

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.04.2019

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE SUBRAMONIUM PRASAD

W.P.No.11236 of 2019

M.Abdul Rahuman Sait

.. Petitioner

Vs.

1. The Principal Secretary to Government,
Personnel and Administrative Reforms Department,
Fort St. George, Chennai.

2. Dr.M.Rajaram, I.A.S. (Retd.) .. Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India, issuance of a Writ of Certiorarified Mandamus, calling for the records pertaining to the impugned notification in G.O.Ms.No.28, Personnel and Administrative Reforms (N.Spl) dated 1st April 2019 by which the 2nd respondent, Dr.M.Rajaram, IAS (Retd) has been appointed as Non Judicial Member of Tamil Nadu Lok Ayukta, quash the same as illegal, contrary to law and void ab initio in so far as the appointment of the 2nd respondent as non judicial member of the Tamilnadu Lok Ayukta and consequently direct the 1st respondent to appoint any other eligible and competent person for the post of Non Judicial Member of the Tamilnadu Lok Ayukta at the earliest.

For Petitioner : Mr.S.Namo Narayanan

For Respondents: Mr.Vijayanarayan,
Advocate General
Assisted by Mr.N.Manoharan,
Additional Government Pleader

O R D E R

(Order of this Court was made by S.MANIKUMAR, J.)

Claiming himself to be a public interest litigant, Mr.M.Abdul Rahuman Sait, a practising lawyer has filed the instant writ petition, challenging the appointment of Dr.M.Rajaram, I.A.S. (Retd.), to the post of Non-Judicial Member

to Tamil Nadu Lokayutta, for the reason that his appointment is in violation of the provisions of Article 319(d) of the Constitution of India and consequently, sought for a direction to appoint some other eligible and competent person for the said post.

2. The petitioner has submitted that the Secretary to the Government, State of Tamil Nadu, Personnel and Administrative Reforms Department, Chennai, 1st respondent, has issued G.O.Ms.No.28, Personnel and Administrative Reforms (N.Spl) Department, dated 1st April' 2019, appointing Dr.M.Rajaram, I.A.S. (Retd.), the 2nd respondent herein, as a Non Judicial Member for Tamil Nadu Lokayukta. According to the petitioner, the 2nd respondent has served the Government of Tamilnadu for decades, as an accredited IAS officer. After his retirement, he was appointed as a member of Tamilnadu Public Service Commission, along with 10 other persons on December 22, 2016. However, such appointments were challenged before this Court in W.P.Nos.4113, 4161 and 4584 of 2016. This Court quashed the appointment of the members of Tamil Nadu Public Service Commission and lateron, the said decision was upheld by the Hon'ble Apex Court. However, the 2nd respondent was again appointed as a member of the TNPSC on 20.04.2017 and he retired on 26.02.2018, on attaining the age of 62 years.

3. In support of the prayer sought for, the petitioner has placed reliance on the provisions, viz., Section 39 of the Tamil Nadu Lokayukta Act, 2018 and Rule 16(2) of the Tamil Nadu Lokayukta Rules, 2018. He has also placed strong reliance on Article 319(d) of the Constitution of India, which states that a member other than the chairman of a state public service commission shall be eligible for appointment as the Chairman or any other member of the Union Public service commission, but not for any other employment either under the government of India or under the Government of a State. He submitted that if the said Article is applied to the appointment of the 2nd respondent, a Non Judicial member of the Tamilnadu Lok Ayukta, then the appointment of the 2nd respondent as a member would make him as a public servant and therefore, his appointment is in contravention to the principles laid down under Article 319(d) of the Constitution of India. Therefore, the instant writ petition has been filed on the following grounds,

(i) When it is an admitted fact that the 2nd respondent had served as a member of a state public service commission, then his appointment as a member of Lok Ayukta is in contravention of the provisions of Article 319(d) of the Constitution of India.

(ii) The appointment of the 2nd respondent at this Juncture, he having ceased to be a member of TNPSC, will be a wrong precedent if not challenged.

(iii) The objective of Article 319(d) had been

blatantly violated in the appointment of the 2nd respondent.

(iv) This is not a question on his competence or integrity but the purpose purported by Article 319(d) had been thrown to the wolves and the main purpose itself will be defeated if such appointment is not quashed.

(v) By this appointment the State government had turned a blind eye to the provisions of the Constitution of India.

4. Opposing the above contentions, Mr.Vijayanarayan, learned Advocate General appearing for the respondents first drew the attention of this Court to Article 319(d) of the Constitution of India and submitted that the appointment of the 2nd respondent as a member of Lokayukta, is not an employment, under the State or Central Government, as the case may be and that there is no violation of Article 319(d) of the Constitution of India, as alleged.

5. Placing reliance on a decision in Hargovind Pant v. Dr.Raghukul Tilak reported in 1979 (3) SCC 458, learned Advocate General submitted that when a member of Public Service Commission, ceased to hold the office, was appointed as Governor, the same was challenged, on the ground that he is ineligible. Giving due consideration to the expression, "employment" under the Government of India, in Article 319(d) of the Constitution of India, and whether office of the Governor is an employment, the Hon'ble Supreme Court rejected the objections to the appointment. He further submitted that the Hon'ble Supreme Court has categorically held that the office of Governor, would not fall within the expression "employment" under the Government of India.

6. Placing reliance on the decision of Kerala High Court in Adv. Sreenivasan Venugopalan v. Hon'ble M.M.Pareed Pillai, Retired, C.J., of Kerala High Court and Anr., reported in AIR 2009 Kerala 148, learned Advocate General for the State submitted that when a member of the Human Rights Commission, demitting the Office, was appointed as a member in Lokayukta, the same was challenged. After considering the landmark judgment in Hargovind Pant's case (cited supra), the Hon'ble Division Bench of Kerala High Court in Adv. Sreenivasan Venugopalan's case (cited supra), held that office of member in Lokayukta, would not fall within the expression, "employment" under the Government of a State and that the said decision is squarely applicable to the case on hand.

7. Learned Advocate General also brought to the notice of this Court that in Kasiramaligam v. The Chief Secretary, Government of Tamil Nadu [W.P.No.22672 of 2012, dated

28.02.2012], this Court, while considering the question, as to whether, appointment of the second respondent therein, as Advocate General, is in any way contrary to Article 319(d) of the Constitution of India, which prohibits employment either under the Government of India or under the Government of Tamil Nadu, after he held the post of a Member of TNPSC. This Court held that the second respondent therein has fully satisfied the eligibility conditions as contemplated under Article 217(2)(b) of the Constitution of India for being appointed as Advocate General of the State of Tamil Nadu, as per Article 165 of the Constitution of India, and he is not barred for being appointed as Advocate General of Tamil Nadu, under sub-clause (d) of Article 319 of the Constitution of India.

8. Inviting the attention of this Court to a decision of the Hon'ble Division Bench of Patna High Court in Mithilesh Kumar Singh v. The State of Bihar [Civil Writ Jurisdiction Case No.17245 of 2015, dated 05.04.2016], wherein, the petitioner therein, by invoking Article 319(d) of the Constitution of India, appointment of a member of Lokayukta, after he had held the office of Chairman of Bihar Service Commission, was challenged. Learned Advocate General appearing for the 1st respondent herein submitted that a Hon'ble Division Bench of Patna High Court rejected the plea of ineligibility.

9. Thus, inviting the attention of this Court to the relevant passages from the judgments relied on, by him, learned Advocate General submitted, as to how, the Hon'ble Supreme Court explained the word, "employment" under the Government of India or the State, as the case may be. Learned Advocate General submitted that appointment of Dr.M.Rajaram, I.A.S. (Retd.), 2nd respondent, in this writ petition, as a member of Lokayukta, would not fall within the expression, "employment" under the Government of State, as the term, "employment" means a relationship of master and servant, control over an employee. He further added that Lokayukta is totally an independent body, created under the statute, and neither the Central Government nor the State Government, exercise any supervisory control over the Lokayukta or its members.

10. Inviting the attention of this Court to the interim order passed by the Madurai Bench of this Court in W.P.(MD) No.8396 of 2019, dated 05.04.2019, learned Advocate General further submitted that probably on the premise that the 2nd respondent, now appointed as a Member of Lokayukta, was serving as a member of the Tamil Nadu Public Service Commission, on the date of appointment, Madurai Bench of this Court has granted stay of his appointment. But the fact remains that on the date of his appointment, as a Member of Lokayukta, he ceased to hold office as Member of TNPSC. For the abovesaid reasons, learned Advocate General, Government of Tamil Nadu, prayed for dismissal

of the writ petition.

Heard Mr.S.Namo Narayanan, learned counsel for the petitioner and Mr.Vijayanarayan, learned Advocate General and perused the materials available on record.

11. Tamil Nadu Lokayukta Act, 2018 (Act No.33 of 2018) is an Act for the establishment of a body of Lokayukta for the State of Tamil Nadu to inquire into allegations of corruption against certain public servants and for the matters connected therewith or incidental thereto.

12. Chapter-II deals with establishment and composition of Lokayukta, and the said chapter is extracted hereunder:

CHAPTER-II

ESTABLISHMENT AND COMPOSITION OF LOKAYUKTA

3. Establishment and composition of Lokayukta:-

(1) On and from the date of notification to be issued by the Government in this behalf, there shall be established a body to be called the "Lokayukta".

(2) The Lokayukta shall consist of,-

(a) a Chairperson who is or has been a Judge of the High Court or a person with twenty-five years experience in anti-corruption policy, public administration, vigilance, finance and law; and

(b) four Members, out of whom two shall be Judicial Members.

(3) A person shall be eligible to be appointed,-

(a) as a Judicial Member if he is or has been a Judge of the High Court or has put in twenty-five years of experience in State judiciary with impeccable record;

(b) as a Non-Judicial Member if he has had twenty-five years of experience in anti-corruption policy, public administration, vigilance, finance and law.

(4) The Chairperson or a Member shall not be,-

(a) a Member of Parliament or a Member of the Legislative Assembly of any State or Union territory;

(b) a person convicted of any offence;

(c) a person of less than forty-five years of age, on the date of assuming office as Chairperson or Member, as the case may be;

(d) a Member of any Panchayat or Municipality;

(e) a person who has been removed or dismissed from service of the Union or a State and;

(f) a person holding any office of trust or profit (other than his office as the Chairperson or a Member) or be connected with any political party or carry on any business or practice any profession.

(5) A person who is appointed as the Chairperson or a Member, as the case may be, shall, before he enters upon his office, if,—

(a) he holds any office of trust or profit, resign from such office; or

(b) he is carrying on any business, sever his connection with the conduct and management of such business; or

(c) he is practicing any profession, cease to practice such profession.

4. Appointment of Chairperson and Members on the recommendation of Selection Committee:—

(1) The Chairperson and the Members shall be appointed by the Governor. Appointment of Chairperson and Members on the recommendation of Selection Committee.

(2) The appointment shall be made on the recommendation of the Selection Committee comprising of the following Members:—

(a) Chief Minister — Chairperson;

(b) Speaker of the Legislative Assembly — Member;

(c) Leader of Opposition or the Leader of the single largest Party in Opposition in the Legislative Assembly— Member.

(3) The Selection Committee may for the purposes of selecting the Chairperson and Members and for preparing a panel of persons to be considered for appointment as such, choose to constitute a Search Committee consisting of three persons having special knowledge and expertise in anti-corruption policy, public administration, vigilance, finance and law.

(4) The Selection Committee shall regulate its own procedure for selecting the Chairperson and Members which shall be transparent.

(5) The term of the Search Committee, if constituted, referred to in sub-section (3), the fees and allowances payable to its Members and the manner of selection of panel of names shall be such as may be prescribed.

5. Term of office of Chairperson and Members:—

The Chairperson and every Member shall, on the recommendations of the Selection Committee, be appointed by the Governor by warrant under his hand and seal and hold office as such for a term of five years from the date on which he enters upon his office or until he attains the age of seventy years, whichever is earlier:

Provided that he may—

(a) by writing under his hand addressed to the Governor, resign his office; or

(b) be removed from his office in the manner

provided in this Act.

6. Salary, allowances and other conditions of service of Chairperson and Members.:- The salary, allowances and other conditions of service of,

(a) the Chairperson shall be the same as those of the Chief Justice of the High Court;

(b) other Members shall be the same as those of a Judge of the High Court:

Provided that if the Chairperson or a Member is, at the time of his appointment, in receipt of pension (other than disability pension) in respect of any previous service under the Government of India or under any State Government, his salary in respect of service as the Chairperson or, as the case may be, as a Member, be reduced,—

(i) by the amount of that pension; and

(ii) if he has, before such appointment, received, in lieu of a portion of the pension due to him in respect of such previous service, the commuted value thereof, by the amount of that portion of the pension:

Provided further that the salary, allowances and pension payable to, and other conditions of service of, the Chairperson or a Member shall not be varied to his disadvantage after his appointment.

7. Restriction on employment by Chairperson and Members after ceasing to hold office:

(1) On ceasing to hold office, the Chairperson and every Member shall be ineligible for,—

(a) reappointment as the Chairperson or a Member of the Lokayukta;

(b) any other assignment or appointment which is required by law to be made by the Governor;

(c) further employment to any other office of profit under the Government of India or under the Government.

(2) Notwithstanding anything contained in subsection (1), a Member shall be eligible to be appointed as a Chairperson, if his total tenure as Member and Chairperson does not exceed five years.

Explanation.— For the purposes of this section, it is hereby clarified that where the Member is appointed as the Chairperson, his term of office shall not be more than five years in aggregate as the Member and the Chairperson.

8. Member to act as Chairperson or to discharge his functions in certain circumstances:

(1) In the event of occurrence of any vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the Governor may, by notification, authorise the senior-most Member to act

as the Chairperson until the appointment of a new Chairperson to fill such vacancy.

(2) When the Chairperson is unable to discharge his functions owing to absence on leave or otherwise, the senior-most Member available, as the Governor may, by notification, authorise in this behalf, shall discharge the functions of the Chairperson until the date on which the Chairperson resumes his duties.

9. Secretary, other officers and staff of Lokayukta: (1) There shall be a Secretary to the Lokayukta not below the rank of Deputy Secretary to Government, who shall be appointed by the Chairperson from a panel of names sent by the Government.

(2) There shall be a Director of Inquiry not below the rank of Deputy Secretary to Government, who shall be appointed by the Chairperson from a panel of names sent by the Government.

(3) The appointment of officers and staff of the Lokayukta shall be made as may be required for smooth functioning, by the Government and as may be prescribed.

(4) The conditions of service of Secretary and other officers and staff of the Lokayukta shall be such as may be prescribed from time to time."

13. Chapter-VIII of the Tamil Nadu Lokayukta Act, 2018, deals with complaints against chairperson, members and officials of Lokayukta and the said chapter is extracted hereunder:

"29. Removal and suspension of Chairperson and Members of Lokayukta:

(1) The Lokayukta shall not inquire into any complaint made against the Chairperson or any Member.

(2) Subject to the provisions of sub-section (4), the Chairperson or any Member shall be removed from his office by order of the Governor on grounds of misbehavior, after the High Court, on a reference being made to it by the Governor on a petition signed by at least forty-five Members of the Legislative Assembly, has, on an inquiry held by the High Court in that behalf, reported that the Chairperson or such Member, as the case may be, ought to be removed on such ground.

(3) The Governor may suspend from office, the Chairperson or any Member in respect of whom a reference has been made to the High Court under sub-section (2), on receipt of the recommendation or interim order made by the High Court in this regard until the Governor has passed orders on receipt of the final report of the High Court on such reference.

(4) Notwithstanding anything contained in sub-section (2), the Governor may, by order, remove from

the office, the Chairperson or any Member, if the Chairperson or such Member, as the case may be,–

(a) is adjudged an insolvent; or

(b) engages himself during his term of office, in any paid employment outside the duties of his office; or

(c) is, in the opinion of the Governor, unfit to continue in office by reason of infirmity of mind or body.

(5) If the Chairperson or any Member is, or becomes, in any way concerned or interested in any contract or agreement made by or on behalf of the Government of India or the Government of Tamil Nadu or participates in any way in the profit thereof or in any benefit or emolument arising therefrom otherwise than as a member and in common with the other members of an incorporated company, he shall, for the purposes of sub-section (2), be deemed to be guilty of misbehaviour.

30. Complaints against officials of Lokayukta.

(1) Every complaint of allegation or wrong doing made against any officer or employee or agency under or associated with the Lokayukta for an offence punishable under the Prevention of Corruption Act, 1988 shall be dealt with in accordance with the provisions of this section."

14. Article 319(d) of the Constitution of India, states that a member other than the Chairman of a State Public Service Commission shall be eligible for appointment as the Chairman or any other member of the Union Public Service Commission or as the Chairman of that or any other State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State.

15. Rule 16(2) of the Tamil Nadu Lokayukta Rules, 2018 and Section 39 of the Tamil Nadu Lokayukta Act, 2018, relied on, by the learned counsel for the petitioner, is extracted hereunder:

"Rule 16(2) states that the Chairperson and Members, who on the date of his appointment as such, was a non-official, i.e., not in the service of the Central or a State Government, shall, on his ceasing to hold office as such Chairperson or Member, be entitled to pension, at the rate fixed by the Government.

.....

Section 39 states that the Chairperson, Members, officers and other employees of the Lokayukta shall be deemed, when acting or purporting to act in pursuance of any of the provisions of this

Act, to be public servants within the meaning of section 21 of the Indian Penal Code, 1860."

Both the Sections are misquoted and not relevant to the case on hand.

16. In *Chitaman Rao v. State of M.P.*, reported in AIR 1958 SC 388, the appellant therein was the manager of a bidi factory, which had contracts with certain independent contractors, known as Sattedars, for supply of bidis. The Sattedars undertook to supply bidis by manufacturing them, in their own factories, or by entrusting the work to third parties, at a price to be paid by the management after delivery and approval. The Inspector of Factories in the appellant's factory found certain Sattedars and their coolies to deliver bidis manufactured by them. The appellant was prosecuted and convicted under Section 92 of the Factories Act, for violation of the provisions of Sections 62 and 63, for the failure to maintain the register of adult workers and for allowing workers to work, in the factory without making beforehand entries of their attendance, in the register.

17. On the above facts and circumstances, the Hon'ble Supreme Court held that Sattedars and their coolies were not workers, within the definition under Section 2(1) of the Factories Act and therefore, non-inclusion of their names, in the register or the absence of entries, in regard to them therein, did not constitute an offence under Section 92 of the Act. Hon'ble Supreme Court held that to determine, as to whether, a person employed is a worker, the test is whether or not, the employer had control and supervision over the manner in which, the work was to be done, at Paragraph No.9, the Hon'ble Supreme Court, observed as follows:

"The concept of employment involves 'three ingredients: (1) employer (2) employee and (3) the contract of employment. The employer is one who employs, i.e., one who engages the services of other persons. The employee is one who works for another for hire. The employment is the contract of service between the employer and the employee hereunder the employee agrees to serve the employer subject to his control and supervision."

18. Though the above decision is with reference to the engagement of Sattedars and workers, we are of the considered opinion that the decision of the Hon'ble Supreme Court in *Chitaman Rao's* case, on the concept of employment, what employment means, who is an employee can be made applicable to the case on hand.

17. In *Hargovind Pant v. Dr. Raghukul Tilak* reported in 1979 (3) SCC 458, a member of the Rajasthan Public Service

Commission, ceasing to be so, was appointed as Governor of Rajasthan. While considering the challenge, in the light of Article 319(d) of the Constitution of India, the Hon'ble Supreme Court, at Paragraphs 3 to 5, held as follows:

"We are concerned in this special leave petition only with clause (d) of Article 319 since the 1st respondent was a member of the Rajasthan Public Service Commission and it is on account of that fact that it is claimed that he was ineligible to be appointed Governor of Rajasthan. Clause (d) of Article 319 provides:

"on ceasing to hold office-a member other than the Chairman of a State Public Service Commission shall be eligible for appointment as the Chairman or any other member of the Union Public Service Commission or as the Chairman of that or any other State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State".

It is, therefore, obvious that the 1st respondent could be appointed Chairman or any other member of the Union Public Service Commission or Chairman of the Rajasthan or any other State Public Service Commission, but he was ineligible for any other employment either under the Government of India or under the Government of a State. Now, it was not the case of the petitioner that the office of Governor was an employment under the Government of a State and the only question which, therefore, requires to be considered is whether the office of Governor can be said to be an employment under the Government of India. If it is, then undoubtedly the 1st respondent could not be appointed Governor of Rajasthan and his appointment would be invalid. But we are of the view that howsoever wide and expansive a meaning we may give to the words "employment . . . under the Government of India", the office of Governor cannot come within it.

4. The first question that arises on the applicability of the words "employment...under the Government of India" is whether the office of Governor is an 'employment' within the meaning of that expression in clause (d) of Article 319. What is the sense in which that word has been used in this Article? Semantically, the word 'employment' is not a word with a single fixed meaning but it has many connotations. On the one side it may bear the narrow meaning of relationship of employer and employee and on the other, it may mean in its widest connotation any engagement or any work in which one is engaged. If the former be the sense in which the word 'employment'

is used in clause (d) of Article 319, the office of Governor would certainly not be an employment, because the Governor of a State is not an employee or servant of any one. He occupies a high constitutional office with important constitutional functions and duties. The executive power of the State is vested in him and every executive action of the Government is required to be expressed to be taken in his name. He constitutes an integral part of the legislature of the State though not in the fullest sense, and is also vested with the legislative power to promulgate ordinances while the Houses of the Legislature are not in session. He also exercises the sovereign power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends. He is vested with the power to summon each House of the Legislature or to prorogue either House or to dissolve the legislative assembly and this power may be exercised by him from time to time. He is also entitled to address either House of the Legislature or both Houses assembled together and he may send messages to the House or Houses of the Legislature with respect to a bill then pending in the legislature or otherwise. No bill passed by the Houses of the Legislature can become law unless it is assented to by him and before assenting to the bill he may return the bill, provided it is not a money bill to the Houses of the Legislature for reconsideration. He has also the power to reserve for consideration of the President any bill which in his opinion would, if it became law, so derogate from the powers of the High Court as to endanger the position which that court is by the Constitution designed to fill. There is also one highly significant role which he has to play under the Constitution and that is of making a report where he finds that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. It is the Governor's report which generally forms the basis for the President taking action under Article 356 of the Constitution. It will be seen from this enumeration of the constitutional powers and functions of the Governor that he is not an employee or servant in any sense of the term. It is no doubt true that the Governor is appointed by the President which means in effect and substance the Government of India, but that is only a mode of appointment and it does not make the Governor an employee or servant of the Government of

India. Every person appointed by the President is not necessarily an employee of the Government of India. So also it is not material that the Governor holds office during the pleasure of the President: it is a constitutional provision for determination of the term of office of the Governor and it does not make the Government of India an employer of the Governor. The Governor is the head of the State and holds a high constitutional office which carries with it important constitutional functions and duties and he cannot, therefore, even by stretching the language to a breaking point, be regarded as an employee or servant of the Government of India. If, therefore, the word 'employment' were construed to mean relationship of employer and employee, the office of Governor would certainly not be an 'employment' within the meaning of clause (d) of Article 319.

5. But if we accept the wider meaning of the word 'employment' as connoting any engagement or any work in which one is engaged as in the expression self-employment' the office of Governor would clearly be an 'employment' within the meaning of clause (d) of Art. 319. That, however, would not be enough to attract the applicability of this provision. There is a further requirement which is necessary and that is that the employment must be under the Government of India. Now, what is the meaning of this expression "under the Government of India"? Fortunately, there are two decisions of this Court which throw some light on this question. The first is the decision in Pradyat Kumar Bose v. The Hon'ble the Chief Justice of Calcutta High Court where the question was as to whether the officers and members of the staff of the High Court could be said to be persons "serving under the Government of India or the Government of a State, in a civil capacity" so as to be within the scope of Article 320(3) (c) which requires consultation with the appropriate Public Service Commission in disciplinary matters. This Court speaking through Jagannadhadas, J., pointed out:

"the phrase 'a person' serving under the Government of India or the Government of 'a State' it seems to have reference to such persons in respect of whom the administrative control is vested in the respective executive Governments functioning in the name of the President or of the Governor or of a Rajpramukh. The officers and staff of the High Court cannot be said to fall within the scope of the above phrase because in respect of them the administrative control is clearly vested in the Chief Justice-".

The question which arose in the other decision in

Baldev Raj Guliani & ors. v. The Punjab & Haryana High Court & ors. was a similar one and it related to the applicability of Article 320(3) (c) to Judicial officers in the State. Here, in this case also the Court took the same view and, after referring to the earlier decision in Pradyat Kumar Bose's case with approval, held that "just as the High Court staff are not serving under the Government of the State, the Judicial officers are also not serving under the State Government", because they are "entirely under the jurisdiction of the High Court for the purpose of control and discipline". It will, therefore, be seen that the employment can be said to be under the Government of India if the holder or incumbent of the employment is under the control of the Government of India vis-a-vis such employment. Now, if one applies this test to the office of Governor, it is impossible to hold that the Governor is under the control of the Government of India. His office is not subordinate or subservient to the Government of India. He is not amenable to the directions of the Government of India, nor is he accountable to them for the manner in which he carries out his functions and duties. His is an independent constitutional office which is not subject to the control of the Government of India. He is constitutionally the head of the State in whom is vested the executive power of the State and without whose assent there can be no legislation in exercise of the legislative power of the State. There can, therefore, be no doubt that the office of Governor is not an employment under the Government of India and it does not come within the prohibition of clause (d) of Article 319."

18. In Dr. Chandra Bhan Singh v. State of Rajasthan reported in AIR 1983 Rajasthan 149, at Paragraphs 9 and 11, the Hon'ble Jaipur Bench held as follows:

"9. I have given my earnest consideration to the above contention and perused the authorities cited above. At the outset, I may observe that Shri Nathu Lal Jain, non-petitioner No. 3, admitted in his reply that he had held the office of a member of the Rajasthan Public Service Commission and after the termination of his office in the said Commission, he was appointed the Advocate General for the State of Rajasthan. Hence, the pertinent question that arises for determination is whether the express bar contained in Clause (d) of Article 319 of the Constitution can be made applicable to his new appointment as Advocate General for Rajasthan. Before dealing with this question, I may say that in order to apply this bar,

the new appointment, after Shri Nathu Lal Jain ceased to be a member of the Rajasthan Public Service Commission, must be an employment under the Government of Rajasthan. According to the submission of the learned counsel for the petitioner, Shri Nathu Lal Jain holds his office of Advocate General during the pleasure of the Governor and the relationship between him and the Government is of master and servant, because the employer, i. e. Rajasthan Government has full control over him in the discharge of the functions and duties of his office. The contention on behalf of Mr. Nathu Lal Jain, on the other hand, is that even though he is appointed by the Governor as Advocate General, he holds his office under the Constitution without being subordinate to the Government of Rajasthan and the relationship between him and the Government is of client and the counsel. In my opinion, there exists no relationship of master and servant between the Advocate General and the Government, because, in the discharge of the functions and duties attached to his office, he is not subject to the control of the Government in a sufficient decree so as to make the Government his master. The legal concept of subordination or control includes the power of the master to direct the duties or functions to be done or performed by the subordinate or the servant, the manner in which they shall be done and performed, and, the means to be employed in doing or performing them, the time when and the place where they shall be done or performed. Having considered all these aspects of control, it can be said without difficulty that the position of Shri Nathu Lal Jain, Advocate General, in relation to the Government of Rajasthan is not that of servant and master but rather that of a counsel and client, because the Government cannot direct him to discharge his functions and duties in the manner in which it likes and, to say in other words, has no right to control the method of his doing work.

.....

11. Although under Clause (3) the office is held by the Advocate-General during the pleasure of the Governor and such remuneration is received by him, as may be determined by the Governor, yet, in my opinion, he cannot be treated as a Government servant on this score, because he holds the office to discharge the functions under the Constitution, as is evident from Clause (2) of Article 165 thereof without being subordinate to the Government of the State. For the discharge of functions and duties of his office he is not controlled by the Governor or the State

Government, because while giving advice to the State Government upon any legal matter referred to him or while performing duties of a legal character assigned by the Governor or while discharging the functions conferred on him by or under the Constitution or any other law for the time being in force, he is free to exercise his discretion, though according to law, and according to his best ability, in the manner which he considers best. The Governor or the State Government is not empowered to ask him to discharge his functions or to perform his duties in the manner in which they like. Similarly, he is free to give such legal advice or assistance to private parties in all such cases in which he is not likely to be called upon to give advice to the Government or to conduct or argue them in the court on behalf of the State. In support of the view I have taken above, I may refer to an authority of the Supreme Court *T. C. Hingorani v. G. P. Misra* (Civil Appeal No. 564 of 1964 decided on 24th Sept., 1965) (reported in 1967 All WR (SC) 662), wherein the following observations were made by their Lordships:--

"Then as to his status as an Advocate simpliciter, he was entitled at the relevant time to practise as a matter of right as prescribed by S. 14 of the Indian Bar Councils Act, 1926 (38 of 1926). It is not disputed that the Advocate-General is not a Government servant though he receives remuneration on his appointment as Advocate-General under Article 165 (3) and so there can be no doubt that subject to the other terms and conditions of his appointment as Advocate-General, he would be entitled "to exercise his right as an Advocate and appear for private parties. Thus, whether the status of Mr. Misra is considered as an Advocate-General or as an Advocate. Prima facie, it is difficult to understand how he can be prohibited from appearing in any legal proceeding like the one with which the Allahabad High Court was dealing in the present case." Consequently. I have no hesitation in holding that Mr. Nathu Lal Jain, who has held the office as a member of the Rajasthan Public Service Commission, was not debarred from holding the office of the Advocate-General after termination of his office in the Rajasthan Public Service Commission."

19. In *Adv. Sreenivasan Venugopalan v. Hon'ble M.M.Pareed Pillai, Retired, C.J., of Kerala High Court and Anr.*, reported in AIR 2009 Kerala 148, a Hon'ble Division Bench of Kerala High Court, at Paragraphs 4 to 7, held as follows:

"4. The ineligibility under Section 24(3) of the Protection of Human Rights Act, 1993 reads thus:

"24(3). On ceasing to hold office, a Chairperson or a Member shall be ineligible for further employment under the Government of a State or under the Government of India."

On a bare reading of the said provision, it is to be noted that the emphasis is on the words, "employment under the Government" whether State or Union. That is to say, the Chairperson or a Member of Human Rights Commission is ineligible to hold any post under the Government after demitting the office of Chairperson or Member. The words "under the Government" denotes that only when the Government can control the functions of an authority, it can be said that the authority is under the control of the Government. Such control is possible in the case of purely executive or administrative authority; but not so with judicial authority, for in the very nature of things, where rule of law prevails, it is not open to the Government to interfere with a particular matter before the judicial authority for decision in a particular manner. The words, 'under the Government' clearly indicates that such posts must be under the employment of the Government. Considering the word 'employment' in Article 319(d) of the Constitution of India, the Apex Court in the case of Hargovind Pant v. Dr.Raghukul Tilak, (1979) 3 SCC 458, observed thus:

"The word 'employment' in Article 319 (3) if understood to mean the relationship of employer and employee does not include the office of Governor because the Governor is the head of the State and holds a high constitutional office which carries with it important constitutional functions and duties. Even if the term employment is widely construed, the element of control by the Government must be shown".

As such, it is necessary to consider whether the office of Lok Ayukta is under the Government, that is to say, whether there exists a relationship of master and servant between the Lok Ayukta and the State. It cannot be disputed that as per the scheme of the Lok Ayukta Act, to discharge the functions and duties of the office, the Lok Ayukta is not controlled by the State Government in any manner. The State Government is not at all empowered to ask the Lok Ayukta to discharge its functions or to perform its duties in the manner which it likes.

5. The Apex Court and several other High Courts have considered the appointments of Advocate General and Members of Public Service Commission in this regard. No doubt, it was contended that those decisions are in respect of constitutional

authorities. But, according to the learned counsel, the post of Lok Ayukta is not a constitutional post. We are aware that the post of Lok Ayukta is not a constitutional one, but, it is a statutory appointment. In our view, that is not the relevant factor to be looked into. What is required to be considered, in order to make the first respondent as ineligible is, to find out whether his employment is 'under the Government'.

6. Lok Ayukta is the Indian version of Ombudsman. The concept of Ombudsman is of Scandinavian origin conceived to redress the grievances of the common man in society without any high connections or influence. Ombudsman in India was conceived with the twin functions of dealing with the grievances of the people arising out of mal-administration, and, fighting corruption at administrative and political levels. The provisions of the Kerala Lok Ayukta Act, 1999 would show that the office is a high level impartial, standing judicial tribunal to investigate and report on complaints of mal-administration and corruption at administrative and political levels. The Act is intended to make provision for the appointment and functions of certain authorities for making enquiries into any action (including any omission and commission in connection with or arising out of such action) relating to matters specified in List II or List III of the Seventh Schedule to the Constitution of India taken by or on behalf of the Government of Kerala or certain public authorities in the State of Kerala in certain cases and for matters connected therewith or ancillary thereto. Since high ranking categories of public servants starting with Chief Minister followed by Minister, Member of State Legislature, Government Secretary, office bearer of a political party at State level and an officer of the All India Services, employed in connection with the affairs of the State are brought under the purview of 'public servant'. The Lok Ayukta has power to punish offenders for contempt of court under the provisions of the Contempt of Courts Act, 1971. Except on the ground of jurisdiction, no proceedings or decision of the Lok Ayukta or Upa Lok Ayukta is liable to be challenged, reviewed, quashed or called in question in any court. The Lok Ayukta or Upa Lok Ayukta cannot be removed from the office except by an order of the Governor passed after and addressed by the Legislative Assembly of the State and supported by a majority of the total number of the House and by a majority of not less than two third of the members of the House present on voting, on the ground of proved misbehaviour or

incapacity. Detailed procedure also has been prescribed in that regard. All these would indicate that once appointed, the Lok Ayukta or Upa Lok Ayukta, there is absolutely no employer-employee relationship between the Government and the appointees. They are not subordinate to the Government of the State. There is no executive control over them. Needless also to say that there is no master-servant relationship. Thus the office of Lok Ayukta or Upa Lok Ayukta is an independent statutory office, which is not under the Government of the State or the Union of India.

7. No doubt, the Lok Ayukta receives his salary from the State Government. But that is not again the sole criteria to hold that he is under the employment of the State. The post of Lok Ayukta is an independent statutory post and by no stretch of imagination, can it come under the purview of 'employment under the Government'. As such, we find that, the post of Lok Ayukta is a public authority, which has public or statutory duties to perform and it is in no way under the control of the State Government. We find that the contention of the petitioner that Lok Ayukta being the post under the Government, as per Section 24(3) of the Protection of Human Rights Act, 1993, the first respondent is disqualified or ineligible, is devoid of merits.

Hence, we find no merit in the writ petition and the same is dismissed."

20. In *Mithilesh Kumar Singh v. The State of Bihar* [Civil Writ Jurisdiction Case No.17245 of 2015, dated 05.04.2016], citing Article 319(d) of the Constitution of India, appointment of a former chairman of the Bihar Public Service Commission, as member of Lokayukta was challenged, stating that he is ineligible. Rejecting the challenge, at Paragraphs 46, 73 to 78, a Hon'ble Division Bench of Patna High Court, held as follows:

"46.

(iii) Questioning the recommendation of respondent No. 6 for his appointment as a Non-Judicial Member of the "Institution of Lokayukta", Mr. Dinu Kumar, learned Counsel, has argued that respondent No. 6 had earlier held the office of the Chairman of Bihar Public Service Commission and, therefore, he is, in view of the bar put under Article 319(d) of the Constitution of India, ineligible for further employment under the Government of India or under the Government of any State. He has additionally submitted that the name of respondent No. 6 was earlier under consideration by the Search Committee pursuant to the process initiated through the advertisement/notice, dated 5.1.2014. Though his name was nominated pursuant to the said advertisement too, the Search Committee,

at that point of time, had not found him fit to be recommended. He has, accordingly, submitted that by the earlier Search Committee, respondent No. 6 having been found unfit to hold the post of Non Judicial Member of the "Institution of Lokayukta", his name ought not to have figured amongst the persons Patna High Court fit for recommendation/appointment for the said post in the panel prepared by the Search Committee."

.....

"73. Coming to the third aspect, i.e., eligibility of respondent No. 6 for his appointment as Non-Judicial Member, because of the bar put by Article 319(d) of the Constitution of India, we are required to take note of Section 7 of the Act of 2011, which reads thus:-

"7. Removal of Chairperson and other Members of Lokayukta.- (1) The Chairprson or Members may be removed from his office by the Governor on the ground of misbehaviour or incapacity Patna High Court CWJC No.17245 of 2015 dt. -04-2016 49 and on no other ground.

Provided that inquiry required to be held before such removal shall be held by a sitting High Court Judge to be nominated by the Chief Justice of Patna High Court.

(2) A person appointed under the proviso to subsection (1) shall submit the report within three months to the Governor who shall, as soon as may be, cause it to be laid before each House of the State Legislature.

(3) Notwithstanding anything contained in subsection (1) the Governor shall not remove the Chairperson or Members except by an order passed after an address by each house of the State Legislature supported by a majority of the total membership of that House and majority of not less than two thirds of the Members of that House present and voting has been presented to the Governor in the same session for such removal.

(4) The State Legislature may regulate the procedure for presentation of an address and conclusion of the proceeding as mentioned in subsection (3) above.

(5) Notwithstanding any other definition of misbehaviour in any other law inforce for the time being, "Misbehaviour" amongst others means, if the Chairperson or any other Member is or becomes in any way associated or interested in any contract or

agreement made by or on behalf of the Government of India or the Government of a State or participates in any way in the profit thereof or in any benefit or emolument arising there from otherwise than as a Member and in common with the other Members of an Corporate Company or has abused his position in any way so as to obtain any gain or favour to himself or to any other person to cause undue harm or hardship to any other person or was actuated in the discharge of the functions by any personal interest or for improper gain, corrupt practices.

(6) Notwithstanding any other definition of incapacity in any other law in force for time being, "Incapacity" amongst others means if the Chairperson or any other members is declared or adjudged an insolvent by a court of competent jurisdiction or is unfit to continue in office by reason of infirmity of mind or body."

74. Section 7 of the Act of 2011 lays down the procedure for removal of Chairperson or Members of Lokayukta from his office by the Governor of the State on the ground of misbehaviour or incapacity and no other ground. Proviso to sub-section (1) of Section 7 of the Act of 2011 prescribes that an enquiry will be required to be held by a sitting High Court Judge, in this regard, to be nominated by the Chief Justice of Patna High Court, who, in turn, will be required to submit a report to the Governor. Thereafter, the Act provides that the Governor shall cause the said report to be laid before each House of the State Legislature. Even the Governor, who is the appointing authority of the Chairperson and Members of the Institution of Lokayukta, does not have the jurisdiction to remove the Chairperson or a Member of Lokayukta except by an order passed after an address by each House of the State Legislature supported by a majority of the total membership of that House and majority of not less than two-third of the Members of that House present and such voting has been presented to the Governor in the same session for such removal.

75. Mr. Pushkar Narain Shahi, learned Addl. Advocate General, appearing for the State of Bihar, is, in our considered view, right in his submission that considering rigorous procedure prescribed for removal of the Chairperson and Members of Lokayukta, as noticed above, their appointments cannot be said to be falling within the meaning of "employment under the Government of a State", the Government having no control over the appointees.

76. Mr. Shahi has rightly placed, in this regard, reliance on the decision of the Supreme Court, in the case of Hargovind Pant v. Raghukul Tilak (Dr.) & Ors., reported in (1979) 3 SCC 458, Patna High Court CWJC No.17245 of 2015 dt. -04-2016 52 wherein the Supreme Court introduced the test of "administrative control of the State Government or Central Government" for deciding as to whether an employment can be said to be under the Government of India or under the Government of a State. We find from the process of removal, as prescribed by Section 7 of the Act of 2011, that the State Government does not have at all any disciplinary or administrative control over the Chairperson or Members of Lokayukta.

77. Further, considering the jurisdiction in respect of inquiry vested in the "Institution of Lokayukta" under Chapter- VI of the Act of 2011, the appointment of Members and Chairperson cannot be termed as employment under the State Government.....

78. Evidently, in view of Section 16 of the Act of 2011, Lokayukta has jurisdiction to enquire into the matter with respect to any allegation or grievance against the public servants enumerated therein including the Chief Minister of the State, Ministers of the State and Members of either house of the State Legislature. These facts, as discussed above, take us to a definite conclusion that the appointments of Chairperson or Member of Lokayukta, under the Act of 2011, cannot be termed as employment under the Government of India or the State Government as contemplated under Article 319(d) of the Constitution of India. We are, therefore, of the view that the recommendation, made in favour of respondent No. 6 by the Selection Committee, does not require interference on the ground of the bar put by Article 319(b) of the Constitution of India."

21. Following the decisions, cited supra, we have no hesitation to hold that the office of Lokayukta Member or Chairman, is not an Employment under the Government, and there is no bar under Article 319(d) of the Constitution of India.

22. Test which the Hon'ble Supreme Court and other Courts, invariably applied in all the decisions and relied on by the learned Advocate General, Government of Tamil Nadu, is applied as to whether, the person appointed to the Office of an Advocate General of the State, Governor of a State, Member of a State or Chairman of Lokayukta, makes it clear that such person is not employed under the Government of India or Government of State, as the case may be.

23. In view of the above, the writ petition is dismissed.
No costs.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

skm/dm

To

The Principal Secretary to Government,
Personnel and Administrative Reforms Department,
Fort St. George,
Chennai.

+1cc to Mr.S.Namo Narayanan, Advocate, S.R.No.35714
+1cc to the Government Pleader, S.R.No.36256

W.P.No.11236 of 2019

JP (CO)

RRS (24/04/2019)



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