

SUPREME COURT OF INDIA

State of U.P. & Ors.

Vs.

Z.U. Ansari

C.A.No.9886 of 2016

(T.S.Thakur,CJI., [V.Gopala Gowda,J.,](#))

30.09.2016

JUDGMENT

T.S.Thakur,CJI.,

,
SLP.(Civil)No.20985 of 2014

1. Leave granted.

2. This appeal arises out of a judgment and order dated 3rd February, 2014 passed by the High Court of Judicature at Allahabad whereby Writ Petition No.19485 of 2012 filed by the respondent has been allowed and disciplinary proceedings based on charge-sheet dated 26th June, 2011 issued to the respondent quashed with the direction that the writ petitioner-respondent herein shall be entitled to all consequential benefits.

3. The respondent-writ petitioner before the High Court joined the Saharanpur Division of Rural Engineering Department of the State of Uttar Pradesh as a Junior Engineer on 26th February, 1973. He was promoted to the post of Assistant Engineer on 25th April, 1981 and transferred to Pratapgarh Division, and thereafter to several other places till he superannuated from service on 30th September, 2008.

4. Financial irregularities allegedly causing a pecuniary loss to the tune of Rs.13,23,964/- to the State exchequer, having been noticed, a proposal for initiating disciplinary proceedings was mooted by the Rural Engineering Department and sanctioned by the Minister in-charge of Rural Engineering Department, Government of Uttar Pradesh on 7th January, 2011. A charge-sheet dated 27th June, 2011 was accordingly issued to the respondent and Chief Engineer (WB) was nominated as Enquiry Officer to conduct an enquiry into the charges. Aggrieved, the respondent filed Civil Miscellaneous Writ Petition No.19485 of 2012 before the High Court of Judicature at Allahabad. The principal contention urged in support of that Writ Petition was that in the absence of a valid sanction from the Governor under 351-A of the Civil Services Regulations, 1975 framed under Article 309 of the Constitution of India, the disciplinary action proposed against the respondent was legally impermissible. That

contention found favour with a Division Bench of the High Court of Allahabad, who, as noticed earlier, has allowed the Writ Petition and quashed the disciplinary proceedings including the charge-sheet served upon the respondent. The High Court has taken the view that Article 166 of the Constitution of India relied upon by the State in support of the sanction issued by the Minister in-charge of Department of Rural Engineering, Government of Uttar Pradesh, and Article 309 of the Constitution of India operate in distinctly different fields. The High Court declared that if Service Regulations framed under Article 309 of the Constitution of India require sanction of the Governor before initiating the departmental proceedings against a retired employee any such sanction must be granted by the Governor himself and not by the Minister in-charge of the department concerned. The High Court observed that in terms of U.P. Rules of Business, 1975 only such business can be dealt with by the Minister as is allocated to him under the said Rules. There was, according to the High Court, nothing to suggest that the power to sanction disciplinary proceedings against a retired government servant had been allocated to the Minister to be disposed of by general or special directions of the Minister. The sanction granted by the Minister for initiating departmental proceedings against the respondent was, in that view, held to be insufficient to maintain such proceedings. The sum total of the reasoning given by the High Court is contained in the following passage extracted from the impugned judgment:

"We are of the considered opinion that the provisions of Article 309 of the Constitution of India operate in a separate field vis-a-vis the conduct of government business under Article 166 of the Constitution of India. They are not overlapping. Therefore, if under the service rules framed under Article 309 of the Constitution of India namely the Civil Services Regulations, 1975, it has been provided that sanction of the Governor would be necessary before initiation of the departmental proceedings with the service of the charge-sheet upon the retired employee then such sanction has to be that of the Governor and not of the minister with reference to the UP Secretariat Instructions 1982 framed under the Rules of Business, 1975. We may also record that the UP Secretariat Instructions 1982, Chapter VII only provide that all business allocated to a department under the Rules of Business, 1975 is to be disposed of by or under the General or special directions of the minister in-charge (Reference Business Regulations 3). It is, therefore, clear that only such business as allocated to the department under the Rules of Business, 1975 can be disposed of under the general or special directions of the minister in-charge. Nothing has been demonstrated before us to lead us to accept that the power to sanction the departmental proceedings in respect of a retired government servant has been allocated as a business to be disposed of under the general or special directions of the minister concerned under the Business Regulations. We have, therefore, no hesitation to hold that the sanction of the minister referable to the Business Regulations in the facts of the case will not amount to the sanction of the Governor as contemplated by Regulation 351-A of the Civil Services Regulations, 1975."

5. The present appeal, as noticed earlier, assails the correctness of the view taken by the High Court. The legal position on the subject is, in my opinion, fairly settled by the decisions of

this Court to which I shall presently refer, but, before I do so I may gainfully extract Regulation 351A of the Civil Service Regulations, 1975 which reads as under:

"351-A. The Governor reserves to himself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from the pension of the whole or part of any pecuniary loss caused to Government, if the pensioner is found in departmental or judicial proceedings to have been guilty of grave misconduct, or to have caused. Pecuniary loss to government by misconduct or Negligence, during his service, including service rendered on re-employment after retirement:

Provided that-

(a) such departmental proceedings, if not instituted while the officer was on duty either before retirement or during re-employment-

(i) shall not be instituted save with the sanction of the Governor,

(ii) shall be in respect of an event which took place not more than four years before the institution of such proceedings, and

(iii) shall be conducted by such authority and in such place or places as the Governor may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made "

6. I may at this stage also refer to Article 163 of the Constitution of India, which, inter alia, postulates that the Governor is bound to act on the aid and advise of Council of Ministers except in so far as he is by or under the Constitution required to exercise his functions or any of them in his discretion:

"163. Council of Ministers to aid and advise Governor

(1) There shall be a council of Ministers with the chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this constitution required to exercise his functions or any of them in his discretion

(2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion

(3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court"

7. Reference may also be made to Article 166 of the Constitution of India which deals with conduct of Government business and inter alia provides that all executive action of the State shall be expressed to be taken in the name of Governor. It reads:

"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"

8. One of the earliest decisions of this Court that interpreted Article 163(1) was delivered in *Shamsher Singh v. State of Punjab and Anr'*. This Court in that case recognised two broad principles while interpreting Article 163 (supra). Firstly, this Court declared that except functions required by the Constitution to be exercised by the Governor in his discretion the Governor acts on the aid and advice of Council of Ministers. Secondly, this Court declared that the functions vested in the Governor whether executive, legislative or quasi-judicial in nature and whether vested by the Constitution or by statute can be delegated under the Rules of Business unless a contrary intention is clearly discernible from any constitutional or statutory provision. This Court observed:

"48. The President as well as the Governor is the constitutional or formal head. The President as well as the Governor exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers, save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion. Wherever the Constitution requires the satisfaction of the President or the Governor for the exercise by the President or the Governor of any power or function, the satisfaction required by the Constitution is not the personal satisfaction of the President or Governor but the satisfaction of the President or Governor in the constitutional sense in the Cabinet system of Government, that is, satisfaction of his Council of Ministers on whose aid and advice the President or the Governor generally exercises all his powers and functions. The decision of any Minister or officer under Rules of Business made under any of these

two Articles 77(3) and 166(3) is the decision of the President or the Governor respectively. These articles did not provide for any delegation. Therefore, the decision of a Minister or officer under the Rules of Business is the decision of the President or the Governor."

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57. For the foregoing reasons we hold that the President or the Governor acts on the aid and advice of the Council of Ministers with the Prime Minister at the head in the case of the Union and the Chief Minister at the head in the case of State in all matters which vests in the Executive whether those functions are executive or legislative in character. Neither the President nor the Governor is to exercise the executive functions personally "

(emphasis supplied)

9. The question then is whether the power to initiate disciplinary proceedings against a Government servant whether in service or retired is an executive function for the Government to exercise. My answer is in the affirmative. The power to direct an enquiry into any misconduct is doubtless an executive function which can be exercised by the Government unless there are any limitations imposed by any constitutional or statutory provisions which there are none in the case at hand. If that be so as it indeed is, the Governor is competent in terms of Article 166(3) to allocate such functions to be discharged and such powers being exercised by Ministers by framing rules of business. That is so especially when the Constitution does not require the Governor to exercise the function of sanctioning a disciplinary enquiry against a Government servant by himself instead of being left to the Minister under the rules that the Governor can frame. The Governor has, in the case at hand, framed Business of Uttar Pradesh (Allocation) Rules, 1975. Rule 2 of the said Rules reads:

"2(1) The business of the Government shall be transacted in the sections or departments of the Uttar Pradesh Secretariat as may be specified by general or special orders of Governor, issued from time to time, in that behalf. Provided that until further orders, the orders relating to allocation in force immediately before the commencement of these rules; shall continue in force.

(2) In addition to the subjects specifically allocated or deemed to be allocated to them under sub-rule (1), all Sections or departments of the Uttar Pradesh Secretariat shall have powers to issue orders under any of the following laws, in so far as the subject is allocated to them and subject to general directions of the Chief Secretary.

(a) The defence of India Act and rules for the time being in force;

(b) Any law for the time being in force for the maintenance of essential services or essential supplies.

- (c) The Essential Commodities Act for the time being in force;
- (d) Any law relating to land acquisition for the time being in force;
- (e) Sanction for prosecution for any offence relating to the subject allocated to the Section or department."

10. Reference may also be made now to Uttar Pradesh Rules of Business, 1975, framed by the Governor under Article 166(3) of the Constitution. Rule 3 of the said rules empowers the Minister in-charge of the department concerned to dispose of the business allotted to a department under U.P. (Allocation) Rules, 1975 except in cases where the rules provide otherwise. Rule 3 reads:

"Disposal of Business: Subject to the provisions of these rules in regard to consultation with other departments and submission of cases of the Chief Minister, cabinet and the Governor, all business allotted, to a department under the business of U.P. (Allocation) Rules, 1975, shall be disposed of by or under the general or special direction of the Minister-in-charge ".

11. Rules 7 and 8 of the Business Rules which provide for submission of cases to the Cabinet or the Chief Minister or the Governor or the Chief Minister and the Governor are relevant for the purpose and may be extracted:

"7. Submission of cases to the Cabinet -All cases specified in the First Schedule to these rules shall be brought before the Cabinet: Provided that no case which concerns more than one department shall, save in cases of urgency be brought before the Cabinet until all the departments concerned have been consulted.

8. Submission of cases of the Chief Minister and the Governor - All cases of the nature specified in the Second Schedule to these rules shall, before the issue of orders thereon, be submitted to the Chief Minister or to the Governor or the Chief Minister and the Governor as indicated therein."

12. Schedules 1 and 2 referred to in the above rules set out the subjects on which the matter must under the Business Rules go either to the Cabinet or to the Chief Minister or to Chief Minister and the Governor. There is, however, nothing in the said two schedules that would require the grant of sanction to initiate a disciplinary enquiry against a serving or retired Government servant to be brought up either before the Cabinet, the Chief Minister or the Governor. This would mean that sanction for the initiation of disciplinary proceedings against a retired Government servant is a matter left to be dealt with by the Minister in charge of the Department concerned. Suffice it to say that neither the Constitution nor the rules framed by the Governor under Article 166(3) require matters touching grant of sanction in cases like the present to be dealt with by the Governor and the Governor alone. The power to sanction stands validly conferred on the Minister concerned and once he takes a decision

on the subject, it is in law and in the constitutional scheme deemed to be a decision or action taken by the Governor for all intended purposes including for the purpose of Regulation 351(A) of the Civil Service Regulations, 1975.

13. In *State of M.P. v. Dr. Yashwant Trimbak*² this Court was dealing with a case where disciplinary proceedings were started against a retired Director of Institute of Animal Health and Veterinary Biological Products, before initiating the proceedings the sanction of the Council of Ministers was obtained under the M.P. Civil Service Pensions Rules, 1976. The sanction order purported to be in the name of the Governor which was conveyed under the signature of the Under Secretary to Government of Madhya Pradesh. The State Administrative Tribunal, however, quashed the departmental enquiry for want of a valid sanction under the Rules aforementioned. Relying upon the decisions of this Court in *State of Bihar v. Rani Sonabati Kumar*³ and *Municipal Corpn. of Delhi v. Birla Cotton Spinning and Weaving Mills*⁴, this Court allowed the State's appeal in the following words:

"14. The Rule in question no doubt provides that departmental proceedings if not instituted while the government servant was in service whether before his retirement or during his re-employment, shall not be instituted save with the sanction of the Governor. The question that arises for consideration is whether it requires the sanction of the Governor himself or the Council of Ministers in whose favour the Governor under the Rules of Business has allocated the matter, can also sanction. It is undisputed that under Article 166(3) of the Constitution the Governor has made rule for convenient transaction of the business of the Government and the question of sanction to prosecute in the case in hand was dealt with by the Council of Ministers in accordance with the Rules of Business. Under Article 154 of the Constitution, the executive power of the State vests in the Governor and is exercised by him either directly or through officers subordinate to him in accordance with the Constitution. The expression "executive power" is wide enough to connote the residue of the governmental function that remains after the legislative and judicial functions are taken away.

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17. The order of sanction for prosecution of a retired government servant is undoubtedly an executive action of the Government. A Governor in exercise of his powers under Article 166(3) of the Constitution may allocate all his functions to different Ministers by framing rules of business except those in which the Governor is required by the Constitution to exercise his own discretion. The expression "business of the Government of the State" in Article 166(3) of the Constitution, comprises functions which the Governor is to exercise with the aid and advice of the Council of Ministers including those which he is empowered to exercise on his subjective satisfaction and including statutory functions of the State Government. The Court has held in *Godavari Shamrao Parulekar v. State of Maharashtra*⁵ that even the functions and duties which are vested in a State Government by a statute may be allocated to Ministers by the Rules of Business framed under Article 166(3) of the Constitution. In

*State of Bihar v. Rani Sonabati Kumari*⁶ where power of issuing notification under Section 3(1) of the Bihar Land Reforms Act, 1950 have been conferred on the Governor of Bihar, this Court held:

"Section 3(1) of the Act confers the power of issuing notifications under it, not on any officer but on the State Government as such though the exercise of that power would be governed by the rules of business framed by the Governor under Article 166(3) of the Constitution."

18. Therefore, excepting the matters with respect to which the Governor is required by or under the Constitution to act in his discretion, the personal satisfaction of the Governor is not required and any function may be allocated to Ministers."

(emphasis supplied)

14. The sanction order, in the case at hand, was no doubt issued under the signature of the Under Secretary and does not purport to be in the name of the Governor but that does not make any material difference as the immunity in Article 166(2) of the Constitution will be available even to such an order, no sooner it is found on the basis of the material on record that an order had indeed been made by the competent authority under the Business Rules. In *Trimbak's case* (supra) this Court had relying upon the decision in *M.C.D. v. Birla Cotton Spinning & Weaving Mills* (supra) held:

"12. Even where an order is issued by Secretary of the Government without indicating that it is by order of the Central Government or by order of the President, this Court came to the conclusion that the immunity in Article 166(2) would be available if it appears from other material that in fact the decision had been taken by the Government. In *Municipal Corpn. of Delhi v. Birla Cotton, Spg. and Wvg. Mills*⁷ this Court came to the conclusion that in fact sanction had been given by the Central Government as required under the Act though the order did not indicate to be so."

15. The constitutional scheme and the ethos of Parliamentary/Cabinet System of Government was explained by a Constitution Bench of this Court in *PU Myllai Hlychho and Ors. v. State of Mizoram and Ors*⁸. in relation to the role of the Governor and matters relating to the exercise of powers by him upon satisfaction in the following words:

"14. Our Constitution envisages the Parliamentary or Cabinet system of Government of the British model both for the Union and the States. Under the Cabinet system of Government as embodied in our Constitution the Governor is the constitutional or formal head of the State and he exercises all his powers and functions conferred on him by or under the Constitution on the aid and advice of the Council of Ministers save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion.

15. The executive power also partakes the legislative or certain judicial actions. Wherever the Constitution requires the satisfaction of the Governor for the exercise of any power or function, the satisfaction required by the Constitution is not personal satisfaction of the Governor but the satisfaction in the constitutional sense under the Cabinet system of Government. The Governor exercises functions conferred on him by or under the Constitution with the aid and advice of the Council of Ministers and he is competent to make rules for convenient transaction of the business of the Government of the State, by allocation of business among the Ministers, under Article 166(3) of the Constitution. It is a fundamental principle of English Constitutional Law that Ministers must accept responsibility for every executive act. It may also be noticed that in regard to the executive action taken in the name of the Governor, he cannot be sued for any executive action of the State and Article 300 specifically states that Government of a State may sue or be sued in the name of the State subject to the restriction placed therein. This Court has consistently taken the view that the powers of the President and the powers of the Governor are similar to the powers of the Crown under the British Parliamentary system. We followed this principle in *Ram Jawaya Kapur vs. State of Punjab*⁹ *A. Sanjeevi Naidu vs. State of Madras*¹⁰ and *U.N.R. Rao vs. Indira Gandhi*¹¹."

16. In the light of the above pronouncements I have no hesitation in holding that:

“(i) The power to direct a disciplinary enquiry against an in-service or retired employee like the respondent is an executive function to be discharged by the State Government in exercise of the executive power of the State;

(ii) In terms of the Business of Uttar Pradesh (Allocation) Rules and the UP Rules of Business 1975, the said function stands allocated to the Ministers in-charge of the department concerned like the Department of Rural Engineering in the case at hand;

(iii) The Minister not only had the power to sanction the initiation of the disciplinary proceedings, but, he had in fact exercised that power when he said:

"Hon'ble Minister for Rural Engineering Services, Lucknow. Let the disciplinary inquiry conducted and inquiry report be submitted. Dr. Jaiveer Singh Department of Rural Engineering Services, Overseas Agro Trade and Export"

(iv) The order so issued was conveyed by the Secretary to the Government of Uttar Pradesh but even when the communication/order was not expressed in the name of the Governor the same was entitled to the immunity postulated under Article 166(2) of the Constitution.

(v) The order so made was in law and in the constitutional scheme an order passed by the

Governor of the State within the meaning of Regulations 351-A of the Regulations and was, therefore, valid in the eye of law.

17. In the result, this appeal succeeds and is hereby allowed. The order passed by the High Court is set aside and Writ Petition No.19485 of 2012 filed by the respondent dismissed with costs assessed at Rs.10,000/- (Rupees Ten Thousand Only).

JUDGMENT

V.Gopala Gowda,J.,

18. I have gone through the judgment written by the learned Chief Justice of India in the present appeal. I am however, in respectful disagreement with the opinion of the learned Chief Justice and record my reasons for the same.

19. Since the relevant facts of the case have been stated by the learned Chief Justice in his opinion, the same are not stated again for the sake of brevity.

20. The short point which arises for consideration in the instant case is whether the sanction accorded by the Minister of the concerned department in the instant case amounts to a valid sanction for the purpose of Regulation 351-A of the Civil Services Regulations, 1975.

21. The Civil Services Regulations, 1975 have been framed under Article 309 of the Constitution of India. According to Regulation 351-A of the same, prior sanction of the Governor is required to be obtained before initiation of departmental proceedings against an officer of the government who has retired.

22. The Uttar Pradesh Rules of Business, 1975 have been framed under Article 166 of the Constitution of India by the Governor of the State of Uttar Pradesh. Rule 3 of the said Rules reads as under:

"3. Disposal of Business- Subject to the provisions of these Rules in regard to consultation with other departments and submission of cases to the Chief Minister the cabinet and the Governor, all business allotted to a department under the Business of U.P. (Allocation) Rules, 1975, shall be disposed of by or under the general or special directions of the Minister in charge."

23. Before I examine the validity of the sanction accorded by the Minister in charge, it is important to examine the relevant constitutional provisions at play in the instant case.

24. Article 154 of the Constitution of India provides for the executive power of the State to be vested in the Governor and reads as under:

"154. Executive power of State.—(1) The executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution."

Article 166 of the Constitution reads as under:

"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 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 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."

(emphasis laid by this Court)

25. Article 166 of the Constitution thus, confers the power on the Governor to make rules for the convenient transaction of business of the Government of the State and for the allocation among its Ministers of the said business. All matters except those on which the Governor is required to act in exercise of his individual discretion have to be allocated to some Minister on the advice of the Chief Minister. Apart from allocating business amongst Ministers, the Governor can also make rules on the advice of the Council of Ministers for convenient transaction of the business. Thus, it becomes clear from a perusal of these provisions that the Rules of Business under Article 166 of the Constitution are framed essentially for the ease or convenience of the working of the departments of the State Government.

26. It is also a well settled principle of law that the Governor exercises executive power under Article 166 of the Constitution. In the case of *State of Gujarat v. R.A. Mehta*¹², this Court held as under:

" Under Article 154 of the Constitution, the executive powers of the State are vested in the Governor, which may be exercised by him either directly, or through officers subordinate to him, in accordance with the provisions of the Constitution. Article 161 confers upon the Governor, a large number of powers including the grant of pardon, reprieves, respites or remissions of punishment etc. Such executive power can be exercised by him, only in accordance with the aid and advice of the Council of Ministers. Article 162 states that the executive power of the State, shall extend to all

such matters, with respect to which, the legislature of the State has the power to make laws. Therefore, the said provision, widens the powers of the Governor. Article 166(3) of the Constitution, further bestows upon the Governor the power to make rules for more convenient transactions of business, of the Government of the State, and also for the purpose of allocating among the Ministers of State, such business."

(emphasis laid by this Court)

27. Article 309 of the Constitution which provides for the regulation of recruitment and conditions of service of persons serving the Union or a state is quoted hereunder :-

"309. Recruitment and conditions of service of persons serving the Union or a State.—Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

(emphasis laid by this Court)

28. In the instant case, there is no dispute regarding the fact that Regulation 351-A of the Civil Services Regulations, 1975 has been framed in exercise of power under Article 309 of the Constitution of India. It is a settled position of law that while exercising power under Article 309 of the Constitution; the Governor acts in a legislative capacity and not executive capacity. In *B.S Yadav v. State of Haryana*¹³, a Constitution Bench of this Court held as under :

"44 The proviso to Article 309 provides, in so far as material, that until the State legislature passes a law on the particular subject, it shall be competent to the Governor of the State to make rules regulating the recruitment and the conditions of service of the judicial officers of the State. The Governor thus steps in when the legislature does not act. The power, exercised by the Governor under the proviso is thus a power which the legislature is competent to exercise but has in fact not yet exercised. It partakes of the characteristics of the legislative, not executive, power. It is legislative power.

45. That the Governor possesses legislative power under our Constitution is incontrovertible and, therefore, there is nothing unique about the Governor's power under the proviso to Article 309 being in the nature of a legislative power. By Article 158, the Governor of a State is a part of the legislature of the State. And the most obvious exercise of legislative power by the Governor is the power given to him by Article 213 to promulgate Ordinances when the legislature is not in session. Under that Article, he exercises a power of the same kind which the legislature normally exercises, the power to make laws. The heading of Chapter IV of Part VI of the Constitution, in which Article 213 occurs, is significant: 'Legislative Power of the Governor'. The power of the Governor under the proviso to Article 309 to make appropriate rules is of the same kind. It is legislative power. Under Article 213, he substitutes for the legislature because the legislature is in recess. Under the proviso to Article 309, he substitutes for the legislature because the legislature has not yet exercised its power to pass an appropriate law on the subject."

(emphasis laid by this Court)

29. The distinction between the powers conferred under Articles 166(3) and 309 was discussed by a Constitution Bench of this Court in the case of *Sampat Prakash v. State of Jammu and Kashmir*¹⁴, as under:

"11 As an example, under Article 77(3), the President, and, under Article 166(3) the Governor of a State are empowered to make rules for the more convenient transaction of the business of the Government of India or the Government of the State, as the case may be, and for the allocation among Ministers of the said business. If, for the interpretation of these provisions, Section 21 of the General Clauses Act is not applied, the result would be that the rules once made by the President or a Governor would become inflexible and the allocation of the business among the Ministers would forever remain as laid down in the first rules. Clearly, the power of amending these rules from time to time to suit changing situations must be held to exist and that power can only be found in these articles by applying Section 21 of the General Clauses Act. There are other similar rule-making powers, such as the power of making service rules under Article 309 of the Constitution. That power must also be exercisable from time to time and must include within it the power to add to, amend, vary or rescind any of those rules "

(emphasis laid by this Court)

30. It becomes clear from a perusal of the constitutional provisions and case law referred to supra that the powers under Articles 166(3) and 309 of the Constitution operate in completely different fields. It would thus, be absurd if the Rules made in exercise of power under Article 166 of the Constitution, are used as a benchmark while exercising power under Article 309 of the Constitution. In the instant case, the Uttar Pradesh Business Transaction Rules, 1975, confer power on a minister in charge to exercise power in the name of Governor. The same however, cannot be used to justify the action of the minister when the

exercise of power under the regulations framed under Article 309 of the Constitution is under scrutiny, as is sought to be done in the instant case.

31. Specifically on the issue of Regulation 351-A of the Civil Services Regulations, in the case of *State of U.P. v. Harihar Bhole Nath*¹⁵, where the order of sanction against the respondent therein who was a clerk in a Government department had been ordered by the Secretary in the name of the Governor, it was held by this Court as under:

"...The proceedings for recovery of the amount from a Government servant can be passed in the event he is held to be guilty of grave misconduct or caused pecuniary loss to Government by his misconduct or negligence during his service. Some procedural safeguards, however, have been laid down in terms of proviso appended thereto, including the requirement to obtain an order of sanction of the Governor. Such order of sanction, however, would not be necessary if the departmental proceedings have been initiated while the delinquent was on duty. Proviso appended to Regulation 351-A merely controls the main proceedings. The same would apply in the exigencies of the situation envisaged therein, namely, even the proceedings were initiated after retirement and nor prior thereto."

(emphasis laid by this Court)

Further, in *State of U.P. v. Krishna Pandey*¹⁶, after referring to Regulation 351-A, this Court held as under:

"A reading thereof clearly indicates that the Governor reserves to himself the power and right to withhold or withdraw pension or a part thereof, whether permanently or for a specified period. Equally, he has right to order recovery from pension of the whole or part of any pecuniary loss caused to Government when it is found in a departmental or judicial proceedings that the delinquent was guilty of grave misconduct or has caused pecuniary loss to the Government by his misconduct or negligence while he was continuing in service including the period of his re-employment after retirement and the same shall not be instituted without the sanction of the Governor. It should be in respect of an event which may have taken place not more than 4 years before the institution of such proceedings."

(emphasis laid by this Court)

It is amply clear from a perusal of the abovementioned case law that sanction of the Governor is required before initiation of proceedings against a retired employee in terms of Regulation 351-A of the Civil Services Regulations, 1975. Undoubtedly, the said power under Regulation 351-A can be delegated by the Governor. However, the delegation accorded under the Business Transaction Rules, 1975, in respect of the power conferred under Article 166 of the Constitution cannot be used as a substitute in the present case. The case of *State of M.P. v. Yashwant Trimbak*¹⁷ on which strong reliance has been placed on by Mr. Gaurav Bhatia, the learned Additional Advocate General appearing on behalf of the

appellants, is also misplaced, as in that case the essential question was authentication of the action of the Governor under Article 166(3) of the Constitution. It was held in that case was that once the Governor delegates his power under Article 166(3) of the Constitution, then it is no longer his personal satisfaction that is required in those matters. It was held specifically as under:

" In this view of the matter when the Governor has framed rules of business under Article 166(3) of the Constitution allocating his functions and it is the Council of Ministers which has taken the decision to sanction prosecution of the respondent, we see no legal infirmity in the same. The Tribunal erred in law in coming to the conclusion that the sanction required under the rule is a sanction of the Governor."

(emphasis laid by this Court)

The said case cannot be used to suggest that once power is delegated under Article 166(3) by the Governor, then that automatically takes away his powers under other Articles of the Constitution as well. The powers under Articles 166(3) and 309 of the Constitution operate in separate fields, and one cannot be used to substitute the other in the absence of express conferment of power by the Governor.

32. Further reliance has been placed on a seven-judge Bench of this Court in the case of *Shamsher Singh v. State of Punjab*¹⁸, wherein it was held that the Governor exercises the powers vested in him on the aid and advice of the council of ministers. But the said judgment also has no bearing on the facts of the case at hand. The fact situation in the *Shamsher Singh* (supra) case dealt with the executive power of the Governor, as the case related to the appointment of persons other than district judges to the Judicial Services of the state which is supposed to be made by the Governor under Article 234 of the Constitution. It was held in that case as under:

33. The executive power is generally described as the residue which does not fall within the legislative or judicial power. But executive power may also partake of legislative or judicial actions. All powers and functions of the President except his legislative powers as for example in Article 123, viz., ordinance making power and all powers and functions of the Governor except his legislative power as for example in Article 213 being ordinance making powers are executive powers of the Union vested in the President under Article 53(1) in one case and are executive powers of the State vested in the Governor under Article 154(1) in the other case. Clause (2) or Clause (3) of Article 77 is not limited in its operation to the executive action of the Government of India under Clause (1) of Article 77. Similarly, Clause (2) or Clause (3) of Article 166 is not limited in its operation to the executive action of the Government of the State under Clause (1) of Article 166. The expression "Business of the Government of India" in Clause (3) of Article 77, and the expression "Business of the Government of the State" in Clause (3) of Article 166 includes all executive business.

30. In all cases in which the President or the Governor exercises his functions conferred on him by or under the Constitution with the aid and advice of his Council

of Ministers he does so by making rules for convenient transaction of the business of the Government of India or the Government of the State respectively or by allocation among his Ministers of the said business, in accordance with Article 77(3) and 166(3) respectively. Wherever the Constitution requires the satisfaction of President or the Governor for the exercise of any power or function by the President or the Governor, as the case may be, as for example in Articles 123, 213, 311(2) proviso (c), 317, 352(1), 356 and 360 the satisfaction required by the Constitution is not the personal satisfaction of the President or of the Governor but is the satisfaction of the President or of the Governor in the Constitutional sense under the Cabinet system of Government. The reasons are these. It is the satisfaction of the Council of Ministers on whose aid and advice the President or the Governor generally exercises all his powers and functions. Neither Article 77(3) nor Article 166(3) provides for any delegation of power. Both Articles 77(3) and 166(3) provide that the President under Article 77(3) and the Governor under Article 166(3) shall make rules for the more convenient transactions of the business of the Government and the allocation of business among the ministers of the said business. The rules of business and the allocation among the Ministers of the said business all indicate that the decision of any Minister or officer under the rules of business make under these two Articles viz., Article 77(3) in the case of the President and Article 166(3) in the case of the Governor of the State is the decision of the President or the Governor respectively."

Further, in reference to Article 311 of the Constitution, it was held as under:

"The theory that only the President or the Governor is personally to exercise pleasure of dismissing or removing a public servant is repelled by express words in Article 311 that no person who is a member of the Civil service or holds a civil post under the Union or a State shall be dismissed or removed by authority subordinate to that by which he was appointed. The words "dismissed or removed by an authority subordinate to that by which he was appointed" indicate that the pleasure of the President or the Governor is exercised by such officers on whom the President or the Governor confers or delegates power."

(emphasis laid by this Court)

34. Similarly, in the case of *State of Bihar v. Rani Sonabati Kumar*¹⁹, the issue was:

"whether it was an order made by the Governor or by someone duly authorised by him in that behalf within Art. 154(1). Even assuming that the order did not originate from the Governor personally, it avails the State nothing because the Governor remains responsible for the action of his subordinates taken in his name."

Thus, while the fact that the powers may be delegated is not in dispute, what is essential to establish is that the delegation has in fact taken place. Further, it is also essential to establish that what has been delegated is the relevant power under the relevant rule for the purpose.

Delegation of power for one purpose cannot be understood to mean a delegation of power for all other purposes as well.

35. In the case of *Godavari Shamrao Parulekar v. State of Maharashtra*²⁰, a Constitution Bench of this Court was contemplating the power of delegation under the Defence of India Rules, 1962. While deciding the power of allocation of the Governor, it was held as under:

"Allocation of business under Art. 166(2) of the Constitution is not made with reference to particular laws which may be in force at the time the allocation is made; it is made with reference to the three lists of the Seventh Schedule to the Constitution, for the executive power of the center and the State together extends to matters with respect to which Parliament and the Legislature of a State may make laws. Therefore, when allocation of business is made it is made with reference to the three Lists in the Seventh Schedule and thus the allocation in the Rules of Business provides for all contingencies which may arise for the exercise of the executive power. Such allocation may be made even in advance of legislation made by Parliament to be available whenever Parliament makes legislation conferring power on a State Government with respect to matters in List I of the Seventh Schedule. It was therefore in our opinion not necessary that there should have been an allocation made by the Governor under Art. 166(3) of the power to detain under the Defence of India Ordinance, Act and Rules after they were passed; it will be enough if the allocation of the subject to which the Defence of India Ordinance, Act and Rules refer has been made with reference to the three Lists in the Seven Schedule and if such allocation already exists, it may be taken advantage of if and when laws are passed. Preventive detention is provided for in List I, item 9, for reasons connected with defence, foreign affairs and the security of India, and in item 3 of List III for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community. The allocation of business made under Art. 166 is in pursuance of these entries in the three List in the Seventh Schedule and would be available to be used whenever any law relating to these entries is made and power is conferred on the State Government to act under that law. The contention of the appellants that fresh allocation should have been made under Art. 166(3) by the Governor after the passing of the Defence of India Ordinance, Act and Rules must therefore fail."

(emphasis laid by this Court)

From a perusal of the above extract, it becomes clear that even in the aforesaid case, this Court was concerned only with the executive exercise of power under Article 166 (3) of the Constitution. Thus, these cases have no bearing on the fact situation in the instant case, as they dealt with executive exercise of power by the Governor. The question in the case on hand is the statutory exercise of power under Regulation 351-A of the Civil Services Regulations, framed under Article 309 of the Constitution of India.

36. In the absence of any evidence on record to show that the Governor had delegated his power to the concerned Minister under Regulation 351-A of the Civil Services Regulations, 1975 to accord sanction, the sanction granted by the Minister in charge cannot be said to be a valid sanction and sustained in law. The same is liable to be set aside and accordingly is set aside. The appeal is accordingly, dismissed

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ORDER

37. Hon'ble the Chief Justice pronounced the judgment on behalf of himself, allowing the appeal in terms of the signed reportable judgment. Hon'ble Mr. Justice V.Gopala Gowda pronounced separate judgment, disagreeing with the views expressed by Hon'ble the Chief Justice and dismissed the appeal.

38. In view of the difference of opinion, the Registry is directed to place the matter before Hon'ble the Chief Justice, so that an appropriate Bench could be constituted for hearing the matter.

¹(1974) 2 SCC 0831

²(1996) 2 SCC 0305

³(1961) 1 SCR 0728

⁴(1968) 3 SCR 0251

⁵AIR 1964 SC 1128

⁶AIR 1961 SC 0221

⁷AIR 1968 SC 1232

⁸(2005) 2 SCC 0092

⁹AIR 1955 SC 0549

¹⁰(1970) 1 SCC 0443

¹¹(1971) 2 SCC 0063