

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :13.12.2018

CORAM

THE HONOURABLE Mrs. JUSTICE PUSHPA SATHYANARAYANA

W.P.Nos.26924 and 27376 of 2018
and W.M.P.Nos.31290, 31293, 31295, 31879, 31904
and 31909 of 2018

M.K.Stalin ... Petitioner in W.P.No.26924/2018

M.Duraimurugan ... Petitioner in W.P.No.27376/2018

Vs.

1. The State of TamilNadu
rep. By its Chief Secretary to Government,
Secretariat, Fort St. George,
Chennai 600 009.
2. The Principal Secretary to Government,
Public (SC) Department,
Secretariat, Fort St. George,
Chennai 600 009.
3. The Director of Vigilance and Anti Corruption,
Tamil Nadu, 293, MKN Road,
Alandur,
Chennai 600 016. ... Respondents in both the W.Ps.

Prayer in both the writ petitions : Writ petitions filed under Article 226 of the Constitution of India praying for a Writ of Certiorari calling for the records of the respondents pertaining to the impugned G.O.(Ms)No.721 dated 24.09.2018 and Letter No.AC/506-1/2018 dated 28.09.2018 on the file of the respondents and quash the same.

For Petitioners in : Mr.P.Wilson, Senior Counsel
both the W.Ps. assisted by Mr.R.Neelakandan
for M/s.Wilson Associates

For Respondents : Mr.A.Natarajan,
in both the W.Ps. Public Prosecutor
assisted by Ms.Krithika Kamal, P.
Government Advocate (Crl. Side)

COMMON ORDER

Both these writ petitions are filed challenging G.O.(Ms.) No.721, Public (Buildings) Department, dated 24.09.2018 and the consequential Letter No.AC/506-1/2018 dated 28.09.2018.

2. Before proceeding with the correctness of the challenge laid to the above said Government Order and the consequential Letter, a brief history of the previous writ petitions filed by the very same petitioners are relevant for consideration, which would run thus :

(i) The petitioner in W.P.No.26924 of 2018 instituted W.P.No.26621 of 2014 and the petitioner in W.P.No.27376 of 2018 filed W.P.No.26622 of 2014. Both these writ petitions were filed challenging G.O.Ms.No.1143, Public (Buildings) Department, dated 02.12.2011 issued by the first respondent herein appointing a Single Member Commission of Inquiry of Hon'ble Mr.Justice R.Regupathi and its proceedings including the procedure dated 05.06.2013 and collection of evidences culminating into summons dated 11.09.2014. This Court on 07.10.2014 passed interim order dispensing the appearance of the petitioners before the Commission and permitting them to be represented by counsel, who were also permitted to receive the questionnaire. Earlier W.P.No.25445 of 2014 was filed by Late.Thiru.M.Karunanithi praying similar relief.

(ii) When the Commission proceeded with the enquiry and sent the questionnaire dated 13.02.2015, there was yet another set of writ petitions filed by the very same writ petitioners in W.P.Nos.7211 and 7493 of 2015 questioning the same along with other proceedings. Similarly, Late.Thiru.M.Karunanithi filed W.P.No.7049 of 2015 for the very same relief, wherein, this Court vide order dated 12.03.2015 restrained the Commission from proceeding further, till the writ petition was finally disposed of.

(iii) By virtue of the interim orders granted in the above writ petitions, the Commission could not take off and the proceedings were kept pending. After a passage of more than three years, when the above writ petitions surfaced for hearing, this Court had expressed its anguish stating that the Commissions of Inquiry are functioning indefinitely for an unspecified period frustrating the very purpose of the appointment of such Commissions. If the inquiry is not conducted and the report is not submitted within a reasonable time, it is useless to continue with such Commissions. The said order further stated that the Commissions are created for the purpose of fact-finding at the cost of the tax-payers money.

(iv) After elaborately considering the arguments of the learned counsels for the petitioners and the respondents and discussing about how the delayed process would defeat the purposes of these Commissions, an interim order was passed on 03.08.2018 giving certain directions in paragraph 126, which are usefully extracted as follows :

"126. In view of the importance involved in the issues raised in these petitions, this Court has considered the issues at length and following orders are passed in the vacate stay petitions and in the stay petitions, as under :-

(i) The third respondent/State is directed to issue orders within one week from today, suspending the Hon'ble Thiru Justice R.Regupathi Commission of Inquiry and stop all further allotment of funds including the perquisites and Government facilities, till the final disposal of the writ petitions.

(ii) The third respondent/State is directed to review the functioning of all the existing Commission of Inquiries and take a decision in respect of its further continuance, dissolving the same or fixing the time limit for the submission of report based on the legal principles settled by the Hon'ble Supreme Court of India and the observations made in this order, within a period of four weeks.

(iii) The respondents 1 and 2 are directed to handover all the records, reports of the Investigating Agencies, statements and the evidences collected, to the third respondent/State, within a period of two weeks from the date of receipt of a copy of this order. On receipt of those documents, the third respondent/State is directed to scrutinise the said reports of the Investigating Agencies, statements and evidences of Government officials and files and if prima facie case is found, then institute criminal prosecutions against all the public servants, Government Officials and the persons concerned, under the penal provisions of law.

(iv) The third respondent/State is directed to issue orders, vacating the respective Government Residential Bungalows allotted to all the

Commissions of Inquiry, within a period of one month from the date of receipt of a copy of this order. If at all, accommodation is required, the same shall be provided in the Government Office buildings suitably."

(v) Pursuant to the said directions, the State had passed the impugned G.O.Ms.No.721, dated 24.09.2018 directing the Secretary to the Commission of Inquiry to handover all the records, reports of the Investigating Agencies, statements and the evidences collected by the Commission of Inquiry to the Director of Vigilance and Anti Corruption, Chennai-16, under due acknowledgment for necessary further action. Thereafter, the Government issued the consequential Letter No.AC/506-1/2018, dated 28.09.2018 according to the permission to the Director, Vigilance and Anti-Corruption, to conduct detailed enquiry and send a report to the Government.

(vi) Challenging the issuance of the said Government Order and the Letter, these writ petitions have been filed.

(vii) At this juncture, it is curious to note that the petitioner in W.P.Nos.25445 of 2014 and 7049 of 2015 passed away on 07.08.2018 due to old age. Therefore, W.P.No.25445 of 2014 and 7049 of 2015 were closed on 20.09.2018.

(viii) In the meanwhile, Chairman of the One Man Commission of Inquiry Hon'ble Mr.Justice R.Regupathi has demitted his assignment with effect from 10.08.2018 and the Government had accepted the same in the G.O.(Ms)No.681, Public (Buildings) Department, dated 07.09.2018. In other words, in view of the direction given by the learned Single Judge to suspend the said Commission of Inquiry coupled with demitting of assignment by the One Man Commission of Inquiry, virtually, the Commission of Inquiry ceased to exist.

(ix) As stated supra, the two other sets of writ petitions filed by the petitioners herein (Thiru.M.K.Stalin and Thiru.Duraimurugan) were pending on the file of this Court. As the Commission itself ceased to exist, the above writ petitions were withdrawn by the petitioners on 01.10.2018.

(x) In the light of the above facts, as narrated above, now the challenge is laid to G.O.Ms.No.721, dated 24.09.2018 and the consequential Letter No.AC/506-1/2018, dated 28.09.2018, which were issued pursuant to the directions of this Court in the interim order dated 03.08.2018.

3. The learned Senior Counsel appearing for the petitioner submitted that the Government Order was issued pursuant to the

interim order passed on 03.08.2018 in the miscellaneous petitions filed in W.P.Nos.25445 of 2014 and 7049 of 2015, and the final order could not be passed, as the petitioner in the said writ petitions died on 07.08.2018 itself. The cause of action for the above writ petitions is no longer in existence with the death of the petitioner, and the writ petitions were closed on 20.09.2018. After the writ petitions were closed, the impugned G.O.Ms.No.721, dated 24.09.2018 was passed by the first respondent. Hence, it was argued that in view of the merger of the interim order with the final order, there cannot be any further proceedings that could be made pursuant to the interim order.

4. In normal circumstances, any interim order, that may be passed in any legal proceedings be it in a suit or appeal, will merge with the final order, as it will be only an interim relief or interim direction, depending upon the facts and circumstances of each case. However, in this case, the entire matter relates to appointment of Commission of Inquiry, in exercise of the powers conferred by the statute and that too for an enquiry for the alleged irregularities like excess expenditure, irregularities causing loss to the exchequer, whether statutory approvals and clearances were obtained, inordinate delay and deficiency in standards of construction of New Secretariat Complex in Omandurar Government Estate, Chennai-600 002. Therefore, the issue cannot be lightly brushed aside, as it is a matter of definite public importance. The doctrine of merger, considering the public importance, for which, the Commission was appointed, cannot of any use on hyper-technical grounds.

5. The next aspect to be looked into is as to whether the impugned Government Order is in accordance with the order passed by the learned Single Judge on 03.08.2018. Paragraph 126(iii) of the said order had specifically directed the first and second respondents, namely, Secretary of the Commission of Inquiry and the Chairman of the Commission of Inquiry to handover all the records, reports of the Investigating Agencies, statements and the evidences collected to the third respondent, namely, the State of Tamil Nadu represented by its Chief Secretary. On receipt of the above said documents, the State Government was directed to scrutinize the said reports of the Investigating Agencies, etc., and if prima facie case is found, thereafter, institute criminal prosecution against all those officials, public servants involved, as per the provisions of law. However, a reading of the impugned Government Order, would go to show that though it adverts to the above said paragraphs 126 (iii) of the order of this Court in paragraph 4, ultimately, in paragraph 6, a direction was issued to the Secretary of the Commission of Inquiry to handover all the records, reports of the Investigating Agencies, statements and the evidences

collected by the Commission of Inquiry to the Director of Vigilance and Anti Corruption, Chennai, under due acknowledgment for necessary further action. This is prima facie against the tenor of the order passed by the learned Single Judge. A reading of the impugned Government Order in its entirety would go to show that the Government has not even cared to receive the files from the Commission, much less, to read and make out a prima facie case for referring the matter to the Director of Vigilance and Anti Corruption. Since no subjective satisfaction of the Government is arrived at before handing over the papers to the Director of Vigilance and Anti Corruption, the impugned Government Order itself is passed in violation of the interim order passed by this Court.

6. The next issue would be whether any material or evidence collected by the Commission of Inquiry when in office can be used for initiating criminal prosecution against the petitioners. Admittedly, though the Commission was constituted in the year 2011, till 2014, when the summons and questionnaire were sent to the petitioners, they have not chosen to challenge the constitution. On receipt of the said summons and the questionnaires, the petitioners herein as well as the petitioner in W.P.No.25445 of 2014 had obtained interim orders and hence, there was no further progress. Even before the questionnaires have been issued to the persons concerned, the investigating agencies had collected materials and other evidence on behalf of the Commission of Inquiry. It is the said evidence and materials collected by the investigating agencies that were directed to be handed over to the State Government in the interim order. The peculiar situation in this case is that the Commission of Inquiry ceased to exist, as the One Man Commission demitted the assignment on 10.08.2018 and one of the persons, who challenged the appointment of the Commission of Inquiry also died. The Commission of Inquiry is always set up only for the purpose of making and enquiring into the matter of public importance.

7. A Division Bench of the High Court of Bombay in Ashok Shankarrao Chavan V. Ch.Vidyasagar Rao and others, reported in MANU/MH/3740/2017, held as follows :

"28. The above decisions of the Apex Court make it abundantly clear that the Commission's Report under the Commissions of Inquiry Act, 1952 has no evidentiary value at the trial before the civil or criminal Courts. It is only recommendatory in nature. It is opinion of commission based on the statements of witnesses and other material. The above decisions also show that investigating agency may with advantage use the report of the commission, at the same time the report does not preclude the investigating agency

from forming a different opinion under Section 169/170 of the Code of Criminal Procedure, 1973. In the light of this, we are of the considered view that report of the Commission cannot be said to be material which can be taken into consideration by the sanctioning authority for two reasons; firstly it is the opinion of the commission based on the statements of the witnesses and other material and; secondly it is not capable of being converted into evidence before the Courts."

8. It is also well-settled that once the Commission of Inquiry files a report, it should not be withheld under any circumstance and the public also should have access to the information, which is of vital importance and interest to them. Then the question that stands out to be decided is whether in the absence of a final report by the Commission whether the evidence and other materials collected in the said regard by the investigating agencies can stand alone and the same can be used for a further criminal prosecution in any case of appreciation of evidence is one of the first and foremost test to consider the credibility and reliability of the oral and documentary evidence.

9. The Commission of Inquiry is a fact-finding body, which is meant only to instruct/recommend the Government. Even a report of the Commission cannot be deemed to be of a judicial nature, as the findings of the Commission are not definite like a judicial order. In fact, in *Maharajah Madhava Singh V. The Secretary of State For India in Council*, 31 IA 239, the Privy Council held as follows :

"..... the Commission in question was one appointed by the Viceroy himself for the information of his own mind, in order that he should not act in his political and sovereign character otherwise than in accordance with the dictates of justice and equity, and was not in any sense a Court, or, if a Court, was not a Court from which an appeal lies to His Majesty in Council."

10. It is not in dispute that even if there is a final report, the Government need not accept the report in its entirety, since it is only a recommendation based on which, further action may be taken.

11. Coming back to the issue whether the materials and evidences collected by the Investigating Agencies without the

final report of the Commission can be used by the Government. Section 8 of the Act prescribes the procedure to be followed by the Commission. Section 8-B of the Act provides for affording hearing to the persons, who would be likely to be prejudicially affected and Section 8-C of the Act provides for right to cross-examine and representation by legal practitioner. In fact, a perusal of the records goes to show that at the earliest point of time, this Court in the interim order dated 07.10.2014 in W.P.Nos.26621 and 26622 of 2014 had permitted the petitioners herein to be assisted by the legal practitioner. The materials and evidences were collected by the Investigating Agencies appointed by the Commission of Inquiry. The scope and ambit of the Commission of Inquiry is different from any statutory authority for a criminal investigation and even in a Court of law. When a Commission of Inquiry is appointed and the report is called for, it is only a piece of evidence, which the Court may consider or ignore subject to the facts and admissibility, whereas, in the given case, the existence of the Commission of Inquiry is brought to an end by the interim order of the Court and the same is not challenged till today. The efforts of the Commission of Inquiry and the evidences and materials collected during the course of its existence, are not pressed into service in bringing out a report, based on the same. In other words, there is no report at all based on the evidences and materials collected by the Commission. It is only the report of the Commission and the papers relating to its secretariat including the evidence tendered before the Commission, which are to be preserved intact and remitted along with the report of the Commission.

12. In this regard, it is relevant to note that the Hon'ble Apex Court in T.T.Antony V. State of Kerala, (2001) 6 SCC 181 held as hereafter :

"33. It is thus seen that the report and findings of the Commission of Inquiry are meant for information of the Government. Acceptance of the report of the Commission by the Government would only suggest that being bound by the Rule of law and having duty to act fairly, it has endorsed to act upon it. The duty of the police - investigating agency of the State - is to act in accordance with the law of the land. This is best described by the learned law Lord - Lord Denning - in R. v. Metropolitan Police Commissioner [1968 (1) All E.L.R. 763 at p.769] observed as follows :

"I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest

citizens may go about their affairs in peace. He must decide whether or no suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself."

34. Acting thus the investigating agency may with advantage make use of the report of the Commission in its onerous task of investigation bearing in mind that it does not preclude the investigating agency from forming a different opinion under Section 169/170 of Cr.P.C. if the evidence obtained by it supports such a conclusion. In our view, the Courts civil or criminal are not bound by the report or findings of the Commission of Inquiry as they have to arrive at their own decision on the evidence placed before them in accordance with law."

13. Reliance was also placed on Ram Krishna Dalmia V. Justice Tendolkar, AIR 1958 SC 538, wherein, the Hon'ble Apex Court held as follows :

"9. It is, in our judgment, equally ancillary that the person or body conducting the inquiry should express its own view on the facts found by it for the consideration of the appropriate Government in order to enable it to take such measure as it may think fit to do. The whole purpose of setting up of a Commission of Inquiry consisting of experts will be frustrated and the elaborate process of inquiry will be deprived of its utility if the opinion and the advice of the expert body as to the measures the situation disclosed calls for cannot be placed before the Government for consideration notwithstanding that doing so cannot be to the prejudice of anybody because it has no force of its own. In our view the recommendations of a Commission of Inquiry are of great importance to the Government in order to enable it to make up its mind as to what legislative or administrative measures should be adopted to eradicate the evil found or to implement the beneficial objects it has in view. From this point of view, there can be no objection even to the Commission of Inquiry recommending the imposition of some form of

punishment which will, in its opinion, be sufficiently deterrent to delinquents in future. But seeing that the Commission of Inquiry has no judicial powers and its report will purely be recommendatory and not effective proprio vigore and the statement made by any person before the Commission of Inquiry is, under S.6 of the Act, wholly inadmissible in evidence in any future proceedings, civil or criminal, there can be no point in the Commission of Inquiry making recommendations for taking any action "as and by way of securing redress or punishment" which, in agreement with the High Court, we think, refers, in the context, to wrongs already done or committed, for redress or punishment for such wrongs, if any, has to be imposed by a court of law, properly constituted exercising its own discretion on the facts and circumstances of the case and without being in any way influenced by the view of any person or body, howsoever august or high powered it may be. Having regard to all these considerations it appears to us that only that portion of the last part of cl.(10) which calls upon the Commission of Inquiry to make recommendations about the action to be taken "as and by way of securing redress or punishment", cannot be said to be at all necessary for or ancillary to the purposes of the Commission. "

14. The learned Public Prosecutor has contended that there is a difference between 'prosecution' and 'investigation' and either the prosecution or the investigation will never affect the life and liberty of any person. The Government had not given power to DVAC to conduct investigation or the prosecution, but it was only asked to conduct detailed enquiry and send a report to the Government early and then only the Government has to decide further, to initiate or not to initiate any action. Since the G.O. does not order any prosecution, ground (F) raised by the petitioner fails.

15. Relying on amended Section 17A of the Prevention of Corruption Act, 2018, it is submitted by the learned Public Prosecutor that there is no sanction, but the Government has to accord approval. After careful examination only, the Government issued the direction to the Secretary of the Commission. He also relied on the Oxford Dictionary meaning for "careful examination". The Government need not go through hundreds of documents to satisfy itself about the commission of offence. A

reading of single page, on the face of it, is suffice to arrive at a satisfaction that the ground is made out or not for ordering enquiry. The G.O. need not contain each and every word, but the totality of reading is suffice to prove the satisfaction of the Government.

16. As mentioned earlier, in the peculiar circumstances of the case, where the Commission has been brought to an unceremonious end, in the absence of a report, whether reliance can be placed upon the materials and evidences collected by the Investigating Agencies appointed by the Commission, is a question to be decided and the same is left open by this Court.

17. It is also not known whether pursuant to the order of the Court, any notification is issued in the Official Gazette, as contemplated under Section 7 of the Commission of Inquiry Act, 1952 specifying the date from which the Commission ceased to exist. Admittedly, there is no interim report filed by the Commission. When the Single Member of the Commission of Inquiry also decided to demit the office in response to the order of this Court, the State Government had not challenged the same, but accepted the resignation and had not chosen to file any appeal against the order dated 03.08.2018.

18. The learned Public Prosecutor appearing on behalf of the State submitted that the impugned Government Order is passed only in furtherance to the interim order of the learned Single Judge dated 03.08.2018. As discussed earlier, the order dated 03.08.2018 has specifically directed the Secretary of the Commission to handover all the records, reports of the Investigating Agencies, statements and the evidences collected by the Commission of Inquiry to the State Government, and then the State Government, after scrutinizing the same, has to satisfy itself and if it is found that there is a prima facie case, thereafter, criminal prosecution has to be instituted.

19. Once again it has to be recollected that the interim order of the learned Single Judge was passed on 03.08.2018, the death of the petitioner in W.P.Nos.25445 of 2014 and 7049 of 2015 was on 07.08.2018, the One Man Commission demitted the office on 10.08.2018 and the said writ petitions were closed (as abated) on 20.09.2018, whereas, the first respondent had passed the impugned Government Order in G.O.(Ms.)No.721 directing the Secretary of the Commission to handover the files, etc. to the Director, Vigilance and Anti Corruption only on 24.09.2018, without realising the fact that the Commission of Inquiry had not even filed a report based on the materials collected. Though the first respondent had ample time, the Government Order

was passed in a hasty manner and the consequential letter was issued according permission to the Director, Vigilance and Anti-Corruption to conduct detailed enquiry into the matter and send a report to the Government.

20. As stated above, the learned Public Prosecutor contended that the amended provision under Section 17A of the Prevention of Corruption Act, 1988 provides for previous approval of the State Government. Therefore, the consequential letter was issued according permission to the Director, Vigilance and Anti Corruption to conduct detailed enquiry in this regard and to send a report early.

21. As discussed earlier, when the mission of the Commission is incomplete and there is no report based on which, the Government can proceed further, the impugned Government Order in G.O.(Ms.)No.721, Public (Buildings) Department, dated 24.09.2018, was issued without jurisdiction and the same cannot be sustained and it is liable to be quashed. In view of quashing of the Government Order, the consequential letter in Letter No.AC/506-1/2018 dated 28.09.2018 also cannot be sustained.

22. Accordingly, G.O.(Ms.)No.721, Public (Buildings) Department, dated 24.09.2018, and the Letter No.AC/506-1/2018, dated 28.09.2018 are set aside and these writ petitions are allowed. There shall be no order as to costs. Consequently, connected miscellaneous petitions are also closed.

Sd/-
Assistant Registrar

//True Copy//

सत्यमेव जयते
Sub Assistant Registrar

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To

1. The Chief Secretary,
Government of TamilNadu,
Secretariat, Fort St. George,
Chennai 600 009.
2. The Principal Secretary to Government,
Public (SC) Department,
Secretariat, Fort St. George, Chennai 600 009.

3. The Director of Vigilance and Anti Corruption,
Tamil Nadu, 293, MKN Road,
Alandur, Chennai - 600 016.

+1 cc to The Public Prosecutor, Sr.No.87161
+2 cc to Mr.R.Neelakandan, Advocate Sr.No.86081
+2 cc to M/s.wilson Associates, Advocate Sr.No.86135

+1cc to the Government Pleader, S.R.No.86394(09/01/2019)

W.P.Nos.26924 and 27376 of 2018

SSD(CO)
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