

VAZHAMUTTAM EAST P.O.
VALLICODE VILLAGE, KONNI TALUK,
PATHANAMTHITTA DISTRICT

*ADDL.R3 IS IMPEADED AS PER ORDER DATED 28.2.2017
IN I.A. NO.169 OF 2017.

R3 BY ADV. SRI.M.R.HARIRAJ
R3 BY ADV. SRI.P.A.KUMARAN
R3 BY ADV. SRI.K.RAJAGOPAL
R3 BY ADV. SMT.PRIYADA R MENON
R3 BY ADV. SMT.G.BINDU
R1 BY ADV. SRI.R.PARTHASARATHY
R1 BY ADV. SRI.K.JAYAKUMAR (SR.)
R BY SMT.LATHA ANAND

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 30-08-
2017, ALONG WITH WA. 2013/2016, WA. 2014/2016, WA. 2017/2016,
WA. 2018/2016, WA. 2163/2016, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

VPS

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE CHIEF JUSTICE MR. NAVANITI PRASAD SINGH

&

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

WEDNESDAY, THE 30TH DAY OF AUGUST 2017/8TH BHADRA, 1939

WA.No. 2012 of 2016 () IN WP(C).18722/2016

AGAINST THE JUDGMENT IN WP(C) 18722/2016 of HIGH COURT OF
KERALA DATED 09-09-2016

APPELLANT/1ST RESPONDENT:

STATE OF KERALA

REPRESENTED BY THE SECRETARY TO
GOVERNMENT OF KERALA,
DEPARTMENT OF GENERAL ADMINISTRATION,
SECRETARIAT,
THIRUVANANTHAPURAM -695 031.

BY ADVOCATE GENERAL SRI.C.P.SUDHAKARA PRASAD
BY SR.GOVERNMENT PLEADER SRI.V.MANU

RESPONDENTS/WRIT PETITIONER AND ADDITIONAL R2:

1. ANKATHIL AJAYAKUMAR

S/O.PADMANABHAN NAMBIAR, AGED 54 YEARS,
'SREEPADAM', ANKATHIL P.O.,
KUTHIRAVATTOM,
KOZHIKODE-673 016.

2. SOMATHAN PILLAI, S/O.LATE SIVARAMA PILLAI
RESIDING AT E.R.A-9, EMS NAGAR, PATTOOR,
VANCHIYOOR P.O.,
THIRUVANANTHAPURAM-695 035.

*3. RTI FEDERATION OF KERALA,

COCHIN CHAMBER OF LAWYERS
PROVIDENCE ROAD,
KOCHI-682018

REP BY ITS STATE GENERAL SECRETARY,
ADV. A.JAYAKUMAR, AGED 43 YEARS,
S/O K.A.ACHUTHAN NAIR, RESIDING AT
KIZHAKKEPURAVATHU HOUSE,

NAVANITI PRASAD SINGH, C.J. &
RAJA VIJAYARAGHAVAN V., J.

W.A. Nos.2012, 2013, 2014, 2017, 2018 &
2163 of 2016

Dated this the 30th day of August, 2017

JUDGMENT

Navaniti Prasad Singh, C.J.

- 1.We are dealing with six writ appeals, five of which being W.A.Nos.2012, 2013, 2014, 2017 & 2018 of 2016 are filed by the State; whereas W.A.No.2163 of 2016 has been filed by an individual, who was the writ petitioner in W.P.(C) No.7665 of 2016. W.A.Nos.2012, 2013, 2014, 2017 & 2018 of 2016, the State intra court appeals, arise from different writ petitions, namely, W.P.(C) Nos.18722, 18744, 17944, 20439 & 18552 of 2016.
- 2.These writ petitions were filed by five candidates, who were selected and recommended by the Selection Committee in terms of section 15(3) of the Right to Information Act, 2005 for being appointed as State

Information Commissioners. The Governor having not notified them as such for appointment and there being delay, the writ petitions were filed and a mandamus was sought which was issued by the learned single Judge. The State being aggrieved, has filed these five intra appeals, namely W.A.Nos.2012, 2013, 2014, 2017 & 2018 of 2016.

3. So far as W.A. No.2163 of 2016 is concerned, the appellant was an applicant, who had applied for the post of State Information Commissioner pursuant to the advertisement issued by the Government and was aggrieved by the unceremonious way in which his name was omitted by the Secretary of the General Administration Department, in the short list prepared by him. It may be noted that in his writ petition, he made the then Leader of Opposition as a party respondent. The Leader of Opposition is one of the members of the selection committee. In course of proceedings, the Leader of Opposition filed a counter affidavit, being the 3rd

respondent, bringing some facts on record, which have not been disputed. We will take note of those aspects at the appropriate stage. This writ petitioner sought quashing of the recommendation as made by the Committee under Section 15(3) of the Act and for a direction to the State to conduct a proper selection to the post of the State Chief Information Commissioner and State Information Commissioners in a fair and transparent manner. However, the said writ petition was dismissed as premature on the ground that the Governor had not yet taken any decision in the matter and therefore, the challenge was premature. He is aggrieved by this dismissal of the writ petition. This writ petition was dismissed prior to the other writ petitions which were later allowed.

4. We have heard all the learned counsel for all the parties and with their consent, are disposing of all these writ appeals at this stage itself.

5. The basic question involved in the present litigation is as to the status and jurisdiction of Governor as contemplated in section 15(3) of the Act. Is he a constitutional authority in terms of Article 163 of the Constitution, or is he the statutory authority in terms of Section 15(3) of the Act or is he a mere rubber stamp? The answer to this question would substantially decide the fate of the case. The second question would be as to the propriety of procedure followed by the Selection Committee. We would first start with the second issue. In order to appreciate, we may quote sections 15(3), 15(5) and 15(6) of the Act.

“Section 15. Constitution of State Information Commission.-

(1) XXXX XXXX

(2) XXXX XXXX

(3) The State Chief Information Commissioner and the State Information Commissioners shall be appointed by the Governor on the recommendation of a committee consisting of--

(i) the Chief Minister, who shall be the

Chairperson of the committee;
(ii) the Leader of Opposition in the Legislative Assembly; and
(iii) a Cabinet Minister to be nominated by the Chief Minister.

Explanation.-- For the purposes of removal of doubts, it is hereby declared that where the Leader of Opposition in the Legislative Assembly has not been recognised as such, the Leader of the single largest group in opposition of the Government in the Legislative Assembly shall be deemed to be the Leader of the Opposition.

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(5) The State Chief Information Commissioner and the State Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance.

(6) The State Chief Information Commissioner or a State Information Commissioner shall not be a Member of Parliament or Member of the Legislature of any State or Union territory, as the case may be, or hold any other office of profit or connected with any political party or carrying on any business or pursuing any profession."

6.It appears that for this State there is one State Chief Information Commissioner and five State Information Commissioners. There were four vacancies to the post of State Information Commissioners for a very long time. Writ petitions were filed and a Division Bench of this Court

had given virtually peremptory directions to the State to ensure that the posts were filled up. This was in W.P.(C) No.19481 of 2015 being judgment dated 23.11.2015. It is pursuant to these directions of the Division Bench of this Court that the matter for appointment of four State Information Commissioners was taken up and the State constituted the committee as contemplated under section 15(3) of the Act.

7. Accordingly, the State issued the first notification on 2.12.2015 notifying four vacancies of State Information Commissioners and invited applications. Thereafter, on 23.12.2015, the State constituted the committee comprising of the Chief Minister, the Leader of Opposition and a Cabinet Minister nominated by the Chief Minister as contemplated under section 15(3) of the Act. Thereafter, on 21.1.2016, the State issued another notification notifying anticipated vacancy to the post of State Chief Information Commissioner and one additional

post of State Information Commissioner. Thereafter, on 22.2.2016 notice was issued for a meeting of the Committee constituted to make selections and recommended for appointment to the various posts to be held on 24.2.2016. In the meantime, it appears, pursuant to the first advertisement, 210 applications were received and pursuant to the second notification, 59 applications were received. On 24.2.2016, in the meeting of the Select Committee, it was pointed out by the Leader of Opposition that the number of applicants being too large to be scrutinized in one meeting, a criteria for selection be adopted. Accordingly, the meeting was adjourned. On the next day, when the meeting was reconvened, as against 269 total applications earlier received, a short list of four candidates for the post of State Chief Information Commissioner and fifteen candidates for the post of State information Commissioner were placed before the Committee. Who did this sorting and what was the

criteria, is not known. It is this fact that persuaded the appellant/petitioner, S.Somanathan Pillai, in W.P.(C) 7665 of 2016 to file writ petition. According to him, the short list was prepared without a comparative analysis of the merit of the candidates, who applied for the posts and purely based on political considerations. According to him, he does not know why, how and by whom and under what authority or criteria he was excluded from consideration. However, when this sub committee met again, the Leader of Opposition expressed his dissent to this mysterious selection process, but was out voted because the other two members were the Chief Minister and his Cabinet Minister. By majority, they recommended one name for the post of State Chief Information Commissioner. So far as the other five posts of the State Information Commissioner are concerned, five names were selected. The objection raised by the Leader of Opposition was that no papers whatsoever to prove their

credentials were brought on record or shown to him. However, these six names, one for the State Chief Information Commissioner and five for the State Information Commissioner, were forwarded to the Governor for appointment as required under section 15(3) of the Act, with the dissent of the Opposition Leader as well.

8.As by then, the writ petition had been filed by S.Somanathan Pillai, the Governor returned the file to be put up after the disposal of the writ petition. After the writ petition was disposed of, on 24.3.2016, the file was sent to the Governor yet again. In the meantime, the Governor had received several complaints which in turn were forwarded to the State. This time, the Governor returned the file asking for remarks on the complaints received, which he had forwarded to the Government. On 14.4.2016, the file was again forwarded to the Governor. The Governor approved the proposal to appoint the State

Chief Information Commissioner, but returned the file insofar as the State Information Commissioners are concerned, asking for papers and documents to substantiate the claims of the nominees as to their eminence in public life and their knowledge in the particular fields as required by section 15(3) of the Act. It may be noticed that there is no dispute with regard to the appointment of the State Chief Information Commissioner for he was a retired DGP of the State. It appears that the file was yet again forwarded to the Governor without placing the matter before the Selection Committee. The records sought for by the Governor were not forwarded. It may be noted that by this time the Government had changed. The Governor returned the file yet again on 27.5.2016, noting two reasons, being that the list enumerating qualifications of the selected candidates was not authenticated and also for the reason that the number and details of documents relied upon by

the Selection Committee to support the eminence of selected candidates have not been specifically indicated or indexed as envisaged by the directives issued by the Apex Court in **Union of India v. Namit Sharma** [(2013) 10 SCC 359] order dated 3.9.2013 in W.P.(C) No.210/2012.

9.It is at this stage of recommendation that the five State Information Commissioners filed the writ petition for mandamus for being appointed, which the learned single Judge issued. The learned single Judge inter alia held that the Governor had absolutely no discretion in the matter and virtually took the view that the Governor in terms of section 15(3) of the Act was a mere rubber stamp.

10.As we are dealing with the second issue, we do not approve of the way the committee conducted itself. The constitution of the Committee as statutorily provided is not a very democratic committee. There is the Chief Minister and a Minister of his Cabinet and then the solitary

leader of opposition. Surely the decisions are known. But we may add that from the very fact that such senior persons are chosen to constitute the committee, it is expected that they would rise above party affiliations and private political interest and act as a repository of public faith and confidence. This is more so when Act 22 of 2005 was enacted by the Parliament for setting out the practical regime of right to information for citizens and to secure access to information under the control of public authorities so as to promote transparency and accountability in the working of every public authority. The State Information Commissioners are high ranking officials who are to perform various functions as contemplated under the Act for safeguarding the individual rights of citizens and so as to provide transparency and accountability in governance. If viewed in this manner, then even this Committee should function quite democratically and independent of personal biases.

Notwithstanding that, when the Committee was called for the first time to deliberate over the applications, which were about 269, the Committee was not given the details thereof and in one sitting itself it was finally concluded. This, as noted above, was objected to by the Leader of Opposition and the meeting was virtually adjourned to the next day. The next day from the 269 candidates, the number came down to four candidates for the State Chief Information Commissioner and fifteen candidates for the State Information Commissioner. It is not on record as to who did this sorting and under whose authority. But, it is the submission of the writ petitioner in W.P.(C) No.7665 of 2016 that it was the Secretary of the General Administration Department who had short listed the candidates on orders of the Chief Minister. The criteria for short listing the candidates is still a mystery. When the individual writ petitioner/appellant contends that he does not know why he has been sifted out, there is no answer,

for there has been no criteria laid out for such an elimination. This is not compatible with the status and purpose of constitution of the Selection Committee. The Selection Committee was not dealing with a domestic enquiry or a trivial issue. We do not approve of such a decision taking process, which is completely a flawed decision making process. It does not stand to judicial scrutiny. This is precisely the objection raised by the Leader of the Opposition which has been brushed aside by the brute majority in the Selection Committee. This, in our view, is sufficient to vitiate the entire selection process. We would accordingly set aside the entire selection process on this ground alone.

11. Though it is unnecessary in such a situation to decide the first issue, we would only note that to degenerate the office of the Governor to a mere rubber stamp is most undesirable. The legislature have contemplated and constituted a selection committee of three senior persons,

the Chief Minister, the Leader of Opposition and a Cabinet Minister nominated by the Chief Minister. We have already noted that it is expected that they would rise above personal predilections in the larger public interest for, they are not conducting a political exercise but exercising statutory functions under section 15(3) of the Act. If the intention of the legislature was that the recommendation by the Committee was final, binding and could not be questioned in any manner, meaning thereby, the follow up was only a mere formality, they could have very well said that on the recommendation of the Committee the Government would notify the members. But that is not so. The legislature chose that the recommendation would be sent to the Governor. Now the question is does the Governor exercise the discretion in the manner in which it is contemplated under Article 163 of the Constitution or upon his own self for we have already disapproved the interpretation that he would act

as a rubber stamp. We need not delve upon this question for, this question has been answered by the Division Bench of this Court in the case of **Binu D.B. v. Governor, Government of Kerala** since reported in 2010 (4) KHC 871, wherein in paragraph 39, this is what their Lordships have held.

"39. The case on hand is a clear example of this position. The Right to Information Act confers the authority on the Governor of a State to choose the Information Commissioners. The nomenclature employed is "Governor". But, the Governor is to make the choice of the Information Commissioners on the recommendation of the Committee mentioned under S.15(3), i.e. the Chief Minister, Leader of Opposition and one member of the Cabinet nominated by the Chief Minister. That being the specification under the law, obviously the Governor is not expected to either seek or act in accordance with the advice of the Cabinet/Council of Ministers. Nonetheless, the Governor cannot act in his absolute discretion also. S.15(3) mandates that the Governor shall appoint the Commissioners on the recommendation of the Committee mentioned above."

12. This shows that the Governor here does not exercise his functions as the Governor as contemplated under Article

163 of the Constitution, but he acts as a statutory authority on the basis of recommendation by the Committee. Why we are saying that the Governor is not a rubber stamp is, being Governor, he is expected to act responsibly. Though he is not entitled to go into the question of suitability, he is surely entitled to go into the question of eligibility.

13.If for example, we pray not in practice, the committee was to recommend the names of five top criminals of the State, was the Governor to act as a rubber stamp and approve the same? Our answer would be no, for, not because of suitability but because of eligibility. We must now refer to section 15(5) itself.

14.Section 15(5) not only talks of persons with experience in law, science, technology, social service, management journalism, mass media or administration and governance but this is to be qualified by the other expressions i.e.,

"eminence in public life with wide knowledge and experience". We do not think that the time has come that criminals would fall in this category of eminence and wide knowledge. Such a situation can never arise. Can the Governor not return the list so sent, for if he was exercising his jurisdiction under Article 163 or as a rubber stamp, he hardly had any discretion. But as we have understood the position, he does have a little discretion in a very limited sense. He cannot question suitability but certainly eligibility and in the facts of the present case, what he had sought information about was eligibility. He repeatedly asked for documents and papers to show as to how these persons, who were recommended, could be termed as persons of eminence in public life with wide knowledge and experience in different fields.

15. To illustrate, one person was a Primary School Teacher, the other a practicing Lawyer in the District Court and yet another was a Development Officer in LIC. By no stretch

of imagination, they would qualify as persons of eminence in public life with wide knowledge and experience. Thus, they had lacked basic eligibility, which the Governor was seeking. The Governor was not seeking their educational qualifications, but documents to show on what basis they were people of eminence. Legislature have chosen the words well. Everyone has to make genuine effort to understand the same and abide by it. Nothing was brought to the notice of the Governor to justify selections as people of eminence. Thus, in our view, the entire decision making process from beginning to end stood vitiated. We, therefore, are unable to agree with the decision as rendered by the learned single Judge in all these cases, which judgments are over ruled.

The writ appeals filed by the State, i.e., W.A.Nos.2012, 2013, 2014, 2017 & 2018 of 2016 are allowed. The writ petition filed by the appellant i.e., W.A.No.2163 of 2016, is partly allowed.

We may clarify that in so far as the appointment of State Chief Information Commissioner is concerned, that has not been in question and is not being interfered with.

Needless to say that sufficient time has been lost in litigation and the Government should consider expediting steps for appointment for filling up the vacancies.

**NAVANITI PRASAD SINGH,
CHIEF JUSTICE**

**RAJA VIJAYARAGHAVAN V.,
JUDGE**

vps/30/8