ALLAHABAD HIGH COURT

Har Sharan Varma

Vs.

Chandra Bhan Gupta

Civil Misc. Writ No. 2261 of 1961

(S.S. Dhavan J.)

15.02.1961

ORDER

S.S. Dhavan J.

1. This is a petition by Sri Har Sharan Verma under Article 226 of the Constitution praying for the issue of a writ in the nature of quo warranto to Sri Chandra Bhan Gupta, Chief Minister, Government of Uttar Pradesh, Lucknow, to show by what authority he claims to hold the office of Chief Minister and to be a member of the Legislative Council. The petitioner asks for a declaration that Mr. Chandra Bhan Gupta's appointment as Chief Minister and nomination to the Legislative Council are invalid and unconstitutional; and he also wants this Court to declare the office of the Chief Minister and the seat held by Mr. Chandra Bhan Gupta vacant, and issue an injunction against Mr. Gupta restraining him from functioning as Chief Minister or as a nominated member of the U.P. Council. The respondents to this petition are Sri Chandra Bhan Gupta and Dr. B. Ramkrishna Rao, Governor of Uttar Pradesh.

2. In his affidavit supporting the petition Sri Har Sharan Varma states that he is a rate-payer and a voter of the Lucknow City Constituency for the Uttar Pradesh Legislative Assembly. The allegations on which this petition is founded are these; Mr. Chandra Bhan Gupta was appointed Chief Minister of Uttar Pradesh by the Governor on 7th December, 1960. A gazette notification, which according to the petitioner, announced this appointment was published in the Gazette Extraordinary dated December 7, 1960. Mr. Gupta was not a member of the Uttar Pradesh State Legislature at the time of his appointment. The petitioner alleges that Mr. Gupta contested the election to the Legislative Assembly twice - once from the Lucknow city constituency in 1957 and again from Maudaha (Hamirpur) Rural consitituency in 1958 - but was defeated in each election. But on 23-1-1961 the Governor of Uttar Pradesh nominated him a member of the Legislative Council in a vacancy caused by the resignation of a city member, Dr. B.B. Bhatia of Lucknow, which however, was not gazetted until the 28th of January 1961.

3. The petitioner alleges that Mr. Chandra Bhan Gupta "got himself nominated as a member of the U.P. Legislative Council under Article 171 (5) of the Constitution although he could not claim to have any special knowledge in respect of literature, science, art, co-operative movement or social service." According to the petitioner, clause (5) applies only to those persons who do not seek elections but have special knowledge in certain subjects and whom the Governor nominates in the public interest as members of the Legislature. But this clause "cannot be availed of as a back-door for the nomination of persons who lost popular election more than once." The petitioner has referred to a statement alleged to have been made by Mr. Chandra Bhan Gupta to the press on 24th January 1961, that "his nomination was a stop-gap arrangement". This, according to the petitioner, was a clear admission that Mr. Chandra Bhan Gupta's nomination was made for reasons of political expediency and not on merits and "was, therefore, a fraud on the Constitution." He contends that Mr. Chandra Bhan Gupta's nomination as member of the council and appointment as Chief Minister are illegal, and he has invoked the jurisdiction of this court to invalidate both. He says that, as a voter of the U.P. Legislative Assembly he is interested in the matter and has a right to move this court.

4. I have heard the petitioner as well as his counsel at considerable length. He addressed the court in person on a previous day and then made a request for adjournment to enable him to engage counsel. This was granted and the petition was re-heard today.

5. The petitioner's first argument is that clause (1) of Article 164 of the Constitution prohibits the appointment of any person not a member of the Legislature as Chief Minister. The relevant portion of this clause runs thus "The Chief Minister shall be appointed by the Governor and the other ministers shall be appointed by the Governor on the advice of the Chief Minister and the ministers shall hold office during the pleasure of the Governor." The petitioner contends that this clause makes a distinction between the Chief Minister and other ministers, and therefore, the word "minister" in this Article does not apply to the Chief Minister. It follows that he cannot take advantage of clause (4). He conceded that, under clause (4), a minister other than the Chief Minister may hold office without being a member of the Legislature for not more than six months at the expiry of which period he shall cease to be a minister; but he argued that word "minister" in this clause does not include the Chief Minister. I am unable to agree. Article 164 is divided into five clauses. The first deals with the appointment of the Chief Minister and other ministers; the second enjoins the collective responsibility of the council of ministers to the Legislative Assembly of the State; the third makes it incumbent upon the Governor to administer the oath of office and of secrecy to every minister before he enters upon his office; the fourth provides that a minister who is not a member of the Legislature for six consecutive months shall vacate his office; and the fifth confers upon the Legislature the power to fix the salaries and allowances of ministers by law. If the word "Minister" throughout this Article was not intended to include the Chief Minister, it would follow that the Chief Minister is exempt from the Constitutional duty to take the oath of office, and shall not cease to be a minister if after his

appointment his election to the Legislature is set aside and he is not re-elected within six months of being unseated. Moreover, the salary and allowances of the Chief Minister, unlike those of his colleagues, will not be under the control of the Legislature of the State as in the case of his other colleagues. The Court cannot accept an interpretation which will lead to such absurd results. It is clear that the word 'minister' in clauses second, third, fourth and fifth of Article 164 includes the Chief Minister. Under clause five (sic) a Chief Minister like any other minister can hold office for six months without being a member of the Legislature.

6. I shall now try to summaries the other argument of the petitioner on this part of his case which he advanced at the initial stage. He frankly confessed that he was "a plain citizen not well-versed in the intricacies of the law," and it is not surprising that his submissions of law were inextricably mixed up with political arguments. I have reproduced below in my own words a paraphrase of his legal arguments which was read out to him and which he said correctly represented his case. He contended that it was clear that clause (1) of Article 164 makes a distinction between the appointment of the Chief Minister and the other ministers at least in one respect; the Chief Minister shall be appointed by the Governor and the other ministers by him on the advice of the Chief Minister. This shows that the Chief Minister must be appointed before the other ministers for there must be a Chief Minister to advice the Governor before the others can be appointed. But how will the Governor appoint the Chief Minister and whom will he select? He cannot pick a mere nobody from the street and make him the Chief Minister. He must select him according to the cardinal principle of parliamentary government that the Chief Minister must be a man enjoying the confidence of the majority of the elected members of the Legislature. Under clause (2), he and his council of ministers shall be collectively responsible to the Legislative Assembly of the State; it follows that there must be an elected member of the Legislature, for how can the Legislature have or even purport to have confidence in a person who is not even its member, and how can such a person be responsible to the Legislative Assembly of the State while remaining outside it? For these reasons, the petitioner contended, the selection of a person who is not a member of the legislature as Chief Minister is impliedly prohibited by Article 164, and also conflicts with the basic principle of parliamentary government.

7. The petitioner's counsel at a later stage relied on the conventions of the British Constitution, and pointed out that the Supreme Court had held that "Our Constitution, though federal in its structure, is modelled on the British Parliamentary system," and that

> "in the Indian Constitution therefore,, we have the same system of Parliamentary executive as in England, and the of Council of Ministers consisting, as it does, of the members of the Legislature is like the British cabinet,, a hyphen which joins, a buckle which fastens the legislative part of the State to the Executive Part. 'The cabinet enjoying as it does a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions."

Ram Jawaya Kapur v. State of Punjab[1],

8. Counsel quoted the following extract from Halsbury's Laws of England:

> "Status of Prime Minister: "By constitutional usage the Prime Minister is invariably a member either of the House of Commons or of the House of Lords;"

[1](1955) 2 SCR 225: AIR 1955 SC 549

and also a foot note on the same page which runs thus:

> "The person selected is preferably a member of the House of Commons as being more in touch with his colleagues and with the House of Commons itself. Thus in 1923 Mr. Baldwin was preferred to Lord Curzon. The last member of the House of Lords to be Prime Minister was Lord Salisbury (1895-1902)" Halsbury's Laws of England, Third Edition, Volume 7, p.347.

9. The petitioner argued that the Governor violated the conventions of the British Constitution which have been held by the Supreme Court to be the foundation of parliamentary government in India as established by our own Constitution, and the appointment of Mr. Chandra Bhan Gupta when he was not a member of the legislature was a gross violation of principles which are implied in clauses (1) and (2) of Article 164. He contended that this Court has the power under Article 226 of the Constitution to issue a writ of quo warranto asking him to show cause why his appointment as Chief Minister should not be invalidated as unconstitutional. This in brief is a paraphrase in my own words of the combined arguments of the petitioner and his counsel, which were based partly on the implications of Article 164 and other provisions of the Constitution and partly on British conventions.

10. I shall first consider whether any basic principle of parliamentary government was violated when the first respondent was appointed Chief Minister, and if so, whether this Court can interfere in the exercise of its powers under Article 226. I agree that the principle that the Chief Minister of a State or the Prime Minister of the Union must have the support of the majority of the members of the Legislative Assembly or the House of the People (as the case may be) is the foundation of parliamentary democracy as established in India by our Constitution. But it is not necessary for me to consider whether this political doctrine can be enforced by the Courts, as it is not the petitioner's case that Mr. Chandra Bhan Gupta does not enjoy the confidence of the majority of the members of the Legislative Assembly of Uttar Pradesh. This vital allegation is absent from the petitioner's affidavit. On the other hand, this Court can take judicial notice of certain facts. According to press reports - the petitioner has relied on some of them in his

affidavit - Mr. Chandra Bhan Gupta was unanimously elected by the members of the legislature who belong to the Congress party which commands an overwhelming majority in the Legislative Assembly. The Court can also take judicial notice of a recent press report that after his appointment, Sri Chandra Bhan Gupta obtained an overwhelming vote of confidence in the Uttar Pradesh Legislative Assembly after the debate which followed the address of the Governor. The facts stated in these reports were admitted by the petitioner. It is therefore obvious that Mr. Chandra Bhan Gupta was selected by a majority of the members of the Legislative Assembly as their leader and the basic principle that the Chief Minister must have the confidence of the legislature has not been violated by his appointment as Chief Minister.

11. The next question is whether the Governor can appoint a person Chief Minister who, though commanding the confidence of the legislature, is not a member of it at the time of his appointment. It is true that in 1922 a convention was established in Britain that the Prime Minister should be a member of the House of Commons. I may agree that it is desirable that a similar convention should be established in this country that the Prime Minister of the Union or the Chief Minister of a State, must be an elected member of the Lok Sabha or the Legislative Assembly, as the case may be. But the issue in this case is whether our own Constitution absolutely prohibits even a "stop-gap arrangement" (to quote the petitioner's own words) like the appointment of the first respondent. More precisely can a person who has been elected by the majority of the members of the Legislative Assembly as their party leader be appointed Chief Minister before he acquires membership of the legislature? I think clause (4) of Article 164 does not prohibit such a "stop-gap" arrangement. It says that a minister who for any period of six consecutive months is not a member of the State Legislature of the State shall at the expiration of that period cease to be a minister. This implies that any minister can hold office for six months without being a member of the legislature. I have indicated that the word "minister" in this clause includes the Chief Minister. It follows that the appointment as Chief Minister of a person who is not a member of the Legislative Assembly but commands its support, pending his election to that House within six months, is not prohibited by the Constitution nor does it violate the basic principle of parliamentary government that the Chief or the Prime Minister must have the confidence of the legislature. Whether such a "stop-gap" appointment is politically desirable or proper is not a matter for this Court to consider.

12. It appears to me, therefore, that the appointment of the first respondent as Chief Minister was not illegal.

13. I shall now consider the petitioner's challenge to the first respondent's membership of the Legislative Council. He argued that the nomination of Mr. Chandra Bhan Gupta as member of the Legislative Council is invalid because he was not qualified under clause (5) of Article 171, and also because his nomination is an abuse of the Governor's power under clause (e) as it was made only for the purpose of providing him with the membership of the Legislature and

circumventing the provisions of clause (4) of Article 164.

14. The petitioner's argument raises two questions. The first is whether the first respondent was qualified under clause (5) to be nominated a member of the Legislative Council, and the second whether his nomination was made in violation of the purpose and spirit of that clause. These two questions are distinct and must be considered separately.

15. The petitioner argued that the first respondent does not possess any of the qualifications specified in clause (5) of Article 171 and his nomination is invalid in law. Under clause (3) of that Article the Governor has the power to fill up a certain proportion of the membership of the council by nomination in accordance with the provisions of clause (5). That clause provides:

> "(5) The members to be nominated by the Governor under sub-clause (e) of clause (3) shall consist of persons having special knowledge or practical experience in respect of such matters as the following namely:Literature, science, art, co-operative movement and social service."

The petitioner has alleged in his affidavit that Mr. Gupta cannot claim to have any special knowledge in respect of "literature, science, or co-operative movement, or social service." But this argument is based on a misreading of the clause. It does not require that the person to be nominated must have special knowledge in these spheres. The words are "special knowledge or practical experience". The petitioner conceded that the two phrases "special knowledge" and "practical experience" have different meanings. But he argued vehemently that the first respondent has neither special knowledge nor practical experience of literature, science, art, co-operative movement or social service.

16. In considering this argument the Court took judicial notice of certain facts which were admitted as correct by the petitioner. Prior to his defeat in the last general election, the first respondent was a member of the Legislative Assembly from the Lucknow City Constituency. He was also a Minister of the Government of Uttar Pradesh uptil the last General Election. Before this too, he was a member of the provincial Legislative Assembly under the old constitution and one of the Parliamentary Secretaries of the Government. These facts were verified from the Civil Lists of the relevant period and the petitioner admitted them. The Court also took judicial notice of the fact that recently the first respondent was elected President of the Uttar Pradesh Congress Committee which is a Committee of the political party in office. This fact too was admitted by the petitioner. The first respondent may, therefore, be described as a politician, using that word in the constitutional sense.

17. In the face of these admitted facts, this Court cannot accept the argument that a person who, according to the petitioner's own case, has taken an active part in the politics and the governance of the State for several years, does not have any practical experience in matters of social service. On the contrary the presumption must be that he has. I am, therefore, unable to hold that any

prima facie case has been made out that on 23rd January, 1961 the first respondent was not qualified in law to be nominated to the Legislative Council.

18. The next question is whether Mr. Gupta's nomination in the circumstances alleged by the petitioner was not for a purpose intended by the makers of the Constitution and, therefore, amounts to an abuse of the power of the Governor under clause (5) of Article 171 and if so, whether this Court can interfere.

19. Clauses (3)(e) and (5) of Article 171 of the Constitution empower the Governor to select one-sixth of the members of the Council by nomination. They make an inroad into the principle of election which is the foundation of the system of parliamentary government established by the Constitution. The purpose and scope of the Governor's power must be ascertained in the light of the other provisions of the Constitution which has to be read and interpreted as a whole.

20. The Preamble of the Constitution says that the people of India were resolved to establish a "Sovereign Democratic Republic". Articles 75 and 164 of the Constitution between them provide for governments responsible to the legislature both at the Centre and in the States. This is made clear by a provision in such article enjoining that a minister who is not a member of the legislature for six months shall cease to be a minister. The makers of the Constitution provided for a situation where a minister may lose a seat in the legislature after appointment - as the result of an election petition for example - or may not be a member when he is appointed. These articles require that a minister must become a member within six months or vacate his office.
The principle underlying these provisions cannot be reconciled with the presence in the Council of Ministers of persons who are nominated to the legislature by the Governor. Every member of the Council of Ministers, which is collectively responsible to the legislature, is expected under the Constitution to enter the legislature by election and not by the backdoor of nomination. The appointment of a minister who was not elected but owes his membership in the legislature to nomination by the Governor is incompatible with the basic principles on which our democratic parliamentary Constitution is founded. It appears to me, therefore, that while inserting clauses (3) and (5) the founders of the Constitution did not intend that the power of nomination would be invoked to provide membership of the legislature for a minister, much less a Chief Minister, who is the head of a cabinet collectively responsible to the legislature.

21. The purpose of these two clauses is not difficult to ascertain. In every State there are persons who have achieved distinction in various fields and the benefit of whose experience and advice may be invaluable to the legislature of the State, but who have neither the time nor the inclination to contest elections and who should not in the public interest, fritter away their energies in fighting political elections. For example, the President may nominate an eminent nuclear scientist as a member to enable the legislature to benefit by his views before passing any laws regulating the production of nuclear energy. Numerous other illustrations could be given of persons who

have special knowledge or practical experience of literature, science, art, and social service. Clause (5) of Article 171 was apparently intended to make the membership of the legislature available in the public interest to such persons so that they may not contest elections. It was not enacted to enable a minister who has been defeated in an election to enter the legislature by the backdoor of nomination, or to enable the political party in office whose strength is derived from the verdict of the electorate, to increase its numerical strength in the legislature without submitting to this verdict.

22. In the present case, the petitioner alleges that Mr. C.B. Gupta contested two elections and lost both of them. The petitioner alleged on oath that the first respondent himself published a statement that his nomination was only a "stop-gap arrangement" in other words, to cover him with the status of a member of the Legislature to qualify him for the post of Chief Minister pending his election to the Legislative Assembly which may take more than six months. On the faith of this allegation I must hold that the petitioner has made out a prima facie case that the nomination of the first respondent to the Legislative Council was for political reasons and not for any purpose intended by the makers of the Constitution.

23. The next question is whether this Court can interfere. The petitioner contended that it can and should. But I am of the opinion that this Court cannot interfere in this case. The nomination of the first respondent has not been shown to be illegal. If, for example, the Governor had nominated a person who was not a citizen of India, this Court would have issued a writ of quo warranto on the ground that that person was not qualified to be a member of the legislature. But in the present case the petitioner has not shown that Mr. Chandra Bhan Gupta was disqualified or that the Governor had no power to nominate him. He merely has made out a prima facie case that the power of nomination was made for a political purpose and therefore improper. This is not enough, in my opinion, to empower the Court to interfere and issue notice to the first respondent.

24. The petitioner, who argued his case with restraint and dignity, said he was unable to appreciate this distinction between legal and political impropriety which as "a layman not versed in the intricacies of the law" he found a little "too subtle" for him. He based his case, to quote his exact words, "on the simple fact that there has been a gross abuse of the power of nomination conferred by the Constitution and I have approached this Court as the guardian of the Constitution." He appealed to the Court not to sit by and watch with indifference "a flagrant violation of one of the basic principles of the Constitution," as he called it. He contended that as guardian of the Constitution the Court has a duty to interfere whenever there is an abuse of a power or usurpation of a right conferred by the Constitution, and warned the Court that if this improper exercise of a constitutional power goes unchallenged it will encourage others and the future of the Constitution will be endangered.

25. This is not the first time that a citizen has come to this Court with a prayer to interfere without realizing that the law Courts are not the proper forum for obtaining any and every kind of

political redress. It is of general importance that the Court should explain to the petitioner, in simple language, the constitutional limits of its powers and the reasons for these limits.

26. The Court's jurisdiction does not extend to every kind of improper exercise of power conferred by the Constitution. Impropriety may be either legal or political in nature. In the former case the Court will interfere, in the latter it cannot.

27. The constitution of parliamentary democracy has been compared to a floating iceberg, as it consists of parts which are written and visible and others which are unwritten and invisible but cannot be ignored without imperiling the democratic process itself. The written text of the Constitution which distributes the powers of government between its different branches and regulates the manner of its exercise is the visible part of the Constitution. If the provisions of the Constitution are violated, the Courts can interfere. If for example, government pass a law infringing the fundamental rights of a citizen in violation of Article 13, or the State imposes a tax which it is not authorised to do, or the Governor nominates as member of the Council a person who is not a citizen of India, the remedy lies in the law courts.

28. On the other hand, the socio-political philosophy on which the Constitution is founded (and which in our Constitution is partly incorporated in the preamble and the Directive Principles of State Policy), its political conventions, the unwritten code of political conduct which imposes a tradition of compromise, fairness, and tolerance and bans the use of unfair means for the realization of political ends and requires from every political party loyalty to the spirit of democracy which transcends political strife these are some of the invisible parts of the Constitution; invisible because they are not to be found in the text of the Constitution. These are no less important than the written articles of a Constitution, and no parliamentary democracy can have a healthy growth unless they are observed. But it is not the function of the Courts to enforce their observance.

29. If, for example, in a federal democracy the party which is in power at the centre organizes a campaign of civil disobedience in one of the States where a rival political party is in power with the declared object of ousting the rival from office or if the leaders of the parties in opposition in any State announce their intention to resort to civil disobedience to gain political ends, or if the political party which forms the government in any State uses its power and patronage for perpetuating its permanent existence in office and making it impossible for the opposition parties ever to secure a verdict from the electorate in their favor and thus establishing a monolithic one-party government in that State, or if a minister who was defeated in a general election is nominated as member of the legislature in defiance of the verdict of the electorate - in each of these cases the unwritten code of parlimentary democracy is defied, though no express provision of the Constitution violated. But the Courts in such a situation have no power to interfere. Any violation of the unwritten code is a political wrong for the redress of which the remedy lies not in the law courts but in an appeal to the electorate.

30. The petitioner has appealed to this Court to do its duty as the guardian of the Constitution. But the Court is not the custodian of the conventions of the Constitution or of the unwritten code of political conduct to be observed by the political parties. Their proper observance is the responsibility of the electorate. In fact, the ultimate guarantee or the successful working of the Constitution of a parliamentary democracy is the vigilance of an intelligent electorate. Parliamentary democracy has been called government by compromise, but a vigilant public opinion alone can impose a tradition of compromise, tolerance and fairness in political life which every political party shall respect. The Judiciary cannot assume political responsibilities of the electorate is indifferent (sic). As I observed in *Moinuddin v. State of U.P*[2]*.,*

> "A Constitution bereft of the allegiance of the people is like a body after the vital spark of life has left it. From a living organism it becomes a corpse though all its parts are intact. If this ever happens to our Constitution no safeguards can prevent" 'a political party' "from carrying out its programme, any more than a foreign army can be prevented from invading India by the Municipal by-laws of Amritsar."

[2] AIR 1960 All 482 (498)

The point to note is that political excesses cannot be rectified by the law Courts unless there has been a violation of the law of the Constitution. In such cases it is for the electorate to assert itself.

31. For these reasons, I am of the opinion that this petition raises political issues which are outside the jurisdiction of this Court under Article 226.

32. The petitioner finally appealed to this Court to express its disapproval of what has been done as a deterrent for the future. In my opinion, it would be neither proper nor desirable for this court to indulge in criticism of any act done in a sphere which is wholly foreign to its own. The petitioner himself has quoted the first respondent's statement to the Press that his nomination to the Legislative Council was "a stop-gap arrangement" pending his election to the Legislative Assembly. This would indicate that the purpose of the nomination is not to avoid the verdict of the electorate. It is not possible for the Court to assess the political forces and compulsions which necessitated any political party to act. Any comment by this Court will be out of place, but as the petitioner appeared to be sincere in his appeals to this Court, I think it is desirable that he should know the reasons for the Court's attitude. The Executive and the Judiciary are independent of each other within their respective spheres. Each is conversant with the peculiar circumstances within its own sphere and has special knowledge of complicated questions which is denied to the other. Each must have the fullest discretion in the discharge of its duties. The acts of the Executive are not open to review by the Judiciary as long as there is no violation of the law or the Constitution. It follows that the Court should not ordinarily comment on any act of the Executive unless the act is such that it is likely to promote disrespect for the law. This Court must extend the same courtesy to the other branches of government, which it receives from them and refrain

from making uncalled for comments on the wisdom of the acts of the ministers of government.

33. The petition has made out no prima facie case for issue of notice to the respondents and is rejected.

34. The second respondent is the Governor of the State. He is not subject to the jurisdiction of this Court. But the petition is directed against the first respondent who is within jurisdiction and if he were held not entitled to be a member of the Council because his nomination was illegal, the Court would issue a writ of quo warranto against him. I have, therefore, decided this petition on its merits.
Petition dismissed.