
(2016) 03 KL CK 0074
In the High Court Of Kerala
Case No : W.P.(C) Nos. 7665 of 2016.

Somanathan Pillai

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 23-03-2016

Acts Referred:

Constitution of India, 1950 — Article 226
Right to Information Act, 2005 — Section 15

Citation : (2016) 2 KLT 311 : (2016) LIC 2268

Hon'ble Judges : A. Muhamed Mustaque, J.

Bench : Single Bench

Advocate : M.R. Rajendran Nair (Sr.Advocate), M.R. Hariraj and B. Vineetha, Advocates, for the Appellant; Advocate General (K.P. Dandapani), K. Gopalakrishna Kurup, G.Shrikumar, P.K. Suresh Kumar and N. Dharmadan (Sr. Advocates), T.B. Hood, M. Isha, Amal Kasha, T.P.

Final Decision : Disposed Off

Judgement

A. Muhamed Mustaque, J. - The question involved in these batch of Writ Petitions is whether the recommendation of the Selection Committee constituted under Section 15 of the Right to information Act, 2005 to appoint a State Chief Information Commissioner and the State Information Commissioners of the Kerala Information Commission, suffers from any legal infirmity.

2. The above Writ Petitions, except W.P.(C).No.9042/2016 and 9278/2016, are filed by the candidates who have either applied to the post of State Chief Information Commissioner or the State Information Commissioners. W.P.(C).Nos. 9042/2016 and 9278/2016 are filed by persons, who claim to be human right activists and information activists, challenging the above recommendation.

3. The Government on 02.12.2015 published a notification inviting application for four posts of State Information Commissioners. The last date for receipt of the applications was 15.12.2015. Thereafter, another notification was published on 21.01.2016 inviting application to the posts of Chief Information Commissioner

and one State Information Commissioner. The last date of receipt of the applications was 20.02.2016. The Committee, which was constituted pursuant to the notification dated 02.12.2015 was also entrusted with the selection of candidates based on the notification dated 21.01.2016. The Committee met on 24.02.2016. As mandated, the Committee constituted under Section 15 of the Right to Information Act is comprised of the Chief Minister as the Chair Person, the Leader of Opposition in Legislative Assembly and a Cabinet Minister to be nominated by the Chief Minister. In the meeting held on 24.02.2016, the Leader of the Opposition wanted to have the preparation of a shortlist based on the experience and criteria of candidates. The Opposition Leader suggested that the shortlist should contain three persons for a single post and it should be based on the criteria referred under Section 15 of the Right to Information Act and as expounded in the judgment of the Hon'ble Supreme Court in *Union of India v. Namit Sharma* (2013 (4) KLT SN 1 (C.No. 1) SC = (2013) 10 SCC 359). Thereafter, a shortlist was prepared and placed in meeting held on the next day, i.e., 25.02.2016. In the said meeting, the Opposition Leader raised an objection. The objection is inter alia regarding the procedure as well as the criteria for shortlisting the candidates and also related to the authority of the committee to recommend the State Chief Information Commissioner and the other State Information Commissioners pursuant to the subsequent notification.

4. The challenge in this Writ Petition essentially is regarding non consideration of the petitioners, who were applicants as well as the proprietary of the selection process. The majority decision of the committee favoured recommendation of Shri. Vincent M. Paul, the fifth respondent in W.P.(C). No.7665/2016, as the State Chief Information Commissioner and the remaining party respondents in the said Writ Petition as the State Information Commissioners. The files were sent to His Excellency, the Governor of Kerala, to make appointments. However, noting the factum of an order of status quo passed by this Court in W.P. (C).No.7665/2016, the files have been returned.

5. The main ground of challenge urged before this Court by the learned Senior Counsel Shri. M.R. Rajendran Nair appearing for the petitioner in W.P. (C).No.7665/2016 is that there is total lack of transparency in the method of selection for recommendation. It is argued that the petitioner was not at all considered for recommendation. Therefore, it is submitted that there is no "selection" process to recommend candidates among those who have applied for the post. It is pointed out that there are more than 236 applicants to the posts of the State Chief Information Commissioner and the State Information Commissioners and the recommendation has been made in a clandestine manner without any transparency. The learned Senior Counsel further argued that the administrative decision also must be supported with reasons, otherwise such a decision will have to be treated as arbitrary. The highlight of the argument is that there has been no consideration of any sort, to assess the comparative merits of the individuals concerned. The learned Senior Counsel pinpointed at the integrity of the office of the Information Commissioner and the necessity to have a

person of impeccable character to hold such office.

6. The learned counsel Shri. E. Nandakumar appearing for the petitioner in W.P.(C).No.9648/2016 would submit that there is no constitution of a valid Committee. The notes generated in the file by the Hon''ble Chief Minister, cannot constitute a Committee subsequent to the notification. Further, it is submitted that in the absence of a defined transparent procedure, the recommendation is vitiated by nepotism.

7. The counsel for the writ petitioner in W.P.(C). No. 9042/2016 submitted that selection of Shri. Vincent M. Paul as the Chief Information Commission is a gratitude for conducting "Bar Bribery Case" and "Ice Cream Parlour case". It is submitted that the selected candidates belonged to different political groups of the ruling Government. The counsel for the writ petitioner in W.P.(C). No. 8986/2016 points out that Shri. P.R. Devadas one of the candidates recommended to be appointed as the State Information Commissioner was a member of the Kerala Public Service Commission and therefore, there is a constitutional embargo in appointing such person.

8. On the other hand, the learned Senior Counsel Shri. N. Dharmadan appearing for one of the party respondents, namely, Shri. K.P. Abdul Majeed in W.P.(C).No.7665/2016 would argue that the Writ Petition is not maintainable as the recommendation has not yet culminated into an appointment. It is submitted that the Governor has to look into the matter and the Court shall not interfere with the selection process before its finalisation. The learned Senior Counsel Shri. G. Shrikumar appearing for Shri Vincent M.Paul would submit that the Court need not sit upon the wisdom of the Selection Committee unless such process is vitiated in any manner. It is pointed out that Shri Vincent M. Paul, who has been selected to the post of the State Chief Information Commissioner is a retired Director General of Police and there is no embargo in considering him to such a pivotal post. It is further argued that once the candidates satisfy the criteria, they become eligible to be appointed and there is no necessity to have comparative evaluation of each candidate. Shri. A.N. Rajan Babu appearing for one of the party respondents ? Shri. P.R. Devadas submits that "eminence" in any of the discipline referred under Section 15 of the Right to Information Act alone is the criteria and his client has no disability for consideration in terms of the Constitution of India. The learned counsel Shri. Mohan Jacob George appearing for one of the party respondents would argue that the objection regarding constitution of the Committee is unsustainable as the Committee itself has been constituted in terms of Section 15 and it is a permanent committee and not an ad-hoc committee. Shri. Mathew John appearing for one of the party respondents submits that there were previous instances, the Governor returning the files refusing to accept the recommendation and therefore, W.P.(C).No.7665/2016 is premature.

9. The learned Advocate General Shri. K.P. Dandapani submits that the selection has been made strictly following the directions of the Hon''ble Supreme Court in

Namit Sharma's case (2013 (4) KLT SN 1 (C.No. 1) SC = (2013) 10 SCC 359). It is further submitted that the Writ Petition is not maintainable as the writ of certiorari cannot be sustained without producing decision of the State impugned before this Court. The learned Advocate General submits that there is no whisper about disability attached with any of the candidates, who have been recommended for appointment. It is further submitted that the recommendation cannot be treated as selection to any post of the Union or under the State and there is no requirement to hold competitive examination or interview for the purpose of assessment of relative merit. It is also pointed out that the Right to Information Act did not provide any other procedure for recommendation, except to ensure that the recommendation of the candidates must be on the eligibility of the "eminence" in the disciplines referred thereunder. Therefore, the Committee can adopt its own procedures for recommendation. The learned Advocate General argues that the writ petitioners in W.P.(C). Nos. 9042/2016 and 9278/2016 have no locus standi in as much as they are not applicants to any of the posts and therefore, the said Writ Petitions are not maintainable.

10. Section 15 of the Right to Information Act refers to constitution of a Committee. It also provides criteria for recommendation by the Committee for appointment to be made by the Governor of the State. In the above context, it is appropriate to refer Section 15, which reads as below:

"15. Constitution of State Information Commission. - (1) Every State Government shall, by notification in the Official Gazette, constitute a body to be known as the.....(name of the State) Information Commission to exercise the powers conferred on, and to perform the functions assigned to, it under this Act.

(2) The State Information Commission shall consist of-

(a) the State Chief Information Commissioner ; and

(b) such number of State Information Commissioners, not exceeding ten, as may be deemed necessary.

(3) The State Chief Information Commissioner and the State Information Commissioners shall be appointed by the Governor on the recommendation of a committee consisting of-

(i) the Chief Minister, who shall be the Chairperson of the committee;

(ii) the Leader of Opposition in the Legislative Assembly; and

(iii) a Cabinet Minister to be nominated by the Chief Minister. Explanation.- For the purposes of removal of doubts, it is hereby declared that where the Leader of Opposition in the Legislative Assembly has not been recognised as such, the Leader of the single largest group in opposition of the Government in the Legislative Assembly shall be deemed to be the Leader of the Opposition.

(4) The general superintendence, direction and management of the affairs of the

State Information Commission shall vest in the State Chief Information Commissioner who shall be assisted by the State Information Commissioners and may exercise all such powers and do all such acts and things which may be exercised or done by the State information Commission autonomously without being subjected to directions by any other authority under this Act.

(5) The State Chief Information Commissioner and the State Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance."

11. The nature of composition of the Committee would go to show that the legislature intends to entrust the task of selection with the head of Council of Ministers by taking into account the views of the Opposition Leader to ensure that such recommendation have undergone democratic process. Therefore, this process is more or less akin to exercise of executive power.

12. Before considering the rival contentions and the issues involved, it is apposite to refer the judgment of the Hon"ble Supreme Court in Namit Sharma's case (2013 (4) KLT SN 1 (C.No. 1) SC = (2013) 10 SCC 359) which refers to eligibility norms and selection norms for appointment as Information Commissioners; as well as the judgment of the Hon"ble Supreme Court in Centre for PIL and Anr. v. Union of India and Anr. (2011 (1) KLT 973 (SC) = (2011) 4 SCC 1) (hereinafter, referred to as the "CVC case") which give guidance for making recommendation in similar situation.

13. In Namit Sharma's case (supra), the challenge was regarding selection and appointment of the Chief Information Commissioner and the Information Commissioners. The Hon"ble Supreme Court disposed of the original Writ Petition, holding that in the domain of the Right to Information Act, the decision of the Information Commissioner involves a lis and the Commissioners perform adjudicatory, supervisory and penal functions. Therefore, the Hon"ble Supreme Court was of the view that the office of the Information Commission must possess the essential attributes and trappings of a Court. It was further held that its powers and functions, as defined under the Right to Information Act sufficiently indicate that it has adjudicatory powers quite akin to the Court system. The Apex Court issued certain directions regarding eligibility criteria for appointment of the Information Commissioner etc. Thereafter, a Review Petition was filed by the Union of India. The review was allowed by taking the view that the earlier observation was a mistake of law and gave the following declarations and directions:

"39.1. We declare that Sections 12(5) and 15(5) of the Act are not ultra vires the Constitution.

39.2 We declare that Sections 12(6) and 15(6) of the Act do not debar a Member of Parliament or Member of the Legislature of any State or Union Territory, as the case may be, or a person holding any other office of profit or connected with any

political party or carrying on any business or pursuing any profession from being considered for appointment as Chief Information Commissioner or Information Commissioner, but after such person is appointed as Chief Information Commissioner or Information Commissioner, he has to discontinue as Member of Parliament or Member of the Legislature of any State or Union Territory, or discontinue to hold any other office of profit or remain connected with any political party or carry on any business or pursue any profession during the period he functions as Chief Information Commissioner or Information Commissioner.

39.3. We direct that only persons of eminence in public life with wide knowledge and experience in the fields mentioned in Sections 12(5) and 15(5) of the Act be considered for appointment as Information Commissioner and Chief Information Commissioner.

39.4. We further direct that persons of eminence in public life with wide knowledge and experience in all the fields mentioned in Sections 12(5) and 15(5) of the Act, namely, law, science and technology, social service, management, journalism, mass media or administration and governance, be considered by the Committees under Sections 12(3) and 15(3) of the Act for appointment as Chief Information Commissioner or Information Commissioners.

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 the citizens as part of their right to information under the Act after the appointment is made.

39.6. We also direct that wherever Chief information Commissioner is of the opinion that intricate questions of law will have to be decided in a matter coming up before the Information Commission, he will ensure that the matter is heard by an Information Commissioner who has wide knowledge and experience in the field of law."

14. In CVC case (2011 (1) KLT 973 (SC) = (2011) 4 SCC 1), the issue considered by the Hon'ble Supreme Court was regarding recommendation to the post of Central Vigilance Commissioner. The Court interfered with the recommendation to appoint Shri. P.J. Thomas, who was an accused under the Prevention of Corruption Act, 1988. The Apex Court held that the criminal case pending against Shri. P.J. Thomas is a relevant factor, which ought to have been taken into account before the recommendation. The Apex Court also held that the candidate must satisfy not only the eligibility criteria but also should satisfy that their selection would not adversely affect Institutional competence. The following directions were issued in the above judgment for making recommendations:

"88.. No reason has been given as to why in the present case the zone of consideration stood restricted only to the civil service. We therefore direct that:

(i) In our judgment we have held that there is no prescription of unanimity or consensus under Section 4(2) of the 2003 Act. However, the question still remains as to what should be done in cases of difference of opinion amongst the Members of the High Powered Committee. As in the present case, if one Member of the Committee dissents that Member should give reasons for the dissent and if the majority disagrees with the dissent, the majority shall give reasons for overriding the dissent. This will bring about fairness-in-action. Since we have held that legality of the choice or selection is open to judicial review we are of the view that if the above methodology is followed transparency would emerge which would also maintain the integrity of the decision-making process.

(ii) In future the zone of consideration should be in terms of Section 3(3) of the 2003 Act. It shall not be restricted to civil servants.

(iii) All the civil servants and other persons empanelled shall be outstanding civil servants or persons of impeccable integrity.

(iv) The empanelment shall be carried out on the basis of rational criteria, which is to be reflected by recording of reasons and/or noting akin to reasons by the empanelling authority.

(v) The empanelment shall be carried out by a person not below the rank of Secretary to the Government of India in the concerned Ministry. (vi) The empanelling authority, while forwarding the names of the empanelled officers/ persons, shall enclose complete information, material and data of the concerned officer/ person, whether favourable or adverse. Nothing relevant or material should be withheld from the Selection Committee. It will not only be useful but would also serve larger public interest and enhance public confidence if the contemporaneous service record and acts of outstanding performance of the officer under consideration, even with adverse remarks is specifically brought to the notice of the Selection Committee.

(vii) The Selection Committee may adopt a fair and transparent process of consideration of the empanelled officers."

15. In the light of Section 15 of the Right to Information Act and the judgments of the Hon"ble Supreme Court as referred above, the selection criteria can be summed up as follows:

i. The candidate must satisfy that he is a person of "eminence" in public life with wide knowledge and experience in any of the disciplines referred under Section 15(5).

ii. The individual integrity of a candidate should match with the institutional competence of the office of the Information Commissioner..

16. The judicial review of recommendation, before the actual appointment of the

recommended person, is very limited. The Court can interfere with the recommendation, if the Court finds that the integrity of the selection process has been subverted. The Court in that process is not actually sitting upon the recommendation made by the Selection Committee but conducts an inquiry to find whether there exist any element to vitiate the selection process or not. There is no law which inhibits the Court from interfering with the selection process, if the Court is satisfied that there is subversion of selection process to render the integrity of the process, denude of desirable fairness as designed by the law to be achieved.

17. In the above backdrop, the grounds challenged in the Writ Petition can be categorised as follows:

- i. There is no constitution of a selection committee as mandated under law in terms of Section 15 of the Right to Information Act.
- ii. There is no definite selection norms applied for selection to recommend the candidates.
- iii. The recommendations are in contravention of the directions in Namit Sharma's case as well as CVC case (supra).

18. With regard to the first point it has to be noted that Section 15 of the Right to Information Act itself provides for composition of the selection committee. Therefore, what is to be followed is only a formal notification, notifying the constitution of the Committee. Exts.R1(a) and R1(b) in W.P.(C).No.7665/2016 are the Government orders notifying the Committee. It is true, Ext. R1(b) is 25/2/2016, after the first meeting convened for selection on 24/2/2016. However, taking note of the nature of the composition as provided under Section 15, this Court is of the view that the notification is only a formality. The subsequent notification is ahead of the recommendation. Since the Committee has been constituted as per Ext. R1(a) dated 23.12.2015, this Court is of the view that there is no vitiating element in constituting the same Committee for selecting the State Chief Information Commissioner and the State Information Commissioners. The first point is answered as above.

19. The second important question is whether there is a selection norm to select the candidates based on the relative merits. The selection process presuppose some criteria for selection. The criteria is referred under Section 15(5) of the Right to Information Act and further propounded by the Hon''ble Supreme Court in Namit Sharma's case (supra). In this context, it is appropriate to refer the direction 39.5 laid down in Namit Sharma's case. The above direction clearly mentions that what is required for recommendation, is mention of eminence of such candidates as against the name of each candidates, who have been recommended. The recommendation means that the person is fit for employment (See the judgment of the Hon''ble Supreme Court in A. Panduranga Rao v. State of Andhra Pradesh and Ors. (AIR 1975 SC 1922). There is no other prefixed norms either provided under the Statute or elsewhere to clamour that there is

subversion of the selection process. This Court, at this stage can only look into the angle whether there is any subversion of selection process by bypassing the norms. This can be either with reference to the inclusion of selected candidates or by exclusion of non selected candidates. In the light of Section 15 of the Right to Information Act and in the light of the direction in clause 39.5 of Namit Sharma's case and in the absence of any other norms, the Committee would be able to justify the selection if they are able to substantiate that the selected candidates satisfy the twin criteria referred in para.15 above. Thus, accountability of the Selection Committee in law is established if the twin criteria have been applied to selected candidates. There is no necessity for the Selection Committee to explain the exclusion of other applicants.

20. In constitutional democracy, the prominence given to the Chief Minister or the Cabinet Minister as a repository of executive functionary cannot be ignored. Their discretionary latitude is so wide and they are only accountable to the constitution and citizenry. If the recommended candidates would satisfy the twin criteria as above, the Court must stop the inquiry and need not travel beyond, to find fault for exclusion of others. It is not in the province of the Court to prevail upon the wisdom of such Selection Committee by making comparative evaluation with non selected candidates, who are qualified in terms of their academic qualification or otherwise. The freedom to choose a person who fulfils the above criteria is given to the Selection Committee. It is perhaps for this reason, why the law provided the composition of the Committee should be headed by the Chief Minister and comprised of the Cabinet Minister and also the Opposition Leader. The law therefore, intends to use the primacy of experience and wisdom of the Statesmen for such recommendation rather than a selection in the like manner of recruitment of an employee by an employer resorting to interview or by awarding marks. Thus, there is no requirement to demonstrate comparative evaluation of all the candidates to the satisfaction of all, to defend such action as an anathema to arbitrariness. As has been noted above, the scheme of legislation itself gives such wide power to the Selection Committee to choose candidates based on the aforesaid twin criteria.

21. It is to be noted that this Court is now only making an inquiry as to the selection process to find whether the integrity of the selection process has been lost or not. This Court, at this stage, cannot examine the suitability of the selected candidates for the post, unless the twin norms as above are patently absent among the recommended candidates. If the writ petitioners feel that any of the candidates suffers from disability from appointment, they are free to challenge the appointment of such individual after the appointment. Any interference at this stage, without finding integrity of process is vitiated, would be premature.

22. The last point to be considered is whether the directions in CVC case has been overlooked or not. The CVC case has, in fact, provided certain safeguards to protect the integrity of the selection process. In Manohar Lal Sharma v.

Principal Secretary and Ors. (2014 (2) KLT SN 9 (C.No.15) SC = (2014) 9 SCC 516), the Hon"ble Supreme Court interfered with the allocation of coal blocks on account of the flaw in selection process and it was observed by the Hon"ble Supreme Court that the Screening Committee has never been consistent and it has never been transparent and it has no proper application of mind. Similarly, in CVC case, a reference has been made in para.88(i) to ensure the credibility of the decision of the majority. It was observed therein that if anyone of the member committee dissents, the majority shall give reasons for overruling the dissent. Essentially, these arguments have to be considered in the light of the objection raised by the Opposition Leader on 25.02.2016. The objection mainly raised by the Opposition Leader is that the criteria for shortlisting has not been disclosed to him and the Government has to disclose who was authorised for shortlisting the candidates. It is to be noted that the Opposition Leader has no objection in shortlisting the candidates. That also means that the Opposition Leader accepted the course or procedure of selection by shortlisting. The only insistence was that it should be based on Namit Sharma's case in terms of "eminence" in any of the disciplines referred under Section 15. The Opposition Leader nowhere appears to have mooted to have a comparative analysis of the candidates for shortlisting. Therefore, the only objection that could have been raised by the Opposition Leader is regarding individual merit of the selected candidates. If such an objection has been raised, as to the individual candidates, certainly, the majority is bound to give reasons to overrule the objection of the Opposition Leader. In the absence of any specific objection to the individual candidates, who have found place in the list, this Court is of the view that there is no necessity to overrule the objection of the Opposition Leader. It is to be noted that the direction in CVC case as above is only one of the methods to ensure transparency and cannot be taken as a sole ground for ensuring transparency in selection. In view of the fact that the Opposition Leader had not questioned the individual merit of shortlisted candidates, this Court is of the view that the selection process as such cannot be held as vitiated. As has been noted in the foregoing paragraphs, this Court is not sitting upon the recommendation of the Selection Committee as an appellate authority and this Court only have ventured upon to inquire into the integrity of the selection process. Therefore, this point is also answered against the petitioners.

23. In view of the discussions as above and as the challenge has been negated, the question regarding locus standi of the petitioners in W.P.(C).Nos. 9042/2016 and 9278/2016 is left open. Accordingly, all the Writ Petitions are dismissed. The files produced by the learned Advocate General shall be returned back. No costs.