

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 20.06.2016

Delivered on : 01.07.2016

CORAM :

The Hon'ble MR.SANJAY KISHAN KAUL, CHIEF JUSTICE

AND

The Hon'ble MR.JUSTICE R.MAHADEVAN

W.P. No.10624 of 2015

P.Pugalenth

.. Petitioner

-VS-

State of Tamil Nadu
Rep. By The Chief Secretary to Govt.,
Personnel and Administrative Reforms
(N) Department, Secretariat,
Chennai 600 009.

.. Respondent

Petition filed under Article 226 of the Constitution of India praying for issue of Writ of Certiorari to call for the records in the order bearing G.O. (Ms.) No.10, Personnel and Administrative Reforms (N) Department, dated 02.02.2016 issued by the respondent and quashing paragraph (4) of the said G.O.

For Petitioner : Mr.M.Radhakrishnan

For Respondents : Mr.A.L.Somayaji,
Advocate General,
assisted by
Mr.V.R.Kamalanathan, Addl.G.P.

* * * * *

ORDER**THE HON'BLE CHIEF JUSTICE**

The petitioner had originally raised the issue of the procedure followed in the investigation of corruption cases filed against the All India Service Officers in Tamil Nadu. In this behalf, Writ Petition No.17949 of 2010 was filed and when the writ petition was still pending, the judgment came to be passed by the Hon'ble Supreme Court in **Dr.Subramanian Swamy vs. Director, Central Bureau of Investigation, AIR 2014 SC 2140**. Thus, proceedings were closed with the assurance of the State Government to re-visit the entire procedure in the light of the said judgment.

2.It is, thereafter, that G.O. (Ms.) No.10 of Personnel and Administrative Reforms (N) Department, dated 02.02.2016 has come to be issued. The challenge laid in the present petition filed under Article 226 of the Constitution of India is to para 4 of the said G.O., as it is alleged that an impermissible procedure is once again sought to be introduced indirectly through that para of the G.O.

3. In order to appreciate the G.O., we reproduce the same as under:

ABSTRACT

Public Services – Uniformity in the investigation procedures of complaints on corruption cases in the light of the judgment of the Hon'ble Supreme Court – Orders issued.

Personnel and Administrative Reforms (N) Department

G.O. (Ms.) No.10

Date : 02.02.2016

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jpUts;Sth; Mz;L 2047

Read:

1. Orders of Hon'ble Supreme court of India in W.P. (Civil) No.38 of 1997
2. Orders of Hon'ble High Court, Madras in W.P. No. 17949 of 2010, dated 07.10.2015.

ORDER:

In W.P. (Civil) No.38 of 1997, the Hon'ble Supreme Court of India held that Section 6 A (1) of Delhi Special Police Establishment Act introduced by the Central Vigilance Commission Act, 2003, which requires prior approval of the Central Government to conduct inquiry or investigation into any offence, alleged to have been committed by the Joint Secretary and above level officers in the Government of India, under the Prevention of Corruption Act, 1988, is invalid and violative of Article 14 of the Constitution of India.

2) The Hon'ble High Court of Madras in its order dated 07.10.2015 in the W.P.No.17949 of 2010 has allowed the prayer of

the Government to revisit and evolve a non-discriminatory policy in the investigation procedures of complaints on corruption cases with reference to All India Service Officers and other Government Servants.

3) Therefore, in order to have uniformity in the processing of the allegations of corruption against all Government Servants and also in the light of orders of Hon'ble Supreme Court of India and Hon'ble High Court, the guidelines / orders issued for investigation against All India Service Officers on allegation of corruption in the Government orders viz.,

- G.O.Ms.No.2187, Public (Spl.A) Department, dated 20.12.1988.
- G.O. (D) No.1, Personnel and Administrative Reforms (N) Department, dated 28.1.1992

and

- G.O. Ms.No.374, Personnel and Administrative Reforms (N) Department, dated 10.10.1996

shall be rescinded with immediate effect.

4)In respect of allegations of corruption against public servants relating to acts made in an official capacity, irrespective of the rank or group of the public servants complained against, the Directorate of Vigilance and Anti-Corruption shall forward the complaints to the Vigilance Commission and the Vigilance Commission in turn shall seek and consider the remarks of the Government before ordering an appropriate enquiry by the Directorate of Vigilance and Anti-Corruption.

(BY ORDER OF THE GOVERNOR)

**K.GNANADESIKAN,
CHIEF SECRETARY TO GOVERNMENT**

4.The submission advanced by the learned counsel for the petitioner was that the discriminatory approach adopted depending

upon the rank held by the Government servants vide the previous G.Os. while obliterated under the new G.O. mandates the Directorate of Vigilance and Anti-Corruption to forward the complaints to the Vigilance Commission, which, in turn, would seek remarks of the Government before ordering an appropriate enquiry by the Directorate of Vigilance and Anti-Corruption. It is this which is sought to be canvassed as impermissible.

5.The contour of controversy examined in Dr.Subramanian Swamy's case, supra, was the challenge laid to Section 6-A(1) of the Delhi Special Police Establishment Act, 1946, providing an impediment in the Delhi Special Police Establishment in conducting an enquiry or investigation into any offence alleged to have been committed under the Prevention of Corruption Act, 1988, except with the previous approval of the Central Government where such allegation related to the employees of the Central Government of the level of Joint Secretary and above. This provision was struck down as unconstitutional broadly on the premise that the classification made was not sustainable as it neither eliminated public mischief nor achieved some positive public good. The provision was held to thwart an independent, unhampered, unbiased, efficient and fearless inquiry/ investigation to track down corrupt public servants. The Hon'ble

Supreme Court observed that the previous approval from the Government would result in indirectly putting to notice the officers to be investigated before commencement of investigation and if the C.B.I. is not even allowed to verify complaints by preliminary enquiry, how could the case move forward ? The very purpose of a preliminary enquiry is intended to ascertain whether a prima facie case for investigation is made out or not. It was emphasized that the criminal justice system mandates that an investigation into the crime should be conducted in accordance with law and should not be tainted, as also that interested or influential persons are not able to misdirect or hijack the investigation so as to throttle the fair investigation resulting in the offenders escaping the punitive course of law.

6.The petitioner pleads that the very intent of these observations are sought to be given a go-by by evolving a procedure to the effect that no complaint of corruption against any public servant (not merely of All India Service Officers, but other Government servants also) should be investigated by the Directorate of Vigilance and Anti-Corruption without prior approval of the Government.

7.Learned counsel drew our attention to Section 2 (s) of the

Code of Criminal Procedure, 1973, (hereinafter referred to as 'the Cr.P.C.') which defines the police station as under:

"police station" means any post or place declared generally or specially by the State Government, to be a police station, and includes any local area specified by the State Government in this behalf.

8.The headquarters of the Directorate has been notified as police station with jurisdiction over the entire State and all police officers in the Directorate of and above the rank of Inspector of Police have been notified to have the powers of an officer-in-charge of police station under Section 2(s) of the Cr.P.C. The Deputy Superintendents of Police of the Directorate of Vigilance and Anti-Corruption were empowered to investigate any offence punishable under the Prevention of Corruption Act, 1988 (hereinafter referred to as 'the said Act').

9.It was, thus, submitted that the legal position was quite explicit in view of the enunciation of the law by the Hon'ble Supreme Court in **Vineet Narain vs. Union of India, (1998) 1 SCC 226**. It has been held thus:

" .. Once the CBI is empowered to investigate an offence generally by its specification under Section 3, the process of investigation, including its initiation, is to be governed by the statutory provision which provide for the initiation and manner of investigation the offence.

..

"There is no similarity between a mere executive order requiring prior permission sanctions investigation of the offence and sanction needed under the statute for prosecution. The requirement of sanction for prosecution being provided in the very statute which enacts the offence, the sanction for prosecution is a pre-requisite for the court to take connivance of the offence. In the absence of any statutory requirement of prior permission or sanction for investigation, it cannot be imposed as a condition precedent for institution of the investigation once jurisdiction is conferred on the CBI to investigate the offence by virtue of the notification under section 3 of the Act."

10. In view of the legal position enunciated, it was submitted, the State has no jurisdiction to introduce the requirement of prior approval of the Government for investigating an offence under the said Act by issuance of any executive instruction like the one in para 4 of the G.O. in question.

11. Learned counsel for the petitioner also urged that while

Section 2 (c) of the said Act defines a public servant to include twelve categories of persons enlisted therein and the G.O. impugned in the previous writ petition related to Government servants alone, instead of issuing a G.O. touching only the Government servants, the respondent has used the expression "public servants" in para 4 covering all twelve categories of persons mentioned in Section 2 (c) of the said Act.

12.Learned Advocate General, on the other hand, sought to emphasize that there was no violation of the assurance given to the Court in the earlier writ proceedings and the mandate of the judgment in **Dr.Subramanian Swamy's** case, supra, was fully met. It was sought to be suggested that the object was to prevent unnecessary harassment of the public servants by motivated persons. The officers should be permitted to carry on their official duties without fear and the Government Order provides that the Vigilance Commission can function in an independent manner and clearly states that the Vigilance Commission can seek and consider the remarks of the Government before ordering an appropriate enquiry. Thus, the Government ensured the uniform process for all Government servants irrespective of the category and rank.

13.The emphasis by the learned Advocate General was on the

plea that both the **Vineet Narain's** case (supra) and **Dr.Subramanian Swamy's** case (supra) propound upon the existence of discrimination between the officers of the rank of Joint Secretary and above and the officers below that rank for conducting enquiry. The G.O. did not incorporate prior permission, but only remarks to be obtained with reference to acts made in official capacity. It was, thus, submitted that allegations of corruption like demand and acceptance of bribe, possession of disproportionate assets and cases involving trap and arrest would not require obtaining of remarks from the Government and the Directorate of Vigilance and Anti-Corruption would be well within its powers to commence enquiry in such other allegations of corruption. There was stated to be, thus, no impediment in the investigative functions of the Directorate of Vigilance and Anti-Corruption.

14. In a nutshell, the plea is that a distinction has to be made between 'obtaining only remarks' and 'obtaining prior approval', the latter not being contemplated. Acts done in official capacity would necessarily require adherence to procedures which may be complex in nature and thus, procedural formalities and methodology prescribed by law and the methodology actually adopted in any case on hand are inevitable for proper investigation by the investigation officers.

15.The establishment of the Vigilance Commission has been explained with reference to the Government of India establishing such an independent Vigilance Commission in the year 1964 based on the recommendations of the Committee of Prevention of Corruption under the Chairman, Sri.K.Santhanam. The then Government of Tamil Nadu on the same lines established a Vigilance Commission in the State in the year 1965, which has been functioning for the past 50 years and is expected to bear a measure of detachment and freedom.

16.Another aspect pointed out by the learned Advocate General by reference to the counter-affidavit was that a Bill was pending before the Parliament for amending the provisions of the said Act with Section 17A(1) sought to be introduced, which provides for investigation of offences relatable to the recommendations made or decision taken by the public servants in discharge of official functions or duties. The prior approval of the Lokpal and Lokayukta was also sought to be envisaged. A role is assigned in para 4 of the G.O. dated 02.02.2016 to the Vigilance Commission and not to the Government.

17.We may notice that towards the conclusion of the arguments, on our query, learned counsel for the petitioner conceded that if the expression "before ordering an appropriate enquiry" in para

4 of the Government Order excluded a preliminary enquiry, he would not have much to say. It is, in these circumstances, that we posed this very query to the learned Advocate General while recording the conclusion of arguments on 13.06.2016 and requiring a response to this aspect. However, on 20.06.2016, learned Advocate General stated that even for preliminary enquiry, it would be so.

18.We have examined the rival contentions of the parties. The legal principles are not in doubt. The law stands enunciated by the Hon'ble Supreme Court inter alia in the two aforesaid judgments of **Vineet Narain's** case (supra) and **Dr.Subramanian Swamy's** case (supra).

19.It is in the aforesaid context that the State Government itself had agreed to supersede the earlier G.Os. to comply with the judgments and to evolve a non-discriminatory treatment. However, while doing so and issuing the G.O., para 4 has been inserted which has given cause to the filing of the present writ petition.

20.It is trite to say that the first enquiry into a complaint or information is in the nature of preliminary enquiry, which has to be conducted with utmost secrecy. There are three memos issued in this behalf, viz., D.V.A.C. Circular Memo No.22761/VAC-4/76, dated

30.09.1976, Govt. Memo No.2312/72-6, Public (Ser-B), dated 30.08.1972 and D.V.A.C. Circular Memo No.38901/VAC-4/80, dated 14.07.1981. The purport of these memos is that the witnesses should normally be contacted only through sources or otherwise, indirectly and even if they have to be contacted directly, the purpose of enquiry must be suitably camouflaged and willingness to make a statement may be ascertained, but actual statement should not be recorded. The departmental files and other records including that may be available with private sources may be looked into and departmental records may also be taken into custody wherever considered it desirable.

21.It is the common case that the headquarters of the Directorate has been notified as police station with jurisdiction over the entire State within the definition of Section 2 (s) of the Cr.P.C.

22.It is the own case of the respondent that allegation of corruption like demand and acceptance of bribe, possession of disproportionate assets and cases involving trap and arrest would not require obtaining of what is referred to as remarks of the Government and the department of Vigilance and Anti-Corruption is well within its powers to commence enquiry. It is hard to frankly understand that if

this be the position, then what is the purpose of para 4, as it refers to "allegation of corruption against public servants" and follows with "relating to acts made in official capacity". On one hand, this is the stand sought to be taken, on the other hand, after instructions, learned Advocate General submits that even for holding a preliminary enquiry, the remarks are to be called for mandatorily. It is nobody's case that in the process of carrying out a preliminary enquiry, information cannot be sought for. In fact, even records can be sought for and witnesses identified. The purpose is to determine whether there is any grain of truth in the allegations, but that is the job of the police officer. The powers of the police officer, however, are sought to be restricted by superimposing a requirement of a mandatory prior remarks "before ordering an appropriate enquiry by the Directorate of Vigilance and Anti-Corruption". If offences are made out under the said Act on the complaint, preliminary enquiry is held, then in the course of preliminary enquiry, the police officer would take the necessary precautions to locate the relevant material. Undoubtedly, the expression used is "remarks" and not "prior permission". But, really speaking there would be no purpose of the mandatory requirement of such remarks which may themselves delay the investigation process even of a preliminary enquiry.

23.The fact is that the procedure prescribes a mandate on the Directorate of Vigilance and Anti-Corruption to first forward the complaints to the Vigilance Commission, which, in turn, to first obtain remarks of the Government and thereafter, apply their mind and forward the result to the Directorate of Vigilance and Anti-Corruption before the Directorate of Vigilance and Anti-Corruption can exercise its jurisdiction of a police station. In our view, this is not permissible.

24.We would have thought that the controversy could have been put to rest if in answer to our query as to whether para 4 of the G.O. while reference to "before ordering an appropriate enquiry" would imply that even preliminary enquiry cannot start without those remarks or whether those remarks have to be necessarily obtained (though not binding) in the course of preliminary enquiry, a positive approach would have been adopted by the State Government with an assurance that there is no impediment at least to the preliminary enquiry being conducted. The contrary answers seems to convey an apparent lack of faith in the Directorate of Vigilance and Anti-Corruption to look into the matter even as a preliminary enquiry. This, in our view, cannot be countenanced.

25.We are, thus, left with no option but to quash para 4 of the

G.O. dated 02.02.2016 as unsustainable in law.

26.Writ Petition is allowed in the aforesaid terms, leaving the parties to bear their own costs.

(S.K.K., CJ.) (R.M.D., J.)
01.07.2016

Index : Yes/No
Website : Yes/No

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To

The Chief Secretary to Govt. of Tamil Nadu
Personnel and Administrative Reforms
(N) Department, Secretariat,
Chennai 600 009.

The Hon'ble Chief Justice
and
R.Mahadevan, J.

(sra)

Order in
W.P.No.10624 of 2015

01.07.2016