

(2012) 07 KAR CK 0029

In the Karnataka High Court

Case No : Writ Petition No. 27995 of 2011 (GM-KLA-PIL)

Shri Natesh

APPELLANT

Vs

The State of Karnataka

RESPONDENT

Date of Decision : 05-07-2012

Acts Referred:

Constitution of India, 1950 — Article 154, 163, 361, 361 (1)
Karnataka Lokayukta Act, 1984 — Section 12, 12 (1), 12 (4), 12 (5)

Citation : AIR 2012 Kar 149 : (2012) 6 KarLJ 11 : (2012) 5 KarLJ 589

Hon'ble Judges : Vikramajit Sen, C.J.;B.V. Nagarathna, J

Bench : Division Bench

Advocate : Krishna S. Dixit, for the Appellant; S. Vijayashankar, Advocate General a/w Shri. R.G. Kolle AGA for R1 and R3, Shri. Udaya Holla, a/w Shri. M.S. Rajendra, Advocate for R-2, Shri. P.P. Rao, along with Shri. D.N. Nanjunda Reddy, a/w Ms. Mahalakshmi Pavani and Shri. Sandesh Chouta Advocate for Sri. A.S. Ponnanna, Advocate for R-4, for the Respondent

Judgement

Vikramajit Sen, C.J.—This Writ Petition prays for issuance of an order/writ in the nature of certiorari for quashing the decision of the Competent Authority under the Karnataka Lokayukta Act 1984, who in this instance is his Excellency, the Governor of Karnataka. The Report has been signed on 23.06.2009 by the "Competent Authority" and it concludes that "no action for recovery of Rs. 23,22,11,850/- (Rupees twenty three crores twenty two lakhs eleven thousand eight hundred and fifty) or any other sum is required to be taken against Shri. N. Dharam Singh. This decision of the Competent Authority may be intimated to the Hon'ble Lokayukta, as required by Section 12(4) of the Karnataka Lokayukta Act, 1984 immediately." The second prayer in the writ petition is for the issuance of a direction to the State of Karnataka, the Competent Authority under the Lokayukta Act and the Commissioner for Mines and Geological Resources and Director of Mines and Geology, Bangalore to initiate appropriate action for recovery of the loss allegedly caused to the State Exchequer, due to the action attributable to Shri. N. Dharam Singh, Member of Parliament and former Chief

Minister, Government of Karnataka. Shri. P.P. Rao, learned Senior Counsel appearing for Shri. Dharam Singh Respondent No. 4 i.e., the former Chief Minister, has raised a preliminary objection as to the maintainability of the writ petition vice Respondent No. 2 i.e., the then Governor of Karnataka namely Shri Rameshwar Thakur. Reliance has been placed on Article 361 of the Constitution of India which provides that the Governor of a State "shall not be answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties." In the context of this Article, the Constitution Bench in Rameshwar Prasad and Others Vs. Union of India (UOI) and Another, has enunciated the law thus:-

173. A plain reading of the aforesaid Article shows that there is a complete bar to the impleading and issue of notice to the President or the Governor inasmuch as they are not answerable to any Court for the exercise and performance of their powers and duties. Most of the actions are taken on the aid and advice of the Council of Ministers. The personal immunity from answerability provided in Article 361 does not bar the challenge that may be made to their actions. Under law, such actions including those actions where the challenge may be based on the allegations of mala fides are required to be defended by the Union of India or the State, as the case may be. Even in cases where personal mala fides are alleged and established, it would not be open to the Governments to urge that the same cannot be satisfactorily answered because of the immunity granted. In such an eventuality, it is for the respondent defending the action to satisfy the Court either on the basis of the material on record or even filing the affidavit of the person against whom such allegation of personal mala fides are made. Article 361 does not bar filing of an affidavit if one wants to file on his own. The bar is only against the power of the Court to issue notice or making the President or the Governor answerable. In view of the bar, the Court cannot issue direction to the President or the Governor for even filing of affidavit to assist the Court. Filing of an affidavit on one's own volition is one thing than the issue of direction by the Court to file an affidavit. The personal immunity under Article 361 (1) is complete and, therefore, there is no question of the President or the Governor being made answerable to the Court in respect of even charges of mala fides.

(underlining added)

2. Article 154 which is found in Chapter-II of Part-VI of the Constitution of India ordains that the executive power of the State shall be vested in the Governor. Article 163 postulates the responsibilities of the Council of Ministers with the Chief Minister as the head to aid and advice the Governor in the exercise of his functions, except in so far as he is required to fulfill this exercise in his discretion. Its second subsection thereafter clarifies that if any question arises whether any matter requires the Governor to act in his discretion, the decision of the Governor in his discretion is final, and its validity "shall not be called in question on the ground that he ought or ought not to have acted in his discretion". The

aspect of exercise of discretion by the Governor is of relevance for the present purposes, since this phrase is also employed in The Karnataka Lokayukta Act 1984, ("Lokayukta Act" for brevity) the provisions of which fall for our interpretation. While there can be no cavil that the Constitution grants immunity to the Governor of a State in respect of the performances of any of his Constitutional duties, it is the Petitioner's contention that the decisions taken under the Constitution of India are totally different to the performance of statutory duties imposed by the Lokayukta Act to which the immunity of the Governor acting in his discretion as Competent Authority is not attracted. It would obviously be appropriate to analyse the law pertaining to the performance of statutory duties by the Governor such as when he dons the mantle of the Chancellor of Universities.

3. Learned counsel for the adversaries have relied on the following observations of the Full Bench of the High Court of Hardwari Lal Vs. G.D. Tapase and Others, which has received the imprimatur of the Supreme Court in terms of Bhurinath - Vs- State of Jammu and Kashmir (1997) 2 Supreme Court Cases 745. The Full Bench returned this opinion -

119. Having adverted to the relevant provisions of the Constitution, it is now to be seen whether the powers exercised by the Chancellor have any relation to the exercise and performance of the powers and duties of the office of the Governor. Though earlier also I have referred to certain relevant provisions of the Act and the Statute, yet for facility of reference it is necessary to make mention of those provisions here again. u/s 3 of the Act the first Chancellor of the University is appointed by the Government. u/s 8 the Chancellor is mentioned as one of the officers of the University. Under sub-section (2) of Section 8, the Chancellor is empowered to appoint a person to be Pro-Vice-Chancellor on such terms and conditions as he may think fit. u/s 19 the Chancellor is empowered to require or direct any officer or authority of the University to act in conformity with the provisions of the Act and the Statute, Ordinances and Regulations made thereunder. Under Sub-Section (2) it is further provided that the power exercised by the Chancellor under sub-section (1) shall not be called in question in any Civil Court.

120. Under the first Statutes of the University, Statute 2 provides that the Governor of Haryana shall be the ex officio Chancellor of the University. Statute 3 says that the Chancellor by virtue of his office will be the head of the University. In sub-clause (2) of Statute 3 it is provided that the Chancellor shall, if present, presides at the convocation of the University for conferring degrees and at all meetings of the Court. Under Statute 4(6) complete power is given to the Chancellor to appoint a Vice-Chancellor on such terms and conditions as he lays down. Under clause (8) of Statute 4 power is given to the Chancellor to fill any casual vacancy in the office of the Vice-Chancellor. Statute 10 provides the constitution of the Court in which the Chancellor is mentioned as one of the ex officio members. Under Statute 26 power of relaxing any condition mentioned in

the Statute is given.

121. As has been observed earlier, and that is the scheme of the Act and the Statutes, that in the University affairs there cannot be any interference from the State Government. The State Government is an authority quite distinct from the authority of the Chancellor. The State Government cannot advise the Chancellor to act in a particular manner. The University is a statutory body, autonomous in character. Under the Act and the Statutes, the Chancellor has been given certain powers exercisable by him in his absolute discretion without any interference from any quarter. For the appointment of the Vice-Chancellor or the Pro-Vice-Chancellor, he is not required to consult the Council of Ministers. It is correct that by virtue of his office the Governor becomes the Chancellor of the University but while discharging the functions of his office he does not perform any duty or exercise any power of the office of the Governor. While discharging the functions of the office, the Chancellor does not act on the aid and advice of the Council of Ministers. It would not be correct to say that as the Governor holds the office of the Chancellor of the University by virtue of his office, therefore, the powers and duties he exercises or performs under the relevant Article or the Statute, are the powers and duties of his office as Governor. The Governor is vested with certain powers and duties under the Constitution that normally are exercised or performed on the aid and advice of Council of Minister and, therefore, it becomes necessary to give immunity to such person in the discharge of the duties of his office. But this is not the position in the case of the Chancellor as he, under the Act, has his own independent existence and exercise his power without any interference from any quarter. The office he holds is a statutory office and is quite distinct from the office of the Governor.

122. If immunity is extended to the Chancellor also, then it would lead to anomalous results, that is, that in respect of action of the Governor as the Head of the State executive, appropriate proceedings against the State would be open, while it would not be permissible for any person to question the action of the Chancellor in any proceedings, for the reason that the Chancellor's action not being the action of the Governor as the Head of the State executive, the second proviso of Article 361 (1) would have no applicability. In this view of the matter, I do not find any escape from the conclusion that the powers and duties exercised and performed by the Chancellor under the Act or the Statutes of the University have absolutely no relation to the exercise and performance of the powers and duties of the office of Governor

(underlining added)

4. It is indeed remarkable that the learned Senior Counsel for Respondent No. 4 as well as the learned Counsel for the Petitioner have relied on these very paragraphs to buttress their respective contentions. The learned Advocate General has supported the arguments of the learned counsel for the petitioner by contending that the decision taken by the Governor acting as Competent Authority under the Lokayukta Act is statutory rather than Constitutional and

accordingly, no immunity attaches to such actions or decisions of the Competent Authority even though they are of the Governor. Respondent No. 4 is the former Chief Minister of the State who does not have allegiance to the party presently in power. We can only wonder whether the learned Advocate General would adopt the same position and canvas this contention if the allegations were against a Chief Minister loyal to the present political dispensation. Fortunately, Courts are insulated from partisan/considerations; Judges are impervious to the pulls of real politik, and must analyse the law objectively so that their decisions abide, apply and endure in all circumstances.

5. In Bhuri Nath, their Lordships had also approved the view in Kiran Babu -Vs- Government of Andhra Pradesh AIR 1986 A.P 275, which was decided without advertence to the Full Bench decision of the High Court of Punjab and Haryana. The cleavage in the opinion of the Division Bench of Andhra Pradesh High Court was removed by B.P. Jeevan Reddy J., as his Lordship then was. His view which accordingly constituted the majority opinion was that "the advice of the Council of Ministers headed by the Chief Minister was not binding on the Governor, since his decision appointing Vice Chancellor of Sri Venkateswara University was taken as the Chancellor of the University which office is distinct and separate from that of the Governor". Two High Courts have had identical dialectics.

6. In Bhuri Nath, the Governor was the ex-officio Chairman of the Board of Shri Mata Vaishno Devi Shrine Trust and by virtue of Section 9 of Jammu and Kashmir Shri Mata Vaishno Devi Shrine Act, 1988 he had the power to supersede or dissolve the Board. The question that arose was whether the Governor while discharging functions under that Act was required to obtain the aid and advice of the Council of Ministers or was competent to arrive at his own decision. Their Lordships held that the High Court was "not right in holding that the Governor while exercising his power under Schedule-V of the Constitution acts with the aid and advice of the Council of Ministers..... The Governor exercises his statutory power as ex-officio Chairman of the Board, though he is the repository of State power by virtue of his office as Governor. Nevertheless, he exercises it in his capacity as Chairman, a distinct and separate function and power and not in the constitutional sense of the Cabinet System, of performing the executive power the State Government has under the Constitution, with the aid and advice of the Council of Ministers headed by the Chief Minister." It is in the backdrop of this exposition of law that we have to unravel the role of the Governor as the Competent Authority under the Lokayukta Act 1984.

7. Section 2 (4) of the Lokayukta Act contains the definition of "Competent Authority" which in the case of the Chief Minister or a member of the State Legislature is the "Governor acting in his discretion". Section 2(7) clarifies that the word "Governor" means the Governor of Karnataka whenever it is employed in the Lokayukta Act. Section 3 deals with the appointment of Lokayukta and Upa-Lokayukta and vests in the "Governor" the power to make this appointment although it is apparent that he is bereft of discretion in doing so, inasmuch as he

is circumscribed by the advice tendered to him by Chief Minister who in turn must consult the Chief Justice, the Chairman of the Legislative Council, the Speaker, and the Leader of the Opposition. Section 5 postulates the resignation of the Lokayukta or Upa-Lokayukta on a written intimation to the Governor. Section 6 stipulates that the Lokayukta or Upa-Lokayukta shall not be removed from office except by an Order of the Governor passed after an address by each House of the State Legislature supported by a majority of total membership of the House and the majority of not less than two-thirds of the members of that House present and voting has been presented to the Governor in the same session for such removal on the ground of proved misbehaviour or incapacity; the Governor does not exercise his discretion in the matter. Section 7 deal with the matters to be investigated by Lokayukta or Upa-Lokayukta, and Section 8 enumerates instances where investigation is prohibited. Sections 9 to 11 deals with the proceedings of the Lokayukta and Upa-Lokayukta. Section 12 enjoins on the Lokayukta or Upa-Lokayukta the duty of filing of a written report recommending to the Competent Authority the remedy or redressal that is proposed. Provisions have also been made for the investigation and reporting of allegations by the Lokayukta or Upa-Lokayukta and reporting by them of the findings and recommendations to the Competent Authority. The said Section 12(5) employs the term Competent Authority as well as the Governor thereby indicating that there is a distinction in these high functionaries, their powers and duties.

8. Despite the separate use of two epithets in the Lokayukta Act, Mr. P.P. Rao, learned Senior Counsel appearing for Respondent No. 4 contends that the function under the statute are essentially and entirely that of the Governor in his Constitutional persona and therefore, immunity from judicial proceedings is automatically attracted even to actions having a strictly statutory flavour. The contentions is that the Governor acts ex-officio as the Competent Authority and consequently, all the vestiges of power as well as the immunity that surrounds the personage of the Governor are identically attracted, regardless of whether it is a constitutional or statutory action that is in focus. We are unable to agree with Mr. Rao that because the Governor act ex-officio as the Competent Authority there cannot be any difference in his status, attributes and character. The precedents which we have already discussed are clearly to the contrary.

9. Subsection (1) of Section 12 of the Lokayukta Act expects the Lokayukta or Upalokayukta to carry out an investigation upon receipt of any grievances and on his being satisfied that injustice or undue hardship has resulted to the complainant, he is required to forward a written report containing recommendations for remedying or redressing such injustice or hardship to the Competent Authority, who in turn, within one month, is to intimate the Lokayukta or Upalokayukta about the action taken by the Competent Authority on the said written report.

10. Subsection 3 is also unhappily worded. It enjoins the Lokayukta and

Upalokayukta to firstly carryout an investigation with regard to any action/allegation and thereafter, if substantiated, to communicate his findings and recommendations to the Competent Authority, who shall within three months intimate the Lokayukta or Upalokayukta of the action taken by the Competent Authority. Section 12 places checks on the Competent Authority, inasmuch as, if his action does not meet with the satisfaction of the Lokayukta or Upalokayukta, a Special Report has to be filed by the latter before the Governor as contemplated under subsection 5. Under the next sub-section the Lokayukta is bound to file a Performance Report before the Governor. It is important to notice that the Section postulates different roles to the Competent Authority and the Governor, which negates the possibility of the Competent Authority discharging the same functions as that of the Governor. Logically, therefore, the aforesaid two functionaries cannot be seen merely as one and the same with the consequence that the immunity available to the person in the capacity as Governor would also envelop the actions as the Competent Authority. Subsection (7) does not bestow any discretion on the Governor in the event a Special Report under Sub-section (5) is received by him. He has to cause a copy thereof together with an explanatory memorandum to be laid before each Houses of the State Legislature. Where the Governor is not required to act as the Competent Authority, the prescribed procedure does not create any problem, but a piquant position presents itself where the same person is to discharge both the Constitutional as well as the statutory functions. The Lokayukta Act itself creates this dichotomy. We are unable to perceive any manner in which the phrase "in his discretion" impacts upon the legal nodus before us. In discharging his gubernatorial functions the Governor exercises discretion in appointing or dismissing the Chief Minister and his Council of Ministers; but the Governor has no discretion in the matter of causing a copy of the Special Report to be laid before each of the Houses of the State Legislature. It is not the contention of Shri. P.P. Rao that the impugned decision has been taken by the Governor and not by the Competent Authority and therefore, immunity is automatically attracted. On the other hand the argument is that the Competent Authority, that is the Governor acting in his discretion under the Act is also empower with immunity as envisaged under Article 361 of the Constitution. We are unable to accept such a proposition as we are of the view that the impugned Order is passed by the Competent Authority who also happens to be the Governor of the State but the impugned Order is not passed by the Governor of the State acting under Article 163 of the Constitution of India. Therefore, the immunity mentioned under Article 361 of the Constitution does not apply to the present case. The correctness of the impugned Order made in the capacity of the Competent Authority though also mentioned as the Governor, is yet to be argued in detail. It is also necessary to underscore that the rulings of the Apex Court clarify that it is always open to the Governor to waive his Constitutional immunity, which is exactly what has happened in the case on hand. His Excellency the present Governor has caused a vakalatnama to be filed and has appointed Senior Counsel who has not claimed the Constitutional privilege of

immunity. We must immediately clarify that the actions which are under challenge are of the previous Hon"ble Governor acting as Competent Authority.

For all these myriad reasons we are of the view that it is not possible for us at the present preliminary stage of hearing to conclude that the impugned Order or action of the previous Hon"ble Governor is not justiciable. The preliminary objection raised by Respondent No. 4, the erstwhile Chief Minister, is accordingly rejected.

The case be listed for further consideration on 31.07.2012.