

(2009) 09 KL CK 0097
In the High Court Of Kerala
Case No : W.A. No. 378 of 2009

Sudheer T.

APPELLANT

Vs

M.V. Susheela and Others

RESPONDENT

Date of Decision : 09-09-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 15
Constitution of India, 1950 — Article 123, 154(1), 166, 166(3), 217(3)
Criminal Procedure Code, 1973 (CrPC) — Section 363
Kerala Education Rules, 1959 — Rule 10, 12, 14, 3, 4
Monopolies and Restrictive Trade Practices Act, 1969 — Section 22

Citation : (2009) 4 ILR (Ker) 121 : (2011) 2 KLJ 471 : (2009) 3 KLJ 369 :
(2009) 4 KLT 29

Hon'ble Judges : V. Giri, J;K. Balakrishnan Nair, J;C.T. Ravikumar, J

Bench : Full Bench

Advocate : Sumathy Dandapani and Millu Dandapani, for the Appellant; C.P. Sudhakara Prasad, A.G. and T.B. Hood, G.P., for the Respondent

Final Decision : Allowed

Judgement

K. Balakrishnan Nair, J.—The point that arises for decision in this case, is the applicability of the principle "he who decides must hear/he who hears must decide" to Governmental decisions. This Writ Appeal was referred to the Full Bench by the Division Bench entertaining the doubt, whether the decision of the Division Bench of this Court in K.P. Subair Haji v. Secretary to Government 2007 (4) K.H.C. 62, lays down the correct position, in the light of the decision of the Apex Court in A. Sanjeevi Naidu, etc. Vs. State of Madras and Another, , which was quoted with approval in Samsher Singh Vs. State of Punjab and Another, .

2. Before considering the above legal question, we will presently refer to the skeletal facts of the case. The subject matter of the case is concerning the right to manage an Aided Upper Primary School. The appellant was the fourth respondent in the Writ Petition filed by the first respondent herein. The Writ Petition was filed, challenging Ext.P8 order of the Government dated 30.8.2008

in favour of the appellant. S.V.A.U.P. School,. Chelambra was owned and managed by one Mr. Appukutty, He died in 1987. He had two children, namely, Mr. Balakrishnan and Mr. Subramanian. Both of them are no more. The first respondent is the widow of Balakrishnan and the appellant is the son of Subramanian. According to the first respondent, the abovesaid Appukutty executed Ext.P1 gift deed dated 11.8.1952 in favour of his wife, Manikutty and their two children, Subramanian and Balakrishnan, transferring some of his properties. On 24.3.1983 Subramanian and Balakrishnan partitioned those properties as per Ext.P2 deed. As per the partition deed, items 1 to 6 were allotted to Subramanian and items 7 and 8 were allotted to Balakrishnan. The school building situate in item 8 of the Schedule to Ext.P2 deed. After Ext.P2. Appukutty submitted a proposal before the Assistant Educational Officer (for short, "A.E.O."), for transfer of the management of the school in favour of Mr. Balakrishnan. The A.E.O., Parappanangadi, as per Ext.P3 proceedings dated 20.9.1986, approved the transfer of management of the school from Appukutty to Mr. Balakrishnan without change of ownership or title, exercising his power under Rule 3 of Chapter V of the Kerala Education Rules (for short, "the K.E.R.") Mr. Balakrishnan continued to be the Manager of the School till his death on 9-6-2006. After his death, the 1st respondent applied for change of management. The Director of Public Instruction, as per Ext. P6 order dated 24.2.2007 held that change of management in favour of the first respondent could be granted subject to her getting exemption from Rule 8(1) of Chapter III of the K.E.R. as, at the relevant time, she being a teacher of the school, without getting such exemption, cannot function as Manager of the School, The said order Ext.P6, was challenged by the appellant before the Government. The Government, by Ext.P8 order dated 30.8.2008, set aside the order of the Director of Public Instruction and authorised the A.E.O. to approve the appellant as Manager of the School, without change of ownership or title of the school. The direction in Ext.P8 was to be in force till the dispute between the parties was settled by the competent civil court.

3. Ext.P4, according to the first respondent, is not a legally valid Will, as nothing concerning the school remained with Appukutty to be bequeathed after the execution of Ext.P1 gift deed. According to her, as per Ext. P2 partition deed, the school and the building vested in Balakrishnan. She also had a case that Ext.P4 was a concocted document. Aggrieved by Ext.P8 order passed relying on Ext. P4, the first respondent filed the Writ Petition.

4. The appellant submitted that he claimed Managership, based on Ext. R4(e) Will dated 18.7.1983, executed by late Appukutty. Later, on 14.12.1983, Appukutty executed Ext.R4(f) Will, bequeathing Managership in favour of the appellant. He further contended that on 27.6.1984, Appukutty executed Ext.P4 registered Will, bequeathing the Managership of the school in favour of Balakrishnan and after the death of Balakrishnan, in favour of the appellant. So, on the strength of Ext.P4, the appellant claimed Managership.

5. The learned Single Judge, after hearing both sides, found that the parties were heard by Smt. Sujatha, Under Secretary to Government and the order was issued by Sr. James Varghese, Secretary to Government. So, the order was vitiated for violation of the principles of natural justice, inasmuch as the person who decided the case did not hear the parties. The said view was taken by the learned Single Judge, relying on the decision of this Court in *Subair Haji v. Secretary to Government* (supra). So, Ext.P8 order was quashed and the matter was remitted to the Government, to take a fresh decision, bearing in mind the principles laid down by this Court in *Pr. Philipoose Mar Theophilus v. State of Kerala* 1986 KLT 57 : Case No. 73 : 1986 KLJ 1069. The appellant, feeling aggrieved by the said judgment, has preferred this Writ Appeal, contending that, the principle "he who heard must decide" will not be applicable to institutional decisions like the decision of the Government, as the one contained in Ext.P8. It was also contended that in the absence of any pleadings and proof of prejudice, it was unnecessary to interfere with the decision on the technical contention of violation of natural justice. It was further pointed out that the Government have correctly decided the issue, by making the arrangement for management of the school till the competent civil court takes a decision. It was also contended that the first respondent has already filed O.S. No. 308 of 2008 before the Munsiff Court, Parappanangadi, seeking a declaration that she has absolute title and possession over the school and its properties and the right to manage the same.

6. As mentioned earlier when the matter came up before the Division Bench, it doubted the correctness of the decision of this Court in *Subair Haji's* case (supra), and referred the Writ Appeal to the Full Bench.

7. We heard Sri. George Poonthottam, learned Counsel for the appellant. He reiterated the aforementioned contentions of the appellant and supported Ext.P8 order of the Government. The learned Counsel pointed out that in a case of decision of the State Government, the rule that he who heard must decide cannot have any application. Further, in this case, no prejudice has been pleaded or proved. Therefore, there was no necessity to interfere with the order of Government, based on violation of the principles of natural justice. The learned Counsel referred to the following decisions. *Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road Transport Corporation and Another*, , *Ossein and Gelatine Manufacturers Association of India Vs. Modi Alkalies and Chemicals Limited and Another*, , *A. Sanjeevi Naidu, etc. Vs. State of Madras and Another*, , *Samsher Singh Vs. State of Punjab and Another*, , *Union of India v. Andrew* 1996 (1) KLT 133, *Katherine v. Secretary to Government* 2002 (1) KLT 882, *Haryana Financial Corporation and Another Vs. Kailash Chandra Ahuja*, , and *State of Kerala v. Krishnakumar T.G.* 2009 (3) KHC 137.

8. Smt. Sumathi Dandapani, learned Senior Counsel, who appeared for the first respondent, supported the decision of the learned Single Judge. In support of her submissions, reference was made to the decisions in *Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road Transport Corporation and Another*, ,

Markose v. Tahsildar 1995 (2) KLT 112, Thomas Mgethew v. Secretary to Government 1999 (3) KLT 275, Marico Industries Ltd. Vs. State of Kerala, , Jesudasan. G. v. Joint Registrar of Co-operative Societies (General) Kollam ILR 2009 Ker 323 and Morgan v. United States 298 US 468.

9. Sri. T. B. Hood, learned Government Pleader, who appeared for the State, supported the appellant and defended Ext.P8 order. He took us through the Rules of Business of the Government of Kerala and pointed out how the Government take a decision. The rule that "he who heard must decide" cannot be mechanically applied to Governmental decision, it was pointed out. He also submitted that in this case, there was no pleading regarding prejudice caused to the first respondent by reason of the decision of the Government not being taken by the officer who heard the parties. To highlight the distinction between Governmental decision and the decisions of other statutory authorities, the learned Government Pleader relied on the decisions in Carltona Ltd. v. Commissioner of Works and Ors. 1943 (2) AII.E.R. 560 and James Edward Jeffs v. New Zealand Dairy Production and Marketing Board 1967 AC 551. The learned Government Pleader also referred to various passages from Wade's Administrative Law, 9th Edition. Reliance was also placed on the decision of the Apex Court in Smt. Kavita Devidasani Vs. State of Maharashtra and Others, ,

10. We considered the rival submissions made at the Bar and the pleadings and the materials on record. First, we will refer to the statutory provisions under which Ext.P8 decision was taken. Chapter III of the Kerala Education Rules deals with management of private schools. Rule 4 thereof deals with approval of appointment of Managers, Rule 5 deals with change of management and Rule 5A deals with change of management involving change of ownership. The aforementioned rules are quoted below for convenient reference.

4. Approval of appointment of Managers.- (1) The Educational Officers shall be competent to approve the appointment of Managers by Educational Agencies and to approve changes in the personnel of the Managers.

(2) If the Educational Agencies have schools in more than one Educational District within a Revenue District the appointment of managers and changes in the personnel of the managers may be approved by the Deputy Director (Education) having jurisdiction in the Revenue District if the Educational Agencies have schools in more than one Revenue District, the appointment of managers and changes in the personnel of the Managers may be approved by the Director of Public Instruction.

(2A). The approval of appointment of Managers and Changes in the personnel of the Managers under sub-rules (1) and (2) above shall take effect from the date of actual assumption of charge of the management specified in the order of approval issued by the competent authorities concerned.

(3) Any person aggrieved by an order of the Educational Officer under Sub-rule (1) or of the Deputy Director under Sub-rule (2) may within 30 days from the

date of receipt of the order prefer an appeal to the Director.

(4) Government may, on their own motion or otherwise revise any order passed by the Director of Public Instruction.

5. Change of management.:

(1) All changes in the personnel of the Managers of aided institutions shall be immediately reported to the Educational Officer and approval obtained.

(2) Appointment and changes approved by the Educational Officer shall be reported to the Director.

Note: The Rules 4 and 5 do not apply to change of management involving change of ownership.

5A. Change of management involving change of ownership.:

(1) Notwithstanding anything contained in these rules, no change of Management of any aided school involving change of ownership shall be effected except with the previous permission of the Director. The Director may grant such permission unless the grant of such permission will, in his opinion, adversely affect the working of the institution and the interests of the staff and the person to whom the Management is transferred.

(2) Any person aggrieved by an order under Sub-rule (1) may, within 30 days from the date of receipt of the order, prefer an appeal to the Government.

(3) In the case of change of management of a school involving change of ownership the new Manager of a corporate or an individual Educational Agency, shall be bound to absorb any member who is a claimant under Rule 51A of Chapter XIV A or is eligible for protection belonging to teaching and non-teaching staff of any school of the transferor manager, against the vacancies that may arise in the school..

(emphasis supplied)

Ext.P8 order, impugned in the Writ Petition, was one passed by the Government, in exercise of its power of revision under Rule 4(4) of the K.E.R. In this case, the learned Government Pleader made available to us the files leading to the issuance of Ext.P8. It was disclosed from the files that Smt. Sujatha, Under Secretary to Government, General Education Department heard the parties and made the following suggestion in the files on 14.5.1988:

In the circumstances, the File may be forwarded to Law Department for advice, whether Sri. Sudheer can be appointed as Manager based on the Will executed by his grandfather dated 14-12-1984

The said note was made at paragraph .22 of the Note File. Sri. KT. George, Additional Law Secretary, on receiving the File, called for further documents to tender the advice sought by the Administrative Department. On getting further

details, the Additional Law Secretary, at paragraph 35 of the Note File stated that the Law Department agrees to the suggestion at paragraph 22 of the Note file. Based on the advice of the Law Department, a draft of Ext.P8 was put up. It was approved by the Under Secretary, Smt. Sujatha on 26.8.2008, by Sri. P.C. Jose, Additional Secretary, General Education Department on 28.8.2008 and further approved by Sri James Varghese, Secretary to Government, General Education Department on 30.8.2008. As a consequence, Ext.P8 order dated 30.8.2008, was issued by the Government. We doubt, if the learned Single Judge has seen the files, whether the impugned order would have been quashed on the ground of, violation of principles of natural justice.

12. Hearing the other side, (*audi alteram partem*), is one of the two main principles of natural justice, the other being the rule against bias. *Audi alteram partem* means hear the other side or listen to the other side. In other words, it means that no man should be condemned unheard or both sides must be heard before passing any order. If "A" hears the parties and "B" takes the decision, then B's decision is one made without hearing the other side. So, essentially when it is said, he who decided did not hear or he who heard did not decide means the decision is rendered without hearing the other side.

13. Hearing need not always be personal hearing or hearing by words of mouth. If a representation is filed by a contesting party and a decision is given advertent to his contentions, the decision must be held to be valid, even though, there was no hearing by words of mouth. In *The State of Maharashtra and Another Vs. Lok Shikshan Sansatha and Others*, the Apex Court held as follows:

When all the relevant circumstances have been taken into account by the District Committee and the educational authorities, there is no violation of any principle of natural justice merely for the reason that the applicants were not given a hearing by the educational authorities before their applications were rejected.

In *Carborundum Universal Ltd. Vs. Central Board of Direct Taxes, New Delhi*, it was held that, "Personal hearing, in every situation, is not necessary and there can be compliance of the requirements of natural justice of hearing, when a right to represent is given and a decision is made on a consideration thereof." In *Jain Exports (P) Ltd. and Another Vs. Union of India (UOI) and Others*, the Apex Court held that once the show cause notice is issued and explanation submitted by the parties is considered, natural justice cannot be said to have been violated on the ground that opportunity for personal hearing was not afforded, as a huge amount was at stake. Again in *Union of India (UOI) Vs. Jyoti Prakash Mitter*, the Honourable Supreme Court considered whether the High Court Judge should be given a bearing by the President of India, while taking a decision under Article 217(3) of the Constitution of India and held as follows:

Article 217(3) does not guarantee a right of personal hearing. In a proceeding of a judicial nature, the basic rules of natural justice must be followed. The respondent was on that account entitled to make a representation. But it is not

necessarily an incident of the rules of natural justice that personal hearing must be given to a party likely to be affected by the order. Except in proceedings in Courts, a mere denial of opportunity of making an oral representation will not without more, vitiate the proceedings. A party likely to be affected by a decision is entitled to know the evidence against him and to have an opportunity of making a representation. He however cannot claim that an order made without affording him an opportunity of a personal hearing is invalid. The President is performing a judicial function when he determines a dispute as to the age of a Judge, but he is not constituted, by the Constitution, a Court. Whether in a given case the President should give a personal hearing is for him to decide. The question is left to the discretion of the President to decide whether an oral hearing should be given to the Judge concerned.

(emphasis supplied)

Going by the above decisions, it cannot be held that an opportunity for personal hearing is always essential to satisfy the requirement of natural justice. But, when complex and difficult questions are involved, the Apex Court held that it is only appropriate that personal hearing is provided to the parties. In *Travancore Rayon Ltd. Vs. Union of India (UOI)*, it was held as follows:

It is true that the rules do not require that personal hearing shall be given, but, if in appropriate cases where complex and difficult questions requiring familiarity with technical problems are raised, personal hearing is given, it would conduce to better administration and more satisfactory disposal of the grievance of the citizens.

The rules of natural justice, it is well settled, are not embodied rules and they cannot be confined within the straitjacket of a rigid formula. The requirements of natural justice will depend upon the circumstances of the case, nature of the inquiry, the law under which the administrator is functioning, the subject-matter that is being dealt with, etc..

14. Yet another aspect of the matter, which is very relevant, is the prejudice caused. The earlier view was, violation of natural justice itself was a prejudice and therefore, proof of independent prejudice was uncalled for. Now, the law is that unless prejudice is shown, violation of the principles of natural justice, ipso facto, will not be accepted as a ground for quashing a decision. The rules of natural justice are designed to advance justice and they cannot be allowed to be used as tools of oppression. If a decision is quashed for violation of principles of natural justice, even if the party impugning the order has absolutely no case on admitted and undisputed facts, it may cause irreparable injury and hardship to the opposite party with a cast-iron case. He will be unnecessarily dragged to defend the proceedings at the instance of a person with no case at all, but only for the reason of not providing an opportunity of hearing to him. For the failure of the Administrator, over whose actions the parties have no control, to hear one side, the other side may suffer irreparable injury, if the order is quashed only on

the ground of violation of natural justice. So, when a party comes to the Court complaining that the principle, "he who hear must decide" was violated, those words cannot be taken as a "open sesame" for invoking the jurisdiction of this Court and to quash the order concerned. This Court must examine whether the case was one requiring a hearing by words of mouth, for effective consideration of the grounds raised by the parties. The Court should also examine whether any prejudice has been pleaded and any material has been placed in support thereof.

15. Now, the next point to be considered is when the decision impugned is that of the Government, whether the principle - "he who heard must decide", can be made mechanically applicable.

16. The main decision relied on by the first respondent is the decision of the Apex Court in Gullapalli Nageswara Rao v. Andra Pradesh State Road Transport Corporation (supra). It was a decision of the Constitution Bench. It was a case, in which, objections regarding nationalisation of road transport were heard by the Secretary and the decision was taken by the Minister for Transport. The order of the State Government was set aside by Subba Rao, J. (as His Lordship then was). The relevant portion of the said judgment reads as follows:

...This divided responsibility is destructive of the concept of judicial hearing. Such a procedure defeats the object of personal hearing. Personal hearing enables the authority to watch the demeanour of the witness and clear-up his doubts during the course of his arguments, and the party appearing to persuade the authority by reasoned argument to accept the point of view. If one person hears and another decides, then personal hearing becomes an empty formality.

The decision was rendered with the dissent of two of the learned Judges of the Bench of five Judges. The above decision was distinguished by the Apex Court in General Manager, Eastern Railway and Another Vs. Jawala Prosad Singh, . It was a case where inquiry into the charges against a delinquent employee was conducted by an enquiry committee. After the enquiry started and made some progress, one of the members of the enquiry committee was substituted by another person on the transfer of the former to another place. The punishment imposed on the delinquent was challenged on the ground of violation of the principle, "he who heard must decide". In the above decision, distinguishing the decision in Gullapalli Nageswara Rao's case (supra), the Apex Court held as follows:

8. The observations of this Court in Gullapalli Nageswara Rao's case (supra) have no bearing on the facts of the present case. There it was held that if a personal hearing is given by the Secretary of a Department and the Minister of the State has to decide on the notes put up by the Secretary, the procedure defeats the object of personal hearing. The observations-at p.367 that:

Personal hearing enables the authority concerned to watch the demeanour of the witnesses and clear up his doubts during the course of the arguments, and the party appearing to persuade the authority to accept his point of view. If one

person hears and another decides then personal hearing becomes an empty formality...

9. In a proceedings before ordinary trial courts of the land, both civil and criminal, it is not uncommon to find oral evidence recorded before more than one Presiding Judge or Magistrate. Common convenience requires it and statutes provides for it. It cannot be suggested that the Legislature have enacted laws in disregard of an elementary principle of natural justice. Besides not often witnesses have to be examined on commission. Whenever a witness is so examined, the Judge does not have the benefit of watching his demeanour. The Criminal Procedure Code provides for more than one Magistrate recording the evidence of witnesses. Section 363, Cr.P.C, enjoins upon a Session Judge or a Magistrate to record such remarks (if any) as he thinks material respecting the demeanour of a witness whilst under examination. Order XVIII, Rule 15 of the CPC empowers a Judge to treat the evidence recorded by his predecessor-in-office as if it had been taken down by him or under his direction under the said rule and he may proceed with the suit from the stage at which his predecessor left it, whenever his predecessor-in-office is prevented from concluding the trial of a suit by reason of his death or transfer or some other cause. Instances are not rare when such powers have to be used either by a Judge hearing a civil suit or a Magistrate or a Sessions Judge hearing a criminal matter. In the vast majority of cases both civil and criminal, a Judge does not come to any conclusion merely on the impression created by a witness while he is in the witness box. In all matters which go up in appeal, the appellate court does not have any opportunity of watching the demeanour of the witnesses; it has to go by the record of the case. Of course if any comment is made by the trial Judge about the demeanour of a witness, the appellate court takes note of it. But it never guides itself entirely by such comments. The entire evidence has to be looked into and assessed as a whole. Whereas here the punishing authority does not hear the evidence, but goes by the record of the case the demeanour of a particular witness when giving evidence can have but little meaning and cannot influence the mind of the Disciplinary Authority in awarding punishment. We therefore hold that the High Court was not right in quashing the order of dismissal on the ground that the report of the Inquiry Committee was vitiated by the violation of any principles of natural justice as stated in the judgment. The appeal is therefore allowed and the order of the High Court set. aside. There will however be no order as to costs.

17. The Apex Court considered the decision in Gullapalli Nageswara Rao's case (supra) in Ossein and Gelatine Manufacturers Association of India Vs. Modi Alkalies and Chemicals Limited and Another, . It was a case involving a decision u/s 22 of the Monopolies and Restrictive Trade Practices Act. The Modis moved for establishment of an undertaking for manufacture of Ossein and Jelatins in the State of Rajasthan. The Ossein and Jelatine Manufacturers Association of India opposed the application. But, rejecting their objections, the application was allowed by the competent authority. While challenging the said decision before

the Apex Court, one of the objections taken was that one Sri. Vijayaraghavan passed the order, though personal hearing was done by Sri. S.S. Khosla. So, the decision was vitiated, as he who heard did not decide. Dealing with the said contention, the Apex Court held as follows:

5. On the issue of natural justice, we are satisfied that no prejudice has been caused to the appellant by any of the circumstances pointed out by the appellant. It is true that the order has been passed by an officer different from the one who heard the parties. However, the proceedings were not in the nature of formal judicial hearings. They were in the nature of meetings and full minutes were recorded of all the points discussed at each meeting. It has not been brought to our notice that any salient point urged by the petitioners has been missed. On the contrary, the order itself summarises and deals with all the important objections of the petitioners. This circumstance has not, therefore, caused any prejudice to the petitioners. The delay in the passing of the order also does not, in the above circumstances, vitiate the order in the absence of any suggestion that there has been a change of circumstances in the interregnum brought to the notice of the authorities or that the authority passing the order has forgotten to deal with any particular aspect by reason of such delay. The argument that the application of the Modis had referred to bonemeal as the raw material used and this was later changed to "crushed bones" is pointless because it is not disputed that all along the petitioners were aware that the reference to bonemeal was incorrect and that the Modis were going to use crushed bones in their project. The last contention that some documents were produced at the hearing by the Modis which the petitioners could not deal with effectively is also without force as, admittedly, the assessee's (sic, association's) representatives were shown those documents but did not seek any time for considering them and countering their effect. There has, therefore, been, in fact, no prejudice to the petitioner. They have had a fair hearing and the government's decision has been reached after considering all the pros and cons. We are unable to find any ground to interfere therewith.

6. There was some discussion before us on a larger question as to whether the requirements of natural justice can be said to have been complied with where the objections of parties are heard by one officer but the order is passed by another. Sri. Salve, referring to certain passages in *Local Government Board v. Alridge* 1915 AC 120, *Ridge v. Baldwin* 1964 AC 40, *Regina v. Race Relations Board, Ex parte Selvarajan* (1975) 1 WLR 1686, and in *de Smith's Judicial Review of Administrative Action* (4th edn., pp. 219-220) submitted that this was not necessarily so and that the contents of natural justice will vary with the nature of the enquiry, the object of the proceedings and whether the decision involved is an "institutional" decision or one taken by an officer specially empowered to do it. Sri. Divan, on the other hand, pointed out that the majority judgment in *Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road Transport Corporation and Another*, has disproved of *Alridge* case and that natural justice demands that the hearing and order should be by the same officer. This is a very

interesting question and Alridge case has been dealt with by Wade (Administrative Law, 6th edn., p.507 et seq). We are of the opinion that it is unnecessary to enter into a decision (sic discussion) of this issue for the purposes of the present case. Here the issue is one of grant of approval by the government and not any particular officer statutorily designated. It is also perfectly clear on the records that the officer who passed the order has taken full note of all the objections put forward by the petitioners. We are fully satisfied; therefore, that the requirements of natural justice have been fulfilled in the present case.

(emphasis supplied)

Thus, we notice that the Apex Court has consistently refused to follow the rigid principle laid down in Gullapalli Nageswara Rao's case (supra). In Jawala Prasad Singh (supra), the Apex Court dissented with the reasoning in Gullapalli (supra) and in Ossein and Gelatine Manufacturers' Association of India (supra), refused to follow Gullapalli (supra), in the absence of any prejudice, by the decision being taken by the officer, who did not hear the parties.

18. Further, the point to be considered is, whether the principle laid down in Gullapalli Nageswara Rao's case, (supra), survives in the light of principles laid down by the Apex Court in A. San Jeevi v. State of Madras (supra) and Samsher Singh v. State of Punjab (supra), interpreting Article 166 of the Constitution of India. The said Article reads as follows:

166. Conduct of business of the Government of a State.- (1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion.

19. Under Article 166(3), the Governor has framed the Rules of Business of the Government of Kerala. Rule 5 provides that the Governor shall, on the advice of the Chief Minister, allot the business of the Government among the Ministers, by assigning one or more departments to the charge of a Minister. Rule 6 provides that each Department of the Secretariat shall consist of a Secretary to the Government, who shall be the official head of that Department. Rule 7 says that, Council of Ministers shall be collectively responsible for all executive orders issued in the name of the Governor, in accordance with these rules, even if such

orders are authorised by an individual Minister. Rule 8 provides that the Minister in charge of a Department shall be primarily responsible for the disposal of the business pertaining to that Department. The said Rule reads as follows:

8. Subject to the orders of the Chief Minister under Rule 14, all cases referred to in the Second Schedule shall be brought before the Council in accordance with the provisions of the Rules contained in Part II.

Provided that no case in regard to which the Finance Department is required to be consulted under Rule 10 shall, save in exceptional circumstances under the directions of the Chief Minister, be discussed by the Council unless the Finance Minister has had an opportunity to consider it.

Rule 10 deals with the provision for consultation with the Finance Department. The said rule being one of the important rules, we quote it here, for convenient reference.

10. (i). No department shall, without previous consultation with the Finance Department, authorise any orders (other than orders pursuant to any general delegations made by the Finance Department, which, either immediately or by their repercussions, will affect the finances of the State or which, in particular, either:

(a) relate to the number of gradincjs or cadres of posts or the emoluments or other conditions of service of posts; or

(b) involve any grant of land or assignment of revenues or concession, grant, lease or licence of mineral or forest rights or a right to water power or any easement or privilege in respect of such concession except when such alienation, abandonment or reduction is in accordance with ordinary rules or a general scheme approved in consultation with Finance Department; or

(c) in any way involve any relinquishment of revenue.

(ii) Subject to the general provisions of rule 8, no proposal, which requires the previous consultation of the Finance Department under Sub-rule (i) but in which the Finance Department has not concurred and the Finance Minister has agreed with the Finance Department may be proceeded with unless a decision to that effect has been taken by the Council of Ministers;

(iii) No re-appropriation shall be made by any department other than the Finance Department except in accordance with such general delegations as the Rnance Department may have made;

(iv) Except in cases where power may have been delegated to departments under rules approved by the Finance Department and in cases where the specific concurrence of the Finance Department has been given, every order of an Administrative Department conveying a sanction to be enforced in audit should be communicated to the Audit Authorities by the Finance Department. In cases where the specific concurrence of the Finance Department has been given, the

following shall be added to the address entry of the G.O. Communicating the sanction, namely:

This order issues with the concurrence of the Finance Department Vide their U.O. Note No. ...dated....

(v) Nothing in this rule shall be construed as authorising any Department, including the Finance Department, to make re-appropriation from one grant specified in the Appropriation Act to another such grant.

Rule 11 says that, all orders or instruments made or executed by or on behalf of the Government of the State shall be expressed to be made or executed in the name of the Governor. Rule 12 permits every order or instrument of the Government of the State to be signed by a Secretary, an Additional Secretary, a Joint Secretary, a Deputy Secretary, an Under Secretary or by such other officer as may be specially empowered in that behalf. Rule 12 reads as follows:

12. Every order or instrument of the Government of the State shall be signed by a Secretary, an Additional Secretary, a Joint Secretary, a Deputy Secretary, an Under Secretary or by such other officer as may be specially empowered in that behalf and such signature shall be deemed to be the proper authentication of such order or instrument.

Rule 1.4 says that, all cases referred to in the Second Schedule shall be submitted to the Chief Minister after consideration by the Minister in charge. Rule 59 provides that in relation to certain matters mentioned therein, all Departments shall consult the Law Department. The said Rule reads as follows:

59. (1) All Administrative Departments shall consult the Law Department on:

- (a) the construction of the statutes, acts, regulations and statutory rules, orders and notifications;
- (b) any general legal principles arising out of any case; and
- (c) the institution or withdrawal of any prosecution at the instance of any administrative department.

Note:- All Administrative Departments shall consult the Home Department also regarding cases coming under (c) above.

(2) Every such reference shall be accompanied by an accurate statement of facts of the case and the point or points on which the advice of the Law Department is desired.

Going by the above Rules, an officer, who hears a party on behalf of the Government, can never take a decision personally according to his views. The file, in some cases will have to be sent through the Minister concerned to the Chief Minister and in many cases the Finance Department and the Law Department will have to be consulted. So, in the light of the Rules of Business, it is impossible to implement the principle "he who heard should decide", when it

concerns governmental decisions. Whoever takes the decision on behalf of the Government, be it the Council of Ministers, the Minister or the Secretary concerned, the order can be issued in the name of the Secretary or even an Under Secretary, in view of Rule 12,

20. Interpreting the provisions of Article 166 of the Constitution of India and similar provisions of the Rules of Business of the Madras Government, a Constitution Bench of the Apex Court, in *A. Sanjeevi v. State of Madras* (supra), held as follows:

11. We think that the above submissions advanced on behalf of the appellants are without force and are based on a misconception of the principles underlying our Constitution. Under our Constitution, the Governor is essentially a constitutional head, the administration of State is run by the Council of Ministers. But in the very nature of things, it is impossible for the Council of Ministers to deal with each and every matter that comes before the Government. In order to obviate that difficulty the Constitution has authorised the Governor under sub-Article (3) of Article 166 to make rules for the more convenient transaction of business of the Government. All matters excepting those in which Governor is required to act in his discretion have to be allocated to one or the other of the Ministers on the advice of the Chief Minister. Apart from allocating business among the Ministers, the Governor can also make rules on the advice of his Council of Ministers for more convenient transaction of business. He can, not only allocate the various subjects amongst the Ministers but may go further and designate a particular official to discharge any particular function. But this again he can do only on the advice of the Council of Ministers.

12. The cabinet is responsible to the legislature for every action taken in any of the ministries. That is the essence of joint responsibility. That does not mean that each and every decision must be taken by the cabinet. The political responsibility of the Council of Ministers does not and cannot predicate the personal responsibility of the Ministers to discharge all or any of the governmental functions. Similarly an individual Minister is responsible to the legislature for every action taken or omitted to be taken in his ministry. This again is a political responsibility and not personal responsibility. Even the most hard-working minister cannot attend to every business in his department. If he attempts to do it, he is bound to make a mess of his department. In every well-planned administration, most of the decisions are taken by the civil servants who are likely to be experts and not subject to political pressure. The Minister is not expected to burden himself with the day to day administration. His primary function is to lay down the policies and programmes of his ministry while the Council of Ministers settle the major policies and programmes of the Government. When a civil servant takes a decision, he does not do it as delegate of his Minister. He does it on behalf of the Government. It is always open to a Minister to call for any file in his ministry and pass orders. He may also issue directions to the officers in his ministry regarding the disposal of Government

business either generally or as regards any specific case. Subject to that over all power, the officers designated by the Rules or the standing orders, can take decisions on behalf of the Government. These officers are the limbs of the Government and not its delegates."

(emphasis supplied)

The above statement of law has been quoted with approval by a Bench of seven Judges in *Samsher Singh Vs. State of Punjab and Another*, and it was held therein as follows:

35. The Scheme was upheld for these reasons. The Governor makes rules under Article 166(3) for the more convenient transaction of business of the Government of the State. The Governor can not only allocate the various subject amongst the Ministers but may go further and designate a particular official to discharge any particular function. But that could be done on the advice of the Council of Ministers. The essence of Cabinet System of Government responsible to the Legislature is that an individual Minister is responsible for every action taken or omitted to be taken in his Ministry. In every administration decisions are taken by the civil servants. The Minister lays down the policies. The Council of Ministers settle the major policies. When a Civil Servant takes a decision, he does not do it as a delegate of his Minister. He does it on behalf of the Government. The officers are the limbs of the Government and not its delegates. Where functions are entrusted to a Minister and these are performed by an official employed in the Ministry's department, there is in law no delegation because constitutionally the act or decision of the official is that of the Minister.

In paragraph 131 of the judgment, it is stated as follows:

In *A. Sanjeevi Naidu, etc. Vs. State of Madras and Another*, , the question arose whether in a case where a central statute, namely, the Motor Vehicles Act, vested certain powers in the State Government, which by definition in the General Clauses Act means the Governor, the order passed by the Minister to whom the relevant business had been allocated by the rules of business was valid. Hegde, J. speaking for himself and his five colleagues, observed:

Under our Constitution, the Governor is essentially a constitutional head, the administration of State is run by the Council of Ministers. But in the very nature of things, it is impossible for the Council of Ministers to deal with each and every matter that comes before the Government. In order to obviate that difficulty the Constitution has authorised the Governor under Sub-Article (3) of Article 166 to make rules for the more convenient transaction of business of the Government. All matters excepting those in which Governor is required to act in his discretion have to be allocated to one or the other of the Ministers on the advice of the Chief Minister. Apart from allocating business among the Ministers, the Governor can also make rules on the advice of his Council of Ministers for more convenient transaction of business. He can, not only allocate the various subjects amongst the Ministers but may go further and designate a particular official to discharge

any particular function. But this again he can do only on the advice of the Council of Ministers.

The Cabinet is responsible to the legislature for every taken in any of the Min"steries. That b the essence of joint responsibility. That does not mean that each and every decision must be taken by the Cab/net. The political responsibility of the Council of Ministers does not and cannot predicate the personal responsibility of the Ministers to discharge all or any of the governmental functions. Similarly, an individual Minister is responsible to the legislature for every action taken or omitted to be taken in, his ministry. This again is a political responsibility and not personal responsibility.

...

21. Under our Constitution, the executive functions are to be discharged by the Council of Ministers, which has the support of the majority in the Legislative Assembly. The moment it loses majority support, the Council of Ministers has to step down. As long as the Government have majority support of the Legislature, they are conceded with the power to administer the State. Though, a literal reading of Article 166 of the Constitution may show that the Governor rules and the Ministers advise, but in practice, it is the other way. The Council of Ministers or the Minister concerned decides and the Governor advises, except in certain specified matters where the Governor is authorised to take decision in his discretion. Article 361 of the Constitution says, inter alia that Governor of the State shall not be answerable to any Court for the exercise and performance of the powers and duties of his office of for any act done or purported to be done by him in the exercise and performance of those powers and duties. The principle that, "King can do no wrong", embodied in British Constitutional law has been incorporated in our Constitution, by enacting the above provision. The King always acts on the advice of his Ministers. He must always find advisers who have majority support in the House of Commons. Since the, King does not act personally, but acts only on the advice of his Ministers, it is said, "King can do no wrong". The said principle of British Constitutional law is incorporated in our Constitution. In Samsher Singh's case (supra), the Constitution Bench has observed as follows:

32. It is a fundamental principle of English constitutional law that Ministers must accept responsibility for every executive act. In England, the sovereign never acts on his own responsibility. The power of the sovereign is conditioned by the practical rule that the Crown must find advisers to bear responsibility for his action. Those advisers must have the confidence of the House of Commons. This rule of English constitutional law is incorporated in our Constitution. Indian Constitution envisages a parliamentary and responsible form of Government at the Centre and in the States and not a Presidential form of Government. The powers of the Governor as the constitutional head are not different.

If the Governor is to decide personally, the decision will be that of the Governor

and the responsibility will be that of the Minister, who is answerable to the Legislature. The Apex Court has, in Samsheer Singh's case (supra) and other decisions, dealt with the areas where the Governor is authorised to act in his discretion.

22. We have mentioned the above point to emphasise that in matters of statutory appeals and revisions before the Government, decisions are taken in accordance with the Rules of Business and communicated in the name of the Governor. The order may be signed by the Secretary/Additional Secretary/Joint Secretary/Deputy Secretary or Under Secretary, as the case may be. But the decision may or may not be one taken by the officer who signed it. In Sanjeevi's case, (supra), the Apex Court has specifically upheld the power of the Minister concerned to call for any file and take a decision, even though the officers under him may be competent to deal with the said matter and also the power to issue directions to the officers regarding the disposal of a specific case and in that event the officers can take decision in that case, subject to such directions only. In some cases, the files have to be sent to the Chief Minister. In certain other matters, the Council of Ministers alone can take decisions, We have quoted the Rules of Business, wherein there is mandatory consultation with Finance Department and Law Department on certain specified matters. So, a decision, as mentioned earlier, can never be taken according to the personal opinion of the Secretary, who heard the matter. Even if the Secretary who heard the matter may entertain a particular view, the Minister can call for the file and take a different decision or direct the Secretary to take decision in a different manner. As mentioned earlier, the said power of the Minister under Article 166, is recognised by the Apex Court in Sanjeevi's case (supra). So, the provisions of Article 166 of the Constitution, as interpreted by the Apex Court and the Rules of Business framed thereunder, cannot be overridden by the principles of natural justice. It is a well settled principle of law that rules of natural justice will step in where the statutory provisions are silent. Where express statutory provisions exist excluding natural justice, the rules of natural justice cannot be brought in by a side wind. (See *Union of India and Another Vs. Tulsiram Patel and Others*, . If we interpret that, when an Under Secretary hears the matter, he alone can decide because he happened to hear the case, then we will be cutting at the root of the Constitutional principle of Ministerial responsibility envisaged under our Constitution. If the Secretary who heard the matter can decide according to his view, even though the Minister is maintaining a different view and even though the Minister is answerable to the Legislature, by invoking the vague principles of natural justice, we cannot sustain such an interpretation, which will subvert Constitutional democracy, So, we are of the view that, when the Government are conferred with the power of revision or appeal under a Statute, they can take that decision in accordance with their procedure. In *B.K. Sardari Lal Vs. Union of India (UOI) and Others*, , the Apex Court held that when the power under Article 311(2)(c) is conferred on the President, the President shall personally take the decision. The said decision has been overruled in Samsheer Singh's case (supra).

In the latter case, it was held that the decision to discharge a probationer or terminate an officer in the Subordinate Judicial Service can be taken by the Government, though the Rules entrust the decision to the Governor, The power of the Court held that it is part of the executive power of the State. On this aspect, in *Samsher Singh (supra)*, it was held as follows:

29. The executive power is generally described as the residue which does not fall within the legislative or judicial power. But executive power may also partake of legislative or judicial actions. All powers and functions of the President except his legislative powers as for example in Article 123, viz., ordinance making power and all powers and functions of the Governor except his legislative power as for example in Article 213 being ordinance making powers are executive powers of the Union vested in the President under Article 53(1) in one case and are executive powers of the State vested in the Governor under Article 154(1) in the other case. Clause (2) or Clause (8) of Article 77 is not limited in its operation to the executive action of the Government of India under Clause (1) of Article 77. Similarly, Clause (2) or Clause (3) of Article 166 is not limited in its operation to the executive action of the Government of the State under Clause (1) of Article 166. The expression "Business of the Government of India" in Clause (3) of Article 77 and the expression "Business - of the Government of the State" in Clause (3) of Article 166 includes all executive business.

So, whatever be the nature of the jurisdiction, whether it be take the decision, as provided under Article 166 of the Constitution of India, read with the relevant Rules of Business. In view of the above position, we overrule the decision of the Division Bench of this Court in *K.P. Subair Haji v. Secretary to Government* 2007 (4) K.H.C. 62. We are also of opinion that the view in *Gullapalli's case (supra)* about the principle "he who heard must decide" is no longer good law as far as the same concerns governmental decisions, in view of the declaration of law made by the Constitution Bench in *A. Sanjeevi v. State of Madras (supra)* that a file dealt with by a Secretary of a Department can be called for by the Minister and he may pass any order on it or direct the officer to pass order on it in a particular manner, j See para. 12 of the said decision, wherein it was held "It is always open to a Minister to call for any file in his Ministry and pass orders. He may also issue directions to the officers in his ministry regarding the disposal of government business either generally or as regards any specific case". In other words, principles of natural justice cannot override Article 166 of the Constitution of India and the Rules of Business framed thereunder and this view is fully supported by the interpretation given to them by the Honourable Supreme Court in *A. Sanjeevi's case (supra)*. We are not referring to the other decisions cited by both sides, as they are not directly concerned with Governmental decisions under Article 166 of the Constitution of India read with the relevant Rules of Business of the Government of a State.

23. In view of the above position, we set aside the judgment of the learned Single Judge, for having quashed Ext. P8 for violation of the principles of natural

justice. The Registry shall place the Writ Petition as per the roster before the learned Single Judge for hearing and disposal of the case, in accordance with law, on merits.

The appeal is allowed as above.