

MD

1 Mr PP Rao.

Indian Constitution

8/2/2017

SLP (C) No. 26560 and 26590 of 2016

Government of NCT of Delhi vs Sandeep Tiwari and Ors

Court 5
Sixth
Annual

Submissions of PP Rao on behalf of the Petitioner

1.

(a) It is clear from the preamble of the Constitution that sovereignty resides in the people of India. It is they who govern themselves through their representatives elected in a free and fair election conducted by the Election Commission in accordance with Articles 324 to 329 of the Constitution.

(i) "In our Constitution ... the democracy means 'People's power'. It stands for the actual, active and effective exercise of power by the people in this regard."

RC Poudyal v. Union of India, (1994)Supp 1 SCC 324, 362, pr.52 (emphasis supplied)

(ii) "In a democratic Republic, it is will of the people that is paramount and becomes basis of authority for the Government."

"In a Parliamentary democracy like ours, government is responsible to the people through the elected representatives... people's representatives fill the role of lawmakers and custodians of the Government."

PUCL v UOI, (2003) 4 SCC 399, 457-458, pr. 94

(iii) "Parliamentary democracy is a part of the basic structure of the Constitution."

P.V. Narasimha Rao vs. State (1998) 4 SCC 626, 673, pr. 47

2(a)

The obvious object of amending the Constitution and inserting Article 239AA is to enable the people of Delhi to govern themselves through their elected representatives as far as possible subject to the power of the Union of India, Delhi being a Union Territory

2. (b)

The Constitution needs to be interpreted having regard to the fact that Parliamentary democracy is the bedrock of its basic structure. The High Court failed to appreciate the settled law that Courts should adopt a construction which strengthens the foundational features and the basic structure of the Constitution - PV Narasimha Rao vs State (1998) 4 SCC 626, 673, pr.47 reiterating the law declared in Sub-Committee of Judicial Accountability vs. UOI (1991) 4 SCC 699, 719, pr.16.

3. Delhi is a Union Territory with a difference. As VR Krishna Iyer J observed, in *Jagdish Saran vs. UOI* (1980) 2 SCC 768, 773, pr 10 "The capital city is not just a part of India. It is miniaturised India..... It is megapolitan and people from all parts flock to this oversized city." Delhi is the only Union Territory with special provisions incorporated in the Constitution. by the 69th Amendment Act, 1991 for its administration. Article 239AA was inserted providing for an elected Legislative Assembly with power to make laws with respect to any of the matters enumerated in the State List or in the Concurrent List except matters in Entries 1, 2 and 18 of the State List and Entries 64, 65, 66 of that List in so far as they relate to Entries 1, 2 and 18 Cl. (4) says, there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the LG in the exercise of his functions in relation to matters within the competence of the State Legislature, "except in so far as he is by or under any law required to act in his discretion."

by J. Sizeri - has the LG referred the matters to President? to check & get back.
 4(i) The Constitution does not confer any discretionary powers on the LG

unlike the Governor of a State in terms of Article 163(1), which uses the words "by or under this Constitution" instead of the words "by or under any law". For example, pr. 9(2) of the VIth Schedule and Article 371A confer discretionary powers on the Governor.

correct
 b/c it is the President

4(ii) Section ⁴¹44 of the Government of National Capital Territory of Delhi Act, 1991 specifies matters in which Lieutenant Governor shall act in his discretion.

4(iii) Sec. 44(1) (a) empowers the President to make Rules "for the allocation of business to the Ministers in so far as it is business with respect to which the Lieutenant Governor is required to act on the aid and advice of his Council of Ministers."

(b) - " for the more convenient transaction of business with the

Ministers, including the procedure to be adopted in the case of a difference of opinion between the Lieutenant Governor and the Council of Ministers or a Minister."

4(iv) Sub-section (2) of Section 44 requires all executive action of the LG whether taken on the advice of the Ministers or otherwise (which means in his discretion) shall be expressed to be taken in the name of the LG. It necessarily implies that every executive action need not be taken by the LG himself. Only with respect to matters where the LG is required to act in his discretion by or under any law, he may take executive action himself. In all other matters the Council of Ministers or individual Ministers can take decisions and implement them as per the Allocation of Business Rules and the Transaction of Business Rules.

4(v) Sub-section (3) provides for authentication of orders made in the name of the LG by the specified officer concerned.

4(vi) Section 45(b) and (c) confer limited discretionary powers on the LG to call for information from the Chief Minister or require him to submit for the consideration of Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council. From this it is clear so far decisions taken by individual Ministers are concerned the discretion left to the LG is to require any of them to be submitted to the Council of Ministers. After consideration of such matter or matters by the Council of Ministers no further reference to the LG is contemplated by the Act except communication of the decision or decisions of the Cabinet.

6 Rules made under Sec. 44 cannot enlarge the area of discretion given to the LG by Sections 41 and 44 of the Act. The Rules have to be read

down and they operate subject to the provisions of Article 239AA and in particular cl (4) thereof

7(a) Before interpreting the proviso to Cl. (4) of Article 239AA and in particular the scope of discretionary power of the LG, it is necessary to have regard to the following aspects:

(i) A proviso is subordinate to the main section and qualifies the the main provision as held in

S. Sundaram Pillai v. V.R.Pattabraman (1985)1SCC 591 at p.607, pr 30 (c) and p-610, pr. 43.

(ii) LG of GNCTD is not comparable to the Governor of a State

Governor	LG
i) Article 153 - shall be a Governor	-
ii) Article 154 (1) - Executive power of the State shall vest in the Governor	-
iii) Article 155 - appointment by President by warrant under his hand and seal.	Article 239 (1) - UT shall be <u>administered by the President acting</u> through an Administrator appointed by him.
iv) Article 163 (1) - Council of Ministers to, aid and advise the Governor <u>except</u> in so far as he is required to act in his discretion by or under the Constitution	Article 239AA (4)- Council of Ministers to aid and advise the L.G . . . <u>except</u> in so far as he is by or under any law required to act in his discretion.
v) Article 166 (3) - Governor shall make Rules for Transaction of	Section 44 (2) of GNCTD Act - The <u>President</u> shall make

Business and Allocation of Business.	Rules for Allocation and Transaction of Business (not the LG).
vi) Discretion conferred on the Governor by or under the Constitution is not controlled by the President.	Discretion conferred on LG by the proviso to Article 239AA (4) is only to refer the matter of difference of opinion to the President for his opinion and, if the matter is urgent requiring immediate action, to pass an order during the interregnum after making the reference.
vii) Governor enjoys immunity from Court proceedings in terms of Art. 361	The LG has no such immunity. He is answerable to a Court of Law.

The word "Lieutenant" means -

i) "Deputy, substitute, viceregent, acting for a superior."
(Concise Oxford Dictionary)

is Pres
Representation

ii) "A military officer holding commissioned rank immediately junior to a captain" and "a person who holds an office in subordination to or in a place of a superior." (Collins English Dictionary).

iii) "Someone acting for a superior in rank" (New Webster's Dictionary and Thesaurus)

Therefore, the Lt. Governor is neither comparable to the President nor the Governor of a State. He is an officer appointed under Article 239 with limited delegated power.

7(b) i) The relationship between the President (Central Government) and the Lt. Governor is that of master and servant, principal and agent or delegator and delegate. The LG is not an independent constitutional authority, unlike the Governor who holds an independent constitutional office which is not under the control of the Government of India.

Hargovind Pant v Dr. Raghukul Tilak, (1979) 3 SCC 458, 464 pr.5.

B.P. Singhal vs. Union of India (2010) 6 SCC 331, 356, pr. 46, p.366, pr.70 and p. 372, pr.83.

ii) The Constitution does not and could not have intended to confer more powers on the Lt. Governor vis-a-vis his Council of Ministers, than those conferred on the Governor of a State or the President of India vis-a-vis their respective Councils of Ministers.

In *Nabam Rebia and Bamang Felix vs Deputy Speaker, Arunachal Pradesh Legislative Assembly* (2016) 8 SCC 1, 158-159, prs. 151 - 155, the Court reiterated that the discretion of Governor is extremely limited. In pr.212 at p. 186, the Court held, "As long as the democratic process in the Assembly functions through a Government, which has the support of the majority, there can be no interference at the behest of the Governor.

iii) With respect to matters which are within the competence of the Legislative Assembly of Delhi, the Governor has to act on the aid and advice of the Council of Ministers, following the established practice in a parliamentary democracy. Only in matters with respect to which he is required by or under any law the LG may act independently ^{discretion}

iv) The discretion to refer a matter with respect to which the LG has a difference of opinion with a Minister or the Council of Ministers is not too wide or unbridled. It is extremely limited as the role of the LG is similar to that of an umpire who cannot and does not interfere with the game, but merely ensures that the game is played according to rules. Consequently, the difference of opinion contemplated by the proviso to Clause (4) of Article 239AA could only be on the question of legality of the decision taken or action to be taken by the Minister or Ministers or whether it is in excess of the powers conferred on them by the Constitution, the GNCTD Act, 1991 or the Rules made thereunder. If two views are possible and if the Council of Ministers takes one of the possible views, the LG cannot refer the matter to the President because he likes the other view.

v) In the case of difference of opinion with any Minister or the Council of Ministers, Rule 49 of the Transaction of Business Rules requires the LG to endeavour to settle the differences by discussion. Only such differences which could not be settled by discussion need be referred to the President for his decision.

Correct
m/s

vi) The consequence of making such a reference to the President is also expressly provided in Rule 50 which says "further action thereon shall not be taken except in accordance with the decision of the Central Government" It means the L.G. cannot decide the question himself. The limited power given to the LG by Rule 51 is to direct that action shall be suspended pending the decision of the President. LG can only pass an interim order if the situation warrants immediate action. Rule 51 thus makes it clear that a Minister or the Council of Ministers can take decisions and act upon them without the previous approval of the LG. The LG is given limited power to direct that the action shall be suspended pending the decision of the President comes into play only after a Minister or the Council of Ministers decides to take or has taken action and the LG has made a reference.

(vii) Only after referring the matter of difference of opinion to the President, LG can pass an interim order of suspension and not without making a reference. In the present batch of cases, there has not been a single reference made by the LG to the President under the proviso to Clause 4. Without making a reference he interfered with the orders issued by the Ministers and the Council of Ministers.

viii) It is settled law that when a power is conferred by a statute to do a certain thing in a certain way the thing must be done in that way or not at all. Therefore, the power conferred by the proviso to Clause (4) of Article 239AA to refer differences of opinion to the President shall be exercised in accordance with the procedure prescribed by Rules 49 to 51 of the Transaction of Business Rules or not at all.

State of UP vs. Singhara Singh and Others (1964) 4 SCR 485, 490-491.

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 (a) (X)
 enjoinment
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ix) The words 'required to act in his discretion' in Clause (4) of Article 239 AA show that such power to act in the L.G.'s discretion has to be conferred expressly by a law or a rule made under a law e.g. Section 24- Assent to Bills, Section 41- Matters in which LG has to act in his discretion, Section 45 (b)- to call for information and (c) to require consideration of a matter by the Council of Ministers.

* xi) If an Act merely defines 'Government' to mean 'the LG,' it does not mean the LG acting in his discretion. It only means by the Government (Council of Ministers) acting in the name of LG. The words, "by or under any law required to act in his discretion"

and 40

necessarily mean that unless a provision is made by or under a law expressly requiring the LG to act in his discretion, he has to act on the aid and advice of the Council of Ministers. In case of difference of opinion, after endeavouring to resolve the difference and failing, he may refer it to the President.

xii) Decided cases show that the discretion ostensibly conferred by the text of the Constitution has inherent limitations. For instance, the Governor's power to ascertain whether a particular Chief Minister has ceased to enjoy the confidence of the House cannot be decided by a head count made in the Raj Bhavan, but has to be decided on the floor of the House as held in *SR Bommal vs. UOI (1994) 3 SCC 1, 127-128, paras. 118-119, and pp. 277-278, para 395*. Again the power to summon the House or prorogue the House conferred on the Governor by Article 174 of the Constitution has to be exercised on the aid and advice of the Council of Ministers.

Nabam Rebia and Bemang Felix vs Deputy Speaker, Arunachal Pradesh Legislative Assembly (2016) 8 SCC 1, 165, paras. 166-167

(xii) The following statement of law by the Constitution Bench in *SG Jaisinghani v. Union of India 1967(2) SCR 703* at pp. 718-719 is relevant in this context:

"It is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. (See Dicey - 'Law of the Constitution' - Tenth Edn., Introduction cx). 'Law has reached its finest moments', stated Douglas, J. in *United States v. Wunderlick*, 342 US 98, 'when it has freed man from the unlimited discretion of some ruler..... Where discretion is absolute, man has always suffered'. It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in the case of *John Wilkes*, (1770) 4 Burr. 2528 at 2539 'means sound discretion guided by law. It must be governed by rule, not by humour. It must not be arbitrary, vague and fanciful.'

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B. As held by the Division Bench of this Hon'ble Court in *Om Prakash Pahwa vs. State of Delhi and Ors. (1998) 46 DRJ 719, para. 75*. "In the matters in which the Governor (LG) acts in his discretion, though not obliged to seek advice of his Council of Ministers yet would act in harmony with his council of Ministers. Constitution does not aim at providing a parallel administration within the State by allowing the Governor (LG) to go against the advice of the Council of Ministers." (emphasis supplied)

9 According to the law declared by the Supreme Court in Shamsher Singh vs. State of Punjab (1974) 2 SCC 831, 857, pr.88, in all other matters, which are outside the realm of discretion, "the President as well as the Governor acts on the aid and advice of the Council of Ministers in executive action and is not required by the Constitution to act personally without the aid and advice of the Council of Ministers or against the aid and advice of the Council of Ministers." (Vol. VII, pp. 92-151, at p. 119 pr. 88) (emphasis supplied).

10. Rules 15 and 16 of the Transaction of Business Rules require the Minister In Charge to dispose of inter-alia the items of business either himself or by any officer of the Department as he may direct in terms of the Standing Orders.

(Rule 7 + 8 + 9 + 10 → copy + Council to LG)

11. Powers of Lieutenant Governor are derived not so much from Articles 239 but really from Article 239 AA of the Constitution, the GNCTD Act, 1991 and the Rules made by the President under Section 44 for Allocation and Transaction of Business.

J. S. Singh 22 - Gen - must refer to Council/Pres

Rule 49 → ref of opinion - refer to President.

12. Neither the Constitution nor the GNCTD Act, 1991 vests the executive power of National Capital Territory of Delhi which is co-extensive with the legislative power in the Lieutenant Governor. Executive power remains vested in the Council of Ministers to the extent legislative power is conferred on the Legislative Assembly by Cl. (3) of Article 239AA. (See Cl. (4)).

13. (a) Section 49 confers on the President power to issue directions to the Lieutenant Governor and his Council of Ministers. The LG has no such power to issue directions to the Council of Ministers.

(b) The power conferred on the President by Section 49 being Executive Power, it cannot be exercised by him in a manner inconsistent with Article 239AA or the statutory Rules for Allocation and Transaction of Business made under Section 44 of the Act until they are amended by him.

(c) The non-obstante clause in Section 49 does not empower the President to exercise the constituent power of Parliament to amend Article 239AA either directly or indirectly so as to alter the distribution

of legislative power between the Parliament and the Legislative Assembly of NCTD effected by Article 239AA (3) with respect to matters in the State List. For example, the President cannot add to the Entries mentioned in the said clause (3) or omit any of them. In case he does it, it will amount to amending the Constitution by an executive order under Section 49.

(d) As repeatedly held by the Hon'ble Supreme Court, the basic postulate of the concept of equality is *'be you ever so high, the law is above you'* holds good in the case of LG also. (See, Vineet Narain vs. UOI (1998) 1 SCC 226, 235, pr.3).

14. The Constitution does not envisage a conflict between the LG, exercising limited power delegated under Articles 239 and 239AA, the provisions of the GNCTD Act and the Allocation and Transaction of Business Rules made under Section 44 and the democratically elected Government of the people which has the mandate to aid and advise him under clause (4) read with clause (3) of Article 239AA.

15. (a) The High Court has misunderstood and misinterpreted Articles 239 and 239AA of the Constitution, the provisions of Government of NCTD Act, 1991, the Transaction of Business Rules and the Allocation of Business Rules, 1993 made by the President under Section 44 of the said Act which provide for disposal of business by the Ministers concerned except with respect to a few items. In fact dealing with the power to appoint a Special Public Prosecutor in the impugned judgment the High Court has rightly held that the competent authority is the Home Minister and not the LG. (See at p. 189, pr. 301 and 302).

(b) The finding in pr. 116 at p. 96 of the impugned judgment that Ministers cannot issue orders in any matter without the approval of the LG defeats the main object of inserting Article 239AA providing for a democratically elected Legislative Assembly and a Council of Ministers collectively responsible to the Assembly. In terms of the law declared by the High Court in the impugned Judgment, the LG has become the supreme executive authority of the National Capital Territory of Delhi like the erstwhile Governor - General of India under the colonial rule. If the view taken by the High Court holds good, the Government of National Capital Territory of Delhi will no longer be a *Government of the people, by the people and for the people of Delhi*.

Instead, it will be a Government of the LG, by the LG and for the LG.

(c) Rule 14(2) of the Transaction of Business Rules which expressly provides that after a proposal has been approved by the Council of Ministers and the decision has been communicated to the LG, the Minister concerned shall take necessary action to give effect to the decision, makes it clear that it is not necessary to wait for the LG's views before taking action. This aspect was not at all adverted to or appreciated by the High Court when it held in pr. 11G relying on Rule 10(5) (whose scope is limited to proposals concerning 19 items set out in the schedule to the Transaction of Business Rules which require decision of the Council of Ministers) that an order can be issued only when the Lt. Governor does not take a different view.

16. The High Court failed to appreciate that the provisions of Government of NCTD Act, 1991, The Transaction of Business Rules and Allocation of Business Rules made by the President under Section 44 of the Act have to be read subject to and harmoniously with Clauses (3) and (4) of Article 239AA. The mandate of the Constitution in Cl.(4) of Article 239AA is clear and unequivocal that in relation to matters with respect to which the Legislative Assembly has power to make laws, the Lt. Governor cannot act without the aid and advice of the Council of Ministers nor act contrary to the advice. The only exception is "in so far as he is, by or under any law, required to act in his discretion".

17. Section 41 of the Government of NCTD Act, 1991 specifies the matters in which the LG shall act in his discretion, while underlining the fact that only in matters where by or under any law the LG is required to act in his discretion, he may take decisions himself, i.e. without the aid and advice of the Council of Ministers or contrary to their advice. In contrast, Section 2(d) of the Delhi Electricity Reform Act, 2000 defines "Government" as 'the Lieutenant Governor referred to in Article 239AA of the Constitution' and cl. (g) says "Lieutenant Governor" means 'Lieutenant Governor of the National Capital Territory of Delhi appointed by the President under Article 239 read with Article 239AA of the Constitution.' There is no provision in the entire Act requiring the LG to act in his discretion in the exercise of his powers or discharge of his functions. Similarly, the Notification dated the 20.2.2004 issued by the Ministry of Home Affairs in pursuance of Article 239AA of the Constitution directing the LG to exercise the

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Notification

powers and discharge the functions of the State Government under the provisions of the Electricity Act, 2003 subject to the control of the President within the National Capital Territory of Delhi, does not require him to act in his discretion (Vol. II, p. 379) of SLP(C) No. 26590 of 2016. Electricity being a subject (Entry 38) in List III, the Concurrent List, it is within the legislative power of the Legislative Assembly of NCTD in terms of cl. (3) (a) of Article 239AA and therefore within the ambit of the corresponding executive power of the Council of Ministers. Consequently, following the mandate of cl.(4), the LG has to act on the aid and advice of the Council of Ministers.

18. The reasons given by the High Court in paragraphs nos. 247-250 at pp.167-169 of the impugned Judgment for declaring the nominations of the Directors on Boards of Distribution Companies made by Hon'ble the Chief Minister of Delhi, vide order no. F. 11 (129) /2002/Power/Vol. II/1900 dated June 18, 2015 (quoted at pp.162-164 of Judgment) are contrary to law and liable to be set aside.
19. Similarly, the reasons given in paragraphs nos. 263-265 at pp.173-174 of the impugned Judgment for quashing the directions issued by the Government of NCTD under Section 108 of the Electricity Act in their letter no. F. 11(58)/ 2010/ Power/ 1856 dated 12.6.2015 (p.169) addressed to the Chairman, Delhi Electricity Regulatory Commission regarding disruption in electricity supply to consumers and compensation payable in respect thereof are equally untenable because, Section 108 of the Electricity Act, 2003 (pp.169-171) read with clause (d) of Section 2(1) Delhi Electricity Reforms Act, 2000 does not require the LG to act in his discretion. The High Court has misunderstood the purport of the said provisions.
20. The High Court while purporting to distinguish the following judgments of earlier Division Benches, in fact has taken a wholly inconsistent view:
 - i) OP Pahwa vs. State of Delhi (1998) 46 DRJ 719 *para-75*
 - ii) United RWAS Joint Action vs. UOI (judgment dated 30.10.2015).
 In both these decisions, coordinate Benches of the High Court had correctly interpreted Article 239AA(3) and (4) relying on the Supreme Court judgments in *Shamsher Singh vs. State of Punjab* (1974) 2 SCC 831 and *Rajender Singh Verma vs. Lt. Governor of Delhi* (2011) 10 SCC 1.

and held that the LG is bound to act on the aid and advice of the Council of Ministers in matters with respect to which the Legislative Assembly of GNCTD has power to legislate.

21. This Hon'ble Court may be pleased to grant special leave to appeal, in all the SLPs and set aside the impugned judgment and order of the High Court and allow the Appeals.