PATNA HIGH COURT

Ram Nagina Singh

Vs

S.V. Sohni

Civil Writ Jur. Cases Nos. 1317, 1366 and 1390 of 1974

(S. Sarwar Ali and Nagendra Prasad Singh, JJ.)

28.11.1974

JUDGEMENT

Sarwar Ali, J.

1. These three writ applications have been heard together and will be governed by a common judgment. In these writ applications prayers have been made for issue of a writ in the nature of quo warranto as also prohibition. During the course of argument, however, it was rightly conceded that the writ of prohibition will not be attracted. That is so because no judicial or quasi-judicial order or proceeding is challenged in these writ applications. The substantial prayer, therefore, is with respect to issue of a writ in the nature of quo warranto as against respondent No. 1. Substantially therefore, the appointment of respondent No. 1 as Lokayukta is under challenge.

2. The law making provision for the appointment, and laying down function, of the Lokayukta was for the first time made by promulgation of Bihar Lokayukta Ordinance, 1973 being Ordinance No. 3 of 1973. The Ordinance was signed on 12-1-1973 by the then Governor and published in the Bihar Gazette on 18-1- 1973. No action was taken in pursuance of the Ordinance. On 14-3-1973 a bill in terms of Ordinance was introduced in the Bihar Legislative Council. On 8-4-1973 the first Ordinance lapsed. Hence necessity of the Second Ordinance being Bihar Lokayukta (Second) Ordinance, 1973 (the 'Second Ordinance'). The Governor signed this Ordinance on 6-5-1973 and the same was published in the Bihar Gazette on 11-5-1973. Section 3 of the Ordinance relates to the appointment of Lokayukta. In the exercise of purported power under the provisions of this Ordinance respondent No. 1 was appointed as the Lokayukta. The aforesaid appointment is under challenge for various reasons which shall be indicated hereinafter. The Ordinance envisages the appointment by a warrant under the hand and seal of the Governor. During the course of argument the warrant was produced, which is stated 26-5-1973.

3. The Second Ordinance lapsed on the mid-night of 26th August, 1973. The lapse was followed by promulgation of a Third Ordinance, called Bihar Lokayukta (Third) Ordinance (the 'Third Ordinance'). The Ordinance was signed by the Governor on 5-10-1973 and published in the Bihar Gazette on 8-10-1973. This was followed by the Bihar Lokayukta Act, 1973, Bihar Act 6

of 1974 (the 'Act').

4. In order to appreciate the contentions raised it would be necessary to refer to some of the provisions of the Ordinances and the Act. It may be stated at the outset that the parties to these writ applications accepted that there is no substantial differences between the various Ordinances and the Act except in relation to section 1 (sic) of the Third Ordinance and Section 23, which was not in the First and Second Ordinances, but was incorporated in the Third Ordinance. This section (Section 23), in the same language, finds place as Section 23 in the Act (except that in the Act there is reference to the third Ordinance).

5. Lokayukta as defined in Clause (2) (e) of the Ordinance means a person appointed as the Lokayukta of Bihar, under Section 3. Section 3, which has an important bearing on the case may be quoted in extenso:

> "Appointment of Lokayukta.- (1) For the purpose of conducting investigations in accordance with the provisions of this Ordinance the Governor shall by warrant under his hand and seal appoint a person to be known as the Lokayukta of Bihar:
> Provided that the Lokayukta shall be appointed after consultation with the Chief Justice of the Patna High Court and the leader of the Opposition in the State Legislative Assembly or if there be no such leader a person elected in this behalf by the Members of the Opposition in the State Legislative Assembly in such manner as the Speaker may direct.
> (2) The person appointed as the Lokayukta shall, before entering upon his office, make and subscribe, before the Governor, or some person appointed in that behalf by the Governor, an oath or affirmation in the form set out for the purpose in the First Schedule."

Section 4 states that the Lokayukta is not to hold any other office. Section 5 deals with the term of office and other conditions of service of Lokayukta. This too is an important section which will come up for consideration. Sub- sections (1) and (2) may be quoted:

> "(1) A person appointed as the Lokayukta shall hold office for a term of five years from the date on which he enters upon his office:
> Provided that-
> (a) the Lokayukta may by writing under his hand addressed to the Governor resign his office;
> (b) the Lokayukta may be removed from office in the manner specified in Section 6.
> (2) On ceasing to hold office, the Lokayukta shall be ineligible for further employment (whether as the Lokayukta or in any other capacity) under the State Government, or for any employment under or in, any such local authority, Corporation, Government Company or Society as is referred to in sub-clause (iii) of clause (j) of Section 2."

Section 6 deals with removal of Lokayukta. This too may also be reproduced.

> "Removal of Lokayukta.- (1) Subject to the provision of Article 311 of the Constitution,

the Lokayukta may be removed from his office by the Governor on the ground of misbehaviour or incapacity and on no other ground; provided that inquiry required to be held under clause (2) of the said Article before such removal shall be held by a person appointed by the Governor, being a person who is or has been the Chief justice of a High Court or a Judge of the Supreme Court of India.

(2) A person appointed under the proviso to sub-section (1) shall submit the report of his inquiry to the Governor who shall, as soon as may be, cause it to be laid before each House of the State Legislature.

(3) Notwithstanding anything contained in sub-section (1) the Governor shall not remove the Lokayukta unless an address by each House of the State Legislature supported by a majority of the total membership of that House and majority of not less than two-thirds of the members of that House present and voting has been presented to the Governor in the same session for such removal."

The other provisions which relate to the powers, jurisdiction, and the manner in which the Lokayukta has to exercise his jurisdiction and other incidental matters, need not be quoted here. But it would be necessary to reproduce Section 23. This is as follows :-

"23. Repeal and saving: (1) The Bihar Lokayukta (Second) Ordinance, 1973 (Bihar Ordinance No. 54 of 1973) is hereby repealed.

(2) Notwithstanding such repeal anything done or any action taken in exercise of the 'powers conferred by or under the said Ordinance, shall be deemed to have been done or taken in the exercise of powers conferred by or under this Act as if this Act were in force on the day on which such action was done or taken."

(Extracted from the Third Ordinance).

6. The main ground of challenge, as will be later clarified and fully enunciated, is that the Lokayukta has been appointed by the Governor without the aid and advice of the Council of Ministers, which is not legally and constitutionally permissible. The learned counsel for the petitioners during the course of argument made it clear that they relied on the statements made in the affidavit of the State for the purpose of showing that their contention that the Governor had not taken the aid and advice of the Council of Ministers has been substantiated. It may be stated at this stage that a show cause and an affidavit was filed on behalf of the State on 24-9-1974. Both were sworn by the Under-Secretary to the Government of Bihar in the Cabinet Secretariat and Co-ordination Department, Sri P.P. Sen. The show cause states that facts as disclosed from the available records were being laid bare, leaving it to the counsel appearing for the State to render such assistance as was required in the light of submissions made on behalf of the petitioners and respondent No. 1. The State also did not claim any privilege. This was a reasonable attitude to take. On 7-11-1974 an application was filed on behalf of the State of Bihar stating that since after the filing of the aforesaid show cause, on fuller consideration of all aspects of the matters, the State of Bihar had been advised as mentioned in paragraph 4 of this application. A prayer was made in this application that submissions made in sub-paragraphs 1 and 2 of paragraph No. 4 of the petition which relate to the maintainability of the writ petitions

should be disposed of as preliminary issue. When the case was taken up for hearing, the counsel for the parties agreed that instead of the point raised being decided as preliminary issue, the whole case may be heard and the various objections that were sought to be raised may not be heard as preliminary issue. This is the course that we have adopted in this case.

7. It may further be stated at this stage that so far as respondent No. 1 is concerned, he filed a separate show cause. In that show cause various legal contentions have been raised and it has been averred that, in fact, and in law the appointment of respondent No. 1 as Lokayukta of Bihar by the Governor of Bihar was on the advice of Council of Ministers. I am not mentioning here the detailed contentions which have been mentioned in the show cause itself in support of this stand and other alternative contentions.

8. I have indicated that the petitioners rely mainly on what has been stated in the counter-affidavit filed on behalf of the State, in order to substantiate their contentions on the factual aspect of the case. It would, therefore be pertinent to briefly indicate here as to what has been stated in the affidavit dated 24-9-1974 on behalf of respondent No. 5 (State of Bihar). In paragraph 1 of the counter-affidavit it has been stated that the deponent was deposing to the facts stated in the affidavit with reference to the records available in the Department of Personnel and Cabinet Secretariat and Co-ordination Department. In Paragraph 4, it is stated that after the promulgation of the Third Ordinance there were three sittings of the Council of Ministers in the month of May, 1973. There is no record in the Government Secretariat in the Department of Personnel or in the Cabinet or Co-ordination Department of any proceeding of any proposal for the appointment of Lokayukta or for selection of any person to be appointed to the office or of any approval of the Council of Ministers for creation to the post of Lokayukta. From the noting in the file in the Department of Personnel on 7-8-1973, it appears that Sri J. Pramanik, Under-Secretary of the Department of Personnel wrote:

> "A question has been raised as to whether in view of such (Section 3 of the bill) a provision, Governor may act on his own in fixing his choice on a person after consultation with the prescribed authorities or he should act in this matter on the advice of Chief Minister and Council of Ministers."

It was suggested that the advice of the Advocate General may be obtained. It appears from the same file that on 13-8-1973 during the course of discussion it was observed (it is not clear who made the observation) that the appointment of S.V. Sohoni (respondent No. 1) against the office of Lokayukta had not been made with the approval of the Council of Ministers. A memorandum containing the proposal regarding the repromulgation of the Ordinance and formal approval of the appointment of respondent No. 1 was placed before the Council of Ministers. The Council of Ministers, however, adjourned the relevant item in the agenda of that meeting after some consideration. On 20-8-1974 a supplementary memorandum was prepared for consideration of the Cabinet meeting to be held on 23-8-1974. The memorandum was accompanied by the opinion of the legal advisors, namely, the Advocate General and the Law Department. The advice of the Law Department was that the post of Lokayukta with all its functions and power will cease to be operative after the Ordinance expired. On 23-8-1973 after some consideration the Council of Ministers again postponed their decision in respect of the aforesaid item in the agenda. On 30-8-1973 the Chief Secretary submitted a note mentioning that the Chief Minister

had required him to send certain papers which the Chief Minister may require for his discussion with the Prime Minister or the President. This note is Annexure C to the State affidavit. Before sending the note of the Chief Secretary to the Chief Minister, who was in Delhi at that time, Sri B.K. Dubey, Secretary to the Chief Minister, sent his note dated 30-8-1973 to the Chief Secretary pointing out to him the notes under submission to the Chief Minister required modification. A copy of the note of Sri B.K. Dubey is Annexure D, to the affidavit. Neither the note of the Chief Secretary nor the note of Sri Dubey appear to have been sent to the Chief Minister at Delhi. On 4-9-1973 the Council of Ministers decided that the memorandum regarding repromulgation of the Ordinance and the appointment of the Lokayukta may be withdrawn and in effect the Ordinance was allowed to lapse. On 11-9-1973 the Council of Ministers approved the proposals for repromulgation of the Ordinance and approved the contents of the draft Ordinance. The Third Ordinance was accordingly promulgated in accordance with the decision of the Council of Ministers. In paragraph No. 7 it has been stated as follows:

> "That there is no record on the files of the Department of Personnel or of the Cabinet Secretariat and Co-ordination Department indicating that at any time any proposal for the appointment of any person as Lokayukta was at all made or any decision taken in accordance with the requirement of Rule 27 (b) of the Third Schedule of the Rules of Executive Business."

9. It may be stated here that Annexure 1 to the petition filed by the State dated 7-11-1974 is a note dated 21-5-1973. This incorporates the note of the Chief Secretary and the note of the then Chief Minister, Sri Kedar Pandey. In this note the Chief Secretary stated that the procedure for the appointment of Lokayukta is mentioned in Section 3 of the Lokayukta Ordinance. The Governor has to consult the Chief Justice and the leader of the opposition and thereafter the Governor has to appoint the Lokayukta. But the Governor, it was pointed out, could do so only after obtaining the opinion of the State Government. The note of the then Chief Minister to the Governor when translated is as follows :-

> "In this connection I have already deliberated with you. In my opinion, it is not necessary to obtain the opinion of the Council of Ministers in this connection."

10. On the basis of these materials it was contended on behalf of the petitioners that the appointment of respondent No. 1 has been made without taking the aid and advice of the Council of Ministers and that the documents on the record lead to an irresistible conclusion that the necessity of taking the aid and advice of Council of Ministers was not thought to be a necessary requirement on the interpretation put by the Chief Minister. Learned counsel appearing on behalf of the State pointed out that it would not be necessary to deal with the factual aspect of the matter as according to his contention the jurisdiction of the Court was barred, so far as consideration of the factual aspect, whether or not any advice was given by the Council of Ministers, was concerned. Learned counsel for respondent No. 1, the learned Additional Solicitor General, who was appearing in one writ application, and Sri Basudeba Prasad, who was appearing in two of the writ applications, contended that the materials on the record do not lead to the conclusion suggested on behalf of the petitioners. According to the learned Additional Solicitor General it was at best a case where no firm conclusion could be arrived at on the materials on the record. Both of them, however, tried to interpret the various notes, other materials on the record, and the relevant circumstances and contended that either the Governor would be deemed in law to have

acted on the aid and advice of the Council of Ministers, or that he, in his discretion, exercisable by virtue of provisions of Article 163 (2) of the Constitution, did not think that it was a matter where aid and advice was required as contemplated under Article 163 (1) of the Constitution.

11. Let me at this stage indicate the various points, briefly, which have been urged on behalf of petitioners in support of their contention that they are entitled to the writ as prayed for. The contentions raised are as follows:

(1) That, in fact, no aid and advice was obtained from the council of ministers by the Governor in making appointment of respondent No. 1. The aid and advice of the Council of Ministers was a necessary pre-requisite. The said aid and advice not having been obtained, the appointment of respondent No. 1, made on 26-5-1973, was not valid in law.

(2) That proviso to the Section 3 (1) of the Second Ordinance requires that the Lokayukta should be appointed after consultation with the Chief Justice of the Patna High Court and the leader of Opposition in the State Legislative Assembly. This requirement was not fulfilled before making the appointment.

(3) The rules of Executive Business have not been followed in this case. The violation of the aforesaid rules makes the appointment of respondent No. 1 illegal and of no effect in law.

(4) That the appointment of respondent No. 1 was a temporary appointment and it lapsed with the expiry of the Second Ordinance.

(5) The appointment of respondent No. 1 being illegal, neither Clause 23 (2) of the Third Ordinance nor Section 23 (2) of the Act could give life to an invalid appointment. The result was that respondent No. 1 could not be said to be validly holding the office of Lokayukta on the date the writ applications were filed.

12. The main contentions of the learned Solicitor General, who appeared on behalf of the State of Bihar, may also be summarized. They are:

(1) The challenge to the validity of the appointment of respondent No. 1 is on the ground that the Governor acted on his own without obtaining aid and advice of the Council of Ministers. Article 163 (3) of the Constitution prevents the Court from enquiring whether any advice was tendered by the Ministers or not. In this situation, the very basis or foundation of the case of the petitioners disappears.

(2) Alternatively, the question whether a matter falls to be decided by the Governor in his discretion, as envisaged in Article 163 of the Constitution, is a matter which has to be decided by the Governor himself. His decision in the matter is final. The validity of the decision of the Governor cannot be challenged on the ground that he ought not to have acted in his discretion. If in the instant case the Governor did decide that in making appointment of Lokayukta he could and should act in his discretion, the matter was not justiciable.

(3) Section 23 of the Third Ordinance and Section 23 of the Act were validating provisions. The effect of these provisions was that irrespective of any infirmity or doubt

in the appointment of respondent No. 1 as Lokayukta made on 26-5-1973, the action taken was validated as a result of the aforesaid section and respondent No. 1 would be deemed to have been validly appointed as from 26-5-1973.

(4) The expiry of Ordinance 54 of 1973 did not bring the appointment of respondent No. 1 which was for a period of five years, to an end. Moreover the validity of the appointment has to be examined with reference to the provision of the Third Ordinance and Act 6 of 1974.

(5) That the power to issue a writ of quo warranto is a discretionary power. The petitioners have moved this Court after a delay of about sixteen months. Respondent No. 1 does not suffer from any disqualification which would make his reappointment impossible. Since respondent No. 1 could be re-appointed, as a matter of law the discretion of the Court should not be exercised to set at nought the appointment of a person who could be reappointed. In any event taking the totality of the circumstances into consideration, it is not fit in which a writ of quo warranto should issue.

13. Learned Additional Solicitor General, apart from substantially supporting the approach of the learned Solicitor General in a helpful argument, raised various alternative contentions. If necessary they would be dealt with separately and later.

14. Mr. Basudeva Pd. also raised various alternative contentions. In one respect, however, his approach was different from that of the learned Solicitor General. His contention was that when the Governor is to exercise powers under a statute he is not exercising executive powers as envisaged under the Constitution. He is, therefore, not required in those circumstances, to act on the aid and advice of the Council of Ministers.

15. Before dealing with the main arguments in the case, it may be pointed out that in construing the various articles of the Constitution it would not be a correct approach to construe them in isolation. All relevant provisions of the Constitution, in the context of the question under consideration, have also to be considered. In my view, it is in the light of the constitutional scheme that the various articles of the Constitution have to be interpreted. This alone will lead to harmonious construction.

16. Article 154 of the Constitution states that the executive power of the State, shall be vested in the Governor. The expression executive power has been construed in several decisions of the Supreme Court. It was pointed out in *Rai Sahib Ramjaway Kapur v. The State of Punjab*[1]*,*

> "It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away."

The same matter has been explained in the case of *Samsher Singh v. State of Punjab*[2] decided by the Supreme Court on 23-8- 1974 (reported in AIR 1974 Supreme Court 2192), where the learned Chief Justice has observed as follows :-

> "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."

It has also been explained by the Supreme Court that it includes all acts necessary for carrying on supervision of the general administration of the State, including both a decision as to action and carrying out of the decision. [See Ram Jaway Kapur's case AIR 1955 Supreme Court 549 and *State of Bihar v. Srimati Sonabati*[3], Article 162 of the Constitution states that subject to the provisions of the Constitution the executive power of the State shall extend to matters with respect to which the legislature of the State has power to make laws. This is subject to the proviso as mentioned therein. Article 163 deals with the manner in which the executive power has to be exercised. It clearly says that there will be a Council of Ministers with the Chief Minister at the head to aid and advice the Governor in the exercise of his functions, except in respect of defined area where the Governor is to act in his discretion. Sub-clause (3) of this Article which will be crucial in this case is as follows :-

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

Article 166 deals with the conduct of Government business. It states that all executive actions of the Government of State shall be expressed to be taken in the name of the Governor. Clause (2) bars judicial inquiry, in specified circumstances, in respect to the question whether an order was made or executed by the Governor. Sub-clause (3) states that for the more convenient transaction of the business of the Government there may be allocation among the Ministers of the said business. It is to be noticed that Article 166 (3) may dispense with the necessity of tendering a formal advice to the Governor. If the rules do envisage such a situation, the decision of the Council of Minister or a Minister has finality about it. Fulfilment of the Rules of Executive Business, in such a situation, would be a deemed advice to the Governor in the eye of law. This position has been explained by the learned Chief Justice in Samsher Singh's case (supra) in these words :

"The decision of Minister or Officer under the rules of executive business is the decision of the Governor."

It may, however, be clarified that so far as third persons are concerned, the decision has to be communicated before it can be said to be a decision in the eye of law. *(See Bacchittar Singh v. State of Punjab*[4]*,).*

17. Having briefly dealt with the relevant provisions of the Constitution, it may now be emphasised that our Constitution envisages a parliamentary or cabinet form of Government. This matter has been fully set at rest by various decisions of the Supreme Court including the recent decision in Samsher Singh's case. It may here suffice to quote some passages from the decision in Samsher Singh's case, AIR 1974 Supreme Court 2192. The learned Chief Justice while dealing with this aspect of the case observed as follows:

"..... 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..... Appointment or dismissal or removal of persons belonging to the judicial service of the State is not a personal function but is an executive function of the Governor exercised in accordance with the rules in that behalf under the Constitution."

At page 45 of the judgment, the learned Chief Justice observed as follows :-

> "Appointment and removals of persons are made by the President and the Governor as the constitutional head of the executive on the aid and advice of the Council of Ministers."

The learned Chief Justice emphasized (at p. 10) that our Constitution embodies generally the Parliamentary or Cabinet system of Government of the British model both for the Union and the States. These quotations are from the leading judgment of the learned Chief Justice with whom four other Hon'ble Judges of the Supreme Court agreed. The same aspect has been emphasised in the judgment of Krishna Iyer, J. with whom Bhagwati, J. was in agreement. I will extract one or two quotations from the judgment of the Hon'ble Judges. Krishna Iyer, J. observed as follows :-

> "Of course, there is some qualitative difference between the position of the President and the Governor. The former, under Article 74 has no discretionary powers, the latter too has none, save in the tiny strips ....."

It was further observed with reference to discretionary power of the Governor :

> "These discretionary powers exist only where expressly spelt out and even these are not left to the sweet will of the Governor abut are remotely controlled

by the Union Ministry which is answerable to Parliament for those actions."
In relation to the form of Government envisaged in the Constitution, the learned Judges observed:

> "As we have already indicated, the overwhelming catena of authorities of this Court have established over the decades that the Cabinet form of Government and the parliamentary system have been adopted in India and the contrary concept must be rejected as incredibly allergic to our political genius, constitutional creed and culture."

It may also be pointed out that even in relation to the allocation of the business of the Government, the decision of the Governor is to be on the aid and advice of the Council of Ministers. (per Hon'ble C. J. in Samsher Singh's case at page 25). It is thus clear that the Parliamentary or Cabinet form of Government is envisaged in the Constitution. The idea of Parliamentary or Cabinet form of Government is basic to our Constitution. I may, however, hasten to add that I am not using the expression 'basic' in the same sense in which it has been used in *Kesvananda Bharati Sripadagalvaru v. State of Kerala*[5], It may also be stated that the

Supreme Court has clarified that the view that was being taken in Samsher Singh's case was in conformity with the earlier decisions of the Supreme Court which have been at length discussed in the judgment aforesaid.

18. Having briefly dealt with the relevant provisions of the Constitution it would, at this stage, be appropriate, first, to consider the submission of Mr. Basudeva Pd., who has contended that in the instant case it was not necessary for the Governor to act on the aid and advice of the council of ministers. The contention of Mr. Prasad is that Article 162 of the Constitution states that subject to the provisions of the Constitution the executive power of the State shall extend to matters with respect to which the legislature of the State has power to make law. It was contended, therefore, that, however wide executive powers may be they are subject to the provisions of the Constitution. Article 245 is one such provision. If, therefore, a law is made where the power of appointment is given to the Governor, it will be different and distinguishable from the general executive powers which is exercisable by the Governor on aid and advice of the Council of Ministers by virtue of the various provisions of the Constitution.

19. The learned Solicitor General on the other hand contended that the Constitution does not contemplate the delegation of power eo nomine to the Governor, except in areas where he in his discretion may exercise power by virtue of Article 163 (2) of the Constitution. Article 163 (1) is all embracing and whenever executive powers are to be exercised by the Governor they have to be on the aid and advice of the Council of Ministers. It is not for the legislature to undo the constitutional scheme so far as the exercise of executive powers are concerned. In other words, the Governor can either exercise executive powers on the aid and advice of the Council of Ministers, or the only circumstance where he need not take their aid and advise is where, by and under the Constitution, the Governor is required to exercise his functions in his discretion. It was further contended that the power of appointment of Lokayukta under Section 3 of
the Ordinance being an executive power, the same will have to be exercised with the aid and advice of the Council of Ministers. Without fully adopting the argument of the Solicitor General, the petitioners also take the stand that so far as the impugned appointment is concerned, the Governor had to act on the aid and advice of the Council of Ministers.

20. Without deciding the extreme contention that has been put forth by the learned Solicitor General, it appears to me that ordinarily when a power is vested, even by a Statute, in the Governor, he is to act on the aid and advice of the Council of Ministers. It does not cease to be an executive power merely because it is conferred by a Statute. It would be defeating the constitutional scheme if it was to be held that the mere use of the word "Governor" in any Statute would be imputing an intention to the legislature of conferring a power 'eo nomine'. Indeed the presumption should be otherwise. When the Governor is under the constitutional scheme to act on the aid and advice of the Council of Ministers, the use of expression Governor in any Statute would, in any event, and unless a strong contrary intention can be inferred, mean Governor acting on the aid and advice of the Council of Ministers. Any other interpretation would upset the constitutional scheme. Even if it be possible for the legislature to invest the Governor with powers eo nomine, in so far as the present Statute is concerned, this, in my view, has not been done. In order to come to a conclusion that the Governor has been invested with powers by the legislature eo nomine very strong indications will have to be there in the relevant Statute; since, as already explained, in one sense it goes against the concept of Parliamentary form of Government, which is one of the basic postulates of the Constitution. In the present Statute I find

no such indication. On the other hand, indications are to the contrary. Section 3 of the Ordinance states that the Governor shall by a warrant under his hand and seal appoint the Lokayukta in consultation with the Chief Justice of the High Court and the leader of Opposition. If Governor is to act eo nomine it would mean that although leader of Opposition will have an effective role to play, the State Government would have no hand in the appointment. This appears to be inconceivable, unless there was something in the Statute which could irresistibly lead to the conclusion that the legislature had not contemplated aid and advice of Council of Ministers in the making of the appointment. I am further of the opinion that the use of the word Governor in Section 3 of the Ordinance was appropriate for the reason that the section contemplates the issue of warrant under the hand and seal of the Governor. Taking all these into consideration, I am of the view that the appointment of Lokayukta, as envisaged in Section 3, has to be made by the Governor with the aid and advice of the Council of Ministers.

21. Learned counsel for respondent No. 1, Mr. Basudeva Pd, has placed reliance on two cases in support of his contention. They are: *Om Prakash Mehta v. Emperor*[6], and In Re, Venkataraman AIR 1949 Madras 578. He relied on the following observation in Om Prakash's case:

> "Section 59 (1), Constitution Act, deals with the normal executive activities of Government which are not covered by Statute. It does not purport to limit the scope and extent of any special enactment passed by a competent Legislature
> and within its province."

It is necessary to examine in what context these observations were made. Section 59 (1) of the Government of India Act requires that all orders of the Government of the Provinces have to be expressed in the name of the Governor. In Om Prakash's case certain powers had been conferred on the Provincial Government. In those circumstances, it was held that the impugned order not having been expressed in the name of the Governor did not bring infirmity in the order. These observations cannot be read to mean that if the expression Governor has been used in a Statute it means that the expression is used 'eo nomine'. In the case of In Re Venkataraman AIR 1949 Madras 578 at p. 579 the observations relied upon are as follows :-

> "Secondly Section 59 (1), Constitution Act deals with the normal executive activities of Government which are not covered by Statute. It does not purport to limit the scope and extent of any special enactment passed by a competent legislature and within its province."

Here also the question under consideration in the instant case was not being considered. These two cases are, therefore, in my view, distinguishable.

22. Having dealt with the contention of Mr. Basudeva Pd. I must now deal with the main argument which has to be first considered in this case and that is whether Article 163 (3) is a bar to the consideration of the question whether any advice was given by the Council of Ministers to the Governor in the instant case.

23. Reading Article 163 (3) in its full width, and giving full effect to the language used in the

Article, ascribing to the words plain ordinary meaning according to the usage of English language, it would appear that it prohibits inquiry in respect of two matters. They are, (a) Whether any advice was given to the Governor by the Council of Ministers and (b) If an advice was given what was that advice. It was suggested on behalf of the petitioners that it is only when an advice has been given that this clause applies. It does not apply to a situation where no advice has been given. I do not think it is possible to accept this contention. Clause (3) really combines two sentences into one. If the compound sentence could be broken up into two simple sentences they would read: (a) The question whether any advice was tendered to the Governor by the Ministers shall not be inquired into in any court, and (b) The question as to what advice was tendered by the Ministers to the Governor shall not be inquired into in any court. The two ideas as indicated above have been blended together to form this clause. It would be pertinent here to inquire whether there could be any reasonable basis for the Constitution makers to differentiate between the two situations as mentioned above. It would mean that the Constitution makers thought that if an advice was given and ignored, it does not matter; hence no necessity of any inquiry. But if no advice was given and action taken, it does matter. The door of inquiry should not be shut. I can discern no reasonable basis for making the differentiation in the two situations. We should not impute to the constitutional makers an intention-contrary as it is to the language of the Article 163 (3)--which would result in unreasonable differentiation.

24. It was contended on behalf of the petitioners that the interpretation put on Clause (3) of Article 163 by the Solicitor General and Additional Solicitor General should not be accepted in view of certain decisions of the Supreme Court. They are: *Bachhittar Singh v. State of Punjab*[7] *M/s. Bijoy Lakshmi Cotton Mills Ltd. v. State of West Bengal*[8] *A Sanjeevi Naidu v. State of Madras*[9] and Haridwar Singh v. Begun Sumbrui[10], It was pointed out that in those cases infraction of rules of executive business has been looked into. Learned counsel suggested that the effect of these decisions is that there would be no bar to the consideration of the question whether or not any advice was given to the Governor, because the Rules of Executive Business envisage that a decision taken in conformity with the Rules of Executive Business amounts to an advice to the Governor. Learned Solicitor General and Additional Solicitor General pointed out that Article 163 (3) must be confined to the cases of actual advice. I find merit in the contention. Article 163 is attracted when there are factually two parties, one receiving the advice and the other giving it. This clause postulates those class of cases where the Governor is to make an order as distinct from those class of cases where orders have been passed by a Minister or Council of Ministers in accordance with the Rules of Executive Business without any actual reference to the Governor. It has no application, to borrow the expression in Bachhittar Singh's case, to a "deemed advice". In such a situation the decision of a Minister is the decision of the Governor. The Rules of Executive Business combine the two roles in one. The requirement of aid and advice as envisaged in Article 163 (1) is satisfied in such cases, because the order actually passed by the Minister, and deemed to be that of the Governor, in itself, necessarily, involves also the advice given by a Minister or Council of Ministers. In the instant case the Governor has to factually receive the advice. It is not one of those cases where an appointment could be made by issue of notification from the Secretariat in the name of Governor without the actual knowledge of the Governor. Here, as we have seen in Section 3 of the Act, the warrant of appointment has to be under the signature of the Governor himself.

25. It may be pointed out that the cases to which reference has already been made are cases of either deemed advice, or cases where the question for consideration was whether an order could

be passed by a Minister incharge of one Department or the other, or the Cabinet. None of those cases are cases where there was, or could be, an occasion of giving actual advice by a Minister or Council of Ministers to the Governor. These cases, in my view, do not stand in the way of the interpretation that I have put on Article 163 (3) of the Constitution.

26. The other objections raised on behalf of the petitioners is that the expression inquiry in Article 163 (3) of the Constitution does not apply to cases where either facts are admitted or where all the relevant and material facts are placed before the Court and they lead to only one conclusion. Where a decision has to be arrived at by looking into materials on the record, it is plain that it is only after an inquiry that any conclusion can be arrived at. The Court does in such a situation, inquire into a matter. Further, in my view, where the foundation of a decision is existence or non-existence of a fact, it cannot be said that the Court does not inquire into it even though it is on the basis of such existence or non-existence that a conclusion is arrived at. It is, therefore, clear that even where facts are admitted, no conclusion is possible without inquiring into a matter or issue which is pre- requisite to the exercise of the jurisdiction or power of the Court in the matter of giving relief to a party in a judicial proceeding. It would thus be not correct to say that if a fact in issue is admitted the court has not to inquire into it. The bar here is on inquiry and not what a party chooses to call as evidence to prove and disprove the facts. The issue is inherent in the controversy itself.

27. Learned counsel for the petitioners further contended that Article 163 (3) creates a privilege in favour of the State and it is capable of being waived. In this case, it is said, it has actually been waived. But as I read the Article, I do not think that any question of privilege is involved. The Article is a bar to the jurisdiction of the Court to inquire into specified matters. There is a clear difference between a privilege and a bar to the jurisdiction of the Court. The Article does not create any privilege but contemplates that certain matters shall not be inquired into by Courts.55 In this view of the matter the last contention in relation to Article 163 (3) of the Constitution also cannot be accepted.

28. In the view that I have taken of the legal position, so far as the interpretation of Article 163 (3) of the Constitution is concerned, it is not necessary to inquire into, and adjudicate the question whether any advice was, in fact, tendered to the Governor by the Council of Ministers. It is also not necessary to decide whether the materials on the record are sufficient to come to a firm conclusion. It must be re-stated that arguments were advanced by the learned counsel for respondent No. 1 that if the question was justiciable, there was, in fact, and in law no such infirmity as to call for an issue of a writ in the nature of quo warranto.

29. The next branch of contention of the petitioners is that there was no consultation as envisaged in proviso to Section 3 of the Ordinance. It was suggested that in this case the consultation was by the Governor and not by the Council of Ministers. The requirement of proviso to Section 3 is that there should be a consultation by the Council of Ministers with the Chief Justice and the leader of Opposition. It was alternatively contended that the leader of opposition, Sri Sunil Mukherji, had not agreed to the appointment of respondent No. 1. The Governor was under a wrong impression that he had actually concurred in the appointment. The incorrect assumption by the Governor would bring infirmity in the appointment and would not amount to fulfillment of the requirement of proviso to Section 3.

30. That there was a consultation with the Chief Justice of the Patna High Court and the leader of

Opposition, Sri Sunil Mukherji, who has been impleaded as respondent No. 2 in this case, is fully borne out by Annexure E to the affidavit filed on behalf of State. This Annexure is a letter of Sri Jiwan Singh, the Secretary to the Governor, along with the minutes of the meeting held at Raj Bhawan on the 24th and 25th May, 1973. There is no reason to doubt the correctness of the minutes. It is clear from a perusal thereof that the views of the Chief Justice and the leader of Opposition were fully ascertained. Shri Mukherji has filed an affidavit in this Court in which he has stated that he was consulted by the Governor of Bihar and in the course of the said consultation several names including that of Sri S.V. Sohoni came up for discussion. Taking all these into consideration the conclusion is irresistible that the views of the Chief Justice and Sri Sunil Mukherji, the leader of Opposition, were ascertained. The contention that unless the Council of Ministers itself holds consultation with the Chief Justice and the Leader of Opposition it would not be a consultation as envisaged in Section 3 does not appear to be correct. What is required is consultation. It is not important as to what was the agency through whom the consultation has taken place. It is difficult to conceive that in actual practice there would be a consultation between a body of men like the Council of Ministers, and the Chief Justice and the Leader of Opposition. It had to be done through some agency. As long as the views of these two dignitaries have been ascertained it would be substantial and sufficient compliance with the requirement of law. It is to be noticed in this connection that consultation does not mean concurrence. This has been so held by the Supreme Court in case of *Chandermauleshwar Prasad v. The Patna High Court*[11], Now, dealing with other branch of the contention of the petitioners, it may be stated that so far as effective consultation is concerned, Sri Mukherji himself affirms to it. It appears from Annexure E to the affidavit of the State (page 100 of the brief) that on 25-5-1973 when the Chief Justice specifically agreed to the appointment of respondent No. 1 as Lokayukta, Sri Mukherji remained silent. This was interpreted as acceptance on his part of the suggestion that respondent No. 1 be appointed as Lokayukta. It was only after appointment of respondent No. 1 on 26-5-1973 that Shri Mukherji communicated at 10 P. M. in the night that his silence should not be interpreted as acquiescence in the suggestion of appointment of respondent No. 1. From the materials on the record it is, first, difficult to see as to how the Governor could come to the conclusion that Sri Mukherji was objecting to the appointment of respondent No. 1 when he did not express any opinion to the effect at the meeting held on 25th May, 1973 in express terms. In any event, the fact of effective consultation having been established in this case, even if there was some misconception about the opinion of Sri Mukherji, I do not think it would bring any infirmity in the appointment of respondent No. 1 or would amount to non-compliance with the requirements of proviso to Section 3.

31. It was contended on behalf of petitioners that there was infraction of the Rules of Executive Business. These rules are Rules 8, 12, 13 and 28 (a) (ii) read with 3rd Schedule of Item 27 (b). Rule 8 of the Rules, so far as relevant, is as follows :-

> "Subject to the orders of the Chief Minister under Rule 12, all cases referred to in the Third Schedule to these rules shall be brought before the Council in accordance with the provisions of the rules contained in Part II."

Rule 12 deals with the cases referred to in Third Schedule in which after consideration by the Minister-incharge, the matter can either be circulated or brought up for consideration at the meeting of the Council under the orders of the Chief Minister. Rule 13 envisages that the Chief

Minister may direct ascertainment of opinion by circulation in certain cases without the matters being placed before the Council of Ministers. Rule 28 (a) (ii) may be quoted:

> "(a) The following cases shall be submitted to the Chief Minister through the Chief Secretary by the Principal Secretary/Secretary of the department concerned after consideration by the Minister-incharge but before the issue of orders :
> (ii) Cases raising questions of policy and cases of administrative importance not covered by the Third Schedule."

Item 27 (b) of the Third Schedule is as follows:

> "Proposal for direct appointment to the posts whose maximum pay-scale exceeds Rs. 840."

The effect of this argument is that the Rules of Executive Business require that the appointment of respondent No. 1 had to be brought before the Council of Ministers and it was after the aid and advice of the Council of Ministers that the appointment could be made. This really takes us back to the first question, namely, whether the absence of advice can be inquired into. Even if the interpretation put forth by the petitioners is accepted, it would only mean that no individual Minister could deal with the matter of appointment of Lokayukta. It had to be dealt with by the Council of Ministers. In my view, even if the Rules of Executive Business do not apply the position would have been the same. If the appointment in question is not covered by any specific rule in the Rules of Executive Business still the appointment in question would have to be made by the Governor on the aid and advice of the Council of Ministers. This is not one of the cases where the appointment could be made departmentally without any aid and advice being actually tendered to the Governor. In those circumstances the alleged infraction of Rules of Executive Business really brings us back to the question which has already been considered namely, whether it is open to this Court to inquire whether any aid or advice was given by the Council of Ministers. This, as already held, is barred by Article 163 (3) of the Constitution. Business rules cannot override the bar of the aforesaid article. I may also briefly notice the argument advanced by the learned Additional Solicitor General that Item 27 (b) of the Schedule does not apply to the instant case. Item 27 (b) has already been quoted. It envisages appointment where pay-scale exceeds Rs. 840. A perusal of the Ordinance makes it clear that there is no question of pay-scale so for as the appointment of Lokayukta is concerned. Reference in this connection may be made to Section 5 (4) read with the Second Schedule. Item 27 (b) of the Business Rules, in my view, is not, therefore, applicable and the argument of the learned Additional Solicitor General appears to be correct. It was also pointed out that appointment of Advocate General and Members of Public Service Commission have been dealt with in items 1 and 9 of the Third Schedule Business Rules. It was only to be expected that if an appointment of a high dignitary like the Lokayukta was to be covered by any item in the Third Schedule, there would have been a separate and specific provision. This too Appears to be correct. In fact, when the Rules of Executive Business were made, the office of Lokayukta was not there at all. We have not been told that there was any amendment in the rules after the Ordinance in question was promulgated. It is, therefore, not surprising that there is no item in the Third Schedule relating to the appointment of Lokayukta. As already indicated, the power of appointment will, therefore, have to be exercised in

conformity with the provision of Section 3 by the Governor with the aid and advice of the Council of Ministers, irrespective of any provision in the Rules of Executive Business. It is, therefore, not possible to accept the contention of the learned counsel for the petitioners as noticed above.

32. The contention that the appointment of respondent No. 1 would lapse on the expiry of the Ordinance, being a temporary legislation, was adequately met by demonstrating that there is contrary intention in the Ordinance it self. Section 5 of the Ordinance contemplates appointment for five years, enduring even after the expiry of the Ordinance. The right so created cannot be taken away because the law which created it has expired. (See *State of Orissa v. Bhupendra Kumar*[12]*).* Moreover, this aspect is not of much importance in view of Section 23 of the Third Ordinance and the Act. No infirmity in the appointment of respondent No. 1 having been established, it is clear that the effect of Section 23 is to antidate the Third Ordinance to the date of appointment of respondent No. 1. It has also the effect of converting appointment made under the Second Ordinance to an appointment under the Third Ordinance. Consequently, when the Act came into force the appointment of respondent No. 1 would be an appointment under the Act, by virtue of the deeming provision in Section 23 of the Act. The Act would also be deemed to be in force on the date of the said appointment. Such is the effect of the deeming provision, which must be given its full effect. (See State of Bombay v. Pandurang Vinayak[13],). Reliance, in my view, was also rightly placed on *Abdul Majid v. P.R. Nayak*[14]*, M/s Gujarat Pottery Works Private Ltd. v. B.P. Sood*[15]*,* and S. K. G. Sugar Ltd. v. State of Bihar[16], It was observed by Chagla, C. J. in Abdul Majid v. P.R. Nayak[17], while considering similar provision in Section 58 of Act 31 of 1950, as follows :-

> "..... The language used in Section 58 is both striking and significant. It does not merely provide that the orders passed under the Ordinance shall be deemed to be orders passed under the Act, but it provides that the orders passed under the Ordinance shall be deemed to be orders under this Act as if this Act were in force on the day on which certain things were done or action was taken. Therefore the object of this section is, as it were, to antedate this Act so as to bring it into force on the day on which a particular order was passed which is being challenged. In other words, the validity of an order is to be judged not with reference to the Ordinance under which it was passed, but with reference to the Act subsequently passed by Parliament."

This has been quoted with approval in Gujarat Pottery Work's case (at page 969). The principles aforesaid are fully applicable in the instant case. There can thus be no doubt that the effect of the deeming provisions is (if my earlier conclusions are correct) that respondent No. 1 is validly occupying the office of Lokayukta. It is not necessary to consider the alternative submission of the contesting respondents that even if there was infirmity in the initial appointment it has been validated by Section 23 aforesaid, nor is it necessary to consider the contrary submissions made on behalf of the petitioners.

33. Since I have dealt with the various contentions that have been raised in order to challenge the appointment of respondent No. 1 to the office of Lokayukta and I have found none of them to have been substantiated, it is not necessary to deal with the other contentions raised on

behalf of the State and respondent No. 1. It may be stated here that apart from the main contentions which I have formulated in paragraph 11 of this judgment other contentions were also raised on behalf of respondent No. 1. It is not necessary to merely state them or deal with them in this judgment in the view that I have taken.

34. The scope of writ of a quo warranto is well settled. In the case of the *University of Mysore v. C. D. Govinda Rao*[18], Gajendragadkar, J. speaking for the Court observed as follows :-

> "As Halsbury has observed:
> "An information in the nature of a quo warranto took the place of the obsolete writ of quo warranto which lay against a person who claimed or usurped an office, franchise, or liberty, to enquire by what authority he supported his claim, in order that the right to the office or franchise might be determined'. Broadly stated, the quo warranto proceeding affords a judicial enquiry in which any person holding an independent substantive public office, or franchise, or liberty is called upon to show by what right he holds the said office, franchise or liberty; if the inquiry leads to the finding that the holder of the office has no valid title to it, the issue of the writ of quo warranto ousts him from that office. In other words, the procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; it also protects a citizen from being deprived of public office to which he may have a right. It would thus be seen that if these proceedings are adopted subject to the conditions recognised in that behalf they tend to protect the public from usurpers of public office; in some cases, persons not entitled to public office may be allowed to occupy them and to continue to hold them as a result of the connivance of the executive or with its active help, and in such cases, if the jurisdiction of the courts to issue writ of quo warranto is properly invoked, the usurper can be ousted and the person entitled to the post allowed to occupy it. It is thus clear that before a citizen can claim a writ of quo warranto, he must satisfy the court, inter alia, that the office in question is a public office and is held by usurper without legal authority, and that necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not."

In this case the learned counsel for respondent No. 1, in the course of argument, produced the warrant of appointment under the hand and seal of the Governor. Annexure A is a notification issued by the Secretariat of the Governor stating that respondent No. 1 has been appointed as Lokayukta on 26th May, 1973. Annexure B is the notification of the State Government dated 1st June, 1973 stating that the Governor of Bihar in exercise of powers under Section 3 of the Ordinance 54 of 1973 (Second Ordinance) has appointed respondent No. 1 as Lokayukta. In view of these notifications and the warrant of appointment, and in the absence of any infirmity having been shown in the aforesaid appointment, it must be held that respondent No. 1 is validly claiming to have been appointed Lokayukta of Bihar. His continuance in office is not illegal. The writ of quo warranto, in the circumstances, cannot be issued on the principles enunciated in the Supreme Court judgment.

35. In the result, these writ applications are dismissed but in the circumstances, there will be no order as to costs.

Nagendra Prasad Singh, J.

36. I agree.

Petitions dismissed.

Cases Referred.

[1] AIR 1955 SC 549 at p. 555
[2](Civil Appeal No. 2289 of 1970)
[3] AIR 1961 SC 221 at p. 230
[4] AIR 1963 SC 395
[5] AIR 1973 SC 1461
[6] AIR 1948 Nag 199
[7] AIR 1963 SC 395
[8] AIR 1967 SC 1145
[9] AIR 1970 SC 1102
[10] AIR 1972 SC 1242
[11] AIR 1970 SC 370
[12] AIR 1962 SC 945
[13] AIR 1953 SC 244
[14] AIR 1951 Bom 440 at p. 447
[15] AIR 1967 SC 964 at p. 968
[16] AIR 1974 SC 1533
[17] AIR 1951 Bom 440 at p. 447
[18] AIR 1965 SC 491