KERALA HIGH COURT

K.K. Aboo

Vs.

Union of India

O.P. No. 924 of 1965 and C.M.P. No. 2591 of 1965

(M. Madhavan Nair, J.)

20.04.1965

JUDGMENT

M. Madhavan Nair, J.

1. Consequent on the resignation of the ministry that caused a breakdown of the constitutional Government in the State of Kerala, the President dissolved the Legislative Assembly and assumed the executive powers of the State to himself by a Proclamation dated September 10, 1964, which was approved by the Parliament by a resolution on September 30, 1964. A general election was held, thereafter, in February/March 1965, for the purpose of constituting a new Legislative Assembly in the State; and the names of members elected for the various Constituencies were notified under Section 73 of the Representation of the People Act, 1951, in the Kerala Gazette, Extraordinary, No. 41 dated March 17, 1965, 133 members were declared elected, inclusive of the petitioner returned by Kuthuparamba Constituency; but no party was able to secure a working majority of seats in the Legislature. The Party position among the elected representatives was thus :

Communist Party of India (Marxist or Left)	40
Indian National Congress	36
Kerala Congress	23
Samyuktha Socialist Party	13
Muslim League	6
Communist Party of India (Right)	4
Independents (of different affiliations)	11

The new Legislature had never been summoned, under Article 174 of the Constitution, to meet and therefore the members elected could not be sworn in. On March 16, 1965, the Governor held consultations with the leaders of the various parties among the elected members, and soon thereafter submitted his report to the President on the possibility of the formation of a

constitutional government in the State. On March 24, 1965, the Vice-President, who was then discharging the functions of the President in the latter's absence out of India, revoked the Proclamation of September 10, 1964, and issued afresh Proclamation (Ext. P 4) under Article 356 assuming to himself all the functions of the Government of Kerala and dissolving the newly constituted Legislative Assembly of the State; and a consequential order (Ext. P5) delegating subject to his superintendence, direction and control, all the functions of the Government of the State to the Governor of Kerala. This Original Petition is for a declaration that Exts. P4 and P5 are illegal and therefore non est and for reliefs which are consequential on such declaration. The challenge of legality of Ext. P4 is mainly on two grounds : unconstitutionally and mala fides.

2. The contentions in regard to the constitutionality may be summarized thus :

(i) Under Article 172 of the Constitution the term of a Legislative Assembly commences with its first meeting; and under Article 174(1) it is incumbent on the President or the Governor to summon the Assembly to hold its meeting. A dissolution of the Legislative Assembly can be ordered "only after the date fixed for its first meeting". The dissolution of the newly elected Legislature, even before its first meeting ordered by the Proclamation, Ext. P4, is premature, illegal and void; and the Legislative Assembly "should therefore be deemed to be in existence" and declared so.

(ii) After the assumption of the Governor's powers by the President by the Proclamation of September 10, 1964, the Governor could function only as a representative of the President, and could not act under Articles 163 and 164 that were suspended by the President. His deliberations with the leaders of various parties were therefore not in accordance with law, and his report to the President illegal and unconstitutional. "The Proclamations issued on the basis of a satisfaction derived from this illegal report is also unconstitutional and is therefore null and void".

(iii) Articles 16S and 164, in their application to the State of Kerala. having been suspended by the Proclamation of September 10, 1964 that remained in force till March 24, 1965 (the date of Ext. P4), the President has frustrated the formation of a constitutional government in the State, and a state of affairs brought about by the President's act cannot be the foundation for a Proclamation under Article 356 of the Constitution by the President himself.

(iv) "A Proclamation under Article 356 can be issued only when two conditions are satisfied : (1) A Government of a State, the functions and powers of which have not been assumed by the President under Article 356 is in existence; and (2) A Legislative Assembly which has power to function and has in fact started functioning under Articles 172, 174 and 176 of the Constitution is also in existence. These preconditions were not in force on the date of Ext. P4. Ext. P4 is violative of Article 356 of the Constitution itself and therefore cannot be enforced by the respondents".

(v) Under Article 356(1)(a) the President assumes only the powers vested in or exercisable by the Governor, The latter has no power to dissolve the Legislative

Assembly before its first meeting. "The President's act dissolving the Legislative Assembly (even before its first meeting) is therefore non est and cannot be acted upon by the respondents".

3. The contention that the President's Proclamation was mala fide is elaborated in the affidavit of the petitioner thus :

"Undue haste has been displayed by the respondents in the matter of the action they have ultimately taken .... I firmly and *bona fide* believe that the action taken by the Government of India and by the respondents is not in good faith, and I would even say the same is tainted by mala fides. During the election campaign most of the big leaders of the Indian National Congress who toured the State had openly stated that if the Indian National Congress does not get a majority, the President's rule would be continued. ..... Of the 40 official candidates of the Communist Left Party returned to the Legislature, 29 were detenus. The Hon'ble the Home Minister made repeated statements after the election results were announced that these detenus M.L. As. will not be released and he also did not say anything with reference to facilities being provided for them to attend the Assembly. ..... It should have been possible for the respondents to give a trial to one at least of the several party leaders who volunteered to form a Government. However with a pro-judged and predetermined mind and coloured by political prejudices, the Government of India have taken the decision that the newly elected Legislative Assembly should not function at all. .... There has been several instances where unstable minority Governments have been formed."

4. Along with the O.P., the petitioner has also moved C.M.P. No. 2591 of 1965 for interim relief to "restrain the 1st respondent from proceeding any further or doing any further act in pursuance of Ext. P4 proclamation and Ext. P5 order, including bringing up of any resolution before the House of Parliament with a view to get approved the said proclamation and order". The grounds for such interim reliefs, as stated in his affidavit, are :

"It is likely that proclamations will be immediately placed before Parliament. On 24-3-1965 the matter was raised in Parliament by some of the members, and the Hon'ble Speaker is said to have stated that the constitutionality of any action of the Government could be challenged only in Courts. This was made in reply to Members' allegations that the action of the Government was unconstitutional with reference to various provisions of the Constitution. It is therefore necessary that further discussions about this notification and the passing of this notification by Parliament be held over till this Writ Petition is disposed of..... My contention is that the notification that is being placed for Parliament's approval is non est and therefore should not be considered at all. There should be a stay of all further proceedings in pursuance of the notification and order, Exts. P4 and P5."

5. I am not impressed by any of the contentions raised by the petitioner, even prima facie, to

issue a rule nisi on this motion.

(i) Neither Article 172 nor Article 174 prescribes that a dissolution of a State Legislature can only be after commencement of its term or after the date fixed for its first meeting. Section 73 of the Representation of the People Act, 1951, provides that, upon the issue of a notification by the Election Commission in the Official Gazette of the names of the members elected for the various constituencies, the Legislative Assembly "shall be deemed to be duly constituted", though it begins to function only after it has been summoned to meet under Article 174 of the Constitution. In my view, once the Assembly is constituted, it becomes capable of dissolution. What has come to be is capable of being put to an end. The contention that the dissolution can only be after its first meeting does not appear to me sound. It has no support in any of the provisions of the Constitution relied on by counsel.

(ii)

Nor do I see any force in the contention that, under Article 174(1), which has not been suspended, it is imperative that the Legislature be summoned to hold a meeting. A Legislature can be summoned to meet only if it is in case at the time. A dissolved Legislature is incapable of being summoned to meet under Article 174 of the Constitution. The question therefore is not whether the Legislature should or could have been summoned to meet, but whether its dissolution ordered by the President, as per Ext. P4, is constitutionally valid.

(ii) The petitioner admits in his affidavit,

"The Governor of the State thereafter invited the various party leaders whose representatives were elected to the Assembly for consultations with him separately at the Raj Bhavan, Trivandrum, on the [forenoon of 16-3-1965. ... I understand, that all these leaders except the representative of the Indian National Congress (hereinafter called the I.N.C.) unit in the State told the Governor that they are willing to form a Government and face the Assembly and take confidence from the Legislative Assembly when it meets. The leader of the I.N.C. party is said to have told the Governor that his party is not prepared to form a Ministry or support a Ministry of another party and his party will function as a responsible opposition in the Assembly. The Kerala Congress and the Muslim League sponsored a coalition Government with the members of both participating in it. The Communist Left Party sponsored its own Government, and alternatively promised to support a minority ministry of the S.S.P. Shri E.M.S. Namboodiripad on behalf of the Communist Left Party had given this in writing to the Governor. The S.S.P. had told the Governor that it would support a ministry formed by the largest single group returned to the Legislature and in the alternative a non-Congress Ministry formed by any of the non-Congress Parties. On 21-3-1965, in pursuance of a fresh decision arrived at, it was decided that the previous decision that the S.S.P. should neither enter a coalition or form a minority ministry of its own be in part revised and that the preparedness of the

party to form a minority ministry may be announced. That decision was conveyed to the Governor in a telegram of even date with post copy separately sent."

It is clear from the above averments that the Governor had made a thorough enquiry as to the possibility of formation of a constitutional Government in the State before he submitted his report to the President as to the situation concerned. The contention that the Governor's deliberations with the leaders of the various parties were illegal and violative of the provisions of the Constitution appears to me fanciful. There is no impediment to the Governor attempting to ascertain the possibility of a constitutional Government in the State before he submitted his report contemplated in Article 356 of the Constitution. In such an attempt the Governor does not exercise any function under Article 163 or 164. The attempt was not to set up a constitutional Government but only to assess the possibility of one such Government being set up by the Legislature constituted by the recent general election. I do not see any illegality, unconstitutionality or even impropriety in the Governor's acts in the above regard. The characterization of his deliberations with the party leaders as unlawful and his report to the President as illegal and unconstitutional deserves only to be repelled summarily.

(iii) The situation in which a constitutional Government became impossible in the State at the relevant time arose not on account of the operation of the President's Proclamation issued on September 10, 1964, but only as a result of the party-position among the members elected for the various constituencies at the general election held in February 1965. None of the parties was able to secure a working majority of seats in the Legislative Assembly. Even the parties who expressed willingness to form a coalition Government had not a joint majority in the Legislature. The averment that such a situation was brought about by the President's Proclamation of 1964 has no merit in fact.

(iv) The contention that a Proclamation under Article 356 can be issued only when the concerned State is not under the President's rule and has a sitting' Legislative Assembly has no legal support. Article 350 empowers the President, whenever he is satisfied that a constitutional Government is not possible in the State, to issue a Proclamation thereunder so as to assume the Government of the State to himself and assimilate its Legislative powers to the Parliament. That Article of the Constitution does not prescribe any condition for the exercise of powers thereunder by the President, except the satisfaction of the President "that a situation has arisen in which the government of the State cannot be carried on in accordance, with the provisions of the Constitution." The facts and circumstances, averred by the petitioner in his affidavit show clearly that the President had ample material for such satisfaction before he promulgated the impugned Proclamation.

(v) The contention that the Governor has no power to dissolve the Legislative Assembly before it has been summoned to meet under Article 174(1) and that the President, under Article 356(1)(a), can assume only the powers of the Governor and therefore cannot dissolve the Assembly before it has been summoned for its first meeting does not impress

me. Article 356(1)(b) empowers the President, whenever he is satisfied of a constitutional breakdown in the State, to issue a Proclamation declaring, inter alia, "that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament." That necessarily implies a power to dissolve the State Legislature. No resort therefore need be had by the President to the provisions of Article 356(1)(a) read with Article 172 or Article 174 to dissolve the State Legislative Assembly.' The power to dissolve the State Legislature is implicit in Clause (1)(b) of Article 356 itself.

6. Though grounds of personal incapacity on the part of the Vice-President, who was at the relevant time discharging the functions of the President, and of circumstantial incapacity on account of want of prior approval of the Parliament, which was then in session, are taken in the affidavit, counsel did not rightly in my opinion-press them into service at the hearing of the motion.

7. The allegations of mala fides in the promulgation of the impugned Proclamation, Ext. P4, do not seem to bear weight. Mala fides is attributed not to the Vice-President, who issued the Proclamation, but to the respondents, who are the Union of India, the State of Kerala and the Secretary to the Kerala Legislative Assembly. The preamble to the impugned Proclamation and the facts narrated by the petitioner show that, in issuing the Proclamation, the Vice-President has relied largely on the report of the Governor of Kerala assessing the political situation that arose from the relative party strengths in the newly elected Legislature. No mala fides are attributed to the Governor in making his report. The enquiries that were admittedly made by him appear to have been so comprehensive that the petitioner could not challenge their *bona fides* or fullness. Even the leader of a party that secured only 6 seats out of the 133 had been invited and consulted. There is nothing to show that the electioneering speeches - even if they contained the prophesy that the petitioner states, on which there is no proof here-had worked any bias in the President when he issued the Proclamation in question. The legality of the detention of certain members, who have been returned to the Assembly at the general election, is not a question here. The question is only of the legality of the imposition of the President's rule in the State. Even if all the detenus were set free the strength of their party would not be enlarged beyond the 40 seats secured by it and therefore the political situation concerned would not be materially affected. The averment that the Proclamation was the result of "a pre-judged and pre-deter-mined mind and colored by political prejudices of the Government of India" is not shown to have any basis in facts. A mere allegation of bias or prejudice on the part of "big leaders"-the character and conduct of leaders can only be such as secure a large volume of public confidence in them - or with a responsible Government, answerable to and requiring the approval of the Parliament for the very action concerned, does not carry conviction to any extent. The contention of mala fides in the promulgation of the impugned Proclamation does not therefore impress me at all. All the grounds of challenge leveled against the President's Proclamation of March 24, 1965, fail and with them must fall the O.P. itself,

8. The averment that the Speaker has told the Parliament that the constitutionality of the action taken by the President should not be discussed by the Parliament but only in the Courts does not appeal to me. The Proclamation by the very provisions of Article 856, requires the approval of the Parliament to be operative beyond a period of two months of its issue. When the matter comes up before it, it is open to the Parliament to withhold approval. If the Parliament, in its supreme wisdom, is not impressed with the constitutionality, the legality or even the propriety of the Proclamation it will not give its approval to it. It requires no exposition by this Court for such action on the part of the Parliament. The necessity for an urgent relief from this Court urged by counsel on behalf of the petitioner is fanciful only.

9. I am glad to note that the petitioner has anticipated a doubt on the maintainability of this motion behind the back of the President who promulgated the impugned Proclamation. He has averred in the affidavit :

> "It may be that the acts of the President and the Governor and as against them are not justiciable. But when these acts are being enforced by the Union or State Governments and are relied upon for authority, the question of constitutionality can be examined, and if unconstitutional, appropriate writs can be issued against the Governments .... I respectfully submit that neither the President nor the Governor is entitled to any immunity in regard writ jurisdiction ....

The acts of the Governor and of the President in this case are null and void and are ultra vires and violative of the provisions of the Constitution and this Hon'ble Court alone can so declare. However they are not made parties to this petition as the same is unnecessary, and as I am concerned with their acts in so far they are being enforced by the respondents .... I have not made the President, the Governor and the Speaker of the Lok Sabha parties to this Writ Petition. The orders impugned are in effect and in substance those passed by the Government of India. Particularly in view of Article 71(74?) it has to be legitimately concluded that the President as the constitutional head has announced but the decision of the Government of India". I am not too sure that in issuing a Proclamation under Article 356 and assuming the Government of a State in a situation of constitutional breakdown the President acts as the representative of the Government of India, and not in his capacity as the constitutional head of India. Article 356, and the impugned Proclamation issued under it, provide for the assumption of the functions of the Government of the State "to himself" by the President. The President who is an integral part of the Parliament (Vide Article 79) may not be the executive head but the constitutional head of India. If that be the correct view, a challenge of his Proclamation behind his back cannot be heard in a Court of law. Perhaps the inevitable consequence of such a view may be to hold that it is not open to the Courts to question the validity of a Proclamation under Article 356. Even otherwise, if the promulgation of a Proclamation under Article 356 is a matter of personal satisfaction of the President who is not personally amenable to the Court's jurisdiction, the same result would follow. The only sanctions against capricious act on the part of the President would then be what

the Constitution itself has provided : namely, an impeachment under Article 61 or the non-approval of his action under clause 3 of Article 358. However, the question need not be decided here, as this O.P. can be and is being disposed of on the merits of its contents.

10. The petitioner has prayed also for a writ of Mandamus

> "to direct the respondents to treat the petitioner as a Member of the Kerala Legislative Assembly from the-date of his election thereto. . . , up till the Legislative Assembly is legally and lawfully dissolved .... and also (to) direct the respondents to pay the petitioner's salary etc. in terms of the Payment of Salaries and Allowances Act, 1951, as amended by the Kerala Amendment Acts".

The material averments in his affidavit in support of that prayer read thus :

> "The President's act dissolving the Legislative-Assembly is therefore non est and cannot be acted upon by the Respondents. If this is so declared I will immediately get, with retrospective effect, all the benefits that are legitimately due to me under Article 194 of the Constitution and by the provisions of the Payment of Salaries and Allowances Act. There is no meaning in my making a demand and so I have not made any demand. Making of a demand under the. circumstances will be ineffective and a waste of time".

As put by the petitioner, his claim is to depend on a declaration-the main prayer in the O.P. that the President's dissolution of the Legislative Assembly was void and that therefore the Assembly continues to exist in law. If so, my refusal to entertain his-prayer for such declaration must negative his claim for Mandamus as well. Also, the petitioner's own averment that he has not made any demand for payment of his salary and allowances, demand and refusal, express or implicit, is normally a condition precedent to the grant of a Mandamus is fatal to his claim.

11. In the result, the motion is unacceptable, and no rule nisi is warranted on it. I am afraid that even the issuance of a rule nisi on a motion with the averment "As things stand now, it is an illegal and unconstitutional Government that is functioning now in the Kerala State" would be highly embarrassing to the administration and prejudicial to public interests, and therefore should not be done unless the petitioner makes a prima facie case in his motion, which he has not. The O.P. is dismissed in limine. The interlocutory application, C.M.P. No. 2591 of 1965, is also dismissed in consequence.
Petition dismissed.