

A

JUSTICE K.P. MOHAPATRA

v.

SRI RAM CHANDRA NAYAK AND ORS.

OCTOBER 9, 2002

B

[M.B. SHAH AND D.M. DHARMADHIKARI, JJ.]

C

*Orissa Lokpal and Lokayuktas Act, 1995—Section 3(1)—Appointment of Lokpal—Chief Minister proposing three names for office of Lokpal to Chief Justice of High Court and Leader of Opposition—Chief Justice agreeing for appointment of retired High Court Judge while Leader of Opposition proposing another name—Government appointing retired High Court Judge as Lokpal—High Court setting aside the appointment as there was no effective consultation with the Leader of Opposition—On appeal held, High Court erred in setting aside the appointment since the consultation with Chief Justice is mandatory and his opinion would have primacy—Nature of consultation with the Leader of Opposition is only to apprise him about the proposal of selecting a person to the post and take his view and the opinion rendered by him is not binding on the Government.*

D

E

*Words and Phrases:*

*'Consultation'—Meaning of in the context of Section 3 of the Orissa Lokpal and Lokayuktas Act, 1995.*

F

G

**For appointment of Lokpal, Chief Minister of Orissa wrote a letter to Chief Justice of Orissa High Court and Leader of Opposition that the three persons named therein were under consideration for the Office of Lokpal and requested them to convey their views. Chief Justice replied that among them, the appellant-retired Judge of Orissa High Court may be appointed as Lokpal. Leader of Opposition opined that another person named therein who was working as Chairman of State Administrative Tribunal could be considered for the office. Thereafter, Government of Orissa appointed the appellant as Lokpal. Respondent filed Public Interest Litigation. High Court set aside the appointment of appellant as Lokpal on the ground that there was no effective consultation with the Leader of the Opposition. Hence the present appeal.**

H

Appellant contended that the suggestion made by Chief Justice of High Court would have primacy; the consultation with the Leader of Opposition would not mean that Government should concur with the same or should postpone the appointment of Lokpal and consider the names suggested by the Leader of Opposition; the Leader of Opposition has not made any grievance against appointment of appellant nor has stated that he is unfit for the appointment and merely because he has suggested another name, it cannot be said that Government should wait and discuss the name suggested by him.

State contended that the appellant was having essential qualification and qualities; and that the Leader of Opposition did not state that the persons sponsored by the Government were devoid of essential qualities or disagreed with the names proposed by the Government.

As none appeared for the respondent, Amicus Curiae was appointed who submitted that the word 'consultation' has to be interpreted in the context of the post or public office and the object and purpose for which the provision for consultation is made and the Government is required to appoint a sitting or retired Judge of Supreme Court or High Court as Lokpal under the Act, thus the consultation by Government with Chief Justice is a *sine qua non*. As against this, consultation with the Leader of Opposition may be for information so that if there is something against the proposed name, he can draw the attention but the law does not require that the Leader of Opposition can propose a name for being appointed as Lokpal.

Allowing the appeal, the Court

HELD: 1.1. The word 'consultation' used in Section 3(1) proviso (a) of the Orissa Lokpal and Lokayuktas Act, 1995 requires that consultation with the Chief Justice of High Court is must or *sine qua non*. For such appointment, Chief Justice of High Court would be the best person for proposing and suggesting such person for being appointed as Lokpal. His opinion would be totally independent and he would be in a position to find out who is most or more suitable for the said office. In this context, primacy is required to be given to the opinion of Chief Justice of the High Court. Proviso (a) provides that Leader of Opposition, if there is any, is also required to be consulted. Therefore, if there is no Leader of Opposition, consultation is not required which would indicate nature of such consultation and which is to apprise him of the proposed action but

A his opinion is not binding on the Government. At the same time, his views or objections are to be taken into consideration. If something is adverse against the person proposed by the Government, he would be entitled to express his views and point it out to the Government. This, however, would not mean that he could suggest some other name and Government is required to consider it. It would, therefore, be open to the Government to override the opinion given by the Leader of Opposition with regard to the appointment of Lokpal who is statutorily required to be a sitting or retired Judge of Supreme Court or High Court. Under Section 3(1) of the Act, there is no question of initiation of proposal by the Leader of Opposition. [172-D-H; 173-A]

C 1.2. Applying the principle enunciated in the *Indian Administrative Service (SCS) Association's* case, scheme of Section 3(1) of the Orissa Lokpal and Lokayuktas Act, 1995 read with the functions to be discharged by the Lokpal and the nature of his qualification, it is apparent that in terms of section 3(1) the consultation with Chief Justice is mandatory and his opinion would have primacy. The nature of the consultation with the Leader of Opposition is to apprise him about the proposal of selecting a person to the post and also to take his views on the said proposal. However, the opinion rendered by the Leader of Opposition is not binding on the State Government and the Leader of Opposition would have no power to recommend someone else for the said post. [174-E-G]

*Indian Administrative Service (SCS) Association, UP and Ors. v. Union of India and Ors.*, [1993] Suppl. 1 SCC 730, relied on.

F CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6643 of 2002.

From the Judgment and Order dated 21.9.2001 of the Kolkata High Court in O.J.C. No. 14278 of 1996.

G K. Ramamoorthy, (AC) and Raju Ramachandran, Jana Kalyan Das, G.D. Gupta, Mrs. Shobha Nagarjuna and Radha Shyam, for the appearing parties.

The Judgment of the Court was delivered by

SHAH, J. Leave granted.

H Short question involved in this appeal is what is the requirement and

what meaning could be assigned to 'Consultation' as contemplated under Section 3(1) of the Orissa Lokpal and Lokayuktas Act, 1995 (hereinafter referred to as 'the Act')? Proviso (a) to Section 3(1) of the Act prescribes that the Government shall appoint Lokpal after consultation with the Chief Justice of the High Court of Orissa and the Leader of the Opposition, if there is any.

In a Public Interest Litigation filed under Articles 226 and 227 of Constitution of India in Original Jurisdiction Case No.14728 of 1996, by judgment and order dated 21.9.2001, the High Court of Orissa set aside the appointment of appellant as Lokpal on the ground that there was no effective consultation with the Leader of the Opposition.

Before dealing with the contentions raised, we would first refer to the brief facts of the present case. Appellant-retired Judge of the High Court of Orissa was appointed as the Lokpal by the Governor of Orissa by issuing Notification dated 26.11.1996. Before that, as provided under Section 3(1) of the Act, the Chief Minister of Orissa wrote a letter on 8.10.1996 to the Chief Justice of Orissa High Court and the Leader of the Opposition that the three persons named therein were under consideration for the Office of the Lokpal and requested them to convey their considered views on the subject. By letter dated 10.10.1996, the Chief Justice replied that the appellant-a retired Judge of Orissa High Court may be appointed as Lokpal. Thereafter, on 11.11.1996, the Leader of the Opposition wrote a letter inter alia stating that the long record of previous Lokpals was one of palpable non-performance and that he construes that act of 'consultation' as envisaged under Section 3(1)(a) of the Act implies making of relevant suggestions on the issue. It was also stated that he wished that the person to be appointed as Lokpal must inter alia be a reputed judicial personality with high integrity, professional maturity and courage of conviction. According to his knowledge, one other person named therein who was working as Chairman of State Administrative Tribunal could be one with such qualities and he may be considered for the august Office. Thereafter, by Notification dated 26.11.1996, the Government of Orissa appointed the appellant as the Lokpal with effect from the date he is sworn in as such.

After hearing the parties, PIL was allowed and it was held that there was no effective consultation with the Leader of the Opposition and that the consultation under Section 3(1) of the Act is not an empty formality but it should be real, full and effective amongst the Governor, Chief Justice and Leader of the Opposition. The Court observed that there was no consultation

A with the Chief Justice with regard to the name suggested by the Leader of the Opposition and if the Chief Minister had consulted the Chief Justice, he would have given his opinion on the same and, therefore, the consultation as contemplated under Section 3(1) of the Act had not taken its full course. Therefore, appointment of the appellant as Lokpal was void. That order is under challenge in this appeal.

B

The learned counsel for the appellant submitted that the order passed by the High Court is, on the face of it, illegal and erroneous. It is his submission that the suggestion made by the Chief Justice of the High Court would have primacy. It is also submitted that the consultation with the Leader of the Opposition would not mean that the Government should concur with the same or should postpone the appointment of Lokpal and consider the names suggested by the Leader of the Opposition. He pointed out that in the present case, the Leader of the Opposition has not made any grievance against appointment of the appellant or has not stated anything that he is not fit for being appointed to the said post. Merely because he has suggested other name than the names which were under consideration by the Government, it cannot be said that the Government should wait and discuss the name suggested by him.

C

The learned counsel for the State also supported the said contentions and submitted that there was no dispute that the appellant was having essential qualification and qualities. The Leader of the Opposition in his letter has nowhere stated the persons sponsored by the Government were devoid of essential qualities for being appointed as Lokpal nor it can be stated that Leader of the Opposition has disagreed with the names proposed by the Government.

D

As none appeared on behalf of the respondent, who was petitioner before the High Court, we appointed learned senior counsel Mr. Ramamurthi as *Amicus Curiae* to assist us. He submitted that the word 'consultation' has to be interpreted in the context of the post or public office and the object and purpose for which the provision for consultation is made. It is his submission that under the Act, Government is required to appoint a sitting or retired Judge of the Supreme Court or of a High Court as the Lokpal. In this context, the consultation by the Government with the Chief Justice is a *sine qua non*. As against this, consultation with the Leader of the Opposition may be for information so that if there is something against the proposed name, he can draw the attention but the law does not require that the Leader of the

E

F

G

H

Opposition can propose a name for being appointed as Lokpal. A

Before appreciating the contention raised by the learned counsel for the parties, we would first refer to the objects and reasons of the Act, which provide that it is an act to make provision for the appointment and functions of Lokpal and Lokayuktas for the investigation of administrative action taken by or on behalf of the Government or certain local and public authorities in certain cases and for matters connected therewith and matters involving acts of injustice, corruption or favouritism. B

Relevant provision which calls for interpretation is Section 3 (1) & (2) of the Act, which reads thus: C

**“3. Appointment of Lokpal and Lokayuktas.—**(1) For the purpose of conducting investigations in accordance with the provisions of this Act, the Governor shall appoint a person to be known as the Lokpal and one or more persons to be known as the Lokayukta or Lokayuktas: D

Provided that—

- (a) the Lokpal shall be appointed after consultation with the Chief Justice of the High Court of Orissa and the Leader of the Opposition, if there is any; E
  - (b) the Lokayukta or Lokayuktas shall be appointed after consultation with the Lokpal.
- (2) A person shall not be qualified for appointment as
- (a) Lokpal unless he is or has been a Judge of the Supreme Court or of a High Court; and F
  - (b) A Lokayukta unless he is qualified to be a Judge of a High Court.”

Further, Section 4(1) *inter alia* provides that Lokpal or Lokayukta should not be connected with any political party. In any case, if he is connected, he is required to sever the connection on being appointed to the said post. That means, he must be an independent non-political person. Under Section 7, Lokpal has *inter alia* to investigate any action which is taken by or with a general or specific approval of Chief Minister or a Minister or a Secretary, in a case where a complaint involving a grievance or an allegation is made G

H

A in respect of such action or such action can be or could have been, in the opinion of the Lokpal, the subject of a grievance or an allegation. The word 'Minister' is defined under Section 2 (i) to mean a member of the Council of Ministers and includes the Chief Minister, Deputy Chief Minister, a Minister of State, a Deputy Minister and the Leader of Opposition or a Parliamentary Secretary.

B

In context of the aforesaid functions of the Lokpal and the required qualification of a person who is to be appointed to hold such office, the word 'consultation' used in Section 3 is required to be interpreted. As provided under Section 3, a person is not qualified to be appointed as Lokpal unless

C

he is or has been a Judge of the Supreme Court or of a High Court. In the context of the functions which are to be discharged by the Lokpal, it is apparent that they are of utmost importance in seeing that unpoluted administration of the State is maintained and mal-administration as defined under Section 2(h) is exposed so that appropriate action against such mal-administration and administrator could be taken. The investigation which

D

Lokpal is required to carry out is that of quasi-judicial nature which would envisage not only knowledge of law, but also of the nature and work which is required to be discharged by an administrator. In this context, the word 'consultation' used in Section 3(1) Proviso (a) would require that consultation with the Chief Justice of the High Court of Orissa is must or *sine qua non*.

E

For such appointment, Chief Justice of the High Court would be the best person for proposing and suggesting such person for being appointed as Lokpal. His opinion would be totally independent and he would be in a position to find out who is most or more suitable for the said office. In this context, primacy is required to be given to the opinion of the Chief Justice of the High Court. It is true that proviso (a) provides that Leader of the

F

Opposition, if there is any, is also required to be consulted. Therefore, if there is no Leader of Opposition, consultation is not required. This would indicate nature of such consultation and which is to apprise him of the proposed action but his opinion is not binding to the Government. At the same time, his views or objections are to be taken into consideration. If something is

G

adverse against the person proposed by the Government, he would be entitled to express his views and point it out to the Government. This, however, would not mean that he could suggest some other name and the Government is required to consider it. It would, therefore, be open to the Government to override the opinion given by the Leader of the Opposition with regard to the appointment of a Lokpal who is statutorily required to be a sitting or retired

H

Judge of the Supreme Court or of a High Court. Under Section 3(1) of the

Act, there is no question of initiation of proposal by the leader of the Opposition. A

This Court in *Indian Administrative Service (SCS) Association, UP and Ors v. Union of India and Ors.*, [1993] Suppl. 1 SCC 730 considered amplitude of the word 'consultation' used in Section 3(1) of the All India Services Act, 1951 which *inter alia* reads thus: - B

"3.(1) Regulation of recruitment and conditions of service.(1) The Central Government may, *after consultation with the Governments of the States concerned* (including the State of Jammu and Kashmir), (and by notification in the Official Gazette) make rules for the regulation of recruitment, and the conditions of service of persons appointed to an All India Service." C

The Court considered the phrase 'after consultation with the Governments of States concerned' and discussed number of decisions on the word 'consultation' and held thus: D

"26. The result of the above discussion leads to the following conclusions:

- (1) Consultation is a process which requires meeting of minds between the parties involved in the process of consultation on the material facts and points involved to evolve a correct or at least satisfactory solution. There should be meeting of minds between the proposer and the persons to be consulted on the subject of consultation. There must be definite facts which constitute the foundation and source for final decision. The object of the consultation is to render consultation meaningful to serve the intended purpose. Prior consultation in that behalf is mandatory. E
- (2) When the offending action affects fundamental rights or to effectuate built-in insulation, as fair procedure, consultation is mandatory and non-consultation renders the action *ultra vires* or invalid or void. F
- (3) When the opinion or advice binds the proposer, consultation is mandatory and its infraction renders the action-or order illegal. G
- (4) When the opinion or advice or view does not bind the person or authority, any action or decision taken contrary to the advice is H

A. The act is not illegal, nor becomes void.

(5) When the object of the consultation is only to apprise of the proposed action and when the opinion or advice is not binding on the authorities or person and is not bound to be accepted, the prior consultation is only directory. The authority proposing to take action should make known the general scheme or outlines of the actions proposed to be taken be put to notice of the authority or the persons to be consulted; have the views or objections, take them into consideration; and thereafter, the authority or person would be entitled or has/have authority to pass appropriate orders or take decision thereon. In such circumstances it amounts to an error to take action after consultation.

(6) No hard and fast rule could be laid, no useful purpose would be served, by formulating words or definitions, nor would it be appropriate to lay down the manner in which consultation must take place. It is for the Court to determine in each case in the light of its facts and circumstances whether the action is 'after consultation', 'was in fact consulted' or 'was it a sufficient consultation'.

In the aforesaid case, the Court has further observed - "the Central Government is not bound to accept all or every proposal or counter proposal".

Applying the principle enunciated in the aforesaid judgment, Scheme of Section 3(1) of the Act read with the functions to be discharged by the Lokpal and the nature of his qualification, it is apparent that the consultation with the Chief Justice is mandatory and his opinion would have primacy. The nature of the consultation with the Leader of the Opposition is to apprise him about the proposal of selecting a person to the post and also to take his views on the said proposal. However, the opinion rendered by the Leader of the Opposition is not binding on the State Government and the Leader of the Opposition would have no power to recommend someone else for the said post.

In the result, the appeal is allowed and the impugned judgment and order dated 21.9.2001 passed by the High Court of Orissa at Cuttack in O.J.C. No.14728 of 1996 is quashed and set aside. There shall be no order as to costs.

Appeal allowed.