

(1964) 12 KL CK 0034

High Court Of Kerala

Case No: O P. No. 1447 of 1963

Gopalan

APPELLANT

Vs

State of Kerala

RESPONDENT

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Date of Decision: Dec. 2, 1964

Acts Referred:

- Constitution of India, 1950 - Article 154, 166(3), 311(2), 356
- General Clauses Act, 1897 - Section 3(60)

**Citation:** (1965) KLJ 892**Hon'ble Judges:** K.K. Mathew, J**Bench:** Single Bench**Advocate:** S. Easwara Iyer and L. Gopalakrishnan Potti, for the Appellant;**Final Decision:** Dismissed

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### Judgement

K.K. Mathew, J.

The petitioner in this case was employed as an acting Lower Division Clerk-in the High School for Girls, Kayamkulam. While he was thus employed the Government received information from the Deputy Inspector General of Police, C.I.D. and Railways that the petitioner was engaged in subversive activities. The Government therefore directed the Director of Public Instruction, who is the competent authority under Rule 2(c) of the Kerala Civil Services (Safeguarding of National Security) Rules, 1961, to take action against the petitioner pursuant to rule 4(a) of the Rules. Accordingly the Director of Public Instruction issued Ext.P.I notice to the petitioner. The reason for taking the proceeding against-the petitioner was mentioned in the annexure to that notice. The petitioner was asked to submit, his explanation within 14 days of the receipt of the notice why he should not be proceeded against. He was also asked whether he wished for a personal hearing before the orders were passed. After this notice the petitioner was allowed to proceed on leave from 5-1-1963 onwards as provided for in Rule 5 of the above Rules. The petitioner submitted an explanation to the Governor on 7-1-1963, a copy of which is marked

Ext. P.2. The Director of Public Instruction gave the petitioner a personal hearing on 28-1-1963. Thereafter the Director of Public Instruction forwarded the representation of the petitioner to the Government with all the concerned papers with his recommendation. The Government passed Ext. P. 6 order compulsorily retiring the petitioner from service. In Ext. P.6 order it is stated that the Governor has examined the question and he was satisfied that in the interest of the security of the State it is not expedient to give the petitioner any opportunity of showing cause against the action proposed to be taken in regard to the petitioner. It is further stated that the explanation of the petitioner was duly considered by the Governor and that he was of opinion that the petitioner was reasonably suspected to be engaged in subversive activities and that his retention in public service was on that account prejudicial to the national security.

2. In the counter-affidavit filed on behalf of the respondent it is stated that the Government alone examined the question and came to the conclusion that it was not expedient to give the petitioner any opportunity of showing cause against the action proposed to be taken against him and that the retention of the petitioner in service was prejudicial to national security, and therefore he was compulsorily retired from service. It is stated in paragraph 2 of the counter affidavit:

The Government examined the case carefully and arrived at the conclusion that the petitioner was reasonably suspected to be engaged in subversive activities and that his retention in public service was on that account prejudicial to national security."

Mr. Easwara Iyer, appearing for the petitioner, submitted that under rule 3 of the above rules it was only the Governor in his individual capacity who should have formed the opinion that the retention of the petitioner in service was prejudicial to national security, and not the Government, that there is a distinction between a case where the Governor functions as the head of the executive and a case where he acts as the constitutional head of the state, and that rule 3 gave the power, of compulsorily retiring a person on the ground that he was suspected of being engaged in subversive activities, to the Governor as the Constitutional head of the State and not as the head of the executive and therefore the Governor in his discretion, and not the Government, should have been satisfied that the retention of the petitioner in service was detrimental to national security. He also submitted that under the proviso (c) to Article 311(2) the Governor in his discretion should have ordered that it was not expedient to give an opportunity to the petitioner to show cause against the disciplinary action taken against him, and not the Government. As regards the last contention, I think, the satisfaction contemplated by proviso (c) to Art. 311(2), to the effect that in the interest of security of the State it is not expedient to give an opportunity to the petitioner to show cause against the disciplinary action proposed to be taken against him, is not the personal satisfaction of the Governor, but the satisfaction of the Government. Security of the State is the most essential part of the executive functions of the State, and that is a matter for which the

primary responsibility is that of the Government. Deprivation of opportunity to a Government Servant, in the context to show cause against the disciplinary action proposed to be taken against him is clearly an act in relation to the security of the State. Such an act must be done under the responsibility of the Government and not under the personal responsibility of the Governor. See the ruling reported in [Narendra N. Das Vs. State of West Bengal](#), .

3. Rule 3 of the Rules framed under Art. 309, called the Kerala State Civil Services (Safeguarding of National Security) Rules, reads as follows:

Where the Governor is of opinion that a Government servant is engaged, or reasonably suspected to be engaged in subversive activities, or is associated with others in subversive activities and that his retention in the Public Service is, on that account prejudicial to national security, the Governor may make an order compulsorily retiring such Government Servant."

It was on the basis of this rule that the submission was made that the Governor and not the Government should have been satisfied in his discretion that the petitioner was engaged in subversive activities and that his retention in service was prejudicial to national security. The term "State Government" is defined in Section 3 (60) of the General Clauses Act, 1897, as meaning the Governor, but that does not mean that the Governor can in each and every case be equated with the State Government. Article 154 of the Constitution lays down that the executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. When the Governor exercises the executive power of the State it is possible to equate him with the State Government, but not when he exercises his other powers. The provisions of the Constitution make it clear that the Governor functions in two different capacities which should not be confused with each other. While exercising the executive power of the State he can be deemed to be functioning as the State Government. And when reference is made to be State Government's in a statute that reference is to the Governor. But the converse would not follow. In *The State of Bombay v Purushottamjog Naik* (1952 S. C. R. Vol. III page 674) it was observed by Bose J:

Now, though the term "State Government" appearing in an enactment means the Governor of the State, there is no provision of law which equates the term "Governor" with the State Government of which he happens to be the head. On the contrary, the Constitution invests him with certain functions and powers which are separate from those of his Government.

There are certain functions which the Governor, is required, by the Constitution, to exercise in his discretion, but unless a particular Article expressly so provides, an obligation or a power on the part of the Governor to act in his discretion cannot be inferred by implication. Article 166(3) makes it quite clear that except in cases where the Governor is required to act in his discretion, he is to act on the advice of the

Ministers. Though the power of the Governor to act in his discretion cannot be inferred from the Constitution by implication, there are some situations under the Constitution when it may be impracticable for a Governor to act upon ministerial advice, in view of the very nature of such situations. It is not necessary for the purpose of this case to enter into a discussion as to what are the situations in which a Governor can act in his discretion, apart from the few cases expressly mentioned in the Constitution. Making a report to the President under Article 356 is an instance on the point. The power of the Governor to act in his discretion is made effectual in two ways, namely, that the Governor is himself the final authority to decide whether he is required by or under the Constitution to act in his discretion; and no court can nullify the act of the Governor on the ground that he should not have acted in his discretion. Where a statute confers a power or function upon the Governor the context may require that the act of the Governor in the exercise of that power or function is not to be construed as the act of the State Government. Hence when the Governor as Chancellor makes an appointment, say of the Vice Chancellor, in the exercise of the statutory power, the Vice Chancellor cannot be said to hold an office of profit under the Government of the State. To hold otherwise would lead to the conclusion that all the other officers of the University who are appointed by the Governor are to be treated as Government Servants, both as regards their rights and obligations, (See A. I. R. 1962 Allahabad 128).

4. Although there is some reason for thinking that the Governor is to form the opinion himself under Rule 3 above referred to, on a balance of all considerations I have come to the conclusion that as this is a matter relating primarily to the security of the Government, and as that pertains to his function as the head of the executive it is proper to construe the expression "Governor" occurring in the rule as meaning only the "State Government". In other words the Governor, in a matter like this, can act only on the advice of ministers. Therefore I think that the opinion formed by the State Government is a sufficient compliance with the provisions of Rule 3 of the Rules. If the State Government were satisfied that the petitioner was engaged in subversive activities prejudicial to the national security, the Government were competent to pass the order compulsorily retiring him. I dismiss the writ petition, but without any order as to costs.