

(2016) 09 KL CK 0062

In the High Court Of Kerala

Case No : WP(C) Nos. 17944, 18552, 18722, 18744 and 20439 of 2016

Royce Chirayil

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 09-09-2016

Acts Referred:

Constitution of India, 1950 — Article 155, Article 163, Article 316, Article 317
Right To Information Act, 2005 — Section 15(3), Section 15(3), Section 15(5), Section 15(5), Section 17, Section 17

Citation : (2016) 4 KLT 1055 : (2017) 1 RCRCivil 1048 : (2017) 1 SCT 654

Hon'ble Judges : P.B. Suresh Kumar, J.

Bench : Single Bench

Advocate : Smt. K.R. Deepa, Government Pleader, for the Respondent; Sri. Mathew John (K), Sri. Domson J. Vattakuzhy, Advocates, for the Petitioners

Final Decision : Allowed

Judgement

P.B. Suresh Kumar, J. - These writ petitions pertain to the appointment of State Information Commissioners in the Kerala State Information Commission.

2. The undisputed facts are the following : By a notification dated 2.12.2015, the State Government invited applications for appointment to the post of State Information Commissioner in the Kerala State Information Commission. The number of vacancies notified were 4. Section 15(3) of the Right to Information Act ("the Act" for short) provides that the State Chief information Commissioner and the State Information Commissioners shall be appointed by the Governor on the recommendation of a committee consisting of the Chief Minister ; the Leader of Opposition in the Legislative Assembly and a Cabinet Minister to be nominated by the Chief Minister. A committee as provided for under Section 15(3) of Act was, accordingly, constituted by the Government on 23.12.2015. Later, by notification dated 21.01.2016, the Government invited applications for appointment to the post of State Chief Information Commissioner and also to the post of State Information Commissioner. The second notification, as far as the

post of the State Information Commissioner is concerned, was intended to fill up a vacancy in the said post arose after the first notification. Since large number of applications were received pursuant to the notifications, the selection committee in its first meeting resolved to short list the candidates. Accordingly, a panel of four persons for appointment to the post of State Chief Information Commissioner and a panel of fifteen persons for appointment to the post of State Information Commissioner were placed before the committee on 25.2.2016. In the said meeting, the Chief Minister and the Cabinet Minister nominated by the Chief Minister, proposed to appoint Sri. Vinson M. Paul as the State Chief Information Commissioner and the petitioners in this batch of writ petitions as State Information Commissioners. The Leader of Opposition expressed his dissent to the said proposal. Despite the dissent expressed by the Leader of Opposition, the selection committee recommended the names proposed by them for appointment as the State Chief Information Commissioner and as State Information Commissioners respectively. Accordingly, the file was forwarded to the Governor for appointment. In the meanwhile, some of the applicants for selection and some others preferred a batch of writ petitions before this Court, challenging the decision of the selection committee. Since the writ petitions were pending, the Governor returned the file observing that the file can be re-submitted after the disposal of the writ petitions.

3. The decision of the selection committee constituted under Section 15(3) of the Act was challenged in the writ petitions referred to above mainly on the grounds that the file does not disclose the criteria adopted by the selection committee for short listing the applicants ; that there has been no consideration of the comparative merits of the candidates and that the decision of the committee is not supported by reasons. The State opposed the challenge against the decision of the selection committee, contending that the selection was made strictly in accordance with the provisions of the Act and the decisions rendered by the Apex Court in this context. This Court dismissed all the writ petitions. Ext.P3 in WP(C).No. 18722 of 2016 is the judgment in the said batch of writ petitions. In Ext.P3 judgment, it was found by this Court that the criteria for selection to the posts are only that the candidate shall be a person of "eminence" in public life with wide knowledge and experience in other disciplines referred to in Section 15(5) of the Act and that the individual integrity of the candidate should match the institutional competence of the Office of the Information Commissioner. It was also found by this Court in the said judgment that the intention of the legislature is to use the primacy of experience and the wisdom of the statesmen for such recommendation rather than a selection in the like manner of recruitment of an employee. It was further found by this Court that the selection committee has the freedom to choose a person who fulfils the twin criteria referred to above and therefore there is no necessity for the selection committee to explain the exclusion of other candidates. It was further found by this Court that there is no requirement to demonstrate comparative evaluation of the candidates to the satisfaction of all and that therefore if the recommended

candidates would satisfy the twin criteria referred to above, it is not the province of the Court to prevail upon the wisdom of the selection committee by making comparative evaluation of the merits of the candidates.

4. After Ext.P3 judgment, the file was resubmitted to the Governor. The Governor returned the file again on 26.3.2016 to put up the same with the remarks of the Government on a complaint dated 25.3.2016 received in the meanwhile. The Government resubmitted the file with the remarks on the complaint dated 25.3.2016. It is seen that in the meanwhile, the Governor received some more complaints concerning the appointment to the above posts. Consequently, on 08.04.2016, the Governor called for the remarks of the Government on said complaints as well. The Government has forwarded the remarks called for by the Governor. Thereupon, on 19.04.2016, the Governor approved the recommendation of the selection committee for appointment of Sri. Vinson M. Paul as the State Chief Information Commissioner. As regards the recommendations made by the selection committee for appointment to the post of State Information Commissioners, the Governor directed the Government to verify the claims of the selected candidates as to their eminence in public life as also their knowledge and experience in their respective fields with the support of documentary evidence as directed by the Apex Court in *Union of India v. Namit Sharma* [(2013) 10 SCC 359]. It is seen that the Government has undertaken the verification directed by the Governor and the file was placed again before the Governor for approving the appointment of the petitioners as State Information Commissioners. The file was returned by the Governor again on 27.05.2016 stating that the list enumerating qualifications of the selected candidates which is enclosed with the communication from the former Chief Minister is not authenticated and that the number and details of documents relied upon by the selection committee to vouch/support the eminence of the selected candidates have not been specifically indicated or indexed so as to provide them as document, in reply to any RTI application, as envisaged in the direction contained in paragraph 39.5 of the decision of the Apex Court in *Namit Sharma's* case. In the meanwhile, a new Government came into power in the State. The grievance of the petitioners in the writ petition is that further action is not taken by the Government in power to appoint them as State Information Commissioners pursuant to the decision taken by the selection committee on 25.2.2016. According to the petitioners, once a recommendation is made by the selection committee constituted under Section 15 (3) of the Act, the Government has no option but to make the appointments. The petitioners, therefore, seek a declaration that the Government is bound by the recommendation made by the selection committee constituted under Section 15(3) of the Act. They also seek directions to the State Government to appoint them as State Information Commissioners.

5. A statement has been filed on behalf of the State Government in WP(C).No. 18722 of 2016. It is stated therein that the file relating to the appointment of the petitioners was returned by the Governor stating that the list enumerating

qualifications of the selected candidates which is enclosed with the communication from the former Chief Minister is not authenticated ; that the number and details of documents relied upon by the selection committee to vouch/support the eminence of the selected candidates have not been indicated or indexed so as to provide them as document, in reply to any RTI application, as envisaged in the direction contained in paragraph 39.5 of the decision of the Apex Court in Namit Sharma's case and that the Government is unable to take further steps in the matter since the selection committee constituted on 23.12.2015 ceased to exist consequent on the general election and the change of Government took place in the meanwhile. It is also contended by the Government that large number of complaints have been received by the Government as also the Governor concerning the appointment of the petitioners ; that the records relating to the selection of the petitioners reveal that the short listing of the candidates was made without any criteria ; that merits of the candidates applied for selection have not been assessed in accordance with the directives issued by the Apex Court in Namit Sharma's case and that therefore, the Government is contemplating to cancel the notifications dated 2.12.2015 and 21.1.2016 with a view to conduct a fresh selection.

6. Heard the learned counsel for the petitioners as also the learned Additional Advocate General.

7. Having regard to the submissions made at the Bar, the following questions are formulated for decision in these matters :

Question (I): Whether the selection of the petitioners by the selection committee constituted under Section 15(3) of the Act is vitiated on the grounds raised in the statement filed on behalf of the State Government;

Question (II): Whether the Government is precluded from taking further steps to appoint the petitioners as State Information Commissioners pursuant to the decision of the selection committee dated 25.2.2015 on any ground whatsoever;

Question (III): Whether the Government is entitled to conduct a fresh selection for appointment to the post of State Information Commissioner for the vacancies notified on 2.12.2015 and on 21.1.2016.

8. Question No. (I). Ext.P3 judgment indicates beyond doubt that the contentions raised by the State Government in the statement filed in this batch of cases as regards the validity of the selection process namely, that the short listing of the candidates was made without any criteria and that merits of the candidates applied for selection have not been assessed in accordance with the directives issued by the Apex Court in Namit Sharma's case were contentions rejected by this Court in the earlier batch of cases. As noted above, in the earlier batch of writ petitions, the specific stand of the State Government was that the selection of the petitioners for appointment as State Information Commissioners was in accordance with the provisions contained in Section 15 of the Act. As such, I do not think that the State Government can contend any more that the selection of

the petitioners is bad on the grounds raised in the statement. Even otherwise, I do not find any substance in the contentions raised by the State Government. As noticed above, in view of Section 15(3) of the Act, the State Chief Information Commissioner and the State Information Commissioners are to be appointed by the Governor on the recommendation of the selection committee consisting of the Chief Minister ; the Leader of Opposition in the Legislative Assembly and a Cabinet Minister to be nominated by the Chief Minister. Section 17(1) of the Act provides that subject to the provisions contained in Section 17(3) of the Act, the State Information Commissioners shall be removed from the 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 enquiry, reported that the State Chief Information Commissioner or a State Information Commissioner, as the case may be, ought on such ground be removed. Section 17(3) of the Act provides that they can be removed otherwise than in accordance with the provisions contained in Section 17(1) of the Act if they are adjudged as insolvent ; have been convicted of an offence involving moral turpitude ; engage during their term of office in any paid employment outside the duties of their office ; are, in the opinion of the Governor, unfit to continue in office by reason of infirmity of mind or body and if they have acquired such financial or other interests as are likely to affect prejudicially their function as the State Information Commissioners. Section 15 of the Act dealing with the appointment of the State Information Commissioners and Section 17 of the Act dealing with their removal from office are *pari materia* with the provisions contained in Articles 316 and 317 of the Constitution dealing with the appointment and removal of the members of the State Public Service Commission. Though the post of the State Information Commissioner is a statutory post, in the light of the aforesaid provisions contained in the Act, it cannot be said that the same is a post in connection with the affairs of the State or that the State Information Commissioner is a Government servant in the sense of there being a master and servant relationship between the State and the State Information Commissioner. As found by this Court in Ext.P3 judgment, going by the scheme of the Act, the criteria for selection for appointment as the State Information Commissioner are only that the candidate must be a person of eminence in public life with wide knowledge and experience in other disciplines referred to under Section 15(5) of the Act and that the individual integrity of the candidate should match the institutional competency of the office of the Information Commissioner. As such, anybody who satisfies the above criteria can be recommended for appointment by the selection committee constituted under Section 15(3) of the Act. There need not even be an invitation of applications for the purpose of appointing the State Information Commissioner. Even if applications are invited, the same does not preclude the selection committee from appointing a person who has not applied for selection, but found to be more eminent in public life with wide knowledge and experience in the disciplines referred to in Section 15(5) of the Act. The contemplation of the statute is only that the Chief Minister of the State along with a Cabinet ü?? Minister nominated by him shall select the

candidate in consultation with the Leader of Opposition. It is just like any other executive function of the State Government except to the limited extent the statute provides that the Leader of Opposition shall also be taken into confidence wherever possible. The selection committee is a committee consisting of three constitutional office holders and, therefore, there is an inbuilt check against any abuse of power in the statutory provision itself. The selection committee cannot be equated to a selection committee constituted for appointment of candidates into a service under the Union or the State. If the committee constituted under Section 15(3) of the Act selects candidates in compliance with the statutory, functional and institutional requirements, the selection cannot be impugned on the ground that there was no criteria for selection or that there was no comparative consideration of the merits of the applicants, for, there has to be sufficient elbow room for the executive to make such appointments. [See *State of Punjab v. Salil Sabhlok*, (2013) 5 SCC 1].

9. Question (II). Since the decision of the Governor dated 27.5.2016 in returning the file relating to the appointment of the petitioners is set up by the Government as a bottleneck in the matter of taking further action pursuant to the decision of the selection committee dated 25.2.2016, the role of the Governor under the Act in the matter of appointing the State Information Commissioner needs to be understood. The Governor is not an elected representative under the Constitution. He is only an executive nominee appointed by the President under Article 155 of the Constitution. The Governor holds office only during the pleasure of the President. Since the President exercises his function on the aid and advice of the Prime Minister and his Council of Ministers, the tenure of the office of the Governor coincide with the aid and advice of the Prime Minister and his Council of Ministers. Chapter II of Part VI of the Constitution dealing with the executive functioning of the States provides that the executive power of the State is vested with the Governor and is to be exercised by him in accordance with the Constitution. Article 163 mandates that the Governor shall exercise his functions on the aid and advice of the Council of Ministers headed by the Chief Minister, except in matters where he is by or under the Constitution required to exercise his functions in his discretion. In other words, the Governor has discretion only in matters where he is by or under the Constitution required to exercise his functions in his discretion. The Governor, therefore, cannot have any overriding authority on the executive Government in relation to a matter over which he is not by or under the Constitution required to exercise his functions in his discretion. [See *Nabam Rebia and Bamang Felix v. Deputy Speaker* (2016 (6) Scale 506)]. Even when the power is vested in the Governor by virtue of a statute, he has to act in accordance with the aid and advice tendered by the Council of Ministers for the simple reason that he does not cease to be an executive head as mentioned under the Constitution merely because such authority is conferred upon him by the statute. It would, in fact, be violative of the scheme of the Constitution, if it is held that the mere use of the word "Governor" in the statute is sufficient to impute to the legislature an

intention by it to confer a power "eo nomine" on the Governor. Any interpretation other than the one referred to above would be against the concept of parliamentary democracy which is one of the basic postulates of the Constitution. [See *State of Gujarat v. R.A. Mehta*, (2013) 3 SCC 1]. It is, therefore, clear beyond doubt that the Governor cannot act in his discretion while acting under Section 15(3) of the Act. In *Binu D.B. v. Governor, Government of Kerala* (2010 (4) KHC 871), a Division Bench of this Court has held, in the context of the appointment of the State Information Commissioner, that the Governor need not even therefore be impleaded as a party in a proceedings challenging the appointment of the State Information Commissioner. It is thus clear that if a recommendation is made by the statutory committee constituted under section 15 (3) of the Act, the Governor is bound to appoint the State Information Commissioner.

10. As noted above, the file relating to the appointment of the petitioners was initially returned by the Governor on 26.3.2016 for the remarks of the Government on a complaint dated 25.3.2016 received by the Governor. The file was returned by the Governor again on 08.04.2016 for the remarks of the Government on the complaints received subsequently. Having understood the role of the Governor in the appointment of State Information Commissioner, I have no hesitation to hold that the receipt of the complaints by the Governor pertaining to the appointment is not a ground at all for the Governor to return the file relating to the appointment of the petitioners. Nevertheless, when the file was resubmitted with the remarks sought by the Governor, the file was again returned by the Governor on the ground that the claims of the selected candidates as to their eminence in public life as also their knowledge and experience in the particular field, have not been verified. Non verification of the credentials of the selected candidates cannot also be a reason for the Governor to return the file. That does not mean that the selection committee need not verify the credentials of the selected candidates. If the appointments are made by the selection committee without verifying the credentials of the applicants, the selection will be open to challenge. As noticed above, the file was again resubmitted after verifying the credentials of the selected candidates. This time, the file was returned by the Governor stating that the direction contained in paragraph 39.5 of the decision of the Apex Court in *Namit Sharma's* case has not been complied with by the committee. When the file was resubmitted this time, a detailed Note of the records placed before the selection committee pertaining to the credentials of the candidates was also forwarded. It is seen that despite all that, the file was returned by the Governor on the ground that the number and details of documents relied upon by the selection committee to vouch/support the eminence of selected candidates have not been specifically indicated.

11. As noted above, the essence of the contentions of the Government is that the selection committee which is to comply with the direction contained in paragraph 39.5 of the decision of the Apex Court in *Namit Sharma's* case does not exist

now and that therefore further action pursuant to the decision of the selection committee cannot be taken. The scope of the direction in Namit Sharma's case referred to above also needs to be examined in the light of the said contention. Paragraph 39.5 of the judgment in Namit Sharma's case reads thus :

39.5. We further direct that the Committees under Sections 12 (3) and 15(3) of the Act while making recommendations to the President or to the Governor, as the case may be, for appointment of Chief Information Commissioner and Information Commissioners must mention against the name of each candidate recommended, the facts to indicate his eminence in public life, his knowledge in the particular field and his experience in the particular field and these facts must be accessible to citizens as part of their right to information under the Act after the appointment is made.

A close reading of the judgment in Namit Sharma's case indicates that the said direction was issued by the Apex Court in the light of the finding rendered therein that only persons of eminence in public life with wide knowledge and experience in the fields mentioned in Section 15(5) of the Act can be appointed as State Information Commissioners. The purpose of the direction, as indicated clearly in the direction itself, is only to enable the citizenry, as part of their right to information, to know the facts concerning the eminence as also the knowledge and experience of the selected candidates, in the fields specified in the section, after the appointments are made. In other words, the direction is only that the facts disclosing the eminence of the selected candidates in public life, their knowledge and experience in the field of specialisation, shall be available in the file, so as to enable the citizenry to access the same as part of their right to information. Having understood the scope of the aforesaid direction in Namit Sharma's case thus, it is clear that if appointments are made in accordance with the provisions contained in Section 15 of the Act, the same will not be invalid for non-compliance of the said direction. Page 193 of the Note File pertaining to the appointment of the petitioners, which is made available to me at the time of hearing, contains the decision of the selection committee in appointing the petitioner in W.P.(C) No. 20439 of 2016 as the State Information Commissioner. Likewise page 195 contains the decision of the selection committee in appointing the petitioners in the remaining cases as the State Information Commissioners. The said decisions recite that considering the merit, rich experience in the relevant field and integrity, the committee selected the said candidates for appointment. In the decision, the eminence of the candidates is also indicated against their names as shown hereunder :

(page 193)

1. Shri. Vinson M. Paul Eminent in the field of Governance and Administration
2. Adv. P.R. Devadas Eminent in the field of Law and Social Work

(page 195)

1. Adv. Abi Kuriakose Eminent in the field of Law and Social work.
2. Adv. Roys Chirayil Eminent in the field of Law.
3. Shri. Abdul Majeed Eminent in the field of Management, Co-operation and Social work.
4. Shri. Ankathil Ajai Kumar Eminent in the field of Social Service, Administration, Governance and Management.

It is, therefore, clear that the file satisfies the requirements contained in the direction issued by the Apex Court in paragraph 39.5 of Namit Sharma's case. Even otherwise, as indicated above, the Governor cannot refrain from appointing the candidates selected by the selection committee on that ground. In this context, it is relevant to note that in the statement filed in this writ petition, the Government have no case that the petitioners are not persons who are eminent in public life nor do they have a case that the petitioners do not have knowledge and experience in the fields specified in Section 15(5) of the Act. Further, it is seen that even while the approval sought in respect of the appointment of the petitioners was declined, the Governor approved the decision of the selection committee to appoint Sri. Vinson M. Paul as the State Chief Information Commissioner. It is thus evident that the Governor was acting in his discretion in the matter of appointment of the petitioners as State Information Commissioners. As noted above, the Governor had no discretion at all in the said matter and the Governor should have approved the appointment of the petitioners at the first instance itself. An interpretation contrary to what is stated above would certainly lead to a constitutional failure.

12. Question No. (iii) : It is now settled that the decision taken at the Government level should not be easily nullified by a change of Government and by some other political party assuming power. True, in so far as the policy is concerned, a political party assuming power is entitled to engraft the political philosophy behind the party, since that must be held to be the will of the people. But, in the matter of governance of a State or in the matter of execution of a decision taken by the previous Government which does not involve a political philosophy, the succeeding Government must be held duty bound to continue and carry on the unfinished job rather than putting a stop to the same. [See *State of Haryana v. State of Punjab*, (2002) 2 SCC 507]. In other words, unless it is found that the act done by the Government earlier in power is either contrary to the constitutional provisions or against public interest, the State should not change its stand merely because another political party has come into power. Political agenda of an individual or a political party should not be subversive of the rule of law. The Government has no case that the decision of the selection committee is contrary to any constitutional provisions or against public interest. As such, the Government is bound to give effect to the decision of the selection committee to appoint the petitioners as the State Information Commissioners.

In the result, the writ petitions are allowed and the State Government is directed

to appoint the petitioners as State Information Commissioners within one month from the date of receipt of a copy of the judgment.