

JUDICIAL REFLECTIONS ON EXERCISE OF STATUTORY POWERS BY THE GOVERNOR

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The Indian Constitution embodies generally the Parliamentary or Cabinet system of Government of the British model both for the Union and the States. Under this system the President is the constitutional or formal head of the Union and he exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers. Similarly, under the Cabinet system of Government as embodied in the Constitution the Governor is the constitutional or formal head of the State and he exercises all his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion.

At this state it is apposite to refer Articles 74 and 163 of the Constitution. Article 74, *inter alia*, states that there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice. Article 163, *inter alia*, states that there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, *except insofar as he is by or under the Constitution required to exercise his functions or any of them in his discretion*.

Thus, it is manifest that the Constitution confers some discretionary powers upon the Governor (in contradistinction to the position of President and Cabinet System) where he can act in his discretion without the aid and advice of the Council of Ministers. A quick glance at the Constitution and various judgments will bring out the following functions where the Governor can act on his own discretion :

- (i) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under the Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final [Article 163(2)].

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- (ii) Special responsibilities of the Governor under Articles 371A(1)(b), 371A(1)(d), 371A(2)(b) and 371A(2)(f).
- (iii) Para 9(2) of the Sixth Schedule in relation to determination of amount of royalties payable by licensees or lessees prospecting for, or extracting minerals, to the District Council.
- (iv) Under Article 239(2) which states that where a Governor is appointed an administrator of an adjoining Union Territory he shall exercise his functions as such administrator independently of his Council of Ministers.
- (v) Article 356 states that the Governor can send a report to the president that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of the Constitution. In making a report under Article 356 the Governor will be justified in exercising his discretion even against the aid and advice of Council of Ministers.
- (vi) Under Article 200 also the Governor may act irrespective of any advice from the Council of Ministers in reserving for consideration any Bill which in his opinion if it became law, would so derogate from the powers of the High Court as to endanger the position which the High Court is designed to fill under the Constitution.

Besides the above, the President or Governor would be justified in acting without aid and advice of Council of Ministers where the Constitution specifically provides that the President/Governor would act only according to the opinion of the constitutional functionaries. In this connection, a reference can be made to Article 103 which specifically provides that the President acts only according to the opinion of the Election Commission. This is when any question arises as to whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in Clause (1) of Article 102. Similar provisions are made in case of disqualification of members of House of the legislature of a State under Article 192 which specifically provides that the Governor shall obtain the opinion of the Election Commission before giving any decision on any question as to whether a member of a House of the Legislature of a State has become subject to any of the disqualifications mentioned in Clause (1) of Article 191, and shall act according to such opinion.

One more instance of such powers can be traced in Article 217(3) which provides that if any question arises as to the age of a judge of High Court, the same shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final.

Thus it is plain that under our cabinet system the President as well as the Governor are the constitutional or formal heads. The President as well as the Governor exercise their powers and functions conferred on them by or under the Constitution on the aid and advice of his Council of Ministers, save in spheres where the President/Governor is required by or under the Constitution to exercise his functions in his discretion and further subject to specific functions assigned to the President/Governor which are exercisable by them after consultation with the named constitutional functionaries as stated above.

Over and above, the position so explained and exceptions elaborated, the Supreme Court in *Samsher Singh v. State of Punjab*¹, further declared few well-known exceptional situations illustratively where the President or Governor can act without the advice of Council of Ministers as under :

- (a) the choice of Prime Minister (Chief Minister), restricted though this choice is by the paramount consideration that he should command a majority in the House;
- (b) the dismissal of a Government which has lost its majority in the House, but refuses to quit office;
- (c) the dissolution of the House where an appeal to the country is necessitous, although in this area the head of State should avoid getting involved in politics and must be advised by his Prime Minister (Chief Minister) who will eventually take the responsibility for the step.

It may, however, be stated that the aforementioned exceptional situations were highlighted by Justice V.R. Krishna Iyer in his separate but concurring opinion. The main judgment was delivered by Chief Justice A.N. Ray for himself and four other judges. The separate but concurring judgment was delivered by Justice V.R. Krishna Iyer for himself and Justice Bhagwati. It appears that the third situation envisaged by justice Iyer did not find any explicit or implicit concurrence with the main judgment and hence cannot

¹ AIR 1974 SC 2192.

be treated as binding. Even otherwise conferment of such wide power of great moment to the President/Governor in a Parliamentary democracy to their discretion, on their subjective satisfaction may subvert the constitutional scheme as it is fraught with dangerous proportions.

The present paper focuses on yet another penumbra area of exercise of statutory powers by Governor under our constitutional scheme. The reasoning will apply, *mutatis mutandis*, to the exercise of statutory powers by the President.

A brief survey of case law on the subject will be appropriate.

In *Hardwari Lal v. GD Tapase*², a Full Bench of the Punjab and Haryana High Court was to consider whether the Governor in his capacity as the Chancellor of Maharshi Dayanand University was to act under Maharshi Dayanand University Act, 1975 (Haryana Act No.25 of 1975) in his official capacity as Chancellor or with aid and advice of the Council of Ministers. The Full Bench, after elaborate consideration of the provisions of the Act and the statutes, came to observe that the Act and the statutes intended that the State Government would not interfere in the affairs of the University³. 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, as a statutory body, autonomous in character, has been given certain powers exercisable by the Chancellor in his absolute discretion without any interference from any quarter. In the appointment of the Vice-Chancellor or the Pro-Vice-Chancellor, the Chancellor is not required to consult the Council of Ministers. Though *by virtue of his office as Governor, he 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 individually*. However, while discharging the functions as a Chancellor, he does every act in his discretion as Chancellor and he does not act on the aid and advice of his Council of Ministers. The performance of the functions and duties under the Constitution with the aid and advice of the Council of Ministers is distinct and different from his discharge of the powers and duties of his office as Chancellor of the University. Under the

² AIR 1982 P&H 439.

³ *Id.*, para 121 at 476.

Act and the statute, the Chancellor has independent existence and exercises his powers without any interference from any quarter. Therefore, the office as a Chancellor held by the Governor is a statutory office quite distinct from the office of the Governor. Same view was taken by the Andhra Pradesh High Court in *Kiran Babu v. Govt. of AP*⁴. In *Ram Nagina Singh v. S.V. Sohni*⁵ the question was as to the appointment of a Lokayukta under Section 3 of the Bihar Lokayukta Act, 1974 to be made by the Governor in his capacity as Governor of the State, with the aid and advice of the Council of Ministers. The language of Section 3(1) of the said Act provides that “the Governor shall by warrant under his hand and seal appoint a person to be known as the Lokayukta of Bihar”. Considering the language in that provision and the scheme of the Act for removal of the Lokayukta, the Division Bench came to hold that the Governor, with the aid and advice of the Council of Ministers, discharges the function in the appointment of the Lokayukta under Section 3 of that Act. In the light of the language therein, there is little difficulty in upholding the correctness of the decision but it renders little assistance to the present controversy.

The Supreme Court approved the ratio of *Hardwari Lal's case in Bhuri Nath v. State of J&K*⁶. In this case the question which fell for consideration before the Supreme Court was whether the Governor exercises the powers under the Jammu and Kashmir Shri Mata Vaishno Devi Shrine Act, 1988 as executive head of the State or in his official capacity as the Governor of the State of Jammu and Kashmir. The administration, management and governance of the Shrine and the Shrine Fund are vested in the Board consisting of the Chairman and members nominated by the Governor. The Governor is the *ex-officio* chairman.

The Supreme Court after analyzing the Act held that in terms of the statute he is required to exercise his *ex-officio* power as Governor to oversee personally the administration, management and governance of the shrine. It was observed that the decision taken by him would be his own on his personal satisfaction and not on the aid and advice of the Council of Ministers.

⁴ AIR 1986 AP 275.

⁵ AIR 1976 Pat 36.

⁶ (1997) 2 SCC 745.

The exercise of powers and functions under the Act is distinct and different from those exercised formally in his name for which responsibility rests only with his Council of Ministers headed by the Chief Minister⁷.

The court further held :

The constitutional mechanism, i.e., cabinet system of Government is devised for convenient transaction of business of the executive power of the State. Though constitutionally the executive power of the State vests in the Governor, he does not, unless the Constitution expressly conferred on him, personally take the decision. The decisions are taken according to business rules at different levels and ultimately the decision rests with the authority specified in the business rules and is expressed to be taken in the name of the Governor. In substance and in reality, decisions are taken by the Council of Ministers headed by the Chief Minister or the Minister or Secretary as per business rules. But they are all expressed to be taken by the Council of Ministers in the name of the Governor and authenticated by an authorized officer. The Governor being the constitutional head of the State, unless he is required to perform the function under the Constitution in his individual discretion, the performance of the executive power, which is coextensive with the legislative power, is with the aid and advice of the Council of Ministers headed by the Chief Minister.

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As posed earlier, the question is : When the Governor discharges the functions under the Act, is it with the aid and advice of the Council of Ministers or in his official capacity as the Governor? The legislature is aware of the above constitutional mechanism of governance. Equally, the legislature of Jammu and Kashmir, while making the Act would be presumed to be aware that similar provisions in the Endowment Acts exist in other States in India. Section 86 read with Section 95 of the Andhra Pradesh Charitable Hindu Religious Institutions and Endowments Act, 1966 gives

⁷ *Id.*, para 24 at 765.

power to “the State Government” to dissolve the Board of Trustees of Tirumala Tirupati Devasthanams and the Board of Trustees of other institutions and reconstitution thereof. Similarly, in Bihar Hindu Religious Trusts Act, 1950, Sections 7 and 8 give power to the State Government for appointment of the members of the Board and Section 80 empowers the State Government to dissolve the Board. The Bombay Public Trusts Act, 1950 confers similar powers on the State Government under Sections 56-D, 56-G, 56-H and 56-R. The Orissa Hindu Religious Endowments Act, 1959 contains similar provisions conferring power on the State Government, vide Section 4 thereof, for constitution of the Board. The U.P. Shri Kashi Vishwanath Temple Act, 1983 is yet another Act where the entire responsibility is saddled on the Governor.

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It would be clear that the legislature entrusted the powers under the Act to the Governor in his official capacity. It expressly states that he would preside over the meetings of the Board. If he is a non-Hindu, his nominees, an eminent qualified Hindu will be his substitute to preside over the functions. As seen, no distinction between the Governor and executive Government is made by the legislature in the relevant provisions in the Act. Under Sections 9, 11 and 12 of the Act, though the Governor acts as repository of the sovereign power of the State, the phraseology employed therein does not indicate that power is given to the Council of Ministers and the Governor is to act on its advice as executive head of the State. It is an admitted position that prior to the Act, Dharmarth Trust was in management and administration of the Shrine and the properties attached thereto.

Thus, the Supreme Court, held that the legislature entrusted the powers under the Act to the Governor in his official capacity and thus the decision is his own decision on his personal satisfaction and not on the aid and advice of the Council of Ministers.

A five judges Bench of the Supreme Court in *MP Special Police*

*Establishment v. State of MP*⁸ missed an opportunity to decide this issue by an authoritative pronouncement. In the instant case the question directly and squarely pertained to exercise of statutory powers by the Governor. In this case sanction was applied for from the Governor for prosecution of two ministers of the Government of MP under sanction 197 of the Code of Criminal Procedure, 1973 for offences under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 and also for the offences of criminal conspiracy punishable under Section 120-B of the Indian Penal Code, 1860.

The Governor granted the sanction on his own discretion contrary to advice tendered by the Council of Ministers. Accused ministers filed writ petitioner under Article 226/227 of the Constitution before the MP High Court. A single judge of the MP High Court held that the Governor could not act contrary to the “aid and advice” of the Council of Ministers and thus allowed the writ petitions. An *intra-court* Letters Patent Appeal filed by the prosecution before the Division Bench of the HC was also dismissed upholding the reasoning and judgment of the Single Judge. Hence the appeal before the Supreme Court.

The SC in this case posed the right question to decide the case as follows :

The question for consideration is whether a Governor can act in his discretion and against the aid and advice of the Council of Ministers in a matter of grant of sanction for prosecution of Ministers for offences under the Prevention of Corruption Act and/or under the Indian Penal Code.

However, while deciding the issue, the Supreme Court completely misdirected itself and sidestepped rather ignored the issue and proceeded to decide the same on the ground of bias implicit in the process. It is submitted the issue which squarely to be decided was exercise of statutory powers by the Governor under Section 197 of CrPC, 1973. The SC had to decide the issue whether the Governor can act on his own discretion or on the aid and advice of Council of Ministers. The question of bias would arise later. The issue was larger having bearing upon the exercise of statutory

⁸ (2004) 8 SCC 788.

powers by the Governor. In exercise of such powers possibility of bias may arise, not only when he has to act on the aid and advice of Council of Ministers but even otherwise. That is a separate and subsequent issue and law on that is also no longer *res integra*.

Thus after misdirecting itself in law the SC allowing the appeal held :

However, on those rare occasions where on facts the bias becomes apparent and/or the decision of the Council of Ministers is shown to be irrational and based on non-consideration of relevant factors, the Governor would be right, on the facts of that case, to act in his own discretion and grant sanction⁹.

These sweeping observations create new exceptions not hitherto recognized by the SC even in *Samsher Singh's*¹⁰ and clothes the Governor to act on his own discretion ignoring the aid and advice of Council of Ministers if the bias becomes apparent or the decision of the Council of Ministers is shown to be irrational and based on non-consideration of relevant factors. Thus the Governor has been exalted to the position of Super CM and appellate authority over the decisions of the Council of Ministers – an absurd situation not envisaged by the Founding Fathers. The decision is bad and is not supported by any authority.

In *fine*, it is clear the area in this branch of law, though not clear, yet veers to the proposition that the statutory powers may be exercised by the Governor on his own discretion and for this conclusion an analysis of the statute in question also plays a vital role in deciding whether powers are to be exercised by the Governor on his own discretion or otherwise.

⁹ *Id.*, para 33.

¹⁰ (1974) 2 SCC 831.