SUPREME COURT OF INDIA

M.Balakrishna Reddy

Vs.

Dir. of CBI.

Crl.A.No.491 of 2008

(C.K. Thakker and Dalveer Bhandari,JJ.)

14.03.2008

JUDGMENT

C.K.Thakker, J.

1. Leave granted.

2. The present appeal is filed against an order passed by Special Magistrate, CBI, Indore, Madhya Pradesh on December 17, 2002 in Criminal Case No. 1155 of 2002 and confirmed by the High Court of Madhya Pradesh (Indore Bench) on January 2, 2007 in Criminal Revision No. 176 of 2003.

3. Briefly stated the facts of the case are that the appellant herein appeared in the examination conducted by the Union Public Service Commission ('UPSC' for short) in the year 1996 at Hamidiya Arts and Commerce College, Bhopal on November 1, 1996. It was alleged that the appellant was found to be in possession of prewritten answer sheets which were similar, if not identical, to the answer sheets supplied by the Examination Board. The appellant was taken out of the hall and a statement was recorded in which he confessed to have prewritten answer sheets with him. The matter was then reported to UPSC Head Office at New Delhi. A preliminary inquiry was instituted and on being prima facie satisfied about the allegations levelled, the Secretary, UPSC, lodged a Criminal Case against the appellant for offences punishable under Sections 420, 471, 474, 467, 468 and 417 read with Section 511 of the Indian Penal Code, 1860 ('IPC' for short). A charge-sheet was filed in the Court of Special Magistrate, Central Bureau of Investigation ('CBI' for short), Indore.

4. The appellant raised a preliminary objection contending that the alleged offences had been committed at Bhopal in the State of Madhya Pradesh and CBI had no power, authority or jurisdiction to institute criminal proceedings. It was also contended that before initiating proceedings under the Delhi Special Police Establishment Act, 1946 (hereinafter referred to as 'the Delhi Act'), consent of the State Government is required. No such consent had been given by the State of Madhya Pradesh and the proceedings initiated against the appellant by CBI were without jurisdiction.

5. The learned Magistrate, by an order dated December 17, 2002 rejected the preliminary objection. Being aggrieved by the said order, the appellant preferred Revision under Section 397 of the Code of Criminal Procedure, 1973 in the High Court of Madhya Pradesh (Indore Bench), and as stated above, the High Court dismissed the Revision Petition. The said order is challenged by the appellant by filing the present appeal.

6. On March 8, 2007, notice was issued by this Court. On August 6, 2007, the Registry was directed to place the matter for final hearing. That is how the matter has been placed before us.

7. We have heard learned counsel for the parties.

8. The learned counsel for the appellant raised several contentions. It was submitted that the High Court was wrong in holding that the proceedings against the appellant could have been initiated by CBI. It was contended that the direction issued by the High Court was ex facie erroneous. When alleged offence was committed by the appellant in Bhopal in the State of Madhya Pradesh, Police Authorities of the State alone could have initiated proceedings against the accused. It was also submitted that before invoking the provisions of the Delhi Act, consent of the State Government is mandatory and a condition precedent for the exercise of power. The provision as to consent of the State Government must be complied with in letter and spirit and such consent should be in proper form as required by law. Since the consent required under the Act is of the 'State Government', the prerequisites of Article 166 of the Constitution must be observed. If the procedure laid down in the said Article is not followed, the so called consent has no meaning. Such consent cannot be said to be legal, valid and in consonance with law and CBI does not get jurisdiction in the matter. It was also submitted that the High Court was wholly wrong in upholding the contention of CBI that it could have initiated prosecution since the alleged offence had been committed in conduct of UPSC Examination which had been conducted by its Delhi office which is the Head Quarter of UPSC and, hence, the Delhi Act was applicable. The High Court was again wrong in holding that since the appellant was selected in Indian Forest Services Examination conducted by UPSC and he was in Indian Forest Services since 1993 and was an officer of Central Government, the Delhi Act would apply for cognizance of offences committed by him as a Central Government employee and CBI had power to prosecute him. The High Court, according to the learned counsel, was not right in holding that the letter dated February 5, 1957 by the Deputy Secretary to the Government of Madhya Pradesh to the Secretary to the Government of India, Ministry of Home Affairs could be termed and treated as 'consent' within the meaning of Section 6 of the Delhi Act. It was, therefore, submitted that the appeal deserves to be allowed by setting aside the orders passed by the Courts below and by quashing the proceedings initiated by CBI against the appellant.

9. The learned counsel for the respondents, on the other hand, supported the order passed by the trial Court and confirmed by the Revisional Court. It was submitted that the High Court had considered the order dated February 5, 1957 in its proper perspective and held that the State of Madhya Pradesh had given consent as required by law (Section 6 of the Delhi Act)

and prosecution by CBI against the appellant under the Delhi Act cannot be said to be without jurisdiction.

10. We have given anxious consideration to the rival submissions of the learned counsel of both the sides. We have also examined the relevant provisions of the Delhi Act, Article 166 of the Constitution and case law cited by both the parties and we are of the view that by rejecting the preliminary objection raised by the appellant, the Courts below have not committed any illegality or error of law and the appeal deserves to be dismissed.

11. At the outset, we must frankly admit that the two factors weighed with the High Court, namely, (i) the Head Office of the UPSC is located at New Delhi; and (ii) the appellant is an employee of Central Government and on those grounds, the Delhi Act would be applicable have not impressed us. The said grounds, in our opinion, do not confer jurisdiction on CBI to invoke the Delhi Act. The main ground, therefore, which remains to be considered is whether 'consent' as envisaged by Section 6 of the Delhi Act has been given by the State Government of Madhya Pradesh to the Central Government so as to enable the latter to invoke the provisions of the Delhi Act. For the said purpose, it is necessary to bear in mind the relevant provisions of the Delhi Act.

12. As the Preamble of the Act states, it is an Act to make provision for the constitution of a Special Police Force in Delhi for the investigation of certain offences in the Union Territories and for the extension to other areas of the powers and jurisdiction of the members of the said force in regard to the investigation of the said offences. Section 1 declares that the Act extends to the whole of India. Section 2 provides for constitution and powers of Special Police Establishment. Section 3 enables the Central Government to investigate offences by Special Police Establishment. It reads thus:3. Offences to be investigated by Special Police Establishment:- The Central Government may, by notification in the official gazette, specify the offences or classes of offences which are to be investigated by the Delhi Special Police Establishment.

13. Section 4 covers superintendence and administration of Special Police Establishment. Section 5 empowers the Central Government to extend the powers and jurisdiction of Special Police Establishment to States. The said section is also relevant and may be reproduced;5. Extension of powers and jurisdiction of Special Police Establishment to other areas:-

> “(1) The Central Government may by order extend to any area including railway areas in a State not being a Union Territory, the powers and jurisdiction of members of the Delhi Special Police Establishment for the investigation of any offences or classes of offences specified in a notification under Section 3.
>
> (2) When by order under sub-section (1) the powers and jurisdiction of members of the said Police establishment are extended to any such area, a member thereof may, subject to any order which the Central Government may make in this behalf, discharge the functions of a police officer in the area and shall, while so discharging such functions, be deemed to be a member of the police force of that area and be

vested with the powers, functions and privileges and be subject to the liabilities of a police officer belonging to that police force

(3) Where any such order under sub-section (1) is made in relation to any area, then, without prejudice to the provisions of sub-section (2), any member of the Delhi Special Police Establishment of or above the rank of Sub-Inspector may, subject to any orders which the Central Government may make in this behalf, exercise the powers of the officer-in-charge of a police station in that area and when so exercising such powers shall be deemed to be an officer-in-charge of a police station in that area and when so exercising such powers shall be deemed to be an officer in charge of a police station discharging the functions of such an officer within the limits of his station."

14. Section 6 is very important which requires consent of State Government for exercising powers and jurisdiction under the Act by Special Police Establishment to any area in a State not being Union Territory or Railway. The said section, therefore, may be quoted in extenso;6. Consent of the State Government to exercise powers and jurisdiction:- Nothing contained in Sec. 5 shall be deemed to enable any member of the Delhi Special Police Establishment to exercise powers and jurisdiction in any area in a State, not being a Union Territory or railway area without the consent of the Government of that State.

15. Plain reading of the above provisions goes to show that for exercise of jurisdiction by the CBI in a State (other than Union Territory or Railway Area), consent of the State Government is necessary. In other words, before the provisions of the Delhi Act are invoked to exercise power and jurisdiction by Special Police Establishment in any State, the following conditions must be fulfilled;

"(i) A notification must be issued by the Central Government specifying the offences to be investigated by Delhi Special Police Establishment (Section 3);

(ii) An order must be passed by the Central Government extending the powers and jurisdiction of Delhi Special Police Establishment to any State in respect of the offences specified under Section 3 (Section 5); and

(iii) Consent of the State Government must be obtained for the exercise of powers by Delhi Special Police Establishment in the State (Section 6)."

16. Now, so far as the first two conditions are concerned, they have been complied with and the requisite material is on record of the case. A notification required to be issued by the Central Government under Section 3 of the Delhi Act specifying offences under the Indian Penal Code (IPC) as also under several other Acts has been issued on September 7, 1989 and has been placed by the respondent on record along with the affidavit-in-reply filed by M.C. Sahni, Superintendent of Police, CBI, Bhopal. The said notification covers inter alia, the offences punishable under Sections 417, 418, 420, 467, 468, 471, 474, 511, IPC. Likewise, the Central Govenrment passed an order on February 18, 1963 as contemplated by Section 5

of the Delhi Act extending the powers and jurisdiction of the members of Special Police Establishment to various States including the State of Madhya Pradesh for the investigation of offences specified in the Schedule annexed to the said schedule. The Schedule specifies various offences under IPC including the offences referred to hereinabove, offences under the Prevention of Corruption Act and various other enactments. Thus, Section 3 and 5 of the Delhi Act have been complied with.

17. The question, therefore, which has to be considered is whether the consent contemplated by Section 6 of the Delhi Act has been given by the State Government. According to the appellant, no such consent has been given by the State of Madhya Pradesh. The counter argument on behalf of the respondent is that such consent has been given by the State Government which is reflected in the order dated February 5, 1957.

18. A copy of the letter addressed by the Deputy Secretary to the Government of Madhya Pradesh to the Secretary, Ministry of Home Affairs, Government of India, New Delhi has been placed on record by the appellant, which reads thus;

> "To
> The Secretary,
> Ministry of Home Affairs,
> Govt. of India,
> New Delhi.
> Bhopal, dated 5th February, 1957
> Sub: Consent of the State Government to the functioning of the Special Police Establishment in the State.
>
> Sir,
> In continuation of this department letter No. 20/12(II)/Home Police dated the 29th December, 1956 on the above subject, I am directed to state that this State Government have no objection to the members of the Delhi State Police Establishment exercising powers and jurisdiction within this state.
>
> Yours faithfully,
> Sd/-
> P.N. MISHRA
> DEPUTY SECRETARY TO THE GOVT."

19. The learned counsel for the appellant contended that the above letter which purportedly records the consent of the State Government to the exercise of powers and jurisdiction of the Delhi State Police Establishment to the State of Madhya Pradesh is merely a letter and does not meet with the requirements of Section 6 of the Delhi Act. The so called 'consent' reflected in the letter, hence, cannot be said to be 'consent' accorded by the State Government under the statute. In other words, the contention is that the letter is in the nature of 'inter-Departmental communication' by the Deputy Secretary to the State of Madhya Pradesh to the

Secretary to Central Government and cannot be regarded as consent under Section 6 of the Act.

20. In the counter-affidavit filed by the Superintendent of Police, CBI, Bhopal, the deponent has stated that the consent as required by Section 6 of the Delhi Act had been given by the State of Madhya Pradesh to the Central Government. It was also stated that the copy of the order, dated February 5, 1957 annexed to the Special Leave Petition by the petitioner (appellant herein) was not full and complete and did not contain file/reference number, name of the department and the authority from whom it was issued. The order, however, contains all such information. The deponent has annexed the order as one of the annexures (Annexure IV) to his reply and the same reads thus;

> "Secret True Copy No. G97/II-Home/Police Government of Madhya Pradesh Home (Police) Department
> From,
> Shri R.N. Mishra, IAS
> Deputy Secretary to Govt.
> To,
> The Secretary to the Govt. of India,
> Ministry of Home Affairs,
> NEW DELHI.
> Bhopal, dated 5th February, 1957
> Subject: Consent of the State Government to the functioning of the Special Police Establishment in the State.
> Sir,
> In continuation of this department letter No. 20/12(II)/Home Police, dated the 29th December, 1956 on the above subject, I am directed to state that this State Government have no objection to the members of the Delhi Special Police Establishment exercising powers and jurisdiction within this State.
> Yours faithfully,
> Sd/-
> R.N. MISHRA
> Deputy Secretary to the Govt.
> ATTESTED
> (T.C. Ramanujachari) Deputy Secretary To The Government Of India"
> (Emphasis supplied)

21. The learned counsel for the appellant then submitted that all executive actions of the Government of a State must be taken in accordance with and as per the procedure laid down in Article 166 of the Constitution. Article 166 of the Constitution on which strong reliance has been placed by the appellant reads thus;166. Conduct of business of the Government of a State.-

> “(1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order on instruction which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion."

22. Bare reading of Clause (1) of Article 166 of the Constitution makes it clear that all executive actions of the Government of a State should be expressed to be taken in the name of the Governor. Clause (2) provides for the authentication of the orders and other instructions made and executed in the name of the Governor. Clause (3) enables the Governor to make rules for the more convenient transaction of the Government of the State and for the allocation of business among the Ministers, usually known as 'Rules of Business' or 'Business Rules'.

23. The learned counsel for the appellant contended that Article 166 of the Constitution deals with 'Conduct of Government Business' and mandates that such business should be performed in the manner laid down in Article 166. To put it differently, according to the learned counsel, the provisions of Article 166 are mandatory and before any action is taken, they are required to be strictly complied with. If the procedure prescribed by Article 166 is not followed, the business cannot be said to be a 'business of the Government of the State' and has no effect whatsoever.

24. The learned counsel for the respondents, on the other hand, submitted that the provisions of Article 166 are directory and even if there is no strict compliance, the action cannot be held illegal or invalid and the same can be upheld provided there is 'substantial' compliance.

25. Now, let us see how the provision (Article 166 of the Constitution) has been interpreted by this Court.

26. Article 166 came up for interpretation before this Court immediately after the Constitution came into force and continued to come up for consideration from time to time. Let us examine few leading cases wherein this Court had an occasion to deal with the said provision.

27. In *Ujgar Singh & Anr. V. State of Punjab*[1], an order of detention was made against the petitioner under the Preventive Detention Act, 1950. The detenu challenged it in this Court by invoking Article 32 of the Constitution. One of the contentions raised on his behalf was that the grounds of detention did not purport to state that the authority making the order was the Governor of the State.

28. The Constitution Bench of this Court, however, negative the contention. Interpreting Article 166 of the Constitution, Chandrasekhara Aiyar, J. stated;

> "Under section 3 of the Preventive Detention Act, the authority to make the order is the State Government. Section 166 (1) of the Constitution provides that all executive action of the Government of a State shall be expressed to be taken in the name of the Governor. The orders of detention expressly state that the Governor of Punjab was satisfied of their necessity and that they were made by his order. The orders are signed no doubt by the Home Secretary, but this is no defect. The communication of the grounds need not be made directly by the authority making the order. Section 7 does not require this. The communication may be through recognized channels prescribed by the administrative rules of business".
>
> (Emphasis supplied)

29. In *Dattatreya Moreshwar Pangarkar V. State of Bombay & Ors*[2]., the petitioner was detained by an order passed by the District Magistrate, Surat in exercise of powers conferred on him by the Preventive Detention Act, 1950. The petitioner moved this Court by filing a writ petition under Article 32 of the Constitution challenging the order of detention. One of the contentions raised by the petitioner in this Court was that the order of confirmation of detention by the State Government was not in proper form inasmuch as it was not made in the name of Governor as required by Clause (1) of Article 166 of the Constitution.

30. The order passed by the Government read as under:

> "Confidential letter
> No. B. D. II/1042-D (11) Home Department (Political) Bombay Castle,
> 28th April, 1951.
> To
> The District Magistrate,
> Surat.
> Subject: - Preventive Detention Act, 1950 - Review of detention orders issued under the - Reference your letter No. Pol. 1187/P, dated the 23rd February, 1951, on the subject noted above.
>
> 2. In accordance with section 9 of the Preventive Detention Act, 1950, the case of detenu Shri Dattatreya Moreshwar Pangarkar was placed before the Advisory Board which has reported that there is sufficient cause for his detention. Government is accordingly pleased to confirm the detention order issued against the detenu. Please inform the detune accordingly and report compliance.
>
> 3. The case papers of the detent are returned herewith.
> Sd/-G.K.Kharkar, for Secretary to the Government of Bombay,Home Department".

(emphasis supplied)"

31. It was urged on behalf of the detenu that the order of confirmation extracted hereinabove had not been made in proper legal form and hence could not be said to be in consonance with Article 166 (1) i.e. in the name of the Governor. Learned Attorney General, on the other hand, submitted that the omission to make and authenticate an executive decision in the form mentioned in Article 166 (1) of the Constitution did not make the decision illegal. It was argued by the Attorney General that there is distinction between the taking of an executive decision and giving formal expression to the decision so taken. It was stated that usually executive decision is taken on the office files by way of notings or endorsements made by the Minister in charge and if every executive decision has to be given a formal expression, the whole governmental machinery would come to a standstill.

32. Accepting the argument, negativing the contention of the detenu, holding the provision directory and relying on a decision of the Federal Court in *J. K. Gas Plant Manufacturing Co. (Rampur) Ltd. & Ors. v. KingEmperor*[3], S.R. Das, J. stated;

> "In my opinion, this contention of the learned Attorney- General must prevail. It is well settled that generally speaking the provisions of statute creating public duties are directory and those conferring private rights are imperative. When the provisions of statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the legislature, it has been the practice of the Courts to hold such provisions to be directory only, the neglect of them not affecting the validity of the acts done"
>
> (Emphasis supplied)

33. His Lordship proceeded to say;

> "Strict compliance with the requirements of Article 166 gives an immunity to the order in that it cannot be challenged on the ground that it is not an order made by the Governor. If, therefore, the requirements of that Article are not compiled with, the resulting immunity cannot be claimed by the State. This, however, does not vitiate the order itself. The position, therefore, is that while the Preventive Detention Act requires an executive decision, call it an order or an executive action for the conformation of an order of detention under Section 11 (1) that Act does not itself prescribe any particular form of expression of that executive decision. Article 166 directs all executive action to be expressed and authenticated in the manner therein laid down but an omission to comply with those provisions does not render the executive action a nullity. Therefore, all that the procedure established by laws requires is that the appropriate Government must take a decision as to whether the detention order should be confirmed or not under Section 11 (1). That such a decision

has been in fact taken by the appropriate Government is amply proved on the record. Therefore, there has been, in the circumstances of this case, no breach of the procedure established by law and the present detention of the petitioner cannot be called in question".

(Emphasis supplied)

34. Agreeing with Justice Das, Mukherjea, and J. said:

"The other contention raised by the learned Attorney-General involves consideration of the question as to whether the provision of article 166(1) of the Constitution is imperative in the sense that non- compliance with it would nullify or invalidate an executive action. The clause does not undoubtedly lay down how an executive action of the Government of a State is to be performed; it only prescribes the mode in which such act is to be expressed. The manner of expression is ordinarily a matter of form, but whether a rigid compliance with a form is essential to the validity of an act or not depends upon the intention of the legislature. Various tests have been formulated in various judicial decisions for the purpose of determining whether a mandatory enactment shall be considered directory only or obligatory with an implied nullification for disobedience. It is unnecessary for our present purpose to discuss these matters in detail. In my opinion, article 166 of the Constitution which purports to lay down the procedure for regulating business transacted by the Government of a State should be read as a whole. Under clause (3) the Governor is to make rules for the more convenient transaction of such business and for allocation of the same among the Ministers in so far as it does not relate to matters in regard to which the Governor is required to act in his discretion. It is in accordance with these rules that business has to be transacted. But whatever executive action is to be taken by way of an order or instrument, it shall be expressed to be taken in the name of the Governor in whom the executive power of the State is vested and it shall further be authenticated in the manner specified in the rules framed by the Governor. Clauses (1) and (2) of article 166 in my opinion are to be read together. Clause (1) cannot be taken separately as an independent mandatory provision detached from the provision of clause (2). While clause (1) relates to the mode of expression of an executive order or instrument, clause (2) lays down the way in which such order is to be authenticated; and when both these forms are complied with, an order or instrument would be immune from challenge in a court of law on the ground that it has not been made or executed by the Governor of the State".

35. Again, in *State of Bombay v. Purushottam Jog Naik*[4], a similar view has been taken by one more Constitution Bench of this Court. There also, the Court was concerned with an order of detention which was confirmed by the State. There also, there was no mention that the 'Governor' of Bombay was pleased to take the action as required by Clause (1) of Article 166 of the Constitution. The Constitution Bench clarified that it did not wish to encourage laxity of expression, nor to suggest that ingenious experiments regarding the permissible

limits of departure from the language of a statute or of the Constitution would be worthwhile, but the Court must look into the 'substance' of Article 166 and not the 'form' of order.
36. The Court stated:

> "The short answer in this case is that the order under consideration is 'expressed' to be made in the name of the Governor because it says 'By order of the Governor'. One of the meanings of 'expressed' is to make known the opinions or the feelings of a particular person and when a secretary to Government apprehends a man and tells him in the order that this is being done under the orders of the Governor, he is in substance saying that he is acting in the name of the Governor and, on his behalf, is making known to the detenu the opinion and feelings and orders of the Governor. In our opinion, the Constitution does not require a magic incantation which can only be expressed in a set formula of words. What we have to see is whether the substance of the requirements is there".
>
> (Emphasis supplied)

37. It is profitable to refer at this stage, to a decision of larger Bench of seven Judges of this Court in *P. Joseph John v. State of Travancore-Cochin*[5],. In Joseph John, a civil servant was removed from service after holding a departmental inquiry wherein the charges leveled against him were proved. The order of removal was upheld by the High Court. The delinquent approached this Court. One of the contentions raised by the employee was that the show cause notice issued to him was not in consonance with the provisions of Article 166 of the Constitution since it was not expressed to have been made in the name of Raj Pramukh. The notice was issued on behalf of the Government and was signed by the Chief Secretary of the United State of Travancore-Cochin who had under the Rules of Business framed by Rajpramukh was in charge of the portfolio of "Service and Appointments" at the Secretariat level in the State.

38. The Court referred to Dattatreya Moreshwar, wherein clauses (1) and (2) of Article 166 were held to be directory and it was observed that non-compliance with them did not result in the order being invalid. It was further held that in order to determine whether there was compliance with those provisions all that was necessary to be seen was whether there had been 'substantial compliance' of the provisions of the Article.

39. Reiterating the law laid down in earlier case, (Dattatreya Moreshwar), the Court stated;

> "In the present case there can be no manner of doubt that the notice signed by the Chief Secretary of the State and expressed to be on behalf of the Government and giving opportunity to the petitioner to show cause against the action proposed to be taken against him was in substantial compliance with the provisions of the article. The petitioner accepted this notice and in pursuance of it applied for further time to put in his defence. He was twice granted this time".
>
> (Emphasis supplied)

40. In *Swadeshi Cotton Mills Co. Ltd. v. State Industrial Tribunal, U.P. & Ors*[6]., a Constitution Bench of this Court held that where certain conditions precedent have to be satisfied before an authority may pass an order, it is not necessary that the satisfaction of those conditions should be recited in the order itself unless the statute specifically requires it. Though it is desirable that it should be so reflected, but even where the recital is not there on the face of the order, the order will not become illegal or void ab initio. Only a burden is thrown on the authority passing the order to satisfy the Court by other means that conditions precedent were complied with.

41. In *Major E.G. Barsay v. State of Bombay*[7], the question was whether statutory consent was required for every individual member of the Delhi Police Establishment or a general consent was enough. In that case, the Home Department of the Government of Bombay addressed a letter to the Government of India on August 13, 1949 which read thus:

> "I am directed to state that this Government re-affirms, with reference to Section 6 of the Delhi Special Police Establishment Act, 1946, the consent given for an indefinite period under its letter No. 5042/4-D, dated the 6th November, 1946 to the members of the Delhi Special Police Establishment exercising powers and jurisdiction in the area of the province of Bombay".

42. Though the Court was not directly deciding the question whether a letter could be treated as valid consent, but whether separate consent was required for every individual member of the Delhi Police Establishment or general consent was enough. The Court nonetheless held the consent valid as general consent was all that was required by law. Though it did not remark on the form in which such consent should be given, i.e. the letter, was correct or not, the fact that it could find nothing wrong with the consent raises a strong presumption in favour of the argument that a letter can be a means of granting consent by the State Government under Section 6.

43. Another important aspect of the case was construction of Article 77 of the Constitution. In Major Barsay, the appellant was a public servant who was prosecuted for an offence under the Prevention of Corruption Act, 1947. Section 6 of the said Act required sanction of the Central Government. The sanction accorded by the Government read thus;

> "Now, therefore, the Central Government doth hereby accord sanction under section 197 of the Criminal Procedure Code (Act V of 1898) and section 6(1)(a) of the Prevention of Corruption Act, 1947 (II of 1947) to the initiation of proceedings to prosecute in a Court of competent jurisdiction the said Major E. G. Barsay and Shri H. S. Kochhar in respect of the aforesaid offences and other cognate offences punishable under other provisions of law. Sd. M. Gopala Menon,Deputy Secretary to the Govt.of ndia."

(Emphasis supplied)

44. The requisite sanction thus had been granted by the Central Government and was signed by the Deputy Secretary to the Government of India in the Ministry of Home Affairs. The contention of the appellant, however, was that the provisions of Article 77 of the Constitution were not complied with.

45. Article 77 of the Constitution reads thus;77. Conduct of business of the Government of India.

> "(1) All executive action of the Government of India shall be expressed to be taken in the name of the President.
>
> (2) Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President.
>
> (3) The President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business. 46. Article 77 relates to conduct of business of the Government of India and is similar to Article 166 of the Constitution which relates to conduct of business of the Government of a State. It was contended that there was non-compliance with Clause (1) of Article 77 inasmuch as the executive action of granting sanction was not expressed to have been taken in the name of the President. The sanction was, therefore, void."

47. The Court noted that Article 77 was corresponding to Article 166 which was subject to judicial scrutiny by the Court in various cases. Then referring to those cases and rejecting the contention, the Court said;

> "The foregoing decisions authoritatively settled the true interpretation of the provisions of Art. 166 of the Constitution. Shortly stated, the legal position is this : Art. 166(1) is only directory. Though an impugned order was not issued in strict compliance with the provisions of Art. 166(1), it can be established by evidence aliunde that the order was made by the appropriate authority. If an order is issued in the name of the Governor and is duly authenticated in the manner prescribed in Cl.(2) of the said Article, there is an irrebuttable presumption that the order or instrument is made or executed by the Governor. Any non-compliance with the provisions of the said rule does not invalidate the order, but it precludes the drawing of any such irrebuttable presumption. This does not prevent any party from proving by other evidence that as a matter of fact the order has been made by the appropriate authority. Art. 77 which relates to conduct of business of the Government of India is couched in terms similar to those in Art. 166 and the same principles must govern the interpretation of that provision".

(Emphasis supplied)

48. In *R. Chitralekha & Anr. v. State of Mysore & Ors*[8]., a Constitution Bench of this Court again had an occasion to consider a letter signed by the Under Secretary to the Government, Education Department of the State of Mysore to a Selection Board communicating the decision of the Government to prescribe interviews for admission into colleges. Validity of the said letter was challenged on the ground that it did not conform to the requirements of Article 166 of the Constitution as it was not expressed in the name of the Governor.

49. The letter sent by the Education Department to the Selection Committee reads thus;

> "Sir,
> Sub: Award of marks for the "interview" of the candidates seeking admission to Engineering Colleges and Technical Institutions. With reference to your letter No. AAS.4.ADW/63/2491, dated the 25th June, 1963, on the subject mentioned above, I am directed to state that Government have decided that 25 per cent of the maximum marks.....
>
> Yours faithfully,
>
> Sd/- S. NARASAPPA, Under Secretary to Government, Education Department."
>
> (emphasis supplied)

50. Referring to earlier cases and holding the letter valid and the decision of the State Government, the majority observed that though the letter did not conform to the provisions of Article 166 of the Constitution, it ex facie stated that an order to the effect mentioned therein was issued by the Government and there was substantial compliance with the provisions of Article 166 of the Constitution.

51. In *State of Uttar Pradesh v. Om Prakash Gupta*[9], this Court observed that it had been repeatedly held that provisions of Article 166 (1) and (2) were 'directory' and 'substantial' compliance with those provisions was sufficient. In that case, the order impugned was made in the name of the State Government but was signed by the Chief Secretary. The order was held valid.

52. In *Gulabrao Keshavrao Patil & Ors. v. State of Gujarat & Ors*[10]., the question of interpretation of Article 166 of the Constitution came up for consideration in a matter under the Land Acquisition Act, 1894. The Court considered previous cases and said:

> "Article 166(1) and (2) expressly envisage authentication of all the executive actions and shall be expressed to be taken in the name of the Governor and shall be authenticated in such manner specified in the rules made by the Governor. Under Article 166(3), the Governor is authorised to make the rules for the more convenient transaction of the business of the Government of the State, and for the allocation

among Ministers of the said business insofar as it is not business with respect to which the Governor is by or under the Constitution required to act in his discretion. In other words, except in cases when the Government in his individual discretion exercises his constitutional functions, the other business of the Government is required to be conveniently transacted as per the Business Rules made by Article 166(3) of the Constitution. If the action of the Government and the order is duly authenticated as per Article 166(2) and the Business Rule 12, it is conclusive and irrebuttable presumption arises that decision was duly taken according to Rules. The letter of the Section Officer is not in conformity with Rule 12 and Article 166(1) and (2), though under Rule 13 he is one of the authorised officers to communicate the decision of the Government. In Major E.G. Barsay v. State of Bombay this Court held that if an order is issued in the name of the President and is duly authenticated in the manner prescribed in Article 77(2), there is an irrebuttable presumption that the order is made by the President. Whereby the order does not comply with the provisions of Article 77(2), it is open to the party to question the validity of the order on the ground that it was not an order made by the President and to prove that it was not made by the Central Government. Where the evidence establishes that the Dy. Secretary on behalf of the Central Government made the order a delegate, the order cannot be questioned. Therefore, it is necessary to show whether decision of the Government is according to Business Rules".

53. In *J.P. Bansal v. State of Rajasthan & Anr*[11]., this Court held that no particular formula of words were required by Clause (1) of Article 166 of the Constitution. It is enough if the requirement is substantially complied with.

54. Referring to several earlier decisions, this Court stated;

"Clause (1) requires that all executive action of the State Government shall have to be taken in the name of the Governor. Further, there is no particular formula of words required for compliance with Article 166(1). What the Court has to see is whether the substance of its requirement has been complied with. A Constitution Bench in R. Chitralekha v. State of Mysore held that the provisions of the article were only directory and not mandatory in character and if they were not complied with, it could still be established as a question of fact that the impugned order was issued in fact by the State Government or the Governor. Clause (1) does not prescribe how an executive action of the Government is to be performed; it only prescribes the mode under which such act is to be expressed. While clause (1) (sic) in relation to the mode of expression, clause (2) lays down the ways in which the order is to be authenticated. Whether there is any government order in terms of Article 166, has to be adjudicated from the factual background of each case. Strong reliance was placed by learned counsel for the appellant on L.G. Chaudhari to contend that for all practicable purposes the decision of the Cabinet has to be construed as a government order, because three of the decisions taken by the Cabinet have been implemented. As noted above, learned counsel for the State took the stand that neither in the writ petition nor before the High Court, the Cabinet decision itself was produced. In fact, the Cabinet

memorandum and the order of the Cabinet show that no decision was taken to pay any compensation. In this connection reference is made to the Cabinet memorandum dated 18-3-1993 and Decision 57 of 1999. It was further submitted that even if it is conceded for the sake of argument that such decision was taken, the same cannot be enforced by a writ petition.We need not delve into the disputed question as to whether there was any Cabinet decision, as it has not been established that there was any government order in terms of Article 166 of the Constitution. The Constitution requires that action must be taken by the authority concerned in the name of the Governor. It is not till this formality is observed that the action can be regarded as that of the State. Constitutionally speaking, the Council of Ministers are advisers and as the Head of the State, the Governor is to act with the aid or advice of the Council of Ministers. Therefore, till the advice is accepted by the Governor, views of the Council of Ministers do not get crystallised into action of the State. (See: State of Punjab v. Sodhi Sukhdev Singh and Bachhittar Singh v. State of Punjab.) That being so, the first plea of the appellant is rejected". (Emphasis supplied)

55. We must, however, closely refer to two decisions of this Court on which strong reliance was placed by the learned counsel for the appellant.

56. In *Bachhittar Singh v. State of Punjab*[12], the Constitution Bench of this Court held that before Article 166 of the Constitution is invoked, essential ingredients laid down therein must be complied with.

57. In Bachhittar Singh, the appellant, who was serving as Assistant Consolidation Officer in the State of Pepsu was dismissed from service after a departmental inquiry wherein it was proved that he was not 'above board'. Against the said order, he preferred an appeal to the State Government. He, however, submitted an advance copy to the Revenue Minister of Pepsu. The Minister called for the record of the case immediately and wrote on the file that instead of dismissal, he should be reverted to his original post of Qanungo. On the next day, the State of Pepsu merged in the State of Punjab. It was the case of the appellant that the remarks amounted to an order which was orally communicated to him by the Revenue Minister.

58. After the merger, the file was put up before the Revenue Minister of Punjab who remarked that the charges were serious and put up a note: "C.M. may kindly advise". The Chief Minister opined that the order of dismissal should be maintained. The said order was then communicated to the appellant who challenged it by filing a petition in the High Court which was dismissed. The appellant approached this Court.

59. It was, inter alia, contended by the appellant that the order passed by the Revenue Minister of Pepsu reducing punishment from dismissal to reversion could not have been reviewed by the successor Government. The record revealed that there was noting by the Revenue Minister of Pepsu. Whether the noting could be said to be 'remarks' or 'order' but it was not in dispute that it was never formally communicated to the appellant apart from the

fact that it was not expressed in the name of Governor. The case of the appellant himself was that the 'order' was 'orally' communicated to him by the Revenue Minister.

60. The question before the Court was whether the 'noting' made by the Revenue Minister could be said to be an 'order', and whether the provisions of Article 166 of the Constitution could be said to have been complied with.

61. Dismissing the appeal and drawing distinction between the noting, remarks or opinion expressed by a Minster on file and an order made by the Government, the Constitution Bench stated;

> "What we have now to consider is the effect of the note recorded by the Revenue Minister of PEPSU upon the file. We will assume for the purpose of this case that it is an order. Even so the question is whether it can be regarded as the order of the State Government which alone, as admitted by the appellant, was competent to hear and decide an appeal from the order of the Revenue Secretary. Art. 166(1) of the Constitution requires that all executive action of the Government of a State shall be expressed in the name of the Governor. Clause (2) of Art. 166 provide for the authentication of orders and other instruments made and executed in the name of the Governor. Clause (3) of that Article enables the Governor to make rules for the more convenient transaction of the business of the Government and for the allocation among the Ministers of the said business. What the appellant calls an order of the State Government is admittedly not expressed to be in the name of the Governor. But with that point we shall deal later. What we must first ascertain is whether the order of the Revenue Minister is an order of the State Government i.e., of the Governor. In this connection we may refer to r. 25 of the Rules of Business of the Government of PEPSU which reads thus:
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> "Except as otherwise provided by any other Rule, cases shall ordinarily be disposed of by or under the authority of the Minister incharge who may by means of standing orders give such directions as he thinks fit for the disposal of cases in the Department. Copies of such standing orders shall be sent to the Rajpramukh and the Chief Minister." According to learned counsel for the appellant his appeal pertains to the department which was in charge of the Revenue Minister and, therefore, he could deal with it. His decision and order wouldaccording to him, be the decision and order of the State Government. On behalf of the State reliance was, however, placed on r. 34 which required certain classes of cases to be submitted to the Rajpramukh and the Chief Minister before the issue of orders. But it was conceded during the course of the argument that a case of the kind before us does not fall within that rule. No other provision bearing on the point having been brought to our notice we would, therefore, hold that the Revenue Minister could make an order on behalf of the State Government".

62. The Court proceeded to consider;

> "The question, therefore, is whether he did in fact make such an order. Merely writing something on the file does not amount to an order. Before something amounts to an order of the State Government two things are necessary. The order has to be expressed in the name of the Governor as required by clause (1) of Art. 166 and then it has to be communicated. As already indicated, no formal order modifying the decision of the Revenue Secretary was ever made. Until such an order is drawn up the State Government cannot, in our opinion, be regarded as bound by what was stated in the file. As along as the matter rested with him the Revenue Minister could well score out his remarks or minutes on the file and write fresh ones".

(Emphasis supplied)

63. The Court concluded;

> "The business of State is a complicated one and has necessarily to be conducted through the agency of a large number of officials and authorities. The Constitution, therefore, requires and so did the Rules of Business framed by the Rajpramukh of PEPSU provide, that the action must be taken by the authority concerned in the name of the Rajpramukh. It is not till this formality is observed that the action can be regarded as that of the State or here, by the Rajpramukh. We may further observe that, constitutionally speaking, the Minister is no more than an adviser and that the head of the State, the Governor or Rajpramukh, is to act with the aid and advice of his Council of Ministers. Therefore, until such advice is accepted by the Governor whatever the Minister or the Council of Ministers may say in regard to a particular matter does not become the action of the State until the advice of the Council of Ministers is accepted or deemed to be accepted by the Head of the State. Indeed, it is possible that after expressing one opinion about a particular matter at a particular stage a Minister or the Council of Ministers may express quite a different opinion, one which may be completely opposed to the earlier opinion. Which of them can be regarded as the "order" of the State Government? Therefore, to make the opinion amount to a decision of the Government it must be communicated to the person concerned. In this connection we may quote the following from the judgment of this Court in the *State of Punjab v. Sodhi Sukhdev Singh*[13],

Mr Gopal Singh attempted to argue that before the final order was passed the Council of Ministers had decided to accept the respondent's representation and to reinstate him, and that, according to him, the respondent seeks to prove by calling the two original orders. We are unable to understand this argument. Even if the Council of Ministers had provisionally decided to reinstate the respondent that would not prevent the Council from reconsidering the matter and coming to a contrary conclusion later on, until a final decision is reached by them and is communicated to the Rajpramukh in the form of advice and acted upon by him by issuing an order in that behalf to the respondent. Thus it is of the essence that the order has to be communicated to the person who would be affected by that order before the State and that person can be bound by that order. For, until the order is communicated to the person affected by it, it would be open to the Council of Ministers to consider the matter over and

over again and, therefore, till its communication the order cannot be regarded as anything more than provisional in character".

(Emphasis supplied)

[See also *State of Bihar & Ors. V. Kripalu Shankar & Ors*[14].

64. In our considered opinion, Bachhittar Singh has no application to the facts of the present case. As is clear, in Bachhittar Singh, there was merely a 'noting' made by the Minister on the file. This Court held that merely writing something on file does not amount to an 'order'. No formal order reducing the punishment was ever made. Until such an order is drawn up by the State Government, it could not take the character of Order since the Minister could change his mind and delete the remarks. Moreover, the decision must also be communicated to the person concerned which was absent in the case. To us, therefore, ratio laid down in Bachhittar Singh does not help the appellant.

65. It is also interesting to note at this stage that in subsequent cases, Bachhittar Singh was relied upon for the proposition that in that case, the Constitution Bench of this Court held the provisions of Article 166 of the Constitution mandatory. This Court, however, did not uphold the argument and distinguished it on facts. For instance, in Chitralekha, the Constitution Bench held Article 166 'directory'. As to Bachhittar Singh, the majority observed that in that case, the order signed by the Revenue Minister was never communicated to the party and, therefore, it was held that there was no effective order. (See also State of Bihar v. Kripalu Shankar; Gulabrao Keshavrao Patil v. State of Gujarat; J.P. Bansal v. State of Rajasthan).

66. Another decision heavily relied upon by the appellant is a recent case in *C.B.I. v. Ravi Shankar Srivastava*[15], In that case, CBI instituted criminal proceedings against the accused. The accused challenged the First Information Report (FIR) in the High Court by invoking Section 482 of the Code of Criminal Procedure, 1973 inter alia contending that the consent given by the State Government under Section 6 of the Delhi Act for investigation of offences by Delhi Special Police Establishment and for operation of the Delhi Act to the State was withdrawn by the State and CBI had no power to initiate criminal proceedings. The High Court upheld the contention. CBI approached this Court.

67. Allowing the appeal and setting aside the order of the High Court, this Court held that there was no notification revoking the earlier one granting the consent. The letter on which great emphasis had been laid by the accused did not indicate as to under what authority such letter had been written. It was also not established that the person was authorized to take such decision. It did not meet with the requirements of Article 166 of the Constitution and could not, even conceptually be said to be a notification.

68. To us, Ravi Shankar has no application to the case on hand. In a particular 'fact situation', this Court held that there was no withdrawal of consent by the State Government. For coming to such conclusion, the Court referred to several factors, such as, it was merely a letter; it did not indicate the authority; there was nothing to show that the person was

authorized to take such decision, and as such, it did not meet with the requirement of Article 166 of the constitution.

69. In the present case, the decision produced by the respondent along with the counter-affidavit filed by the Superintendent of Police, CBI, Bhopal clearly sets out all the particulars required by Section 6 of the Delhi Act. It refers to the file/reference number, name of the department, the authority from whom it was issued and communicated to the concerned department of the Central Government. It, therefore, cannot be said that the State Government had not granted consent under Section 6 of the Delhi Act.

70. In Ravi Shankar, consent was granted by a notification. This Court, therefore, held that it could not have been revoked by a letter, authenticity of which was not established and was in cloud. In our judgment, it would be an impermissible leap of logic to deduce to formulate a rule of law that consent can never be accorded except by issuing a notification.

71. A closer scrutiny of the relevant provisions of the Delhi Act also add credence to the view which we are inclined to take. Section 3 refers to 'notification' and requires the Central Government to issue notification specifying offences or class of offences to be investigated by Special Police Establishment. Section 5 uses the term 'order' and enables the Central Government to extend powers and jurisdiction of Special Police Establishment to other areas not covered by the Act. Section 6 which speaks of consent of State Government for the exercise of powers and jurisdiction of the Special Establishment neither refers to 'notification' nor 'order'. It merely requires consent of the State Government for the application of the Delhi Act. Parliament, in our considered opinion, advisedly and deliberately did not specify the mode, method or manner for granting consent though in two preceding sections such mode was provided. If it intended that such consent should be in a particular form, it would certainly have provided the form as it was aware of different forms of exercise of power. It, therefore, depends on the facts of each case whether the consent required by Section 6 of the Delhi Act has or has not been given by the State Government and no rule of universal application can be laid down.

72. On the facts stated hereinabove, there is no doubt that the State of Madhya Pradesh has given consent as envisaged by Section 6 of the Delhi Act and prosecution instituted by CBI against the appellant cannot be said to be without jurisdiction. We see no infirmity in the order passed by the trial Court and confirmed by the High Court. The appeal, hence, deserves to be dismissed and we accordingly do so.

73. The appeal is dismissed accordingly.

Judgment Referred.

[1]*(1952) SCR 0756*
[2]*(1952) SCR 0612*
[3]*(1947) FCR 0141*
[4]*(1952) SCR 0674*
[5]*(1955) 1 SCR 1011*

[6] *(1962) 1 SCR 0422*
[7] *(1962) 2 SCR 0195*
[8] *(1964) 6 SCR 0368*
[9] *(1969) 3 SCC 0775*
[10] *(1996) 2 SCC 0026*
[11] *(2003) 5 SCC 0134*
[12] *(1962) 3 SCR 0713*
[13] *AIR 1961 SC 0493*
[14] *(1987) 3 SCC 0034*
[15] *(2006) 7 SCC 0188*