on the very next day i.e., on 09.11.2012 and there was no reasonable chance for the Governor to have come across Ext. P2 before Ext. P3 order was passed. Even otherwise, there is no provision in the Statute (S. 17(2) of the R.T.I. Act), to make it obligatory for the Governor to have issued any "prior notice" before passing an order of suspension. As such, it cannot be said that, Ext. P3 order has caused infringement of any statutory requirements. There is no violation of any known principles of natural justice as well.

21. In connection with the course and procedure on reference under Art. 317(1) of the Constitution of India, it has been held by the Apex Court in the decision reported in, In the Matter of Reference Under Art. 317(1) of the Constitution of India In The Matter of Reference under Article 317(1) of The Constitution of India, that, the President's prima facie satisfaction, based on the available materials is enough for making a reference under Art. 317(1) of the Constitution. It has also been held that, when the language is plain and clear, something else read into it as an additional provision, especially in the nature of a condition precedent, is not justified. It has been further held that the power of the President to make a reference to the Supreme Court under Art. 317(1) of the Constitution is not subject to the condition precedent, that he must first have the facts examined by some other body or authority. The power, course and procedure under S. 17(1) of the R.T.I. Act, to be invoked/pursued by the Governor, are almost similar to that of the President under Art. 317(1) of the Constitution of India. Satisfaction of the Governor is supreme. Such satisfaction was recorded, as to the necessity to make a reference in respect of the alleged deeds and misdeeds of the petitioner, brought to light from the materials on record. The above dictum has been relied on and the procedure for inquiry under Art. 317(1) of the Constitution has been reiterated by the Apex Court in the subsequent decision reported in In Re: Smt. Sayalee Sanjeev Joshi, Member, Maharashtra Public Service Commission, as well.

22. The question whether any show cause notice has to be issued by the Governor before suspending the members and Chairman of the P.S.C. and making a reference to the Apex Court under Art. 317(1), had come up for consideration before the Apex Court in Ram Kumar Kashyap and Another Vs. Union of India (UOI) and Another, . It was held there, in crystal-clear terms, that it was not necessary that the principle of "audi alteram partem", rigorously followed in the domain of service law, need to be applied with the same degree of rigour, in proceedings involving removal and suspension of members of the State Public Service Commission. The observation made by the Apex Court in Paragraph "12" is relevant, and is extracted below:

12. It is clear from the perusal of the above cases that the petitioners were not entitled to an opportunity to show cause or to be heard before the point of time that the orders of suspension were passed by the Hon"ble Governor of Haryana under Art. 317(2) after the President had referred the matter to the Supreme

Court. The rationale behind empowering the Governor of a State to issue such an order of suspension even before the reference is actually decided by the Supreme Court is to maintain the public trust and confidence in the impartial and honest working of the said Public Service Commission.

In the above facts and circumstances, this Court holds and declares that, the contention of the petitioner, that suspension of the State Chief Information Commissioner/State Information Commissioner contemplated under sub-s. (2) of S. 17 of the R.T.I. Act can only be "after commencement of the inquiry by the Supreme Court", is not correct or sustainable. This Court finds that the Writ Petition is devoid of any merit and none of the grounds raised in support of the same could be held as tenable. Interference is declined and the Writ Petition is dismissed.