

V.A. Arun Kumar Vs. State of Kerala, Rep. by the Additional Chief Secretary, Home and Vigilance Department of Home Affairs (S.S.A.), Secretariat and Others

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Court : Kerala

Decided On : Sep-30-2011

Judge : Antony Dominic

Appeal No. : W.P.(C).Nos.16891 of 2011 (J) & 20125 of 2011 (M)

Appellant : V.A. Arun Kumar

Respondent : State of Kerala, Rep. by the Additional Chief Secretary, Home and Vigilance Department of Home Affairs (S.S.A.), Secretariat and Others

Judgement :

Issues raised in these writ petitions and the parties are common and therefore these cases were heard together and are disposed of by this common judgment. W.P.(C).No.20125/2011 is adopted as the leading case and documents produced therein are referred to in this judgment.

2. From May 2006 till May 2011 the petitioner's father was the Chief Minister of the State and the 3rd respondent was the Opposition Leader in the Legislative Assembly. During the said period, on the floor of the Legislative Assembly and outside, members of the opposition raised several allegations against the

petitioner and his father. Subsequently, the 3rd respondent sent Ext.P1 letter dated 01.03.2011 containing as many as the 11 allegations against the petitioner, against the Chief Minister himself and his office. The contents of this letter being relevant to decide the issues raised in these writ petitions, the letter is extracted for ready reference;

“Malayalam”

3. The files produced by the learned Government Pleader show that, on receipt of Ext.P1, by his letter dated 9.3.2011, the then Chief Minister forwarded it to the then Minister for Home and Vigilance Department requesting him to take steps for an enquiry into the allegations against his son, the petitioner herein. This letter reads thus:

“Malayalam”

4. On 09.03.2011 itself, the then Minister for Home and Vigilance Department issued a note to the Addl. Chief Secretary (Home and Vigilance) directing that since the petitioner is an officer of institute of Human Resources Development (“IHRD” for short). Ext.P1 complaint may be forwarded to the Lok Ayukta for an enquiry under Section 7(3) of the Kerala Lok Ayukta Act 1999 (hereinafter referred to as ‘Act’ for short). This note of the Minister reads thus:

“Malayalam”

5. Accordingly, the 1st respondent issued Ext.P2 dated 10.03.2011 to the Registrar of the Kerala Lok Ayukta requesting that steps be taken for an enquiry in terms of Section 7(3) of the Act into the allegations contained in Ext.P1 letter. Ext.P2 letter reads thus:

“Malayalam”

6. In this context, it should be noticed that in Ext.P1 complaint made by the 3rd respondent, specific allegations were made not only against the petitioner, but also against his father, the former Chief Minister, and his office. The opening sentence of Ext.P1 itself will demonstrate this factual position. However, on receipt of the

complaint, when the Chief Minister forwarded it by his letter dated 09.03.2011 to the Minister for Home and Vigilance, he has cautiously requested for an enquiry only into the allegations against his son. In other words, though this letter contains a generous request, the former Chief Minister absolved himself and his office, from the scope of the enquiry recommended by himself. This has been repeated by the Minister and the Additional Chief Secretary, when the reference under Section 7(3) of the Act was made.

7. On receipt of Ext.P2, it was registered as G.R.No.01/2011-A and the Upa Lok Ayukta passed Ext.P3 order dated 18.04.2011 taking on file the reference under Section 7(3) of the Act, treating the 3rd respondent as the complainant and the petitioner as the respondent and to issue notice to the parties and posting the reference to 02.06.2011. Accordingly, Ext.P4 notice was issued to the parties concerned.

8. Meanwhile, 3rd respondent filed I.A.No.640/2011, a copy of which is Ext.P5, requesting for advancing the hearing and to decide on the maintainability of the reference. The main contention raised was that the 3rd respondent was not a public servant and hence the Act itself is inapplicable to him. The relevant averments contained in paragraphs 5 to 7 of the affidavit, reads thus:

“5. It is obvious that Mr. Arun Kumar is not a “Public Servant” in his capacity as son of the Chief Minister. Moreover, as Additional Director of Institute of Human Resource Development (IHRD) also, he is not a Public Servant as the said Organization registered under the Travancore-Cochin, Literary Scientific and Charitable Societies Registration Act 1955 is not so far notified under the provisions of the Lok Ayukta Act 1999. To my knowledge only the Societies viz., C-DIT and Audio Visual and Reprographic Centre only are notified so far.

6. It is submitted that the Hon. Chief Minister and the authorities in Government are well aware of the above fact and that Sri. Arun Kumar is not a Public Servant under the provisions of the Lok Ayukta Act and that the ‘Reference’ made to the Hon’ble Lok Ayukta is a non-est in the eye of law and hence not maintainable, in as much as Mr. Arun Kumar is not a “Public Servant” as defined under the provisions of the Kerala Lok Ayukta Act 1999 either in his capacity as son of the

Chief Minister or as Additional Director of IHRD.

7. It is submitted that the above Reference is intended only to defeat, delay and to protract the legal action to be taken against Mr. Arun Kumar in view of the very serious nature of the allegations raised against him and hence the 'Reference' is also vitiated by malafides."

9. Again the 3rd respondent filed Ext.P6 Additional Affidavit and Ext.P7 counter affidavit was filed by the petitioner, contending that some of the allegations against him related to the period when he was working as the Managing Director, COIRFED and that COIRFED was already notified under the Act. It is stated that by order dated 16.05.2011, I.A.No.640/2011 was dismissed by the Upa Lok Ayukta. The 3rd respondent again filed Ext.P8 I.A.No.675 of 2011, dated 29.04.2011 requesting that the reference may be answered/returned to the Government. To this IA also, the petitioner filed Ext.P10 counter affidavit. In the counter affidavit, petitioner made reference to Ext.P9 notification issued by the Government on 04.05.2011, under Section 2(o) (vii) (D) of the Act, bringing IHRD within the purview of the Act.

10. Meanwhile, elections to the State Legislative Assembly were held and when results were declared on 13.05.2011, the United Democratic Front lead by the 3rd respondent secured majority and he was sworn in as the Chief Minister and the petitioner's father became the Leader of Opposition.

11. The files show that on 07.06.2011 a Note was submitted by the Minister for Law to the Cabinet recommending to withdraw the reference already made under Section 7(3) of the Act and to order Vigilance enquiry into the allegations. Reason stated is mainly that under Section 7(3) of the Act, Lok Ayukta has the power only to investigate into actions of a public servant, that the term action means administrative action and includes willful failure or omission to act and that the allegations raised against the petitioner are that he is guilty of corruption, favouritism etc., which will not come within the scope of Section 7(3) of the Act. The matter was placed before the Cabinet on 08.06.2011 and it was decided that the reference be withdrawn and that the allegations in Ext.P1, except the one relating to the online lottery about which CBI is already investigating, the other

issues be referred for Vigilance enquiry.

12. In pursuance to the said decision of the Cabinet, the 1st respondent issued Ext.P11 letter dated 10.06.2011 intimating the Lok Ayukta that the Government have decided to conduct a vigilance enquiry into the allegations and requested that steps may be taken for withdrawal of the reference made under Section 7(3) of the Act. Thereafter, Ext.P12, G.O.(MS).No.19/2011/Vg., dated 16.06.2011 was issued ordering that the Vigilance and Anti Corruption Bureau shall investigate into the 10 allegations mentioned therein against the former Chief Minister and his son, the petitioner herein.

13. Immediately thereafter, W.P.(C).No.16891/2011 was filed with a prayer to quash Exts.P11 and P12. When that writ petition was considered by this court on 05.07.2011, the learned Advocate General informed that the question whether the proceedings before the Lok Ayukta could be closed on the basis of Ext.P11 order has been raised by the counsel for the petitioner and that the Lok Ayukta would be considering the said issue on 07.07.2011. In view of the submission so made, the case was ordered to be posted to 14.07.2011 to await the outcome of the hearing on 07.07.2011. It appears that on 07.07.2011, the 1st respondent herein got impleaded in the proceedings as additional 2nd respondent and filed a statement to the effect that the reference is invalid and ineffective. Accordingly, the Upa Lok Ayukta considered the matter and order dated 15.07.2011 was passed upholding the power of the Government to cancel the reference made under Section 7(3) of the Act and to discontinue the investigation into the complaint. It was thereupon that producing order dated 15.7.11 as Ext.P14, W.P.(C).No.20125/2011 was filed seeking to quash the said order, to declare that the Government has no authority to withdraw a reference made under Section 7(3) of the Act and to direct that the complaint be restored on file and to proceed with it in accordance with law.

14. The contention raised by the Sr. Counsel for the petitioner was mainly that once a reference is made under Section 7(3) of the Act, in the absence of any enabling provision in the Act, Government has no power to withdraw such reference. In support of this contention, learned Counsel relied on the Apex Court judgments in State of Bihar v. D.N. Ganguly (AIR 1958 SC 1018) and State of

Madhya Pradesh v. Ajay Singh and others (AIR 1993 SC 825). On the other hand, Learned Government Pleader contended that the Government having made the reference under Section 7(3) of the Act, always had the power to withdraw/modify the reference. According to him, though the Act does not confer any specific power in this regard, Section 21 of the General Clauses Act, confers adequate power on the Government in this behalf.

15. When the writ petitions initially came up for consideration on 25.7.11, upon hearing the learned Sr. Counsel for the petitioner and going through the pleadings, this Court passed an order, which reads as under:

“When the writ petition was taken up, learned counsel for the petitioner was called upon to clarify whether the allegations in Ext.P1 complaint could form the subject matter of a reference under Section 7(3) of the Lok Ayukta Act. He was also further asked to clarify whether the notification issued under Section 2(o)(vii)(D) of the Act notifying IHRD could make the petitioner a public servant as on 10/3/2011, when Ext.P2 reference was made.

Counsel for the petitioner seeks time to look up and argue.

Post on 27/7/2011 along with WP(c)No.16891/2011.”

16. Thereupon at the request of the counsel, these cases were adjourned and were finally heard on 17.08.2011 and both the Sr. Counsel for the petitioner and the learned Govt. Pleader argued on the issues raised in the writ petition and those covered in the order dated 25.07.2011.

17. I shall first deal with the question whether the issues raised in Ext.P1 complaint, could have formed the subject matter of a reference under Section 7(3) of the Act. Placing reliance on the words “action means any action including administrative action” occurring in Section 2(a) of the Act, learned Senior Counsel for the petitioner contended that in view of the language of the Section and the object sought to be achieved by the Act, any action by a public servant would come within the scope of Section 2(a) of the Act. Further he also contended that reference under Section 7(3) is not limited to actions defined in Section 2(a)

alone, but would also extend to actions involving allegations and grievances. According to him a narrow interpretation of Sections 2(a) and 7(3) would defeat the very object of the Act and therefore should not be preferred.

18. In this context, it is necessary to have a look at the relevant statutory provisions to understand the scope of these provisions. Section 7 of the Act enumerates the matters which may be investigated by the Lok Ayukta and the Upa Lok Ayuktas and to the extent relevant, the section is extracted below for reference:

“Sec.7(1): Subject to the provisions of this Act, the Lok Ayukta and one of the Upa-Lok Ayuktas, as may be nominated by the Lok Ayukta for the purpose, may investigate any action which is taken by or with the general or specific approval of

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(i) the Chief Minister; or

(ii) a Minister; or

(iii) a Member of the State Legislature; or

(iv) a Secretary; or

(v) an office bearer of a political party at the state level; or

(vi) an officer referred to in sub-clause (iii) of clause (d) of Section 2,

in any case where a complaint involving a grievance or an allegation is made in respect of such action and where there is difference of opinion between the Lok Ayukta and the Upa-Lok Ayukta as so nominated, the action shall be investigated by the Lok Ayukta and both the Upa-Lok Ayuktas together and the decision of the majority therein shall prevail,

(2) Subject to the provisions of this Act, an Upa-Lok Ayukta may investigate any action which is taken by, or with the general or specific approval of, any public servant not being the Chief Minister or a Minister or a Member of the State Legislature or a Secretary or an office bearer of a political party at State level or an

officer referred to in sub-clause (iii) of clause (d) of Section 2, in any case where a complaint involving a grievance or an allegation is made in respect of such actions or such action can be or could have been in the opinion of the Upa-Lok Ayukta, the subject of a grievance or an allegation.

(3) Notwithstanding anything contained in sub-sections (1) and (2), the Lok Ayukta or an Upa-Lok Ayukta may investigate any action taken by or with the general or specific approval of a public servant, if it is referred to him by the Government”.

19. The general rule of construction of a statute is not only to look at the words but also to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning according to what would appear to be the meaning intended to be conveyed by the use of the word under the circumstances (vide *Jagir Singh and others v. State of Bihar and another* (AIR 1976 SC 997)).

20. A perusal of sub-section (1) shows that the Lok Ayukta may investigate any action which is taken by or with the general or specific approval of any of the public servants mentioned at Serial Nos.1 to 6, in any case where a complaint involving a “grievance or an allegation” in respect of such action is made. Sub-section (2) provides for investigation by Upa Lok Ayukta into any action taken by or with the general or specific approval of, any public servant not included in Section 7(1), in any case where a complaint involving a “grievance or an allegation” is made in respect of such actions or such action can be or could have been in the opinion of the Upa-Lok Ayukta, the subject of a “grievance or an allegation”. Section 7(3) states that notwithstanding the provisions contained in sub-sections (1) and (2), the Lok Ayukta or Upa Lok Ayukta may investigate “any action” taken by or with the general or specific approval of a public servant, if it is referred by the Government.

21. A close reading of sub-sections (1), (2) and (3) show that sub Sections (1) and (2) confers authority on the Lok Ayukta or Upa Lok Ayukta, as the case may be, to investigate into any “action” of the public servant, where such actions involve a “grievance” or an “allegation”, which expressions are defined in clauses (b) and (h) of Section 2 of the Act. On the other hand, notwithstanding Section 7(1) and (2), Section 7(3) authorizes the Government to refer to the Lok Ayukta for

investigation, any “action” taken by a public servant, which expression is also defined in Section 2(a) of the Act. Thus, in view of the non-obstante clause contained in Section 7(3) of the Act, inspite of the provisions contained in Section 7(1) and (2), Section 7(3) will have its full operation and Sections 7(1) and (2) will not be an impediment, for a reference being made for an investigation. Here it is to be noticed that while the legislature has used the expression, “action involving allegation or grievance” in Sections 7(1) and (2), the expression used in Section 7(3) is “action”. Therefore to invoke Sections 7(1) and (2) of the Act, the action complained of should also involve a “grievance” or an “allegation”, whereas Section 7(3) only requires an “action” to make a reference to the Lok Ayukta.

22. The expressions, action, allegation and grievance, have been defined in Section 2(a), (b) and (h) of the Act and the definitions read thus:

“(a) “action” means any action including administrative action taken by way of decision, recommendation or finding or in any other manner and includes willful failure or omission to act and all other expressions relating to such action shall be construed accordingly;

(b) “allegation”, in relation to a public servant, means any affirmation that such public servant. --

(i) has abused his position as such public servant to obtain any gain or favour to himself or to any other person or to cause undue harm or hardship to any other person;

(ii) was actuated in the discharge of his functions as such public servant by personal interest or improper or corrupt motives; or

(iii) is guilty of corruption, favouritism, nepotism or lack of integrity in his capacity as such public servant;

(h) “grievance” means a claim by a person that he sustained injustice or undue hardship in consequence of mal-administration.”

23. Thus, as per Section 2(a), an action means any action including administrative action by way of decision, recommendation or finding or in any other manner and includes willful failure and omission to act. This definition clause is in the form of “mean and include” and such definitions are considered exhaustive. The object of the Act is to ensure purity in administrative actions by public servants and machineries have been created to enquire into such actions. Bearing in mind the principles laid down by the Apex Court in Jagir Singh’s Case (supra), if the meaning of the word of “action” as defined in Section 2(a) is examined, it can be seen that, to qualify to be an “action” as defined in Section 2(a) of the Act, the action complained of must be that of a public servant and should be one in discharge of or in the purported discharge of his duties as a public servant. Otherwise, if the interpretation canvassed on behalf of the petitioner is accepted, the resultant position would be that everything done by a public servant, including those which are totally unrelated to his duties as such, would also come within the purview of Section 2(a). Such an interpretation, is against the object of the statute itself and is untenable. Contrary to this, the expression “allegation” in relation to a public servant includes abuse of his position as public servant to obtain any gain or favour, any affirmation that he was actuated by personal interest, improper or corrupt motives and cases where he is guilty of corruption, favouritism, nepotism or lack of integrity in his capacity as public servant. The expression “grievance” means the claim by a person that he sustained injustice or undue hardship as a consequence of mal-administration. From these expressions also it is clear that while ‘action’ means and include what is done by a person in discharge of his duties as a public servant, “allegation” refers to omissions and commissions of a public servant, which are actuated by personal interest or corrupt motives, etc., and “grievance” arises out of individual hardship or injustice caused by a public servant. Viewed in this manner, it can be seen that while Sections 7(1) and (2) takes in only cases of actions of public servants which involve allegations or grievance as defined in Section 2(b) and (h) of the Act, the subject matter of reference under Section 7(3) of the Act can only be the action of a public servant, which means that the action should be in his capacity as a public servant or in the purported discharge of his duties as such.

24. As far as the broad interpretation sought to be placed on Section 7(3) is concerned, as I have already held while the legislature has used the expression “action involving grievance or allegation” in Sections 7(1) and (2) of the Act, it has only used the expression “action” in Section 7(3) of the Act. From the unambiguous words used in the statute, it is clear that under Section 7(3) of the Act the legislature intended to refer only cases involving action as defined in Section 2(a), which will not include cases where actions involve allegation or grievance. If the argument canvassed by the learned Senior Counsel for the petitioner is to be accepted, this court will have to ignore the difference in the plain language of Sections 7(1) and (2) as compared to Section 7(3) of the Act. Such an exercise is impermissible in a process of interpretation, particularly in a case where the words of the statute are clear and unambiguous, justifying only its literal interpretation. For the aforesaid reasons, this contention of the Senior Counsel of the petitioner deserves to be rejected.

25. The scope of Section 7(3) of the Act being as above, Ext.P1 complaint made by the 3rd respondent should be examined to decide whether a reference under Section 7(3) of the Act could have been made. Among the 11 allegations raised, allegation No.4 is directly against the former Chief Minister and allegation Nos.7 and 10 are against both the former Chief Minister, his office and the petitioner and all the remaining allegations are against the petitioner himself. These allegations do not have any connection with the duties discharged by the petitioner in his capacity as a public servant, to qualify these to be “actions” as defined in Section 2(a) of the Act. If that be so, the only conclusion that is possible is that the allegations in Ext.P1 complaint could not have formed the subject matter of a reference under Section 7(3) of the Act and therefore, Ext.P2 order dated 10.3.2011 and the reference made to the Kerala Lok Ayukta are legally unsustainable.

26. The 2nd question which was posed to the learned Senior Counsel for the petitioner was whether Ext.P9 notification issued on 04.05.2011 could validate Ext.P2 reference made on 10.03.2011. Ext.P2 reference was made on the basis of the former Chief Minister’s letter dated 09.03.2011 (extracted above), requesting the Minister for Home and Vigilance Department to enquire into the allegations

against the petitioner, who is an Additional Director in IHRD. It was acting upon that letter, the Minister for Home and Vigilance issued his note dated 09.03.2011 (extracted above) to the Addl. Chief Secretary, Home and Vigilance, directing that since Arun Kumar is an officer of IHRD, the allegations raised by the Opposition Leader should be referred to the Lok Ayukta for an enquiry under Section 7(3) of the Act. Therefore, the reference under Section 7(3) was made on the basis that, being an officer of IHRD, petitioner is a public servant as defined under the Act.

27. IHRD is a Society registered under the Travancore Cochin Literary, Scientific and Charitable Societies Registration Act 1955 under the control of Government of Kerala. The employees of such a Society could be public servants for the purpose of the Act, only if a notification is issued by the Government of Kerala in terms of Section 2(o)(vii)(D) of the Act. Admittedly, when the reference was made on 10.03.2011, IHRD was not a Society notified in terms of Section 2(o)(vii)(D) of the Act and it was only by Ext.P9 notification dated 04.05.2011 that the Government of Kerala notified IHRD for the purpose of the Act. Thus, it is only with effect from 04.05.2011, employees of IHRD became public servants for the purpose of the Act.

28. In such circumstances, the question is whether Ext.P9 notification issued on 04.05.2011 would validate Ext.P2 reference made on 10.03.2011 when the petitioner was not a public servant for the purpose of the Act. As already seen, reference under Section 7(3) could be made only regarding the “action” of a public servant. Therefore, at the time of the alleged action, the person concerned should be a public servant. In this case, this fundamental requirement is not satisfied and hence, the reference is without jurisdiction and is a nullity.

29. The question whether an initial fundamental defect such as the one pointed out above, could be rectified by a subsequent notification, has been considered by the Apex Court in various cases and it has been consistently held in the negative. In the context of a proceeding under the Contempt of Court Act, where consent of the Advocate General was obtained subsequent to making of the motion, in its Judgment in *State of Kerala v. M.S. Mani and Others* (AIR 2001 SC 3315), the Apex Court held that:-

“subsequent obtaining of a consent, in our view, does not cure the initial defect so as to convert the incompetent motion in to a maintainable petition.”

30. In *Ritesh Tewari and another v. State of Uttar Pradesh and Others* (2010 (10) SCC 677) it has been held thus:

“32. It is settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A subsequent action/development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. It would be beyond the competence of any authority to validate such an order. It would be ironical to permit a person to rely upon a law, in violation of which he has obtained the benefits. (Vide *Upen Chandra Gogoi v. State of Assam*; *Satchidananda Misra v. State of Orissa* and *SBI v. Rakesh Kumar Tewari*.)

33. In *C. Albert Morris v. K. Chandrasekaran* this Court held that a right in law exists only and only when it has a lawful origin.

34. In *Mangal Prasad Tamoli v. Narvadeshwar Mishra* this Court held that if an order at the initial stage is bad in law, then all further proceedings consequent thereto will be non est and have to be necessarily set aside.”

31. Again in *Chairman-cum-Managing Director, Coal India Limited and Others v. Ananta Saha and Others* (2011 (5) SCC 142) it has been held thus:

“32. It is a settled legal proposition that if initial action is not in consonance with law, subsequent proceedings would not sanctify the same. In such a fact situation, the legal maxim *sublato fundamento cadit opus* is applicable, meaning thereby, in case a foundation is removed, the superstructure falls.”

Thus, if the initial reference by Ext.P2 order is without jurisdiction, it could not have been sanctified by Ext.P9, the subsequent notification issued under Section 2 (o)(vii)(D) of the Act. For this reason also the reference made under Section 7(3) of the Act is untenable.

32. In Ext.P9 counter affidavit filed by him, petitioner has raised a contention that some of the allegations pertained to the period when he was an employee of COIRFED and that COIRFED was an establishment already notified under Section 2(o)(vii)(D) of the Act. However, I am unable to accept this contention to sustain the reference for the reason that files show that the reference under Section 7(3) was made on the basis that the petitioner, being an officer of IHRD, is a public servant. If it were not so, the Government need not have issued Ext.P9 notification. In the light of the above discussion, the finding of the Upa Lok Ayukta, that the petitioner's actions even before he became a public servant as defined in the Act can be investigated, is unsustainable.

33. The main contention of the learned Senior Counsel for the petitioner was that once a reference is made under Section 7(3) of the Act, it cannot be withdrawn by the Government. It was contended that there is no provision in the Act enabling withdrawal of a reference made under Section 7(3) and therefore the impugned decision of the Government is illegal. This contention was sought to be supported relying on the principles laid down by the Apex Court in the judgments in *State of Bihar v. D.N. Ganguly and Others* (AIR 1958 SC 1018) and *State of Madhya Pradesh vs. Ajay Singh and others* (AIR 1993 SCC 825).

34. I should mention in this context that while the petitioner is arguing to sustain the reference made, in the pleadings, he is not canvassing that the reference is legally tenable. Therefore he is reserving his right to raise this plea when time is ripe for such an argument. It is in this context the apprehension of the Government recorded in Ext.P14 order of the Upa Lok Ayukta that the allegations leveled against the petitioner may go without investigated in case it is ultimately found that the reference itself is invalid, has to be appreciated. I have already held the reference legally unsustainable and accepting the contentions of the petitioner, if the order now passed by the Upa Lok Ayukta is interfered with, result would be the revival of a legally untenable reference. An investigation into such a reference, will be an exercise in futility, a waste of time, public money and energy and will delay, if not defeat, investigation by competent agencies. In such a case, this Court will not exercise its jurisdiction and quash the impugned order for the reason that quashing the impugned order will result only in the revival of an illegal reference.

35. This view I have taken, is fortified by the principles laid down by this Court in the judgment in *Rameshan v. Jayavally* (2007 (2) KLT 325), where, referring to the relevant precedents, it was held thus:

“12. However, our conclusion on the above issue does not conclude the dispute, if we accept the contention of the appellant on point No.2. As we have already noted, according to the quashing of Ext.P5 and Ext.P7 would result in restoration of the orders of the Educational Authorities declining approval to his appointment which is per se illegal for other reasons and therefore we should restrain ourselves from exercising power under Art.226 of the Constitution of India. Counsel made reference to various authorities in support of the above proposition canvassed by him. He has referred to the judgment of the Supreme Court reported in *Venkateswara Rao v. Government of Andhra Pradesh* (AIR 1966 SC 828), wherein it has been observed as follows:

“If the High Court had quashed the said order, it would have restored an illegal order - it would have given the Health Centre to a village contrary to the valid resolutions passed by the Panchayat Samithi. The High Court, therefore, in our view, rightly refused to exercise its extraordinary discretionary power in the circumstances.”

This was followed by the Andhra Pradesh High Court in the case reported in *M. Padmanabha Iyyengar v. Government of A.P.* (AIR 1990 A.P. 357) and held as follows:

“It must also be remembered that the remedy under Art.226 is a discretionary one. The court is not bound to interfere merely on the establishment of an irregularity or illegality. The court must further be satisfied that such interference is called for to meet, or to further, the orders of justice. If by interfering in the matter the interests of justice are going to suffer, this Court will withhold its arm: (See *Sangram Singh v. Election Tribunal, Kotah* (AIR 1955 SC 425) and *Venkateswara Rao v. Government of Andhra Pradesh* (AIR 1966 SC 828). Having regard to the totality of the circumstances, we do not think that this court should interfere and quash the Inquiry under S.5A.”

Still later in the case of Jagan Singh v. State Transport Appellate Tribunal (AIR 1980 Raj. 1, it has been held as follows:

“As we have already pointed out above, the effect of setting aside the impugned order passed by the Tribunal by a writ of certiorari would be restoring an invalid and illegal order passed by the Regional Transport Authority. Reference may also be made to G. Venkateswara Rao v. Government of Andhra Pradesh (AIR 1966 SC 828).”

Making reference to R. v. Garland (1970 (5) QB 269), it was contended that even in issuing writs of mandamus, the same principle is followed and that if the effect of issuing mandamus is going to be highly prejudicial, as where it would enable trustees to evade the discharge of their duties, a court of equity will not issue the writ. These judgments were followed by a Division Bench of this Court in the case reported in Koya v. State of Kerala (1992 (2) KLT 194), where it has been held as follows:

“It is now well settled that if an order of an authority is illegal or without jurisdiction, it need not be quashed by the High Court under Art.226 of the Constitution of India if such action would result in restoration or revival of another order, which is also bad.”

On this reasoning, this Court concluded in the following terms:

“Following the principles laid down by the Supreme Court in Venkateswara Rao v. Government of Andhra Pradesh (AIR 1966 SC 828) for exercise of discretion, we hold that this is not a fit case for quashing Ext.P5 order of the Government even if it was without jurisdiction for, such quashing would restore Ext.P4 order of the Wakf Board which is bad for other reasons. This is therefore, not a fit case for exercising discretion to quash Ext.P5.”

Counsel also made reference to the judgment in Mohammad Swallieh and Ors. v. Third Addl. District Judge, Meerut and Anr. (1988 (1) SCC 40). Paragraph 7 thereof is extracted below for reference:

“It was contended the High Court that no appeal lay from the decision of the Prescribed Authority to the District Judge. The High Court accepted this contention. The High Court finally held that though the appeal laid (sic no appeal lay) before the District Judge, the order of the Prescribed Authority was invalid and was rightly set aside by the District Judge. On that ground the High Court declined to interfere with the order of the learned District Judge. It is true that there has been some technical breach because if there is no appeal maintainable before the learned District Judge, in the appeal before the learned District Judge, the same could not be set aside. But the High Court was exercising its jurisdiction under Article 226 of the Constitution. The High Court had come to the conclusion that the order of the Prescribed Authority was invalid and improper. The High Court itself could have set it aside. Therefore in the facts and circumstances of the case justice has been done though, as mentioned hereinbefore, technically the appellant had a point that the order of the District Judge was illegal and improper. If we reiterate the order of the High Court as it is setting aside the order of the Prescribed Authority in exercise of the jurisdiction under Art.226 of the Constitution then no exception can be taken. As mentioned hereinbefore, justice has been done and as the improper order of the Prescribed Authority has been set aside, no objection can be taken.”

We are also referred to the Supreme Court judgment in the case reported in *Roshan Deen v. Preeti Lal* (2002 (1) KLT (SC) (SN) 43 = AIR 2002 SC 33), where it has been held as follows:

“Time and again this Court has reminded that the power conferred on the High Court under Arts.226 and 227 of the Constitution is to advance justice and not to thwart it, (vide *State of Uttar Pradesh v. District Judge, Unnao and Ors.*, (AIR 1984 SC 1401). The very purpose of such constitutional powers being conferred on the High Court is that no man should be subjected to injustice by violating the law. The look out of the High Court is, therefore, not merely to pick out any error of law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the byproduct of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law.”

We were also referred to a Division Bench of this Court in W.A.No.2430 of 2002 in which the aforesaid judgment of the Supreme Court has been followed and it was held that the court cannot erase justice done in the name of correcting error of law.”

36. These principles have been again stated in the Apex Court judgment in Mysore Urban Development Authority v. Veer Kumar Jain (AIR 2010 SC 2153). Therefore, in view of the finding that the reference is legally untenable and for the aforesaid reasons, it is unnecessary to examine the contention raised by the petitioner regarding the power of the Government to withdraw a reference made under Section 7(3) of the Act.

37. In W.P.(C).No.16891/2011, petitioner is seeking to quash Ext.P12 order dated 16.06.2011 issued by the first respondent ordering a vigilance enquiry into the allegations mentioned in the order. Contention raised was that the 3rd respondent, being the present Chief Minister of the State, is also in charge of the Vigilance and Anti Corruption Bureau. Therefore, according to him, the complainant being the Minister in charge of the investigating agency, the investigation will not be fair and unbiased. First of all, petitioner’s father himself having initiated the reference against him, this very argument was urged by the respondents also. That apart, by the time writ petitions were heard, the 3rd respondent had relinquished his charge over the Vigilance and Anti Corruption Bureau. Further, the result of accepting this contention would be that, no agency in this state will be competent to conduct the investigation, so long as the 3rd respondent continues in office. Irrespective of all these, this argument is also against the settled legal principles regarding the independence enjoyed by the investigating officers, which has been reiterated by the Apex Court in R. Sarala v. T.S. Velu (AIR 2000 SC 1731) where it has been held thus:

“15. In this context we may also point out that the Investigating Officer, though is subject to supervision by his superiors in rank is, not to take instructions regarding investigation of any particular case even from the executive government of which he is a subordinate officer. This position which was well delineated by the celebrated Lord Denning, has since been followed by this Court. In R. v.

Metropolitan Police Commissioner, (1968 (1) All ER 763). Lord Denning had said thus:

“I have no hesitation, however, in holding that, like every constable in the land, he should, and is, independent of the executive. He is not subject to the orders of the Secretary of State I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and t the law alone.”

Therefore, this contention also has no force.

For the aforesaid reasons, the writ petitions lack merit and are dismissed.

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