Central Administrative Tribunal
Ernakulam Bench

OA No. 337/2010

This the 13th day of August, 2010

HON'BLE MR. L.K.JOSHI, VICE CHAIRMAN (A)
HON'BLE MR. GEORGE PARACKEN, MEMBER (J)
HON'BLE MS. K. NOORJEHAN, MEMBER (A)

Tomin J. Thachankary IPS (KL-87),
S/o The late Joseph Thomas, aged 46 years,
Inspector General of Police,
Kannur Range (Under Orders of suspension),
Range House, Near Municipal Office,
Kannur-670002 ....Applicant

(Through Mr. O.V. Radhakrishnan, Senior Advocate with
Mr. Prakash Kesavan)

Versus

1. State of Kerala, represented by its Chief Secretary,
Government Secretariat,
Thiruvananthapuram-695001

2. Union of India, represented by its Secretary,
Ministry of Home Affairs,
New Delhi-110001 ...Respondents

(Through Mr. Renjith Thamban, Addl. Advocate General, Mr. P.
Santhosh Kumar, Spl. GP and Mr. N.K. Thankachan, Spl.
GP, for respondent 1
Mr. Sunil Jacob Jose, SCGSC, for respondent 2)

ORDER

Mr. L.K.Joshi, Vice Chairman (A)

Shri Tomin J. Thachankary, an Indian Police Service (IPS)) Officer of 1987 batch of Kerala Cadre, was placed under suspension by an order dated 17.04.2010 of the Government of Kerala (Annex A-8). The order has been signed by Ms. Neela Gangadharan, Chief Secretary of the Government of Kerala, by order of the Governor. The said order has been impugned in the OA. The following reliefs have been sought:

"i) to declare that Annexure A-8 Order of suspension as illegal, ultra vires and without authority of law having been passed in the purported exercise of power under Rule 3 of the AIS (Discipline and Appeal) Rules before commencing the Departmental Proceedings and wrongly stating that the Order of suspension has been issued pending disciplinary proceedings which is a non-existent fact;

ii) to call for the records leading to Annexure A-8 GO dated 17-04-2010 and to set aside the same;

iii) to issue appropriate direction or order directing the respondents to re-instate the applicant forthwith;

iv) to issue appropriate direction or order directing the respondents to pass an order treating the period of suspension as duty for all purposes and to grant him full service benefits including arrears of pay and allowances for the period he has been kept under suspension unlawfully;

v) to grant such other reliefs which this Hon'ble Tribunal may deem fit and proper in the circumstances of the case; and

vi) to allow the above O.A. with costs to the applicant."

Facts of the case:

2. The Applicant was holding the post of Inspector General of Police, Kannur Range at the relevant time. On 16.02.2010, the Applicant made an application for earned leave for six days from 15.03.2010 to 20.3.2010, with permission to prefix 13th and 14th March 2010 and suffix the 21st of March 2010 in order to avail Leave Travel Concession (LTC) for visiting Gangtok, Sikkim. The first Respondent, the State of Kerala, sanctioned leave permitting him to avail LTC for travelling to Gangtok with the members of his family by order dated 3.03.2010. However, the Applicant could not avail LTC due to some urgent official duties. On 25.03.2010, the Applicant made another application for earned leave for seven days from 3.04.2010 to 9.04.2010 with permission to prefix 1st and 2nd April and suffix 10th and 11th April, 2010. The leave was applied for the purpose of availing LTC to Gangtok, Sikkim. By order dated 30.03.2010 of the Government of Kerala, the Applicant was permitted, subject to eligibility, to avail LTC for his journey to Gangtok along with his wife and two daughters. He was also granted earned leave, subject to eligibility, for seven days from 3.04.2010 to 9.04.2010 with permission for prefixing and suffixing, as applied for, instead of earned leave sanctioned by the Government from 15.03.2010 to 20.03.2010 (Annex A-1). However, the Applicant left for Gulf Countries - including UAE and Bahrein - on 2.04.2010. His wife and children left on different dates for the aforesaid countries. The Applicant returned on 11.04.2010. On 12.04.2010 he wrote a letter to the Chief Secretary, Government of Kerala, which, *inter-alia*, stated that he had decided not to avail LTC but to visit Bahrein, with family and also to UAE. This letter is placed at Annex. R 1(a), with the reply affidavit of the

Respondents. This was followed by another letter of the same date addressed to the Chief Secretary, the text of which was the same as of the letter placed at Annex R-1 (a), except that it stated that the Applicant's decision not to avail LTC "was intimated to you vide my letter No. 188/Camp/2010 KR dtd. 31.03.2010", placed at (Annex A-3). The letter dated 31.03.2010, placed at Annex A-2, has been disputed by the Respondents, as we shall see later. In this letter addressed to the Chief Secretary (Annex A-2) dated 31.03.2010, the Applicant has stated that he had decided not to avail LTC but to visit Bahrein and UAE, along with his family, seeking permission "to grant permission to visit abroad by using the earned leave already sanctioned by you". It is not disputed that the letter was received in the office of the Chief Secretary on 17.04.2010. The dispute is about the date on which the letter was sent. According to the Applicant, it was sent on 31.03.2010. The Respondents, on the other hand, contend that it was sent after the Applicant's return, as a cover up.

3. On 12.04.2010 itself, the Additional Director General of Police (Addl. DGP), Intelligence, wrote to the Applicant that the Chief Minister of Kerala had asked him (the Addl. DGP) to inquire into the alleged foreign trip by the IG (Police), Kannur, i.e., the Applicant. The Applicant was requested to inform immediately the "details of travel plan as part of LTC availed by you from Ist April to 9th April 2010" (Annex. A-4). On 12.04.2010, the Director General of Police (DGP), Kerala also wrote demi-officially to the Applicant, asking the latter (i) to clarify if he had followed the conditions specified in GO (P) No. 233/08/ Fin dated 3.06.2008 as well as those in GO (P) No. 418/2008/Fin dated 16.09.2008; and (ii) to report the details of any such visits carried out by him during the year (Annex.A-5). The

Applicant replied to the DGP's queries by letter dated 14.04.2010 (Annex. A-6), stating therein that the former had decided not to avail of LTC and decided instead to visit Bahrein. Advertence was made to letter dated 31.03.2010, by which, it was stated, the Chief Secretary had been informed about the change in the Applicant's plan. He informed that the Applicant also visited Muscat and Kuwait and that public money was not spent on purely personal visits. The Applicant also clarified that he was abiding by the Government of India Rules on foreign visits for private purposes and the conditions in GO (P) No. 233/08/Fin dated 3.06.2009 and GO (P) No. 418/2008/Fin dated 16.09.2008 were followed. The facts were intimated to the Chief Secretary, Government of Kerala for ratification on 12.04.2010, he added. The Applicant also mentioned in the aforesaid communication that he went abroad without waiting for prior approval because he had noticed in several cases that officers had gone abroad in anticipation of ratification of such visits. Cases of Smt. R. Sreelekha, IPS, Sri P.C. Sanalkumar, IAS, Sri T. Vikram, IPS and Sri Jayaprakash, IPS were cited in support of this argument. He further stated that Dr. Jayathilakan, IAS and Smt. Ishitha Roy, IAS had also gone to USA after obtaining LTC for visiting Gangtok, without prior sanction and in anticipation of ratification. He also said that about 30 IAS/IPS officers and 600 State Service Officers were also granted such rectification after their foreign trips as mentioned by the Applicant in the aforesaid letter.

4. On 17.04.2010, the Applicant received by Fax a copy of the impugned order GO (Rt) No. 2799/2010 GAD dated 17.04.2010, placing him under suspension under Rule 3 of All India Service (Disciplinary and Appeal) Rules, 1969 [AIS (D&A) Rules, 1969].

5. Mention may also be made of the reasons given by the Applicant in various communications adverted to above, for going abroad. It was stated that his wife was born and brought up in Bahrein for 18 years till her mother died. The Applicant's wife had lots of nostalgia about Bahrein and she wanted to take her daughters there. It was also stated that one of his wife's close relative was critically ill in UAE and the Applicant wanted to visit there also with his family. It was also mentioned that as the visas for the countries visited could be obtained only at the last moment for want of advance planning, he could not obtain prior sanction.

6. The order of suspension has been challenged in the instant OA on various grounds. On 23.04.2010, a learned Division Bench of the Ernakulam Bench of this Tribunal stayed the operation of the said suspension order with liberty to the Respondents to file their reply affidavit. The interim order was challenged before the Honourable High Court of Kerala in Writ Petition (C) No. 14203/2010. The Applicant herein (the first Respondent before the Honourable High Court) gave an undertaking that he would not insist on reinstatement as directed by the Tribunal, till 17.05.2010 and would not move any petition for contempt for non-compliance of the aforesaid direction of the Tribunal. The suspension was extended for four weeks or till the final order of this Tribunal, whichever was earlier. The Honourable High Court also requested the Tribunal to complete the final hearing of the matter by taking up the case on 28.05.2010 so that final order could be pronounced at the earliest. The matter was heard by a learned Division Bench (DB) of this Tribunal. There was difference of opinion between the learned Members of the DB and the question on which there was difference of opinion was referred to a Larger Bench

by order dated 18.06.2010. The following questions have been referred to the Larger Bench:

> "(i) Whether the Governor has got the jurisdiction to order the suspension of an All India Service employee under Rule 3 of the All India Services (Discipline & Appeal) Rules, 1969 without the advice of the Chief Minister or the Council of Ministers?
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> (ii) Whether for suspending an All India Service employee, the Governor has got the executive power of the State Govt. which is conferred by a statute promulgated by the Parliament or the Central Government, even if any delegation is there to the State Govt. by such statute, to take disciplinary action against an All India Service employee without the advice of the Council of Ministers?

7. Following the reference, the Honourable Chairman of the Central Administrative Tribunal constituted this Bench comprising Vice Chairman (A), CAT, Principal Bench, Honourable Member (J), CAT, Ernakulam Bench and Honourable Member (A), CAT, Ernakulam Bench under Section 5 (4) (d) of the Administrative Tribunals Act, 1985. That is how the matter is before us.

8. At the outset, it was put to the learned counsel for both sides whether in the light of observations of the Honourable High Court of Kerala regarding expeditious disposal of the OA, the Full Bench should proceed to decide not only the questions under reference but the OA on merits as well. The learned counsel for both sides have no objection to this proposition. The learned senior counsel for the Applicant stated that the Bench was bound to decide the case on merits as well in view of the fact that the Bench had been constituted under Section 5(4) (d) of the Administrative Tribunals Act, 1985 and not under Section 26 *ibid*. Sections 5 (4) (d) and 26 have been

extracted below:

> "5.(4)(d) Notwithstanding anything contained in sub-section (1), the Chairman –
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> (d) may, for the purpose of securing that any case or cases which, having regard to the nature of the questions involved, requires or require, in his opinion or under the rules made by the Central Government in this behalf, to be decided by a Bench composed of more than [two Members] issue such general or special orders, as he may deem fit:
>
> [Provided that every Bench constituted in pursuance of this clause shall include at least one Judicial Member and one Administrative Member."

> "**26. Decision to be by majority** – If the Members of a Bench differ in opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which they differ, and make a reference to the Chairman who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other Members of the Tribunal and such point or points shall be decided according to the opinion of the majority of the Members of the Tribunal who have heard the case, including those who first heard it."

We are accordingly proceeding to decide the points under reference as well as the case on merits.

9. The learned senior counsel for the Applicant argued that it was not a contentious issue that the State Government was empowered to place a Member of the All India Service (against whom the disciplinary proceedings were contemplated or pending) under suspension. He would contend that it would be the satisfaction of the State Government, which would be necessary for placing an officer belonging to All India Service under suspension. It would not, according to the

learned senior counsel, be the satisfaction of the Chief Minister. He would contend that under Section 3 (60) (c) of the General Clauses Act, the "State Government" would mean Governor in a State. The aforesaid Rule is extracted below:

> "3 (60) "State Government".
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> (a) ... .
>
> (b) ... ...
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> (c) According to this definition, the expression "State Government" has three meanings. As regards the period before the commencement of the Constitution on January 26, 1950, it means in a Part A State the Provincial Government of the corresponding Province, in a Part B State the authority or person authorized at the relevant date to exercise executive Government in the corresponding acceding State and in a Part C State the Central Government. As respects anything done or to be done after the commencement of the Seventh Amendment of the Constitution on November 1, 1956, the "State Government" means in a State the Governor and in a Union Territory the Central Government. It is also provided in the definition that the expression "State Government" shall, in relation to functions entrusted under Article 258-A of the Constitution to the Government of India, include the Central Government acting within the scope of the authority given to it under that article. Article 258-A of the Constitution of India provides that notwithstanding anything in the Constitution, the Governor of a State may, with the consent of the Government of India, entrust either conditionally or unconditionally, to that Government or to its officers, functions in relation to any matter to which the executive power of the State extends."

10. The argument is that the power of suspension under Section 3 (1) of the AIS (D&A) Rules, 1969 has to be exercised by the Government of State, when the officer is working under the State Government. The said Rule is reproduced below:

> "3.Suspension.(1) If, having regard to the circumstances in any case and, where articles of charge have been drawn up,

> the nature of the charges, Government of a State or the Central Government, as the case may be, is satisfied that it is necessary or desirable to place under suspension a member of the Service, against whom disciplinary proceedings are contemplated or are pending that Government may-
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> (a) if the member of the Service serving under that Government, pass an order placing him under suspension, or
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> (b) if the member of the Service is serving under another Government, request that Government to place him under suspension....."

11. The Rule has been made under entry 70 of List-I, i.e., the Union List. The aforesaid entry reads thus:

> "70. Union Public Services; All-India-Services; Union Public Service Commission."

It is urged that the State Government has no power to legislate in the matters under the aforesaid List I. The executive power of the State, it is contended, is limited to the matters with respect to which the State legislature can make laws. Article 162 of the Constitution provides for the limit of the executive power of the State as quoted below:

> "162. Extent of executive power of State.- Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws.
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> Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to and limited by the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof."

12. The business of the Government of the State has to be conducted as provided in Article 166 of the Constitution. Article 166

reads thus:

> "166. Conduct of business of the Government of a State.- (1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.
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> (2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.
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> (3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion."

It is strenuously urged that the Governor has not made rules for authentication under Article 166 (2), quoted above. The learned senior counsel advanced the argument that if the Governor has to act in his discretion, then it would be outside the Rules of business of Government of Kerala. Advertence has been made to Rule 12 of the aforesaid Rules of business, which reads as thus:

> "12. Every order or instruments of the Government of the State shall be signed by a Secretary, an Additional Secretary, a Joint Secretary, a Deputy Secretary, an Under Secretary or by such other officer as may be specially empowered in that behalf and such signature shall be deemed to be the proper authentication of such order or instrument."

13. It is further urged that the powers conferred on the State Government by the Central enactment cannot be included in the Rules of business of the State Government. The executive power of the State Government, as provided in Article 154 of the Constitution, vests in

the Governor. The Article 154 has been quoted fully below:

> "154. Executive power of State.- (1) The executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.
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> (2) Nothing in this article shall-
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> (a) be deemed to transfer to the Governor any functions conferred by any existing law on any other authority; or
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> (b) prevent Parliament or the Legislature of the State from conferring by law functions on any authority subordinate to the Governor."

14. It is further contended that under Article 164 (2) of the Constitution of India, it is the Council of Ministers, which shall be exclusively responsible to the Legislative Assembly of the State. The learned counsel cited the judgment of the Honourable Supreme Court in **Samsher Singh** Vs. **State of Punjab and Another**, AIR 1974 SC 2192 in support of his contention that the Governor has to be aided and advised by the Council of Ministers. In this context, paragraphs 31, 40 and 48 of the aforesaid judgment have been specifically cited by the learned senior counsel. The aforesaid paragraphs have been reproduced below:

> "31. Further the rules of business and allocation of business among the Ministers are relatable to the provisions contained in Article 53 in the case of the President and Article 154 in the case of the Governor, that the executive power shall be exercised by the President or the Governor directly or through the officers subordinate. The provisions contained in Article 74 in the case of the President and Article 163 in the case of the Governor that there shall be a Council of Ministers to aid and advise the President or the Governor, as the case may be, are sources of the rules of business. These provisions are for the discharge of the executive powers and functions of the Government in the name of the President or the Governor. Where functions entrusted to a Minister are performed by an official employed in the Minister's Department there is in law no delegation because constitutionally the act or

decision of the official is that of the Minister. The official is merely the machinery for the discharge of the functions entrusted to a Minister (See Halsbury's Laws of England 4th Edn. Vol. I, paragraph 748 at p. 170 and Carltona Ltd. v. Works Commrs., (1943) 2 All ER 560 (CA))."

....

"40. The Rules of Business in the Bejoy Lakshmi Cotton Mills case (1967) 2 SCR 406 = (AIR 1967 SC 1145) (supra) indicated that the business of the Government was to be transacted in various departments specified in the Schedules. Land and Land Revenue was allocated as the business of the Department of the Minister with that portfolio. The Minister-in-charge had power to make standing order regarding disposal of cases. This Court held that the decision of any Minister or officer under Rules of Business is a decision of the President or the Governor respectively. The Governor means, the Governor aided and advised by the Ministers. Neither Article 77 (3) nor Article 166 (3) provides for any delegation of power. Although the executive power of the State is vested in the Governor actually it is carried on by Ministers under Rules of Business made under Article 166 (3). The allocation of business of the Government is the decision of the President or the Governor on the aid and advice of Ministers."

....

"48. The President as well as the Governor is the Constitutional or formal head. The President as well as the Governor exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers, save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion. Wherever the Constitution requires the satisfaction of the President or the Governor for the exercise by the President or the Governor of any power or function, the satisfaction required by the Constitution is not the personal satisfaction of the President or Governor but the satisfaction of the President or Governor in the Constitutional sense in the Cabinet system of Government, that is, satisfaction of his Council of Ministers on whose aid and advice the President or the Governor generally exercises all his powers and functions. The decision of any Minister or officer under rules of business made under any of these two Article 77 (3) and 166 (3) is the decision of the President or the Governor respectively. These articles did not provide for any delegation. Therefore, the decision of Minister or officer under the rules of business is the decision of the President or the Governor."

15. It was argued that unless the Council of Ministers gave its advice to the Governor, which the latter accepted, no order could be passed. The satisfaction of the Governor of State, as envisaged in Section 3 (1) of the AIS (D&A) Rules, 1969, has to be the satisfaction of the Governor on the aid and advice of the Council of Ministers. The power of suspension conferred under the aforesaid Rule is outside the gamut of the business of the Government of the State and falls outside the scope of the rules of business framed by the Governor under Article 166 (3) of the Constitution. According to the learned senior counsel, merely because the All India Services have been placed under General Administration Department (GAD), which is placed under the portfolio of the Chief Ministers, the Chief Minister would not become competent to place a Member of All India Service under suspension without the matter being placed before the Council of Ministers and without the decision of the Council of Ministers being accepted by the Governor. It would become an action of the Government only after the advice of the Council of Ministers to place All India Service officers under suspension as accepted by the Governor. The argument is that the order of suspension has been passed by the Chief Minister and has been issued by the Chief Secretary to the Government of Kerala by stating it to be "By order of the Governor". Such an order would be illegal because the Governor has not framed the Rules about authentication under Article 166 (2). It is further contended that under Article 166 (1) of the Constitution, all executive action of the Government of a State shall be expressed to be taken in the name of the Governor and not by the order of the Governor. The learned counsel would rely on the judgement of the Honourable Supreme

Court in **Bachhittar Singh Vs. State of Punjab and another**, AIR 1963 SC 395. Paragraph 10 of the aforesaid judgement relied upon by the learned senior counsel has been reproduced below:

> "10. The business of State is a complicated one and has necessarily to be conducted through the agency of a large number of officials and authorities. The Constitution, therefore, requires and so did the Rules of Business framed by the Rajpramukh of Pepsu provide, that the action must be taken by the authority concerned in the name of the Rajpramukh. It is not till this formality is observed that the action can be regarded as that of the State or here, by the Rajpramukh. We may further observe that, constitutionally speaking, the Minister is no more than an adviser and that the head of the State, the Governor or Rajpramukh*, is to act with the aid and advice of his Council of Ministers. Therefore until such advice is accepted by the Governor whatever the Minister or the Council of Ministers may say in regard to a particular matter does not become the action of the State until the advice of the Council of Ministers is accepted or deemed to be accepted by the Head of the State. Indeed, it is possible that after expressing one opinion about a particular matter at a particular stage a Minister or the Council of Ministers may express quite a different opinion, one which may be completely opposed to the earlier opinion. Which of them can be regarded as the 'order' of the State Government? Therefore, to make the opinion amount to a decision of the Government it must be communicated to the person concerned. In this connection we may quote the following from the judgment of this Court in the State of Punjab v. Sodhi Sukhdev Singh, AIR 1961 SC 493 at p. 512.:
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> > "Mr. Gopal Singh attempted to argue that before the final order was passed the Council of Ministers had decided to accept the respondent's representation and to reinstate him, and that, according to him, the respondent seeks to prove by calling the two original orders. We are unable to understand this argument. Even if the council of Ministers had provisionally decided to reinstate the respondent that would not prevent the Council from reconsidering the matter and coming to a contrary conclusion later on until a final decision is reached by them and is communicated to the Rajpramukh in the form of advice and acted upon by him by issuing an order in that behalf to the respondent."

Thus it is of the essence that the order has to be communicated to the person who would be affected by that order before the State and that person can be bound

> by that order. For, until the order is communicated to the person affected by it, it would be open to the Council of Ministers to consider the matter over and over against and, therefore, till its communication the order cannot be regarded as anything more than provisional in character."

Reliance has also been placed on **M. Balakrishna Reddy Vs. Director, Central Bureau of Investigation, New Delhi**, (2008) 4 SCC 409. Our attention has been drawn to paragraph 56 of the aforesaid judgement in which the Honourable Supreme Court has quoted paragraph 8 of the judgement in **J.P. Bansal Vs. State of Rajasthan and another**, (2003) 5 SCC 134, which reads thus:

> "8. We need not delve into the disputed question as to whether there was any cabinet decision, as it has not been established that there was any government order in terms of Article 166 of the Constitution. The Constitution requires that action must be taken by the authority concerned in the name of the Governor. It is not till this formality is observed that the action can be regarded as that of the State. Constitutionally speaking, the Council of Ministers are advisors and as the Head of the State, the Governor is to act with the aid or advice of the Council of Ministers. Therefore, till the advice is accepted by the Governor, views of the Council of Ministers do not get crystalised into action of the State. (See: State of Punjab v. Sodhi Sukhdev Singh, AIR 1961 SC 493 and Bachhittar Singh v. State of Punjab, AIR 1963 SC 395). That being so, the first plea of the appellant is rejected."

16. It is strenuously urged that even the advice of the Council of Ministers would not be crystallized till it is accepted by the Governor. The learned counsel would contend that the validity of an order, which is supposed to be authenticated under Article 166 (2) of the Constitution can be challenged on other grounds than the ground that it is not an order made by the Governor. In this context, advertence has been made to the observations of the Honourable Supreme Court in paragraph 78 of the judgement in **E.P. Royappa Vs. State of**

Tamil Nadu and another, AIR 1974 SC 555. The relevant portion of the paragraph reads thus:

> "78. ..... It is now well-settled law that when an order is authenticated, the only challenge that is excluded by the authentication is that it is not an order made by the Governor. The validity of such an order can be questioned on other grounds. (Vide King Emperor v. Shibnath Banerjee, 72 Ind App 241 = (AIR 1945 PC 156) and State of Bihar v. Sonabati (1961) 1 SCR 728 at p. 746 = (AIR 1961 SC 221). The authentication does not, therefore, preclude the contention that the order though made by the Governor suffers from some other infirmity. The authenticated order is merely an expression of the actual order which precedes it and which is made by the appropriate authority entitled to act on behalf of the State Government. As pointed out by this Court in State of Bihar v. Sonabati, (1961) 1 SCR 728 at p. 746 = (AIR 1961 SC 221) "the process of making an order precedes and is different from the expression of it". It should, therefore, be axiomatic that if the authenticated order does not correctly reflect the actual order made, or to put the same thing differently, the actual decision taken by the State Government, it must be open to correction. The formal expression of the order cannot be given such sanctity that even if found to be mistaken, it must prevail over the actual order made and override it. That would not be consonant with reason or principle. It would be an artificial rule calculated to obstruct the cause of truth and justice..... We have, therefore, no doubt that it was competent to the petitioner to contend, by reference to the draft order which contained the original decision of the State Government, that the authenticated order did not correctly reflect such decision and suffered from an error....."

The learned counsel would contend that the same view has been reiterated in paragraph 37 of the judgement in Balakrishna Reddy (supra). His contention is that even if the authentication is proper, although it is not conceded, the validity of the order can be challenged on other grounds also. The learned counsel would strenuously urge that the powers of the State Government are limited to the matters with respect to which the legislature of the State has power to make laws. In this context, the learned counsel would contend that reliance

placed by the Respondents on **Gullapalli Nageswara Rao and others Vs. Andhra Pradesh State Road Transport Corporation and another**, AIR 1959 SC 308, is wrong and it does not support their contention that the rules of business can include such rules in which the State Legislature may not have any power to make laws. In this context, the observations of the Honourable Supreme Court in paragraph 7 of the judgement have been cited, where the Honourable Court, *inter alia*, observed thus:

> "7. We have quoted the observations in extenso as they neatly summarise the law on the subject. The legal position may be briefly stated thus : The Legislature can only make laws within its legislative competence. Its legislative field may be circumscribed by specific legislative entries or limited by Fundamental Rights created by the Constitution. The Legislature cannot over-step the field of its competency, directly or indirectly. The Court will scrutinize the law to ascertain whether the Legislature by device purports to make a law which, though in form appears to be within its sphere, in effect and substance, reaches beyond it....."

It is contended that it would be clear from the facts of the case that the matter related to creation of Andhra Pradesh State Road Transport Corporation. He would contend that since the matter in this case is in List III in concurrent jurisdiction of the Union and the State, hence the rules of business could include rules regarding regulation of mechanically propelled vehicles.

17. The learned counsel would further contend that in the rules of business of the Government of Kerala, the General Administration Department has been allocated to the Chief Minister. Under serial number B (1) and (2), the All India Services come under the purview

of the General Administration Department. The subject is mentioned thus in the rules of business:

> "B. All India Services
>
> (1) Personnel Management, Career Development and Administration of the Rules framed under the A.I.S. Act.
>
> (2) All Establishment matters relating to members of All India Services."

It is contended emphatically that the disciplinary powers including the powers of ordering suspension in respect of Members of All India Services are not exercisable by the Chief Minister holding the portfolio of General Administration Department. In the aforesaid allocation, as quoted above, it is contended that the power to invoke Rule 3 of the AIS (D&A) Rules, 1969 has not been allocated to the Chief Minister. He would contend that the expression `Administration' means `management of the affairs of the institution' as laid down by the Honourable Supreme Court in paragraph 9 of the judgement in **State of Kerala Vs. Very Rev. Mother Provincial**, AIR 1970 SC 2079. He would contend that `Administration' would mean to oversee the day to day affairs and to deal with the establishment matters, which do not take in statutory power conferred upon a State under a central statute and the rules thereunder.

18. To sum up, the argument of the learned senior counsel is that the order of suspension (Annex A-8) is illegal, ultra vires and unconstitutional because the decision has not been taken by the Council of Ministers and there was no occasion for the Governor to accept the decision of the Council of Ministers regarding the matter. The order at Annex A-8 cannot, therefore, be termed as the action of

the Governor of the State under Rule 3 (1) of the AIS (D&A) Rules, 1969. The powers and functions assigned to the State Government under a central enactment, exclusively within the preserve of the Parliament, cannot be included in the rules of business of the State Govenment. Further, in spite of the authentication made in the order of suspension, it can be challenged on grounds other than the ground whether the order has been made by the Governor. It is further contended that the decision or the views of the Council of Ministers get crystallized into the action of the State only when the same are accepted by the Governor. Yet another contention is that the State Legislature is not competent to make any law in respect of All India Service, which falls under Entry 70 List-I of Schedule VII of the Constitution of India.

Arguments on the merits of the case.

19. It has been contended by the learned senior counsel that the Government should not place an officer - especially of the Indian Police Service - lightly under suspension without any justifiable grounds. Suspension has penal consequences. The order of suspension has been passed in a routine manner, without application of mind, thereby leading to adverse consequences for the Applicant. Honourable Supreme Court has, in this context, observed thus in **P.R. Nayak** Vs. **Union of India**, AIR 1972 SC 554:

> "18. There is no gainsaying that there is no inherent power of suspension postulated by the Fundamental Rules or any other rule governing the appellant's conditions of service. Except for Rule 3 of the A.I.S. (D & A) Rules, 1969 no other rule nor any inherent power authorising the impugned order of authorising the impugned order of suspension was relied upon in this Court in its support.

> Therefore, if Rule 3 , which is the only rule on which the appellant's suspension pending disciplinary proceedings can be founded, does not postulate an order of suspension before the initiation of disciplinary proceedings and the Government initiating such proceedings can only place under suspension the member of the Service against whom such proceedings are started, then, the impugned order of suspension which in clearest words merely states that disciplinary proceedings against the appellant are contemplated, without suggesting actual initiation or starting of disciplinary proceedings, must be held to be outside this rule. The impugned order of suspension, it may be pointed out, is not like an order of suspension which without adversely affecting the rights and privileges of the suspended Government servant merely prohibits or restrains him from discharging his official duties of obligations. An order of that nature may perhaps be within the general inherent competence of an appointing authority when dealing with the Government servant. The impugned order made under Rule 3 of A. I. S. (D & A) Rule, 1969 on the other hand seriously affects some of the appellant's rights and privileges vesting in him under his conditions of service. To mention some of the disabilities resulting from his suspension, he is not entitled to get his full salary during suspension, but is only to be paid subsistence allowance and in certain circumstances some other allowances: in order to be entitled to the subsistence allowance he is prohibited from engaging in any other employment, business, profession or vocation (vide Rule 4): the appellant is not permitted to retire during the period of suspension: indeed, the impugned order specifically prohibits the appellant even from leaving New Delhi during the period of suspension, without obtaining the previous permission of the Central Government. The fact that these prejudicial consequences automatically flow from the impugned order under the rules also lends support to our view that the clear and explicit language of Rule 3 must not be so strained to the appellant's prejudice as to authorise an order of suspension on the mere ground that disciplinary proceedings against him are contemplated. The precise words of Rule 3 are unambiguous and must be construed in their ordinary sense. The draftsman must be presumed to have used the clearest language to express the legislative intention, the meaning being plain Courts cannot scan its wisdom or policy."

20. It was argued that the order of suspension should be passed only when there are grave charges of misconduct or corruption against an employee and it should not be merely an automatic order passed without giving due consideration to the issues involved. Advertence

was made to the following observations of the Honourable Supreme Court in **State of Orissa** Vs. **Bimal Kumar Mohanty**, (1994) 4 SCC 126:

> "13. It is thus settled law that normally when an appointed authority or the disciplinary authority seeks to suspend an employee, pending inquiry or contemplated inquiry or pending investigation into grave charges of misconduct or defalcation of funds or serious acts of omission and commission the order of suspension would be passed after taking into consideration the gravity of the misconduct sought to be inquired into or investigated and the nature of the evidence placed before the appointing authority and on application of the mind by disciplinary authority. Appointing authority or disciplinary authority should consider the above aspects and decide whether it is expedient to keep an employee under suspension pending aforesaid action. It would not be as an administrative routine or an automatic order to suspend an employee. It should be on consideration of the gravity of the alleged misconduct or the nature of the allegations imputed to the delinquent employee. The Court or the Tribunal must consider each case on its own facts and no general law could be laid down in that behalf. Suspension is not a punishment but is only one of forbidding or disabling an employee to discharge the duties of office or post held by him. In other words it is to refrain him to avail further opportunity to perpetrate the alleged misconduct or to remove the impression among the members of service that dereliction of duty would pay fruits and the offending employee could get away even pending enquiry without any impediment or to prevent an opportunity to the delinquent officer to scuttle the enquiry or investigation or to win over the witnesses or the delinquent having had the opportunity in office to impede the progress of the investigation or enquiry etc. But as stated earlier, each case must be considered depending on the nature of the allegations, gravity of the situation and the indelible impact it creates on the service for the continuance of the delinquent employee in service pending enquiry or contemplated enquiry or investigation would be another thing if the action is by mala fides, arbitrary or for ulterior purpose. The suspension must be a step in aid to the ultimate result. The authority also in mind a public interest of the impact of the delinquent's continuance in office while facing departmental enquiry or trial of a criminal charge."

Rajesh

Observations of the Honourable High Court of Kerala in **A.K.Veermani** Vs. **State of Kerala**, 1974 KLT 630, in paragraphs 8, 19 and 21 have also been cited in support of this contention. These observations have been quoted below:

> "8. We will certainly not be justified in interpreting rule 7 of the Rules by importing the words of other rules though framed under the Constitution in exercise of identical or similar powers. But Rule 7 of the Rules has to be interpreted. We consider that if the Rule is interpreted with reference to its working and read with Rule 6 (1) and the general principles that should govern the matter the conclusion is obvious that before a Government servant is placed under suspension there must be serious allegations of misconduct against the servant and there should be a prima facie satisfaction that the allegations are true. Rule 6 (1) of the Rules provides that:
>
> > "whenever on a complaint or otherwise, it is found necessary to inquire into the conduct of a member of the service the departmental superior under whom such member is employed shall make a preliminary inquiry and determine whether there are grounds for further action".
>
> There is a proviso to this sub-rule which has been added to the original rule and the proviso is in these terms:
>
> > "Provided that no such preliminary inquiry shall be necessary if prima facie grounds for action against the member of the service have already been established to the satisfaction of the departmental superior, or any authority to whom such superior is subordinate".
>
> From the above, it is clear that either there should be a preliminary enquiry and a prima facie satisfaction or there must be material available which would indicate prima facie grounds for action against the member and those grounds should be established to the satisfaction of the departmental superior or any authority to whom such superior is subordinate. When Rule 7 (1) (a) is read with Rule 6, it is clear that an enquiry can be said to be contemplated against a member of a service only when a prima facie case for enquiry is established. It is further obvious that in all cases when an enquiry is to be conducted there need not be an order of suspension. There should be some guide-lines then in determining when an order of suspension could and should be passed. An order of suspension should be passed only if it is necessary or desirable. Such necessity or desirability will arise when the

charges against a servant are of a serious nature and keeping him in service will not be conducive to discipline or the maintaining of the efficiency or the honesty of the administration. So it follows that there must be serious allegations of misconduct and having regard to the allegations and the attendant circumstances the authority must be satisfied that it is necessary or at least desirable to keep a member of a service under suspension."

....

"19. We are not suggesting that the order passed by the Chief Minister is not an honest order in the sense that it was passed with good intentions. Perhaps it was felt that such an order was necessary in the circumstances of tension that prevailed then. But none the less it would be an improper order f it had been passed due to political pressure. It is clear from what we have stated that the pressure played a dominant part in inducing the order Ext. P7. The rule laid down by the Supreme Court in the decision in S. Partap Singh V. State of Punjab reported in AIR 1964 SC 72, must apply. That was of course, a case which was of a very clear nature, mala fides being writ large and the intention to wreak vengeance on the Government servant being spelt out in clear terms. But the principle must apply here also and the principle has been so stated:

> "The second ground of attack on the orders might be viewed from two related aspects of ultra vires pure and simple and secondly as an infraction of the rule that every power vested in a public body or authority has to be used honestly, bona fide and reasonably, though the two often slide into each other. When a power is exercised for a purpose or with an intention beyond the scope of or not justified by the instrument creating the power, in legal parlance it would be a case of a fraud on a power, though no corrupt motive or bargain is imputed. In this case, if it could be shown that an authority exercising a power has taken into account it may even be bona fide and with the best of intentions - as a relevant factor something which it could not properly take into account in deciding whether or not to exercise the power or the manner or extent to which it should be exercised, the exercise of the power would be bad. Sometimes courts are confronted with cases where the purposes sought to be achieved are mixed, some relevant and some alien to the purpose. The Courts have, on occasions, resolved the difficulty by finding out the dominant purpose which impelled the action and where the power itself is conditioned by a purpose, have proceeded to invalidate the exercise of the power when any irrelevant purpose is

> proved to have entered the mind of the authority. This is on the principle that if in such a situation the dominant purpose is unlawful then the act itself is unlawful and it is not cured by saying that they had another purpose which was lawful".
>
> ....
>
> 21. The passing of an order of suspension of any public servant is a matter of important consequences not only so far as the public servant is concerned but as regards the satisfactory discharge of the duties by the members of a service and therefore so far as the public interest is concerned. It affects the reputation of the public servant and if unjustifiably passed, it affects his morale apart from the fact that it deprives him of his full emoluments and the right to work. It affects the efficiency of the service as well as security of service. As far as the Police force is concerned, demoralizing it and making it ineffective and inefficient has the result of rendering the rule of law envisaged by the Constitution a mockery. This being so it is necessary that such power is exercised with caution and only for valid reasons and not for extraneous considerations".

21. It is urged that the Honourable High Court of Kerala gave a cautionary note in its judgement in **Surendran K. Vs Government of Kerala and others**, 2008 (3) ILR 587 (Ker.) about exercising the powers of suspension with care because the employee has to face shame and humiliation as a result of being placed under suspension. It has been observed that:

> "The power to suspend an employee should be exercised with caution and care as an order of suspension pending enquiry may put the employee into shame and humiliation. Of course, if the continuance of the employee in the same place affects the disciplinary proceedings, the employer can suspend the employee. Whether an employee should be suspended pending enquiry will depend upon various circumstances. Suspension pending enquiry though cannot be considered as a punishment, it cannot be disputed that it causes real hardship to an employee. The stigma attached cannot be ignored. The object in placing an employee under suspension pending enquiry is to enable the administration to conduct the proceedings smoothly so as to establish the allegations or the charge against the employee. If he is allowed to continue on duty,

there may be occasion for tampering with the evidence so that the investigation cannot be successfully conducted. The power to suspend is discretionary. There should be material to justify the suspension. The order should be free from the taint of mala fides, arbitrariness and extraneous considerations. Subjective satisfaction regarding suspension should be based on objective considerations and relevant circumstances. The suspension order should be sparingly passed in compelling circumstances. It is true that commission of grave misconduct may be a ground for suspending an employee, but the need for suspending an employee would not necessarily depend upon the gravity of the charges alone. The disciplinary authority should consider whether it is necessary to keep the employee away from the post. A person who is alleged to have embezzled public funds can be suspended immediately to prevent him from committing further embezzlement or doing something to cover up the fraud, but, it is not proper to suspend an employee posted elsewhere for an alleged irregularity committed nine years back, the file of which was closed. In N. Prabhakar Murthy v. Tirumala Tirupathi Devasthanams, it was held that the action taken by the authorities by suspending an employee on the ground of the charges issued after a long lapse of six years is illegal and arbitrary and calls for interference by the High Court. If there is no possibility of tampering with the evidence, suspension need not be made. Since the appellant was transferred back to the parent department in 1999 and is now working in Palakkad (another District) in a totally different department, continuation of his service will not affect the enquiry. His suspension pending enquiry, nine years after the commission of alleged misconduct based on a matter which was closed clearly establishes that there is no reason for suspending the appellant pending enquiry. Victimisation can be inferred on the facts and circumstances of this case. It is arbitrary and illegal and warrants interference."

The same sentiments were echoed by the Honourable High Court of Kerala in **Mathew** Vs. **State of Kerala**, 2000 (1) KLT 245, when it held thus in paragraph 4 of the aforecited judegment:

"4. In passing an order of suspension, authority is required to take into consideration the gravity of misconduct sought to be enquired into or investigated and the nature of offence placed before the authority. There should be an application of mind. It should not be an administrative routine or an automatic order to suspend an employee. It is to be noted that such an order is an administrative order and not a quail judicial order. Order of suspension does not put an end to service. Real effect of the order of

> suspension is that though the civil servant continues to be a member of service, he is not permitted to work and is paid only subsistence allowance, which is less than the salary. Suspension merely suspends the claim to salary. During suspension, there is suspension allowance (See Khem Chand v. Union of India : AIR 1963 SC 687). There would be no question of salary accruing or accruing due so long as order of suspension stands (State of M.P. v. State of Maharashtra : AIR 1977 SC 1466). There is no doubt that an order of suspension, unless departmental enquiry is concluded within a reasonable time, affects an employee injuriously. Very expression `subsistence allowance' has an undeniable penal significance. Dictionary meaning of the word `subsist' as given in Shorter Oxford English Dictionary Vol. II is `to remain before as on food; to continue to exist'. `Subsistence' means, means of supporting life, especially a minimum livelihood. But at the same time, there should not be unusual delay in considering the question whether departmental proceeding is to be terminated."

22. The learned senior counsel would urge fervently that no grave misconduct has been committed by the Applicant and his suspension was absolutely unwarranted merely because he went abroad without prior permission of the Government. The principles of judicious application of mind before suspending an employee, as enunciated in the judgments cited above, have been abandoned and given a go by, contends Sh. O.V. Radhakrishnan, the learned senior advocate.

23. Taking serious exception to the contents of the impugned order of suspension, it was submitted by the learned senior counsel that the order was based on speculation, untruth and half-truths. The learned senior counsel has taken us through the entire order of suspension. Regarding the statement in paragraph 3(a) of the impugned order that the charge of the Kannur Range was given to Inspector General of Police, Thrissur because the competent authority was under the impression that the Applicant was availing LTC and earned leave as sanctioned by the Government, the learned senior counsel would

contend that the Respondents would not have made any other arrangement, had they known in advance that the Applicant was going abroad. The arrangement, which was made on the assumption that the Applicant was availing LTC, could not have been changed merely because the Applicant was going abroad instead of travelling on LTC to some part in the country. He would even contend that it would be quicker and easier for the Applicant to return to his headquarters from Bahrein or any other country in the gulf than from Gangtok in Sikkim, if any such situation had arisen to recall him. The other observation in the same paragraph is that it was necessary for the Applicant to observe the conditions of the GO by which leave was granted to him on the ground that there were no conditions in the GO adverted in paragraph 3-A of the order of suspension. The GO dated 30.03.2010, which has been placed at Annex A-1, was read out by the learned senior counsel to emphasize the point that there are no conditions prescribed in the aforesaid GO, which the Applicant should have observed.

24. He would further contend that no permission was needed for the Applicant to deviate from the GO dated 30.03.2010 and no prior permission was needed for visiting abroad. He would contend that the allegation made in paragraph 3 (c) that the Additional Director General of Police, North Zone had not received any prior intimation from the Applicant about his intention to visit any foreign country is contrary to record in the light of the letter dated 31.03.2010, which the Applicant wrote to the Chief Secretary of the Government of Kerala. For the same reason, it is urged that the statement made in paragraph 3 (d) of the order of suspension that neither the Director General of Police nor the Additional Director General of Police were informed by the

Applicant of his intention to cancel his LTC and go abroad, is also incorrect. Serious exception has been taken to paragraph 3 (e) of the order of suspension wherein it is mentioned that the veracity of letter dated 30.03.2010 addressed to the Chief Secretary, giving information of his intention to visit foreign country shall be verified before coming to a conclusion whether prior permission was given directly to the Government. It is vehemently contended that this shows total non-application of mind in as much as it should have been verified before issuing the order of suspension. As regards paragraph 3 (f), in which it is stated that LTC is not available for trips abroad, the learned senior counsel would contend that the Applicant had not availed of LTC at all let alone for going on foreign visit. It is further contended that another reason for suspension mentioned in paragraph 3 (f) is that the Applicant had decided on his own not to avail of the LTC and that he had undertaken journey abroad without prior permission. It is argued that permission is not needed to not avail of the LTC and prior permission is also not needed to undertake journeys to foreign countries. It is further contended that the Respondents have accepted in paragraph 3 (g) that the expenses for foreign visit were made by the Applicant himself and by the Applicant's relatives because it is stated in this paragraph that "No information is available to believe that these submissions by the officer are incorrect." The submission referred to in this sentence related to the statement of the officer that he and his relatives paid for his visit abroad. It is also argued that the statement in paragraph 3 (i) that the action of the Applicant in going abroad after taking leave for going to Gangtok has resulted in public discussion about the deviation made by the officer is incorrect because no evidence of such discussion has been given. Challenging paragraph

3 (j) of the order of suspension, the learned senior counsel would contend that it is only mentioned in this paragraph that the Applicant has violated standing orders of the Government with regard to the procedure to the adopted before a foreign visit for personal purpose, without making it clear as to which standing orders have been violated. Further it has not even been made clear as to which form of proper norms of conduct and discipline have been violated by the Applicant, as mentioned in paragraph 3 (k) of the order of suspension. It is strenuously urged that the Government has totally wrongly assumed that the letter dated 31.03.2010 was never sent by the Applicant merely because it was received on 17.04.2010 in the office of the Chief Secretary. Objection has also been raised to paragraph 5 of the impugned order, wherein it is mentioned that the Applicant has violated existing Government rules regarding foreign visit and also violated the All India Services (Conduct) Rules. It is contended that no existing Government rules or conduct rules have been cited, in the absence of which the allegation against the Applicant is absolutely vague.

25. It is further contended that it would be clear from the perusal of the order dated 30.03.2010 that the Applicant was given permission to avail of LTC to Gangtok in paragraph 3, separately from grant of seven days earned leave in paragraph 4. It is contended that the grant of earned leave is not necessarily for availing of LTC. The Applicant could use the leave granted in paragraph 4 of the order dated 30.03.2010 for any purpose other than LTC. It is reiterated that the Applicant had intimated the Chief Secretary about his intention to visit abroad by using the earned leave already sanctioned in his letter dated 31.03.2010. The learned senior counsel would emphatically contend

that it was sufficient under the Rules to give intimation about his foreign visit and prior permission was not needed. It is pointed out that advertence to the letter dated 31.03.2010 was also made in the letter dated 12.04.2010, addressed to the Chief Secretary, which is placed Annex A- 3.

26. Adverting to the letter dated 12.04.2010 from the DGP regarding clarification about following the conditions stipulated in GO (P) No. 233/08/Fin dated 3.06.2008 as well as GO (P) no. 418/08/Fin dated 16.09.2008, it is contended that the GO dated 3.06.2008 placed at Annex A-9 is applicable only to the officers of Kerala State and not to the officers of All India Services. It is stated that the GO dated 3.06.2008, *inter alia*, states that "there is no need to obtain Government sanction in the case of private visit abroad on eligible leave as defined in the Note below Rule 118 A Part 1 Kerala Service Rules but the specific sanction of the leave sanctioning authority should be obtained before undertaking the journey". It is contended that under Rule 2 (g) (iii), the leave sanctioning authority is the Government of the State. In view of what is stated in the order dated 3.06.2008 that there is no need to obtain Government sanction, it is contended that it would be clear that there is no need to take prior permission of the leave sanctioning authority for the officers of the All India Services. It is also contended that circular dated 29.04.2002 issued by the Personnel and Administrative Reforms Department, adverted to in the GO dated 3.06.2008, whereby the prior sanction of the leave sanctioning authority for visit abroad was necessary, has been done away with by the GO dated 3.06.2008. Moreover, it is reiterated that this, in any case, does not apply to officers of All India

Services. In so far as GO dated 16.09.2008 is concerned, it is pointed out that it has no relevance as far as permission to visit abroad is concerned. The aforesaid GO has been placed at Annex A-10. By this order, the period of absence on foreign visit has been enhanced to one month from fifteen days as prescribed earlier. It is urged that this GO dated 16.09.2008 is completely irrelevant. The learned senior counsel would also point to the inadvertent mistake in the letter dated 12.04.2010 written by the Applicant addressed to the Chief Secretary, which has been placed at Annex R-1(a) of the counter affidavit. It is urged that the Respondents are making unnecessary hue and cry about not mentioning of letter dated 31.03.2010 in the letter of 12.04.2010. It is contended that this was by inadvertent oversight that the Applicant forgot to mention the letter dated 31.03.2010 and because of this he immediately, after faxing the aforesaid communication at Annex R 1 (a) faxed another letter, placed at Annex A-3 in which it was mentioned that he had intimated the Chief Secretary about his foreign visit dated 31.03.2010. It is further contended that there is nothing on record to show that the said letter was not posted on 31.03.2010. The Respondents have placed the cover of the aforesaid letter dated 31.03.2010 at Annex R 1 (b). The learned senior counsel would contend that it only shows the date of receipt, which was 16.04.2010 but the date of dispatch has not been shown. Therefore, the aforesaid Annex R 1 (b) is totally irrelevant and would not help the Respondents in coming to the conclusion that the letter was not posted on 31.03.2010.

27. In yet another contention, it is submitted that the Respondents have now given up reliance on the Government orders dated

3.06.2008 (Annex A-9) and 16.09.2008 (Annex A-10) but instead reliance was being placed on Annex R-1 (f) to Annex R-1 (j). It is argued that in paragraph 3 of Annex R-1 (f), which is a letter issued by the Department of Personnel & Training(DoP&T) on 7.03.2003 to the Chief Secretaries all States, the provision for approval of the Central Government for travel abroad of members of the All India Services has been done away with. As per paragraph 2 of the aforesaid letter, the approval of the Central Government is no longer required for All India Services for traveling abroad. It is further contended that there is no requirement of prior permission of the State Government in paragraph 3 of the aforesaid letter dated 7.03.2003. Paragraph 3 reads thus:

> "3. While considering the requests of the member of an All India Service for grant of leave to proceed abroad, all the State Governments/ Ministries to the Government of India are requested to satisfy themselves regarding the funding of such visits made by the officer concerned in each case and to see that no cadre officer accepts hospitality from a foreign government/private body other than a close relative."

28. It is further contended that Annex R-1 (f) has been modified by the DoP&T by its letter dated 5.12.2007, addressed to the Chief Secretaries of all States. The aforesaid letter dated 5.12.2007 has been placed at Annex A-13. It is urged that the letter, *inter alia,* mentions that:

> "Further delegation:- It has been decided that State Governments and Ministries/ Departments of the Government of India be delegated the power to allow permission for such private visits in which the government is not bearing any expenditure subject to the condition that the total period of ex-India leave does not exceed three weeks....."

It is contended that though the power has been delegated to the State Government by the Central Government for allowing permission for private visits abroad, yet the State Government has not made any rules or regulations pursuant to this delegation. Therefore, this provision is of no consequence.

29. It is further submitted that the Office Memorandum dated 18.05.1994, already adverted to above, is based on the provisions of Fundamental Rule (FR), which is reproduced below:

> "11. Unless in any case it be otherwise distinctly provide, the whole time of a Government servant is at the disposal of the Government which pays him, and he may be employed in any manner required by proper authority, without claim for additional remuneration, whether the services required of him are such as would ordinarily be remunerated from general revenues, from a local furn or from the funds of a body incorporated or not, which is wholly or substantially owned or controlled by the Government".

The argument is that the FRs do not apply to the officers of the All India Services. These, it is contended, are applicable only to Central Civil Services and Central Secretariat Service. Therefore, instructions based on FRs would have no application to an officer of the IPS. A list of circulars issued by the DoP&T, downloaded from its website, has been placed at Annex A-14, from page 126 to page 128 of the paper book, in an attempt to show that these have been issued under the provisions of CCS (Conduct) Rules, 1964 by the Establishment Division, whereas instructions regarding All India Services are issued by the AIS Division of the DoP&T. It is pointed out that Annex R (1) (i) and Annex R 1(b) have been placed at serial numbers 17 and 18 respectively of this list. R (1) (i) is issued under Office Memorandum number 11013/7/2004- **Estt. (A)** and R (1) (b) is numbered 11013/7/2004 - **Estt. (A)** dated 5.10.2004. Annex R (1) (i) is the

Office Memorandum dated 15.12.2004, issued by DoP&T and has been extracted below:

" No. 11013/7/2004-Esttt. (A)
Government of India
Ministry of Personnel, P.G. & Pensions
(Department of Personnel & Training)

New Delhi, dated the 15th December, 2004

OFFICE MEMORANDUM

Sub: Requirement of taking prior permission by Government servants for leaving station/headquarters.

The undersigned is directed to refer to this Department's O.M. of even number dated 5th October, 2004 under which a proforma has been prescribed for the Government servants to furnish details of the private foreign travel proposed as well as undertaken during the last one year by them. The High Court of Delhi during further hearing in respect of direction given in W.P. (Crl.) No. 1004/2003 (Chandra Kumar Jain Vs. Union of India) observed on 17.11.2004 that it would be advisable for the Department of Personnel & Training, to amend the proforma published with the Office Memorandum dated 5th October, 2004 so as to obtain details of previous private foreign travel, if any, undertaken by the Central Government employees during the last four to five years.

2. The matter has been considered and it has been decided that in the entries against serial number 7 of the proforma prescribed under the O.M. dated 5th October, 2004, the words "lst one year" may be substituted by the words " last four years". A revised proforma is enclosed.

3. Ministry of Finance etc. are requested to bring the contents of the Office Memorandum dated 5th October, 2004 as well as this Office Memorandum to the notice of all Government servants serving under their control and ensure that these are strictly followed by all concerned."

30. Advertence has been made to R (1) (b) above. It is submitted that these instructions are not applicable to officers of the All India Services. The learned Senior Counsel, Shri O.V. Radhakrishnan, would further point out that visiting abroad without prior permission is not a specific misconduct under All India Services (Conduct) Rules, 1968.

Rule 3, *ibid,* is a General Rule, where there is no mention of such specific misconduct as going abroad with prior permission of the Government. He has taken us through the aforesaid Rules to drive home the point that such specific misconduct has not been provided in the conduct Rules. It is further contended that 'approval' can be subsequent approval also and need not be prior approval. Our attention has been drawn to the observation of the Honourable Supreme Court in paragraph 10 and 12 of **Ashok Kumar Das and others** Vs. **University of Burdwan and Others**, (2010) 3 SCC 616, which reads thus:

> 10. The learned counsel for respondents 1 to 3, on the other hand, submitted that Section 21 (xiii) used the expression "approval of the State Government" and not "prior approval of the State Government" and it has been held by this Court in U. P. Avas Evam Vikas Parishad v. Friends Coop. Housing Society Ltd. & High Court of Judicature for Rajasthan v. P.P. Singh that when an approval is required, an action holds good and only if it is disapproved it loses its force. He further submitted that promotions made on the basis of Resolution of the Executive Council of the University adopted on 26-6-1995, therefore, hold good and now that the State Government has approved the Resolution of the Executive Council of the University adopted on 26-6-1995 by Order dated 10-10-2002, the promotions made on the basis of the Resolution dated 26-6-1995 of the Executive Council of the University hold good and cannot be set aside by this Court.
>
> ....
>
> "12. In U. P. Avas Evam Vikas Parishad this Court made the distinction between permission, prior approval and approval. Para 6 of the judgment is quoted hereinbelow:
>
> > "6. This Court in LIC v. Escorts Ltd., considering the distinction between `special permission' and `general permission', `previous approval' or `prior approval' in para 63 held that:
> >
> > "63.....we are conscious that the word "`prior" or "previous" may be implied if the contextual situation or the object and design of the

> legislation demands it, we find no such compelling circumstances justifying reading any such implication into Section 29(1) [of the Act].'
>
> Ordinarily, the difference between approval and permission is that in the first case the action holds good until it is disapproved, while in the other case it does not become effective until permission is obtained. But permission subsequently granted may validate the previous act. As to the word `approval' in Section 32 (2) (b) of the Industrial Disputes Act, it was stated in Lord Krishna Textile Mills Ltd. v. Workmen, that the management need not obtain the previous consent before taking any action. The requirement that the management must obtain approval for distinguished from the requirement that it must obtain permission, of which mention is made in Section 33(1)."

The judgment of the Honourable Supreme Court in **A.K.Kalra** Vs **Project and Equipment Corporation of India Ltd.**, 1984) 3 SCC 316 has been adverted to in order to buttress the argument that a misconduct has to be specifically mentioned in the Conduct Rules to be a misconduct. Paragraph 22 of the aforecited judgment is reproduced hereinbelow:

> "22. Rule 4 bears the heading 'General'. Rule 5 bears the heading 'Misconduct'. The draftsmen of the 1975 Rules made a clear distinction about what would constitute misconduct. A general expectation of a certain decent behaviour in respect of employees keeping in view Corporation culture may be a moral or ethical expectation. Failure to keep to such high standard of moral, ethical or decorous behaviour befitting an officer of the company by itself cannot constitute misconduct unless the specific conduct falls in any of the enumerated misconduct in Rule 5. Any attempt to telescope Rule 4 into Rule 5 must be looked upon with apprehension because Rule 4 is vague and of a general nature and what is unbecoming of a public servant may vary with individuals and expose employees to vagaries of subjective evaluation. What in a given context would constitute conduct unbecoming of a public servant to be treated as misconduct would expose a grey area not amenable to objective evaluation. Where misconduct when proved entails penal consequences, it is obligatory on the employer to specify and if necessary define it with precision and accuracy so that any ex post

> facto interpretation of some incident may not be camouflaged as misconduct. It is not necessary to dilate on this point in view of a recent decision of this Court in Glaxo Laboratories (I) Ltd. v. Presiding Officer, Labour Court, Meerut where this Court held that "everything which is required to be prescribed has to be prescribed with precision and no argument can be entertained that something not prescribed can yet be taken into account as varying what is prescribed. In short it cannot be left to the vagaries of management to say ex post facto that some acts of omission or commission nowhere found to be enumerated in the relevant standing order is nonetheless a misconduct not strictly falling within the enumerated misconduct in the relevant standing order but yet a misconduct for the purpose of imposing a penalty". Rule 4 styled as 'General' specifies a norm of behaviour but does not specify that its violation will constitute misconduct. In Rule 5, it is nowhere stated that anything violative of Rule 4 would be per se a misconduct in any of the sub-clauses of Rule 5 which specifies misconduct. It would therefore appear that even if the facts alleged in the two heads of charges are accepted as wholly proved, yet that would not constitute misconduct as prescribed in Rule 5 and no penalty can be imposed for such conduct. It may as well be mentioned that Rule 25 which prescribes penalties specifically provides that any of the penalties therein mentioned can be imposed on an employee for misconduct committed by him. Rule 4 does not specify a misconduct."

31. Reliance has also been placed on the judgment of this Tribunal in OA No. 2944/2009 (Principal Bench), **Francis John Aranha** Vs. **Union of India and others**, decided on 2.02.2010. In paragraph 15 of the cited judgment the matter came up for consideration whether going abroad without permission could be construed as misconduct under the AIS (Conduct) Rules, 1968. Our attention has been drawn to the following observation of the Tribunal:

> "The Government never thought of incorporating in the Rules of 1968 misconduct or delinquency of going abroad without prior permission. Even though, instructions shall also be binding and if the said instructions may require an employee to do a particular thing in a particular manner, he is supposed to act in that manner only, all that we are trying to emphasize is that going abroad without permission was never viewed seriously so as to make it a

> definite misconduct under the rules. Further, the delinquency or misconduct of not seeking permission to go abroad, in our considered view, cannot touch upon maintenance of absolute integrity or devotion to duty. Going abroad is not banned and thus not a misconduct. Only prior permission is required, and in our considered view, even though, it would be misconduct on the part of an employee to violate instructions, the same cannot partake the character so as to mean lack of integrity and devotion to duty, nor it would be something unbecoming of a member of the service. Indeed, it is an infraction of instructions and may call for some punishment as well depending upon the facts and circumstances of each case. All that we are trying to emphasize is that it would not be a serious misconduct, such as lack of integrity or devotion to duty, or something which may be unbecoming of a member of the service. In the facts and circumstances, we are of the firm opinion that the applicant could not be charged under rule 3(1) of the Rules of 1968. He could, at the most, be charged for violating rule 13(1)(b) and instructions dated 18.5.1994, which may, in our view, may call for some punishment, but since it is not with regard to lack of integrity and devotion to duty, no major penalty could possibly be imposed."

32. It has been argued with great emphasis that the Government of Kerala had always taken a very lenient view in the past about employees going abroad without prior permission and considered it as minor infringement. Different treatment meted out to the Applicant smacks of vengeful attitude and is in violation of Article 14 of the Constitution. Orders passed in disciplinary proceedings on the allegations of going abroad without prior permission of the Government have been placed on record at Annexes MA-1 and MA-2. Annex MA-1 is regarding the disciplinary action taken against P.C. Sanalkumar, an IAS officer of 1993 batch of Kerala Cadre. The charges against the said officer were that he went to the USA twice without obtaining prior permission of the State Government, accepted hospitality from foreign organizations and pursued a course of study. The disciplinary proceedings were dropped by order dated 15.06.2009

on the basis of the following grounds:

> "6. Sri P.C. Sanalkumar, IAS is retiring on 30.06.2009. The Offence of Shri P.C. Sanalkumar is a minor infringement of the conduct rule. However, it is pointed out that the offence was not wilful or malafide, arising more from ignorance and compulsion of circumstances. For the visit to USA he had applied for permission and pursued it and left the place without permission because of administrative delay. His registering for a distance education course without permission is also out of ignorance, which is technically an infringement all the same.

33. In Annex MA-2, the officer proceeded against was Smt. Sreelekha, IPS, who was charged for going to Thailand, while posted as Managing Director of Kerala State Rubber Marketing Federation for official work without obtaining permission from the Government. Disciplinary action against her was dropped by order dated 26.10.2009 thus:

> "3. Smt. Sreelekha IPS in her Written Statement of Defence has totally refuted all the charges initiated against her. As regards the first charge, the officer has submitted that she did not obtain Government sanction; caused loss and committed misconduct while undertaking this journey for RRI are unsustainable. Regarding the second charge, the officer has submitted that she has never disobeyed any Government rules or directions in the past nor intends to do so. The officer has also affirmed that in future she will follow all the rules and procedures more rigorously while carrying out trips abroad. Government have carefully examined the explanation furnished by the officer and accordingly the disciplinary action initiated against Smt. Sreelekha IPS (KL : 1987) now Inspector General of Police Crimes is dropped."

It is argued that when the Government has viewed the act of going abroad without the permission of the Government as minor infringement as recently as June and October 2009, it was not justified

in treating it the same act as grave misconduct. It was much ado about nothing, contends the learned senior counsel.

34. Yet another argument advanced on behalf of the Applicant is that the legality or otherwise of the order of suspension (Annex A-8) has to be judged on the reasons and grounds shown therein and not on the basis of the averments and allegations made in the reply affidavit before the Tribunal. Additional grounds cannot be advanced to justify the order later before the Tribunal. The ratio, in this regard, laid down by the Honourable Supreme Court in paragraph 8 of the judgement in **Mohinder Singh Gill** Vs. **The Chief Election Commissioner, New Delhi and Others,** AIR 1978 SC 851 has been adverted to. Paragraph 8 of the aforementioned judgment reads thus:

> "8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. In Gordhandas Bhanji (AIR 1952 SC 16) (at p. 18):
>
> > "Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself".
>
> Orders are not like old wine becoming better as they grow older. A Caveat."

The judgment in **Union of India and Others etc. Vs. Mario Cabral e Sa**, AIR 1982 SC 691 has also been relied upon. Paragraph 11 of the judgment has been reproduced below:

> "11. The contention of the respondent that the Government cannot be permitted to shift the ground for refusal to grant accreditation must be accepted. The legality of the governmental action must be adjudged on the reason stated in the impugned order, and it is impermissible for the Government to take a new ground. In Commr. of Police, Bombay v. Gordhandas Bhanji, 1952 SCR 135 : (AIR 1952 SC 16). Vivian Bose, J., speaking for the Court, observed (at p. 18 of AIR) :
>
> > "(P)ublic orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."
>
> It was, therefore, not permissible for the Government to offer a justification for refusal to grant accreditation to the respondent, on grounds other than the one that he did not fulfil the requirements of R. 2 (1) of S. II of the Rules.

This view has been reiterated in paragraph 37 of **Chandra Singh and Others** Vs. **State of Rajasthan and another**, (2003) 6 SCC 545:

> "It is fairly well settled that the legality or otherwise of an order passed by a statutory authority must be judged on the face thereof as the reasons contained therein cannot be supplemented by an affidavit."

35. The learned counsel put forth the proposition that principles of natural justice have to be observed scrupulously while passing administrative orders, which may have civil consequences for an employee. It was argued that as had been shown by citing several judgments of the Honourable Supreme Court and the Honourable High

Court of Kerala, the order of suspension has adverse civil consequences for an employee, it was necessary to put the Applicant to notice before passing an order of suspension. It is urged that it was not done and the order of suspension was passed behind the back of the Applicant. The learned senior counsel would draw sustenance from the ratio laid down by the Honourable Supreme Court in **State of Orissa** Vs. **Dr (Miss) Binapani Dei and others**, AIR 1967 SC 1269 that administrative orders should be made consistently with the rules of natural justice. Paragraph 12 of the judgment is quoted below:

> "12. It is true that some preliminary enquiry was made by Dr. S. Mitra. But the report of that Enquiry Officer was never disclosed to the first respondent. Thereafter the first respondent was required to show cause why April 16, 1907, should not be accepted as the date of birth and without recording any evidence the order was passed. We think that such an enquiry and decision were contrary to the basic concept of justice and cannot have any value. It is true that the order is administrative in character, but even an administrative order which involves civil consequences, as already stated, must be made consistently with the rules of natural justice after informing the first respondent of the case of the State, the evidence in support thereof and after giving an opportunity to the first respondent of being heard and meeting or explaining the evidence. No such steps were admittedly taken, the High Court was, in our judgment, right in setting side the order of the State."

36. It is submitted that the principle of the right to fair hearing is also adumbrated in **Sayedur Rehman** Vs. **The State of Bihar and Others**, (1973) 3 SCC 333 thus:

> "11. This rule embodies the principle of natural justice requiring the appellate authority to hear the parties. The order dated April 22, 1960 must have, therefore, been made after hearing both sides as provided by this rule. There is no express provision for review in the rules to which our attention was drawn. But we are not asked and, therefore, not required to express any considered opinion on the competence of review and we express none. We are, however, clear that if the order dated April 22, 1960 is

> to be reconsidered then the appellant must be afforded adequate opportunity of hearing and presenting his case. This unwritten right of hearing is fundamental to a just decision by any authority which decides a controversial issue affecting the rights of the rival contestants. This right has its roots in the notion of fair procedure. It draws the attention of the party concerned to the imperative necessity of not overlooking the other side of the case before coming to its decision, for nothing is more likely to conduce to just and right decision than the practice of giving hearing to the affected parties. The President of the Board of Secondary Education would be deciding a controversy affecting the rights of the parties before him if and when he chooses to reconsider the order dated April 22, 1960, whatever be the source of his power to do so - a point left open by us. He is required to decide in the spirit and with a sense of responsibility of a tribunal with a duty to mete out even-handed justice. The appellant would thus be entitled to a fair chance of presenting his version of facts and his submissions on law as his rights would be directly affected by such proceeding. The omission of express requirement of fair hearing in the rules or other source of power claimed for reconsidering the order dated April 22, 1960, is supplied by the rule of justice which is considered as an integral part of our judicial process which also governs quasi-judicial authorities when deciding controversial points affecting rights of parties."

37. Paragraph 16 of the judgment in **S.L. Kapoor** Vs. **Jagmohan and others**, (1980) 4 SCC 379, which has been reproduced below was also cited for furthering the proposition that the tenets of the principles of natural justice had not been met:

> "16. Thus on a consideration of the entire material placed before us we do not have any doubt that the New Delhi Municipal Committee was never put on notice of any action proposed to be taken under Section 238 of the Punjab Municipal Act and no opportunity was given to the Municipal Committee to explain any fact or circumstance on the basis that action was proposed. If there was any correspondence between the New Delhi Municipal Committee and any other authority about the subject-matter or any of the allegations, if information was given and gathered it was for entirely different purposes. In our view, the requirements of natural justice are met only if opportunity to represent is given in view of proposed action. The demands of natural justice are not met even if the very person proceeded against has furnished the information on which the action is based, if it is furnished in a casual way or for some other purpose. We do not

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> suggest that the opportunity need be a 'double opportunity' that is, one opportunity on the factual allegations and another on the proposed penalty. Both may be rolled into one. But the person proceeded against must know that he is being required to meet the allegations which might lead to a certain action being taken against him. If that is made known the requirements are met. We disagree with the finding of the High Court that the Committee had the opportunity to meet the allegations contained in the order of supersession."

Paragraphs 8 and 11 of the judgment in **Vikraman Nair K** Vs. **State of Kerala (Chief Secretary) and others.** ILR (2008) 4 Kerala 395 (DB) were also quoted in support of the aforesaid contention:

> "8. No doubt, this Court while exercising jurisdiction under Article 226 of the Constitution is not sitting as a court of appeal or revision so that this Court can substitute the order challenged with its own decision. But it is also the settled position of law that this Court can certainly interfere when, among other things, it is revealed that the authority concerned which took the impugned decision has reached an unreasonable decision or has abused its powers. It is also the position of law that his Court can review and evaluate question of fact for the limited purpose of scrutinizing the decision-making process. While examining and scrutinizing the decision-making process it may become inevitable for this Court to appreciate the facts of a given case even though for the limited purpose of ascertaining among other things, whether the authority concerned has reached an unreasonable decision or has abused its powers. Reminding ourselves about this legal position we shall consider whether interference is required with Exhibits P-11 and P-12, dated 18-4-2008 and 29-4-2008, respectively."
>
> ....
>
> "11. Suspension of an employee pending disciplinary proceedings and departmental enquiry is not automatic, but is discretionary. One of us (J.B. Koshy, J.), speaking for the Division Bench in **Surendran v. Government of Kerala,** 2008 (3) K.H.C. 738 pointed out that the object of placing an employee under suspension pending enquiry is to enable the administration to conduct the proceedings smoothly so as to establish the allegations or charge against that employee. If victimization is discernible from the facts of the case or, suspension is arbitrary or illegal, interference in exercise of the power under Article 226 of the Constitution is justified and warranted."

Reliance has also been placed on **Ram Kumar Kashyap** Vs. **Union of India and Another**, (2009) 9 SCC 378, paragraphs 6, 7 and 8 whereof have been quoted below:

> "6. It has been argued on behalf of the petitioners that the passing of the common order of suspension by the Hon'ble Governor of the State of Haryana would cause adverse civil consequences, they deserved a notice and an opportunity of being heard before such order was passed.
>
> 7. The petitioners have cited several judgments of this Court such as those delivered in State of Orissa v. Dr. Binapani Dei, AIR 1967 SC 1269; Sayeedur Rehman v. State of Bihar, (1973) 3 SCC 333; S.L. Kapoor v. Jagmohan, (1980) 4 SCC 379; and Olga Tellis v. Bombay Municipal Corpn., (1985) 3 SCC 545, all of which affirm the principle that an adverse order cannot be passed at the back of the affected party.
>
> 8. It is not necessary that principles of "audi alteram partem" rigorously followed in the domain of service law need to be applied with the same degree of rigour in proceedings involving the removal and suspension of the members of the State Public Service Commission. This exceptional treatment is mandated by Article 317. Furthermore, the issuance of suspension orders is as per the "procedure established by law" and not in derogation from the same."

38. The sum and substance of the argument is that there has been serious violation of the principles of natural rights by not putting the Applicant to notice and not hearing him before placing him under suspension. It is contended that the letters dated 12.04.2010 written by the Addl. DGP and the DGP (Annexes A-4 and A-5) already adverted to above, cannot be called show cause notices prior to placing the Applicant under suspension.

39. It is further contended that the order of suspension is based on wrong and misleading fact in as much as it is stated in paragraph 5 of the impugned order of suspension that the Government consider it necessary to place the Applicant under suspension "pending

disciplinary proceedings against him". However, at the given point of time when the order of suspension was passed against the Applicant, disciplinary proceedings were not pending against the Applicant. The Applicant was placed under suspension without the Government having satisfied itself as to the necessity and desirability of placing him under suspension. It is contended that it is now a well settled proposition of administrative jurisprudence that disciplinary proceedings are considered to have been initiated only when the Memorandum of charge has been communicated to the Applicant (**Union of India** Vs. **K.V.Jankiraman and others**, (1991) 4 SCC 109, **State of MP** Vs. **O.C. Sharma**, (2001) 9 SCC 171 and **UCO Bank and Anr.** Vs. **Rajender Lal Kapoor**, (2007) 6 SCC 694).

40. It was vehemently argued that the Original Application was maintainable before the Tribunal in spite of the fact that the alternative remedy of appeal of the Union Government in the DoP&T against the order of the State Government has not been exhausted. Section 20 of the Administrative Tribunals Act, 1985 reads thus:

> "20. **Applications not to be admitted unless other remedies exhausted** – (1) A Tribunal shall not ordinarily admit an application unless it is satisfied that the applicant had availed of all the remedies available to him under the relevant service rules as to redressal of grievances.
>
> (2) For the purposes of sub-section (1), a person shall be deemed to have availed of all the remedies available to him under the relevant service rules as to redressal of grievances, -
>
> (a) if a final order has been made by the Government or other authority or officer or other person competent to pass such order under such rules, rejecting any appeal preferred or representation made by such person in connection with the grievance; or
>
> (b) where no final order has been made by the Government or other authority or officer or

> other person competent to pass such order with regard to the appeal preferred or representation made by such person, if a period of six months from the date on which such appeal was preferred or representation was made has expired."

41. The first argument of the learned counsel is that the OA was initially heard by a DB of this Tribunal, which passed an interim order on 23.04.2010 after detailed hearing of the arguments by both sides. The matter was carried to the Honourable High Court of Kerala in Writ Petition (C) number 14203/2010 against the interim order staying the order of suspension. The Writ Petition was heard by the Honourable High Court and the matter remitted to the Tribunal for hearing the case on merits. The OA was thereafter heard by a DB of the Tribunal (Ernakulam Bench) and detailed submissions were made by both sides. The learned DB, however, referred the matter to a larger Bench, which was constituted by the Honourable Chairman of the Tribunal. The larger Bench has also heard arguments for full two days. In such view of the matter, the learned senior counsel would contend that it would be too late in the day to hold the OA to be not maintainable on the ground that alternative remedy of appeal under Rule 16 of the AIS (D&A) Rules, 1969 was not availed by the Applicant. Second, it was further submitted that not availing alternative remedy is not always a bar for not exercising its jurisdiction by the Tribunal. The learned senior counsel would rely on **Whirlpool Corporation** Vs. **Registrar of Trade Marks, Mumbai and others**, (1998) 8 SCC 1 in which it has been held that:

> "15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of

which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order of proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point put to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.

16. Rashid Ahmad v. Municipal Board, Kairana, AIR 1950 SC 163, laid down that existence of an adequate legal remedy was a factor to be taken into consideration in the matter of granting writs. This was followed by another Rashid case, namely, K. S. Rashid & Son v. Income Tax Investigation Commission, AIR 1954 SC 207, which reiterated the above proposition and held that where alternative remedy existed, it would be a sound exercise of discretion to refuse to interfere in a petition under Article 226. This proposition was, however, qualified by the significant words, "unless there are good grounds therefor", which indicated that alternative remedy would not operate as an absolute bar and that writ petition under Article 226 could still be entertained in exceptional circumstances.

17. A specific and clear rule was laid down in State of U. P. v. Mohd. Nooh, 1958 SCR 595 : AIR 1958 SC 86, as under:

> "But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies."

18. This proposition was considered by a Constitution Bench of this Court in A. V. Venkateswaran, Collector of Customs v. Ramchand Sobhraj Wadhwani, AIR 1961 SC 1506 and was affirmed and followed in the following words:

> "The passages in the judgments of this Court we have extracted would indicate (1) that the two exceptions which the learned Solicitor General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive, and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner

> relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the Court."

19. Another constitution Bench decision in Calcutta Discount Co. Ltd. v. ITO, Companies Distt., AIR 1961 SC 372 laid down :

> "Though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Court will issue appropriate orders or directions to prevent such consequences. Writ of certiorari and prohibition can issue against the Income Tax Officer acting without jurisdiction under Section 34, Income Tax Act."

20. Much water has since flown beneath the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation."

42. It was argued that it would not be necessary to avail of the alternative remedy in case the principles of natural justice have been breached, the decision is arbitrary and the Government's guidelines for placing an employee under suspension have been wantonly flouted. Letter number 43/56/64-AVD, dated 27.10.1964 of the Union Ministry

of Home Affairs has been placed at Annex A-11. The guidelines are fully reproduced below:

"(1) Guiding principles for suspending a Government servant – It has been decided that public interest should be the guiding factor in deciding to place a Government servant under suspension, and the disciplinary authority should have the discretion to decide this taking all factors into account. However, the following circumstances are indicated in which a disciplinary authority may consider it appropriate to place a Government servant under suspension. These are only intended for guidance and should not be taken as mandatory:-

(i) Cases where continuance in office of the Government servant will prejudice the investigation, trial or any inquiry (e.g. apprehended tampering with witnesses or documents);

(ii) Where the continuance in office of the Government servant is likely to seriously subvert discipline in the office in which the public servant is working;

(iii) Where the continuance in office of the Government servant will be against the wider public interest other than those covered by (i) and (ii) such as there is a public scandal and it is necessary to place the Government servant under suspension to demonstrate the policy of the Government to deal strictly with officers involved in such scandals, particularly corruption;

(iv) Where allegations have been made against the Government servant and the preliminary inquiry has revealed that a prima facie case is made out which would justify his prosecution or his being proceeded against in departmental proceedings, and where the proceedings are likely to end in his conviction and/or dismissal, removal or compulsory retirement from service.

1. Inserted by G.I., M.H.A., Notification No.35012/2/80-Ests (A) dated the 7th September, 1981.

Note – (a) In the first three circumstances the disciplinary authority may exercise his discretion to place a Government servant under suspension even when the case is under investigation and before a prima facie case is made out.

Note – (b) Certain types of misdemeanour where suspension may be desirable in the four circumstances mentioned, are indicated below :-

(i) any offence or conduct involving moral turpitude;

(ii) corruption, embezzlement or misappropriation of Government money, possession of disproportionate assets, misuse of official power for personal gain;

(iii) serious negligence and dereliction of duty resulting in considerable loss to Government;

(iv) desertion of duty;

(v) refusal or deliberate failure to carry out written orders of superior officers.

In respect of the type of misdemeanour specified in sub-clauses (iii), (iv) and (v) discretion has to be exercised with care."

It was vehemently contended that tested on the touchstone of the above guidelines, the Applicant's suspension would be totally arbitrary. None of the conditions precedent for suspension are met in this case, contends the learned senior counsel.

43. Third, it was argued that there is no absolute bar under Section 20 of the Administrative Tribunals Act, 1985 not to hear an OA if alternative remedy under the rules has not been availed of. The word `ordinarily' used in the section cited supra provides discretion. Relying on **Kailash Chandra Vs. The Union of India,** AIR 1961 SC 1346, the learned senior counsel would argue that "ordinarily" means "in the large majority of cases but not invariably" (Paragraph 8 of the judgement). He would contend that this view has been reiterated in

Shibji Khetshi Thacker Vs. **The Commissioner of Dhanbad Municipality and others**, (1978) 2 SCC 167, paragraph 24 of which gives the meaning to be attributed to the word "ordinarily" thus:

> "24. It is nobody's case that the appellant's holding was left out from the old assessment. So far as the revised assessment is concerned, S. 102 has to be read not in isolation but in conjunction with S. 106. The language of S. 106 is flexible enough to enable the Commissioners to leave out for some good reason, any holding from the revision of the valuation and assessment lists. The word "ordinarily", tones down the force of "shall" which immediately precedes it, and indicates that the requirements with regard to revision of the assessment in every five years and to include all the holdings, are not absolute but only directory and can be departed from in extraordinary circumstances, or in the case of particular holdings for good reasons. This being the correct import of the word "ordinarily", it follows therefrom that in the case of a holding which is excluded from the quinquennial revision of assessment, the old valuation and assessment lists do not lapse but continue to remain in force till they are altered or amended in accordance with the procedure laid down in the Act. This position of the law is clear from a reading of the last clause of sub-section (2) of S. 106, which provides that every valuation and assessment entered in a valuation or assessment list shall be valid from the date on which the list takes effect in the municipality and until the first day of the April following the competition of a new list. The key word repeatedly occurring in the sub-section is "list" which appears to have been advisedly used in singular, in contradistinction to "lists" employed in plural, in sub-section (2). Such distinctive use of the word "list" in these sub-sections, puts it beyond doubt that in respect of a holding which, for some reason, is not included in the five yearly revision, the old valuation or assessment list continues till a new list is completed and the 1st day of April following such completion is reached."

44. The learned senior counsel would also cite the judgement of Honourable Supreme Court in **Kanak (Smt.) & Anr. Vs. U.P. Awas Evam Vikas Parishad & Ors.**, (2003) 7 SCC 693, to lend weight to his contention that it was too late at this stage to direct the Applicant to avail the alternative remedy. Paragraphs 25 and 29 have been

specifically pointed out, which are quoted below:

> "25. The writ petition for the reasons stated hereinbefore was maintainable. It is one thing to say that the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India may not grant a relief inter alia on the ground of existence of alternative remedy but it is another thing to say that the writ petition was not maintainable at all. "
>
> ....
>
> "29. Furthermore, this writ petition was entertained. The appellants herein filed a counter-affidavit. The matter was argued on merit and in that view of the matter it is too late in the day to contend that the respondent herein should have availed of the alternative remedy."

45. Relying on the judgement of a DB of this Tribunal in **A.N. Saxena and Another Vs. Chief Commissioner (Admn.)**, (1988) 6 ATC 320, it is contended that the condition laid down in Section 20 (1) has to be considered at admission stage only and there is no absolute bar to admission of application without exhausting departmental remedies. It was pointed out that the Tribunal in **Thakur Prasad Pandey Vs. Union of India and others**, (1988) 8 ATC 911 had held that non-exhaustion of remedies under Section 20 (1) of the Administrative Tribunals Act, 1985 was not an absolute bar to admission of an Application and the matter would have to be decided on the circumstances of each case. In this case it was held that the requirement of exhaustion of remedies would not apply to writ petitions filed before High Court prior to 1.01.1985 and subsequently transferred to the Tribunal under Section 19 *ibid.* It was further reiterated, relying on **S. Pandian and Others Vs. Union of India and Another**, (1991) 16 ATC 184 that the provision regarding non-exhaustion of remedies would not apply, where principles of natural

justice have been violated. Paragraph 7 of the judgement is quoted below:

> "7. The counsel for the respondents then raised the objection that the applicants had got an alternative remedy and since they did not avail that opportunity the present applications are not maintainable. In this context we find that the applicant in O.A. No. 853 of 1989 had in fact filed an appeal and the said appeal has not been disposed of till date by the appellate authority even though six months' time had elapsed. The counsel for the applicants further submitted before us that if an order is made in violation of the principles of natural justice, there is no need to file an appeal. In this context he relied the decision rendered in Baburam v. Zilla Parishad, AIR 1969 SC 556. This position has been explained by a Division Bench of the Bombay High Court in Yashwant v. Hindustan Petroleum Corporation Ltd., AIR 1988 Bom 408 in para 18, which reads as follows:
>
> > An order which is non est on account of the violation of the basic principle of natural justice, viz., audi alteram partem, need not be even appealed from Hussain Miya Dosnmiya v. Chandubhai Jethabhai, AIR 1954 Bom 239. It can be challenged at any time even by way of defence as has been done in the present case. Even if one regards the application to the District Court as an appeal, the existence of the provision of appeal does not wash away the original sin of the infraction of the rule of natural justice. Even in the administrative filed it has now been held that if natural justice is violated at the first stage, the right of appeal is not so much a true right of appeal as a correct remedy. In such a case, right of appeal is not so much a true right of appeal as a correct remedy. In such a case, right of appeal is not a right of appeal at all. The Supreme Court in the case of Institute of Chartered Accountants of India v. L.K. Ratna, AIR 1987 SC 71 has referred to certain pages in Wade's Administrative Law and National Union of Vehicles Builders (1971) 1 Ch 34 in this regard. The following from the observations of Megarry, J. may profitably extracted again here:
> >
> > If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an with an unjust trial and a fair appeal.
>
> We have held that the orders had been passed violating the principles of natural justice. The orders are non-speaking orders. Even where an appeal had been filed in

> one case, the same had not been disposed of. The application had already been admitted and matters had been set down for final hearing. Hence in view of the rulings referred above and the peculiar facts and circumstances of the case, we are rejecting the objection of the learned counsel for the respondents in this regard."

Paragraph 4 of the judgement dated 14.08.1989 in **Braj Kishore Singh Vs. Government of Bihar and Others**, (1990) 12 ATC 501 has been relied upon to contend that the objection regarding non-maintainability cannot be entertained when arguments have been heard on merits. Paragraph 4 of the judgement (supra) is quoted below:

> "4. The first question that arises is regarding the maintainability of the application. The contention has been raised since no application was preferred by the applicant from the order of suspension before the Central Government as provided under the Rules. As the original application has been admitted by a Bench of this Tribunal, though the remedy of appeal was not pursued by the applicant, we are of the view that it will not be proper to hold at this stage that the application is not maintainable on that ground. Besides, the applicant has clearly explained in the rejoinder filed by him the circumstances under which he could not prefer the appeal. He has further pointed out that after he was able to gather the circumstances under which the order of suspension was made, he made a representation before the 1st respondent for revocation of the suspension, and it was only after the rejection of the same that he has filed the present application. In the circumstances, we repeal the contention of the respondents on this ground."

The learned senior counsel would thus contend emphatically that the objection of the Respondents about non-maintainability of the OA because of non-exhaustion of alternative remedy of appeal must be rejected.

Arguments on behalf of the Respondents

46. The learned Additional Advocate General, Shri Ranjith Thamban, at the outset, briefly narrated the facts of the case stating that the Applicant was I.G., Police of Kannur Range, which was a very sensitive charge and he was also involved in the investigation of terrorist activities. He would contend that the I.G., Police of Thrisssur Range was given the charge of the Kannur Range in the absence on leave of the Applicant because the latter was going to a place within the country. The Applicant, however, flew to destinations in the Middle East on 2.04.2010 from Bangalore and returned on 12.04.2010. He would contend that the visit of the Applicant to these destinations became a subject of intense media discussion because he had visited these countries only in very recent past and earlier also, in some other foreign visit, he had been warned not to go abroad without the permission of the Government. The Applicant called Sh.C.B. Mathews, Addl.DGP on 12.04.2010 to inform him that he had gone abroad. The State Government asked the Addl. DGP and the DGP to conduct an inquiry. The reports of these officers are placed at Annex R 1 (c) and R 1 (d) respectively and it is stated therein that the Applicant had violated the instructions for going abroad. He contended that, before passing the order of suspension, the Government had considered the entire matter including the alleged letter of 31.03.2010. The Applicant's previous track record was not good and he was guilty of the same misconduct earlier also, for which he had earned serious reprimand. He would argue that the OA was not maintainable as the Applicant had not availed of the alternative remedy and no convincing reason has been given for not doing so. Further the Applicant was

guilty of suppression of facts in order to mislead the Tribunal, contended the learned Addl. AG. It was strenuously urged that the order of suspension had not been passed without jurisdiction. It was submitted that the Tribunal ought not to interfere with the order if it was not found to be without jurisdiction.

47. Learned Addl. A.G. repelled the argument that the Governor had not made any rules for authentication of documents by pointing out that the opening sentence of the Rules of Business of the Government of Kerala states that the Rules have been made "in exercise of the powers conferred by clause (2) and (3) of Article 166 of the Constitution of India." Article 166 (2) of the Constitution provided for powers of authentication. It would, therefore, be a completely misleading argument that the Governor has not made any rules regarding authentication and, therefore, any order by the Governor has to be issued under his own signatures, contended the learned Addl.A.G.

48. It was also argued that the Article 163 (3) of the Constitution places the question of whether any or if so what advice was tendered beyond the scope of judicial review. Article 163 of the Constitution has been reproduced below:

> "163. Council of Ministers to aid and advise Governor.- (1) There shall be a Council of Ministers with the Chief Minister as the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.
>
> (2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the

> validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion.
>
> (3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court."

Advertence was made to the observation of the Honourable Supreme Court in **S.R.Bommai** Vs. **Union of India**, (1994) 3 SCC 1, regarding Article 74 (2) of the Constitution , which is about the advice tendered to the President:

> "33. .....Article 74(2) then provides that "the question whether any, and if so what, advice was tendered to the President shall not be inquired into in any Court." What this clause bars from being inquired into is "whether any, and if so what, advice was tendered" and nothing beyond that. This question has been elaborately discussed by my learned colleagues who have examined in detail its pros and cons in their judgments and, therefore, I do not consider it necessary to traverse the same path. It would suffice to say that since reasons would form part of the advice, the Court would be precluded from calling for their disclosure but I agree that Article 74(2) is no bar to the production of all the material on which the ministerial advice was based....."

The argument is that whether there was material for advice is justiciable but whether there was advice at all is not justiciable. It is further observed in paragraph 48 of Bommai (supra) that Article 74 (2) is no bar to production of materials on which the ministerial advice is based, for ascertaining whether the case falls under the justiciable area and acting on it when the controversy is found justiciable. Paragraphs 83, 86, 124 and 434 (6) of the aforesaid judgment is reproduced below:

> "83. It was contended on behalf of the Union of India that since the Proclamation under Article 356 (1) would be issued by the President on the advice of the Council of Ministers given under Article 74(l) of the Constitution and since clause (2) of the said Article bars enquiry into the

question whether any, and if so, what advice was tendered by Ministers to the President, judicial review of the reasons which led to the issuance of the Proclamation also stands barred. This contention is fallacious for reasons more than one. In the first instance, it is based on a misconception of the purpose of Article 74 (2). As has been rightly pointed out by Shri Shanti Bhushan, the object of Article 74 (2) was not to exclude any material or documents from the scrutiny of the Courts but to provide that an order issued by or in the name of the President could not be questioned on the ground that it was either contrary to the advice tendered by the Ministers or was issued without obtaining any advice from the Ministers. Its object was only to make the question whether the President had, followed the advice of the Ministers or acted contrary thereto, non-justiciable. What advice, if any, was tendered by the Ministers to the President was thus to be beyond the scrutiny of the court.

....

86. What is further, although Article 74(2) bars judicial review so far as the advice given by the Ministers is concerned, it does not bar scrutiny of the material on the basis of which the advice is given. The Courts are not interested in either the advice given by the Ministers to the President or the reasons for such advice. The courts are, however, justified in probing as to whether there was any material on the basis of which the advice was given, and whether it was relevant for such advice and the President could have acted on it. Hence when the courts undertake an enquiry into the existence of such material, the prohibition contained in Article 74(2) does not negate their right to know about the factual existence of any such material....."

....

"124. ..... We have already discussed the implications of Article 74(2) earlier and have pointed out that although the advice given by the Council of Ministers is free from the gaze of the court, the material on the basis of which the advice is given cannot be kept away from it and is open to judicial scrutiny....."

....

434.(6) Article 74(2) merely bars an enquiry into the question whether any, and if so, what advice was tendered by the ministers to the President. It does not bar the court from calling upon the Union Council of Ministers (Union of India) to disclose to the court the material upon which the President had formed the requisite satisfaction. The material on the basis of which advice was tendered does not become part of the advice. Even if the material is

> looked into by or shown to the President, it does not partake the character of advice. Article 74(2) and Section 123 of the Evidence Act cover different fields. It may happen that while defending the proclamation, the minister or the official concerned may claim the privilege under Section 123. If and when such privilege is claimed, it will be decided on its own merits in accordance with the provisions of Section 123."

49. The learned Addl. A.G. would further contend that the advice tendered by a Minister is deemed to be advice tendered by the Council of Ministers. Further, the executive action of the Government has to be taken by the Minister. Paragraphs 319 and 320 of Bommai (supra) have been relied on:

> "319. Article 53(l) insofar as says that the executive power of the Union, which vests in the President, can be exercised by him either directly or through officers subordinate to him in accordance with the Constitution stresses the very idea. Even where he acts directly, the President has to act on the aid and advice of the Council of Ministers or the Minister concerned, as the case may be. (Advice tendered by a Minister is deemed to be the advice tendered by the Council of Ministers in view of the principle of joint responsibility of the cabinet/council of ministers). If such act is questioned in a court of Law, it is for the Minister concerned (according to rules of business) or an official of that Ministry to defend the act. Where the President acts through his subordinates, it is for that subordinate to defend the action.
>
> 320. Articles 74 and 77 are in a sense complimentary to each other, though they may operate in different fields. Article 74(l) deals with the acts of the President done "in exercise of his functions", whereas Artice 77 speaks of the executive action of the Government of India which is taken in the name of the President of India. Insofar as the executive action of the Government of India is concerned, it has to be taken by the Minister/ official to whom the said business is allocated by the rules of business made under clause (3) of Article 77 for the more convenient transaction of the business of the Government of India. All orders issued and the instruments executed relatable to the executive action of the Government of India have to be authenticated in the manner and by the officer empowered in that behalf. The President does not really come into the picture so far as Article 77 is concerned. All the business of the Government of India is transacted by the Ministers or

other officials empowered in that behalf, of course, in the name of the President. Orders are issued, instruments are executed and other acts done by various Ministers and officials, none of which may reach the President or may be placed before him for his consideration. There is no occasion in such cases for any aid and advice being tendered to the President by the Council of Ministers. Though expressed in the name of the President, they are the acts of the Government of India. They are distinct from the acts of the President "in the exercise of his functions" contemplated by Article 74. Of course, even while acting in exercise of his functions, the President has to act in accordance with the aid and advice tendered by the Council of Ministers with the Prime Minister at its head. He is thus rendered a constitutional - or a titular-head. [The proviso to clause (1) no doubt empowers him to require the Council of Ministers to reconsider such advice, either generally or in any particular case, but if and when the Council of Ministers tenders the advice on such reconsideration, he is bound by it]. Then comes clause (2) of Article 74 which says that the question "whether any, and if so, what advice was tendered by the Ministers to the President shall not be enquired into in any court. "The idea behind clause (2) is this: the court is not to enquire - it is not concerned with - whether any advice was tendered by any Minister or Council of Ministers to the President, and if so, what was that advice. That is a matter between the President and his Council of Ministers. What advice was tendered, whether it was required to be reconsidered, what advice was tendered after reconsideration, if any, what was the opinion of the President, whether the advice was changed pursuant to further discussion, if any, and how the ultimate decision was arrived at, are all matters between the President and his Council of Ministers. They are beyond the ken of the court. The court is not to go into it. It is enough that there is an order/ act of the President in appropriate form. It will take it as the order/ act of the President. It is concerned only with the validity of the order and legality of the proceedings or action taken by the President in exercise of his functions and not with what happened in the inner councils of the President and his Ministers. No one can challenge such decision or action on the ground that it is not in accordance with the advice tendered by the Ministers or that it is based on no advice. If, in a given case, the President acts without, or contrary to, the advice tendered to him, it may be a case warranting his impeachment, but so far as the court is concerned, it is the act of the President. (We do not wish to express any opinion as to what would be the position if in the unlikely event of the Council of Ministers itself questioning the action of the President as being taken without, or contrary, to their advice)."

In **Prof. B.B.Patil Okaly** Vs. **Y.K. Puttasome Gowda and Ors**, AIR 1996 Karnataka 14, the Honourable High Court of Karnataka also considered the question whether the question that an appointment made to the State Public Service Commission was on the advice of Chief Minister or the Council of Ministers could be looked into by the Court. It was thus :

> "8. Article 163 (3) of the Constitution reads as follows:
>
> > "Art. 163 (3) – The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into any Court."
>
> This Article consists of two propositions – (1) the question whether any advice was tendered to the Governor by the Ministers shall not be inquired into by any Court. It would not be therefore correct to say that action was taken by the Governor without taking any advice from or consulting the Ministers and as such inquiry is open in that regard; (ii) the question as to what advice was tendered by the Ministers to the Governor shall not be inquired into in any Court. The resultant position is that as a legal consequence of this provision that the resolution or other deliberations at the meetings of the Council of Ministers or advice finally tendered in pursuance of such deliberation to the Governor are immune from inquiry in any court irrespective of the provisions of the Evidence Act. The Government is not obliged to furnish any information in that regard nor can the Court make inquiry into the question of ministerial advice tendered or as to the nature of such advice. On the scope and ambit of Article 163 (3), it has been held by several decisions is the same as Article 74 of the Constitution with reference to the President and Council of Ministers of the Union Government, while the former is in relation to the Governor and Council of Ministers of a State Government. On this question, the Supreme Court in S.R. Bommai v. Union of India, AIR 1994 SC 1918, had occasion to consider the scope in relation to imposition of President Rule under Article 356 of the Constitution and in that context the ministerial advice tendered to the President and the scope of scrutiny thereof was considered. The unanimous opinion rendered by the learned Judges is to the effect that in the matter of imposition of President's Rule question as to whether any advice was tendered to the President is not open to scrutiny though not as to the material on the basis of which such advice is tendered which could be looked into and in relation to such documents privilege under Section 123 of the Evidence Act could be claimed subject to the limitation thereto. In explaining the extent of bar under

Article 74 (2), it is stated that inquiring into question whether any, and if so, what advice was tendered by the Ministers to the President is barred. Thus the object of Article 163 (3) is not to exclude any material or documents from the scrutiny of the courts, but to provide that an order issued by or in the name of the President could not be questioned on the ground that it was either contrary to the advice tendered by the Ministers or was issued without obtaining any advice from the Ministers. Its object was to make the question whether the President had followed the advice of the Ministers or acted contrary thereto, non-justiciable. What advice, if any, was tendered by the Ministers to the President was thus to be beyond the scrutiny of the court. The actual advice tendered by the Council of Ministers gets immunity from production and the court shall not inquire into the question whether and if so what advice was tendered by the Ministers. In other words, the material other than the advice tendered by the Minister to the Governor, if found necessary, may be looked into. Thus the Cabinet decision authorizing the Chief Minister or the Chief Minister tendering any advice to the Government cannot be looked into or examined by this Court in view of the clear bar under Article 163 (3) of the Constitution of India.

9. The argument articulated on behalf of the petitioner is that this Court is enquiring into a stage anterior to the tendering of advice, that is at the stage of formulation of advice by the Cabinet, the action of the Cabinet having been disclosed already, it is not impermissible for this Court to examine the same. As stated earlier, the Constitutional bar is clear as to the consideration of the question as to whether any advice was tendered at all by the Cabinet or only tendered by a Minister and therefore, I find it difficult to accept the contention advanced on behalf of the petitioner in this regard that it is still open for this Court to inquire into the same to give a finding that the action of the Governor is ultra vires the Business Rules. If the Business Rules alone held the field, perhaps an enquiry could have been made into and a finding given thereof. But, in view of the constitutional immunity in regard to inquiry contained in Article 163 (3), I find no hesitation in refusing to inquire into the question whether any advice was tendered by the Cabinet or by the Chief Minister alone to the Governor."

In this context the judgement of Honourable Patna High Court in **Ram Nagina Singh and others Vs. S.V. Sohni and others,** AIR 1976

Patna 36 has also been cited in which it has been held that:

> "23. Reading Article 163 (3) in its full width and giving full effect to the language used in the Article, ascribing to the words plain ordinary meaning according to the usage of English language, it would appear that it prohibits inquiry in respect of two matters. They are (a) Whether any advice was given to the Governor by the Council of Ministers and (b) if an advice was given what was that advice. It was suggested on behalf of the petitioners that it is only when an advice has been given that this clause applies. It does not apply to a situation where no advice has been given. I do not think it is possible to accept this contention. Clause (3) really combines two sentences into one. If the compound sentence could be broken up into two simple sentences they would read : (a) The question whether any advice was tendered to the Governor by the Ministers shall not be inquired into in any court, and (b) The question as to what advice was tendered by the Ministers to the Governor shall not be inquired into in any court. The two ideas as indicated above have been blended together to form this clause. It would be pertinent here to inquire whether there could be any reasonable basis for the Constitution makers to differentiate between the two situations as mentioned above. It would mean that the Constitution makers thought that if an advice was given and ignored, it does not matter; hence no necessity of any inquiry. But if no advice was given and action taken, it does matter. The door of inquiry should not be shut. I can discern no reasonable basis for making the differentiation in the two situations. We should not impute to the constitutional makers an intention – contrary as it is to the language of the Article 163 (3) – which would result in unreasonable differentiation."

50. It is further argued that by Article 154 of the Constitution, the Executive Power of State is vested in the Governor. The said Article is extracted below:

> "154. Executive power of State – (1) The executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.
>
> (2) Nothing in this article shall –

(a) be deemed to transfer to the Governor any functions conferred by any existing law on any other authority; or

(b) prevent Parliament or the Legislature of the State from conferring by law functions on any authority subordinate to the Governor."

51. Article 162 of the Constitution defines executive power of State. However, Article 166 (1) deals with the `executive action' of the State. Article 166 (3) is about `business of the Government of the State'. Learned Addl. A.G. would contend that business of the Government includes all powers. The learned Addl. A.G. would advert to paragraphs 29 and 30 of Samsher Singh Vs. State of Punjab (supra) for elucidation of the above idea:

> "29. The executive power is generally described as the residue which does not fall within the legislative or judicial power. But executive power may also partake of legislative or judicial actions. All powers and functions of the President except his legislative powers as for example in Article 123, viz., ordinance making power and all powers and functions of the Governor except his legislative power as for example in Article 213 being ordinance making powers are executive powers of the Union vested in the President under Article 53(1) in one case and are executive powers of the State vested in the Governor under Article 154 (1) in the other case. Clause (2) or clause (8) of Article 77 is not limited in its operation to the executive action of the Government of India under Cl. (1) of Article 77. Similarly, clause (2) or clause (3) of Article 166 is not limited in its operation to the executive action of the Government of the State under clause (1) of Article 166. The expression "Business of the Government of India" in clause (3) of Article 77, and the expression "Business of the Government of the State" in Cl. (3) of Article 166 includes all executive business.
>
> 30. In all cases in which the President or the Governor exercises his functions conferred on him by or under the Constitution with the aid and advice of his Council of Ministers he does so by making rules for convenient transaction of the business of the Government of India or the Government of State respectively or by allocation among his Ministers of the said business, in accordance with Article 77(3) and 166(3) respectively. Wherever the Constitution requires the satisfaction of the President or

> the Governor for the exercise of any power or function by the President or the Governor, as the case may be, as for example in Article 123, 213, 311 (2), Proviso (c), 317, 352(1), 356 and 360 the satisfaction required by the Constitution is not the personal satisfaction of the President or of the Governor but is the satisfaction of the President or of the Governor in the constitutional sense under the Cabinet system of Government. The reasons are these. It is the satisfaction of the Council of Ministers on whose aid and advice the President or the Governor generally exercises all his powers and functions. Neither Article 77(3) nor Article 166(3) provides for any delegation of power. Both Article 77(3) and 166(3) provide that the President under Art. 77(3) and the Governor under Article 166(3) shall make rules for the more convenient transactions of the business of the Government and the allocation of business among the Ministers of the said business. The rules of business and the allocation among the Ministers of the said business all indicate that the decision of any Minister or officer under the rules of business make under these two Articles viz., Article 77(3) in the case of the President and Article 166(3) in the case of the Governor of the State is the decision of the President or the Governor respectively."

It has been elaborated in **State of M.P. and others Vs. Dr. Yashwant Trimbak**, (1996) 2 SCC 305 thus:

> "14. The Rule in question no doubt provides that departmental proceedings if not instituted while the government servant was in service whether before his retirement or during his re-employment shall not be instituted save with the sanction of the Governor. The question that arises for consideration is whether it requires the sanction of the Governor himself or the Council of Ministers in whose favour the Governor under the Rules of Business has allocated the matter, can also sanction. It is undisputed that under Article 166(3) of the Constitution the Governor has made rule for convenient transaction of the business of the Government and the question of sanction to prosecute in the case in hand was dealt with by the Council of Ministers in accordance with the Rule of Business. Under Article 154 of the Constitution the executive power of the State vests in the Governor and is exercised by him either directly or through officers subordinate to him in accordance with the Constitution. The expression "executive power" is wide enough to connote the residue of the governmental function that remains after the legislative and judicial functions are taken away.
>
> ....

17. The order of sanction for prosecution of a retired Government servant is undoubtedly an executive action of the Government. A Governor in exercise of his power under Article 166(3) of the Constitution may allocate all his functions to different Ministers by framing rules of business except those in which the Governor is required by the Constitution to exercise his own discretion. The expression "business of the Government of the State" in Article 166(3) of the Constitution, comprises functions which the Governor is to exercise with the aid and advice of the Council of Ministers including those which he is empowered to exercise on his subjective satisfaction and including statutory functions of the State Government. The Court has held in Godavari Shamrao Parulekar v. State of Maharashtra thatt even the functions and duties which are vested in a State Government by a statute may be allocated to Ministers by the Rules of Business framed under Article 166(3) of the Constitution. In State of Bihar v. Rani Sonabati Kumari where power of issuing notification under Section 3 (1) of the Bihar Land Reforms Act, 1950 has been conferred on the Governor of Bihar, this Court held :

> "Section 3 (1) of the Act confers the power of issuing notifications under it not on any officer but on the State Government as such though the exercise of that power would be governed by the rules of business framed by the Governor under Article 166 (3) of the constitution".

This has been made luminously clear in an earlier judgement of the Honourable Supreme Court in **Smt. Godavari Shamrao Parulekar Vs. The State of Maharashtra and others**, AIR 1964 SC 1128 as follows:

> "8. The next argument is that there is no order of allocation made by the Governor under Art. 166 of the Constitution after the passing of the Defence of India Ordinance and the Rules framed thereunder and therefore the allocation of business by the Rules of Business which were enforced by an order of the Governor dated May 1, 1960 would not be of any effect in allocating the subject of preventive detention arising under the Defence of India Ordinance, Act and the Rules to the Minister and the Governor should have passed the order of detention himself. We are of opinion that there is no force in this contention. Allocation of Business under Art. 166(3) of the Constitution is not made with reference to particular laws which may be in force at the time the allocation is made; it is made with reference to the three lists of the Seventh Schedule to the Constitution, for the executive power of

> the Centre and the State together extends to matters with respect to which Parliament and the Legislature of a State may make laws. Therefore, when allocation of business is made it is made with reference to the three Lists in the Seventh Schedule and thus the allocation in the Rules of Business provides for all contingencies which may arise for the exercise of the executive power. Such allocation may be made even in advance of legislation made by Parliament to be available whenever Parliament makes legislation conferring power on a State Government with respect to matters in List I of the Seventh Schedule. It was therefore in our opinion not necessary that there should have been an allocation made by the Governor under Art. 166(3) of the power to detain under the Defence of India Ordinance, Act and Rules after they were passed; it will be enough if the allocation of the subject to which the Defence of India Ordinance, Act and Rules refer has been made with reference to the three Lists in the Seventh Schedule and if such allocation already exists, it may be taken advantage of if and when laws are passed. Preventive detention is provided for in List I, item 9, for reasons connected with defence, foreign affairs and the security of India, and in item 3 of List III for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community. The allocation of business made under Art. 166 is in pursuance of these entries in the three Lists in the Seventh Schedule and would be available to be used whenever any law relating to these entries is made and power is conferred on the State Government to act under that law. The contention of the appellants that fresh allocation should have been made under Art. 166(3) by the Governor after the passing of the Defence of India Ordinance, Act and Rules must therefore fail."

52. It is emphatically stated that procedural rules made by the Governor for transaction of the business of the State Government even apply to quasi-judicial acts, as held in paragraph 28 of the judgement in Gullapalli Nageswara Rao (supra). In Bachhittar Singh (supra), it was held thus:

> "13. Thus the order passed by the Chief Minister, even though it is on a matter pertaining to the portfolio of the Revenue Minister, will be deemed to be an order of the Council of Ministers. So deemed its contents would be the Chief Minister's advice to the Governor, for which the Council of Ministers would be collectively responsible. The action taken thereon in pursuance of R. 8 of Rules of Business made by Governor under Art. 166 (3) of the Constitution would then be the action of the Government.

Here one of the Under Secretaries to the Government of Punjab informed the appellant by his letter dated May 1, 1957 that his representation "had been considered and rejected", evidently by the State Government. This would show that appropriate action had been taken under the relevant rule."

In **P.U. Myllai Hlychho and others Vs. State of Mizoram and others,** (2005) 2 SCC 92 also, it was further elaborated thus:

"12. There are several powers and duties for the Governor and some of these powers are to be exercised in his discretion and some other powers are to be exercised by him with the aid and advice of the Council of Ministers. The executive powers of the State are vested in the Governor under Article 154(1). Article 163(1) states that there shall be a Council of Ministers with the Chief Minister as the head to aid and advise the Governor in the exercise of his functions, except insofar as he is by or under this Constitution, required to exercise his functions or any of them in his discretion.

....

14. Our Constitution envisages the parliamentary or cabinet system of government of the British model both for the Union and the States. Under the cabinet system of government as embodied in our Constitution, the Governor is the constitutional or formal head of the State and he exercises all his powers and functions conferred on him by or under the Constitution on the aid and advice of the Council of Ministers save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion.

15. The executive power also partakes the legislative or certain judicial actions. Wherever the Constitution requires the satisfaction of the Governor for the exercise of any power or function, the satisfaction required by the Constitution is not personal satisfaction of the Governor but the satisfaction in the constitutional sense under the cabinet system of government. The Governor exercises functions conferred on him by or under the Constitution with the aid and advice of the Council of Ministers and he is competent to make rules for convenient transaction of the business of the Government of the State, by allocation of business among the Ministers, under Article 166(3) of the Constitution. It is a fundamental principle of English constitutional law that Ministers must accept responsibility for every executive act. It may also be noticed that in regard to the executive action taken in the name of the Governor, he cannot be sued for any executive action of

> the State and Article 300 specifically states that the Government of a State may sue or be sued in the name of the State subject to the restriction placed therein. This Court has consistently taken the view that the powers of the President and the powers of the Governor are similar to the powers of the Crown under the British parliamentary system. We followed this principle in Rai Sahib Ram Jawaya Kapur v. State of Punjab, A. Sanjeevi Naidu v. State of Madras, SCR at p. 511 and U.N.R. Rao v. Indira Gandhi."

In **Dr. B.L. Wadhera Vs. Union of India and others**, AIR 1998 Delhi 436, the Honourable High Court of Delhi also held that the satisfaction required by the Constitution was not the personal satisfaction of the Governor:

> "20. In Samsher Singh v. State of Punjab, (1974) 2 SCC 831 : (AIR 1974 SC 2192), while considering the scope and interpretation of Articles 77 and 166 (3) of the Constitution of India and Transaction of Business Rules it was held by the Supreme Court that the decision of any Minister or Officer under Rules of Business made under any of the two Articles 77 (3) and 166 (3) is the decision of the President or the Governor respectively. The Court held that in the Cabinet system of Government wherever the Constitution requires the satisfaction of the President or the Governor of any power or function, the satisfaction required by the Constitution is not the personal satisfaction of the President or the Governor but the satisfaction of the President or the Governor in the constitutional sense in the Cabinet system of Government, i.e. satisfaction of his council of ministers on whose aid and advise the President or the Governor generally exercises all his powers and functions."

53. The learned Addl. A.G. would expound that Rules 7, 22 and 34 (xiv) of the Rules of Business of the Government of Kerala makes it clear beyond doubt that:

(i) the Council of Ministers shall be collectively responsible for any decision taken by a Minister;

(ii) A Minister may give appropriate directions for disposal of cases in his department; and

(iii) All cases of, *inter alia,* officers of All India Services, in which the conduct of such officers is involved to be submitted to Chief Minister.

54. The aforesaid Rules of the Rules of Business of the Government of Kerala have been extracted below:

> "7. The Council shall be collectively responsible for all executive orders issued in the name of the Governor in accordance with these rules, whether such orders are authorized by an individual Minister on a matter appertaining to his portfolio or as the result of discussion at a meeting of the Council, or otherwise."
>
> ....
>
> "22. Except as otherwise provided by any other rule, cases shall ordinarily be disposed of by or under the authority of the Minister in charge who may by means of standing orders give such directions as he thinks fit for the disposal of cases in the Department. Copies of such standing orders shall be sent to the Governor and the Chief Minister."
>
> ....
>
> "34. (xiv) All cases in which the conduct of officers appointed by the former Secretary of State for India, officers of the All India Services and State Service officers is involved and which the Secretary to Government in the Department concerned considers to be of sufficient importance to be submitted to the Chief Minister."

55. Shri Ranjith Thamban, learned Addl. A.G. would fervently state that on the basis of the law laid down by the Apex Court and following the Rules of Business enacted by the Governor under clauses (2) and (3) of the Article 166 of the Constitution, the Chief Minister qua Governor could place the Applicant under suspension and the order issued in this regard is properly authenticated.

56. Coming to the merits of the case, the learned Addl. A.G. would contend that the Application was not maintainable as the remedy provided under Rule 16 of the AIS (D&A) Rules, 1969 of appeal to the Central Government against the order of suspension has not been availed. He takes serious exception to the averment in paragraph 6 of the Original Application that such remedy of appeal is neither effective nor efficacious and the order, which has been challenged has been passed without lawful authority. It was argued that no reason whatsoever has been given as why the appeal to the Central Government would not have been effective or efficacious. Such questions as have been raised in the instant Application could have been answered by the appellate authority. It was urged that reasons had to be given about the rare and exceptional circumstances in which not availing of the available remedy of appeal could be justified. Reliance has been placed on the judgement of a Full Bench of this Tribunal in OA number 27/1990, **B. Parameshwara Rao Vs. The Divisional Engineer Telecommunications, Eluru and Anr.**, decided on 12.04.1990, which dealt with an identical matter and in which in which it was held:

> "12. The question now is whether it is imperative for every applicant to exhaust the remedy of statutory appeal for redressal of service matters before be comes to the Tribunal under Section 19 of the Act? The wordings of Section 20 of the Act uses the words : "A Tribunal shall not ordinarily admit an application ...." Which means that ordinarily it will not be open to the Tribunal to admit an Application under Section 19 of the Act where the statutory provision for appeal etc., had not been availed of. It will be deemed to have been availed of if after the filing of such an appeal, a period of six months have expired and no orders have been passed by the Appellate Authority. The emphasis on the word "ordinarily" means that if there be an extraordinary situation or unusual event or circumstance, the Tribunal may exempt the above

> procedure being complied with and entertain the Application. Such instances are likely to be rare and unusual. That is why the expression "ordinarily" has been used. There can be no denial of the fact that the Tribunal has power to entertain an Application even though the period of six months after the filing of the appeal has not expired but such power is to be exercised rarely and in exceptional cases."
>
> ....
>
> "17. In view of the above, the power to entertain an Application under Section 19 of the Act even before exhaustion of the statutory remedy of appeal etc., in service matters is not the usual feature but an extraordinary, unusual and uncommon feature. As indicated above, this power to entertain an Application under Section 19 of the Act even before availing of the remedy provided by statute or statutory rules cannot be exercised generally or always. The statutory right of appeal has to be exhausted before the Application under Section 19 of the Act is admitted by the Tribunal in exercise of its power under Section 20 of the Act."

57. Similar issue was considered by the Honourable Gujarat High Court (DB) in **G.K. Vaghela Vs. Union of India and** others, 2000 (2) SLR 307. The Writ Petition was filed against the dismissal of OA 604/1998 by this Tribunal on the ground that the applicant therein had not brought out any extraordinary circumstances, which would warrant dispensing with the need for exhausting the remedies available to him under the Rules. While upholding the order of the Tribunal, it was observed thus by the High Court of Gujarat:

> "6. Now so far the order passed by C.A.T. not entertaining the petition is concerned, in our opinion, no error of law and/or of jurisdiction can be said to be committed by the C.A.T. To us sub-sec. (1) of Sec. 20 is clear and specific. It states that C.A.T. shall not ordinarily admit an application where a statutory remedy is available under the relevant service rules. Looking to the Rules referred to hereinabove, any order passed by an authority under Rule 11 is subject to appeal under Rule 23 of the Rules. The Rules are statutory in nature. Ordinarily, when a statutory remedy is available to the aggrieved party to approach the Appellate Authority, C.A.T. would refuse to entertain an

application, and by doing so, C.A.T. has not committed any error of law or of jurisdiction. In fact, C.A.T. has taken into account the legislative intent reflected in Sec. 20 (1). It is true that the Bar is not absolute and in certain circumstances, C.A.T. may entertain an application. Mr. Patel is right in submitting that the provision is merely enabling one but taking into consideration, the phraseology used by Parliament, if the C.A.T. has directed the petitioner to go before an Appellate Forum, no exception can be made against such a direction.

7. Recently, in Tin Plate Co. of India Ltd. v. State of Bihar and Others, AIR 1999 SC 74, the Apex Court has observed:

> "It is no doubt that when a alternative and efficacious remedy is open to a person, he should be required to pursue that remedy and not to invoke extraordinary jurisdiction under Arts. 226 and 227 of the Constitution of India."

8. Here the jurisdiction is further truncated by Parliament by the language in sub-sec. (1) of Sec. 20 of the Act that ordinarily the C.A.T. would not entertain an application. The Tribunal has observed that there are no special circumstances which warranted filing of Original application dispensing with statutory remedy available to the applicant. We do not find any error in the finding by the C.A.T."

The learned Addl. A.G. would contend that no material has been placed before the Tribunal to show that the instant case is an exceptional case. The Applicant has failed to satisfy the Tribunal in this regard.

58. It is further contended that action has been taken against the Applicant not only because he went abroad without prior permission of the Government. It was urged that the Applicant was working in a very responsible and high position under the Government but he kept the Government totally in the dark about his whereabouts for about one week. It is further contended that the Applicant has attempted to fabricate the document dated 31.03.2010, placed at Annex A-2, which it is urged is the alleged letter written by the Applicant to the Chief

Secretary of the Government of Kerala. The learned Addl. A.G. would contend that in the Articles of Charge against the Applicant, which had been issued on 28.05.2010 and placed at pages 130-131 of the paper book, it has been alleged that the letter allegedly sent on 31.03.2010 is totally fictitious with an intention to create documents. He would further contend that the Tribunal could not go into the question of the veracity or otherwise of the document at this stage and this would be proved or disproved in the inquiry to be held against the Applicant.

59. In yet another contention raised on behalf of Respondents, it was contended that the Applicant's past record was also murky as regards the foreign visits. A copy of the order dated 18.08.2009 has been placed at Annex R1 (e). Disciplinary action had been taken against the Applicant, *inter alia*, on the charge that from 9.03.2001 to 15.06.2002, he travelled to Singapore on 20.01.2002 by availing casual leave for 21.01.2002 and 22.01.2002 and one Benefit Holiday on 20.01.2002, without obtaining sanction from the leave sanctioning authority to go abroad. The following order was passed:

> "5. It is, however noted that the action of Shri Tomin J. Thachankary IPS a Deputy Inspector General of Police, Crimes, Ernakulam in having gone to Singapore without obtaining sanction from the leave sanctioning authority amounts to minor violation of rules. Shri Tomin J. Thachankary IPS, being an All India Service Officer dealing with the affairs of State concerned ought to have informed about his whereabouts before he leaves the country. He should also have taken the prior permission of the competent authority before going abroad. Since this lapse alone has no vigilance angle and also departmental action for this minor lapse is not justified and explanation of the officer is accepted. Accordingly, the disciplinary action initiated against Shri Tomin J. Thachankary IPS (KL : 1987) now Inspector General of Police Kannur Range is dropped. However, Shri Tomin J. Thachankary is warned again the recurrence of such lapses in future."

60. The learned Addl. A.G. would vehemently contend that in spite of the warning given in the aforesaid order, the Applicant proved himself to be of incorrigible nature and again visited without obtaining prior sanction of the Government. He would contend that such indiscipline could not be considered as minor infringement for the second time. It is further contended that the Applicant had taken casual leave for five days from 8.03.2010 to 12.03.2010 and three days Benefit Holidays on 7th, 13th and 14th March, 2010 in order to visit UAE, Qatar and Oman. He was given permission for visit to the aforesaid countries by order dated 6.03.2010, placed in the MA filed on 20.07.2010. The contention of the learned counsel is that the Government could well have asked the Applicant reasons for going abroad for the second time so close on the heels of the previous visit in March, 2010 itself, had he applied for leave for going abroad. It is strenuously urged that the Applicant's application for earned leave and LTC for visiting Gangtok in Sikkim was a deceitful ruse to deceive the Government about his intentions so that inconvenient questions were not asked. It is contended that the Applicant always intended to visit the gulf countries but did not want to divulge it for the reasons mentioned above. The learned Addl. A.G. would contend that the Applicant had not come before this Tribunal with clean hands as he had concealed the fact that he had been earlier warned for going abroad without permission of the Government.

61. Adverting again to Annex A-2, the letter dated 31.03.2010, addressed to the Chief Secretary, the learned Addl. A.G. would contend that it would be a prudent inference that the letter was an afterthought when there was an uproar in the media on 12.04.2010 when the Applicant returned. There was no certificate of posting to

prove that the letter had been posted on 31.03.2010. It is further contended that the Applicant had faxed all other letters, including the two letters of 12.04.2010 but the aforesaid letter was not faxed. He would advert to the letter dated 12.04.2010 written by the Applicant to the Chief Secretary Kerala, placed at page 76 of the paper book at Annex R-1 (a) in which there is no mention of the letter dated 31.03.2010. He would contend that immediately thereafter the Applicant realized the need to cover his tracks and sent another letter on the same date mentioning that he had sent a letter on 31.03.2010 also. It is submitted that the Government has sufficient reasons to believe that the letter dated 31.03.2010 was not sent on the above date but on 12.04.2010 itself. It was received only on 16.04.2010 in the office of the Chief Secretary. Advertence has also been made to the report dated 13.04.2010 from Dr. Sibi Mathews, IPS, Addl. DGP (Intelligence) addressed to the Additional Secretary (Home), Government of Kerala in which it is stated that:

> "After reporting for duty Shri Tomin J. Thachankary had contacted ADGP (Intelligence) over phone on 12.4.2010. He stated that he had visited Behrain, Dubai and other foreign countries without obtaining Government sanction and ***he would submit necessary applications for the same to the Government***." (emphasis added)

It is contended that this clearly shows that the Applicant had not submitted the alleged intimation dated 31.03.2010. It is further contended that after the Addl. DGP (Intelligence) and the DGP had written to the Applicant on 12.04.2010 asking for the details of his travel plans as the part of LTC (Annex A-4 and A-5 respectively), only then did he add in the second letter of 12.04.2010 that intimation had been earlier given on 31.03.2010 about his visit. The learned Addl.

A.G. would vehemently contend that the Applicant is guilty of suppressing the fact that he had sent two letters on 12.04.2010 and in one of those letters he had not mentioned the alleged letter dated 31.03.2010 and thus the Applicant is guilty of suppressing the material fact. It is alleged that it is only because of this suppression that the interim order staying the suspension of the Applicant was given by the Tribunal. He would contend that the Applicant has consistently tried to mislead the Tribunal. The learned Addl. A.G. would further contend that the Applicant never responded to the letter of the Additional DGP (Intelligence) dated 12.04.2010 asking for his travel plans. The Applicant never disclosed his travel plans but merely faxed the letter dated 12.04.2010 to the Chief Secretary intimating that he had given earlier intimation about his visit abroad.

62. The DGP by his letter dated 12.04.2010 had asked the Applicant whether he had violated the instructions contained in GO (P) No. 233/08/ Fin dated 3.06.2008 as well as in GO (P) No. 418/08/Fin dated 16.09.2008. The Applicant in his reply dated 14.04.2010 (Annex A-6) stated categorically that:

> "During the visits I was abiding by the Government of India Rules on foreign visits for private purposes. Also I followed conditions on the GO (P) No. 233/08/ Fin dated 3.6.2009 as well as those in G.O. (P) No. 418/2008/Fin dtd 16.09.2008"

The argument is that after admitting that he had not violated the aforesaid instructions, the Applicant would now deny that such instructions would not apply to him at all. It is further contended that he gave no reply to the query of the DGP in letter at Annex A-5 regarding his foreign visits, although he had visited abroad only in

March, 2010. Advertence has also been made to the observations of the DGP in his report at Annex R-1 (d), which is as follows:

> "8. a) Sri Thachankary and family had been granted LTC by the Government of Kerala on 30/03/2010. For this purpose he had been granted Earned Leave also. It was on this basis that the Addl. Director General of Police, North Zone made charge arrangements for Kannur Range by entrusting the charge with Inspector General of Police, Thrissur. While issuing orders for charge arrangements the Addl. Director General of Police was under the impression that Sri Thachankary was availing LTC and Earned Leave which had been duly sanctioned by Government. The G.O. dated 30.03.2010 formed the basis of the additional charge arrangements ordered on 31.03.2010. Therefore it was necessary for Sri Thachankary to observe the conditions and the purpose of the G.O. which granted him leave and LTC. He has not done so."

63. Relying on **State of Haryana Vs. Hari Ram Yadav and others**, 1994 SCC (L&S) 711, the learned Addl. A.G. would contend that it was not necessary that the order of suspension should contain recital regarding the satisfaction of the Governor of Kerala about insisting on placing the Applicant under suspension. The Honourable Supreme Court held thus in the aforesaid judgement:

> "9. It would thus appear that the only ground on which the Tribunal has quashed the impugned order of suspension is that it does not contain a recital to the effect that the Governor of Haryana was satisfied that it is either necessary or desirable to place respondent No.1 under suspension.
>
> 10. We find it difficult to agree with the said view of the Tribunal. The mere fact that the impugned order of suspension does not contain a recital that the Governor was satisfied that it is either necessary or desirable to place respondent No. 1 under suspension does not, in our opinion, render the said order invalid. The law is well settled that in cases where the exercise of statutory power is subject to the fulfilment of a condition then the recital about the said condition having been fulfilled in the order raises a presumption about the fulfilment of the said condition, and the burden is on the person who challenges

the validity of the order to show that the said condition was not fulfilled. In a case, where the order does not contain a recital about the condition being fulfilled, the burden to prove that the condition was fulfilled would be on the authority passing the order if the validity of the order is challenged on the ground that the said condition is not fulfilled. Reference, in this context, may be made to the decision of this Court in Swadeshi Cotton Mills Co. Ltd. v. State of U.P. wherein it has been observed:

> "The validity of the order therefore does not depend upon the recital of the formation of the opinion in the order but upon the actual formation of the opinion and the making of the order in consequence. It would therefore follow that if by inadvertence or otherwise the recital of the formation of the opinion is not mentioned in the preamble to the order the defect can be remedied by showing by other evidence in proceedings where challenge is made to the validity of the order, that in fact the order was made after such opinion had been formed and was thus a valid exercise of the power conferred by the law. The only exception to this course would be where the statute requires that there should be a recital in the order itself before it can be validly made.
>
> "We cannot accept the extreme argument of Shri Aggarwala that the mere fact that the order has been passed is sufficient to raise the presumption that conditions precedent have been satisfied, even though there is no recital in the order to that effect. Such a presumption in our opinion can only be raised when there is a recital in the order to that effect. In the absence of such recital if the order is challenged on the ground that in fact there was no satisfaction, the authority passing the order will have to satisfy the court by other means that the conditions precedent were satisfied before the order was passed. We are equally not impressed by Shri Pathak's argument that if the recital is not there, the public or courts and tribunals will not know that the order was validly passed and therefore it is necessary that there must be a recital on the face of the order in such a case before it can be held to be legal. The presumption as to the regularity of public acts would apply in such a case; but as soon as the order is challenged and it is said that it was passed without the conditions precedent being satisfied the burden would be on the authority to satisfy by other means (in the absence of recital in the order itself) that the conditions precedent had been complied with."

64. The learned Addl. A.G. would further submit that (i) the Tribunal should not interfere with the order of suspension unless order passed is malafide and (ii) the order of suspension is not a quasi judicial order but an administrative order and there is no need to put any employee to notice before placing him/her under suspension. Reliance has been placed on the judgement of the Honourable Kerala High Court in **Muhammad Vs. State of Kerala**, 1997 (2) KLT 394, in which it was held thus:

> "14. Therefore, we have to test the power of the Government to suspend a Government servant when they find a public servant prima facie guilty of certain offences under various penal statutes as well as under the provisions of the Indian Penal Code and Prevention of Corruption Act etc. In this connection, reference can be had to R.10 of the Kerala Civil Services (Classification, Control and Appeal) Rules, which is extracted below:
>
> > "10. Suspension: (1) the appointing authority or any authority to which it is subordinate or any other authority empowered by the Government in that behalf may at any time place a Government servant under suspension,
> >
> > (a) where a disciplinary proceeding against him is contemplated or is pending ; or
> >
> > (b) where a case against him in respect of any criminal offence is under investigation or trial; or
> >
> > (c) where final orders are pending in the disciplinary proceeding.
> >
> > If the appropriate authority considers that in the then prevailing circumstances it is necessary in public interest that the Government servant should be suspended from service.
> >
> > Provided that the authority competent to place a member of the Kerala Civil Judicial Service or the Kerala Criminal Judicial Service under suspension shall be the High Court of Judicature
> >
> > ---
> >
> > (6) an order of suspension made or deemed to have been made under this rule may at any time be revoked by

the authority which made or it deemed to have made the order or by any authority to which that authority is subordinate.

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(Emphasis supplied)

The above mentioned provision gives considerable amount of power to the Government or the authority concerned to place a Government servant under suspension at any time where a disciplinary proceeding is contemplated or pending, or, where a case against him in respect of any criminal offence is under investigation or trial or where final orders are pending in the disciplinary proceeding. Such an order placing a Government servant under suspension can be issued if the authority considers that in the then prevailing circumstances it is necessary in public interest that the Government servant should be suspended from service. Suspension order can be issued when the disciplinary proceedings are contemplated or have started or charge sheet is given. During the preliminary enquiry it may be necessary to find out facts from people working under him, or look into papers which are under his custody. If the public servant is allowed to continue, there may be occasion for tampering with the evidence.

15. On materials, if the government comes to the conclusion that the public servant is involved in ay serious misconduct, involving moral turpitude or when he is found guilty of the offences under the Prevention of Corruption Act, etc., Government is justified in acting, because considerable amount of public interest is involved in the conduct of Government servant.

....

17. Supreme Court in the former case held whether the employees should or should not continue in their office during the period of inquiry is a matter to be assessed by the authority concerned and ordinarily the Court should not interfere with the orders of suspension unless they are passed malafide and without there being even a prima facie evidence on record connecting the employees with the misconduct in question. Supreme Court in the latter case has laid down the principles for keeping an officer under suspension. It was held it will not be an administrative routine or an automatic order to suspend an employee. It should be on consideration of the gravity of the alleged misconduct or the nature of allegations imputed to the delinquent employee. Court or Tribunal must consider each case on its own facts and no general law could be laid down in that behalf. Suspension is not a

punishment but is only one of forbidding or disabling an employee to discharge the duties of office or post held by him. It would be another thing if the action is actuated by malafides, arbitrary or for ulterior purpose. Suspension must be a step in aid to the ultimate result of the investigation or inquiry. The authority also should keep in mind public interest of the impact of the delinquent's continuance in office while facing departmental inquiry or trial or a criminal charge. In other words, it is to refrain him to avail further opportunity to perpetrate the alleged misconduct or to remove the impression among the members of service that dereliction of duty would pay fruits and the offending employee could get away even pending inquiry without any impediment or to prevent an opportunity to the delinquent officer to scuttle the inquiry or investigation or to win over the witnesses or the delinquent having had the opportunity in office to impede the progress of the investigation or inquiry, etc. Above mentioned decisions of the Supreme Court were followed by this Court in M.Balakrishanan Nair vs. State (1995) 2 KLJ 701.

18. The order passed by the government placing a Government servant under suspension is an administrative order and not a quasi-judicial order. Therefore, no opportunity need be afforded to any employee to explain the charges on which he was sought to be suspended. Order of suspension is not an order imposing a punishment on a person. It is an order made on him, not because he is found guilty, but for the smooth conduct of disciplinary proceedings initiated against him. Order of suspension would be issued by the Government only when the Government comes to the conclusion that in public interest Government servant should be kept under suspension. There should be some material before the Government to reach that conclusion. Even though an element of subjective satisfaction is involved in every such order of suspension, it should be based on objective consideration and relevant circumstances. When there is no serious charge against the employee, Government could always in its wisdom transfer the employee to some other office or station, so that he would not interfere with the continuance of disciplinary proceeding. When the allegations are of a serious nature, which have got considerable public interest, and those allegations are based on some relevant material, authority can always place the Government servant under suspension even till the completion of the disciplinary proceeding, investigation or trial. It depends upon the gravity of the offences, nature of the allegations as well as public interest involved. Such action of the Government would be justified so as to achieve the purity of administration.

....

20. Supreme Court and this Court on various occasions have taken the view that suspension order is not a routine order. It should be on consideration of the gravity of the alleged misconduct or the nature of the allegations imputed to the delinquent employee. Stigma attached to an order of suspension cannot also be ignored. Even recognizing that suspension per se is no punishment, it cannot be denied that the opprobrium that suspension brings in its wake it, in some respect, worse than many of the penalties prescribed under the rules. The stigma that attaches to an officer under suspension cannot be wished away on the legalistic plea that it is no punishment. That is the reason whey the courts always insist that before issuing an order of suspension the authority should be satisfied that in public interest there is material at least prima facie to place an officer under suspension. Courts have always power to look into those records and to satisfy themselves as to whether there are materials before the authority to issue such an order of suspension. All the same, could will not re-appreciate or re-weigh the whole evidence unless it is proved that the suspension order is vitiated by mala fide or irrelevant considerations or issued on extraneous consideration or with improper motive. As held by the Supreme Court in A.K.K.Nambiar v. Union of India, AIR 1970 SC 652, in order to succeed on the proof of mala fides in relation to the order of suspension, the party has to prove either that the order of suspension was mala fide or that the order was made for collateral purposes. Court is not concerned with the correctness or the propriety of the report based on which the suspension order was issued. The court will examine whether the order of suspension was warranted by the rule and also whether it was in honest exercise of power. Supreme Court in its recent decision in Allahabad Bank v. Deepak Kumar Bhola, (1997) 4 SCC 1, upheld the suspension of a Bank employee for 10 years reversing the decision of the Division Bench of the Allahabad High Court, which interfered with the order of suspension. Supreme Court held that there was material on record before the Bank in the form of report of the CBI/SPF which clearly indicated the acts of commission and omission amounting to moral turpitude alleged to have been committed by the employee. Supreme Court further held allowing such an employee to remain in the seat would result in giving him further opportunity to indulge in the acts for which he was being prosecuted.

It is urged that in view of the submissions made earlier, the Applicant is guilty of grave misconduct and hence the suspension is justified.

65. Reliance has also been placed for the above proposition regarding the Tribunal not interfering with the order of suspension in

judicial review on **Balakrishan Nair Vs. State of Kerala,** 1996 (1) KLT 14, in which it was held that:

> "8. The suspension order, Ext.P9 may also be tested in the light of Supreme Court decisions in U.P. Rajya Krishi Utpadan Mandi Parishad v. Sanjiv Rajan, JT 1993 (2) SC 550 and State of Orissa v. Bimal Kumar Mohanty, (1994) 4 S.C.C.126. It has been laid down by the Supreme Court in the former case that whether the employees should or should not continue in their office during the period of inquiry is a matter to be assessed by the concerned authority and ordinarily the Court should not interfere with the orders of suspension unless they are passed mala fide and without there being even a prima facie evidence on record connecting the employees with the misconduct in question. In the instant case, no mala fide has been alleged or proved against the respondents. On the other hand, the Government has acted on the basis of some material which imputed motives on the part of the petitioners and authorities felt that they should be kept away from service so as to facilitate an enquiry. The Supreme Court in the latter case has laid down the principle for keeping an officer under suspension. The Supreme Court has said that it will not be an administrative routine or an automatic order to suspend an employee. It should be on consideration of the gravity of the alleged misconduct or the nature of the allegations imputed to the delinquent employee. The Court or the Tribunal must consider each case on its own facts and no general law could be laid down in that behalf. Suspension is not a punishment but is only one of forbidding or disabling an employee to discharge the duties of office or post held by him. It would be another thing if the action is actuated by mala fides, arbitrary or for ulterior purpose. The suspension must be a step in aid to the ultimate result of the investigation or inquiry. The authority also should keep in mind public interest of the impact of the delinquent's continuance in office while facing departmental inquiry or trial of a criminal charge. In other words, it is to refrain him to avail further opportunity to perpetrate the alleged misconduct or to remove the impression among the members of service that dereliction of duty would pay fruits and the offending employee could get away even pending inquiry without any impediment or to prevent an opportunity to the delinquent officer to scuttle the inquiry or investigation or to win over the witnesses or the delinquent having had the opportunity in office to impede the progress of the investigation or inquiry, etc.
>
> In the instant case, it is worthwhile to note that the charge levelled against the petitioners is with regard to noxious substances inherently dangerous to humanity. When

> persons at the helm of affairs are alleged to be involved in such charges, the authority has to keep in mind the public interest of the impact of the delinquent's continuance in office while facing departmental inquiry. In the instant case, I am of the view that the Government is justified in keeping the petitioners under suspension pending enquiry. I therefore do not find any reason to interfere with Ext.P9 order in exercise of the extra-ordinary jurisdiction of this court under Article 226 of the Constitution of India. Original petition is dismissed."

66. The learned Addl. A.G. would further contend that juristic basis of doctrine of ultra vires and the order of suspension cannot be challenged on the ground that the facts stated or consequence therein are not correct or improper. This can be looked into only by the appellate authority and not in judicial review. Reliance has been placed on **Anilkumar Vs. State of Kerala,** 2002 (2) KLT 101, in which the Honourable High Court of Kerala held thus:

> "7. I heard both sides. What is under challenge is a suspension order. It can be successfully challenged under Art.226 of the Constitution of India if only the same has been issued without jurisdiction. Assuming everything that is stated in the suspension order is correct, still the suspension is unwarranted, this Court can interfere with it. A suspension order cannot be attacked on the ground that the facts stated therein are not correct or the conclusions on the facts are improper. Such contentions are available only before the appellate authority. A court exercising the power of judicial review may interfere with a decision if on the given set of facts, no man in his senses could arrive at such a decision. The validity of the suspension order has to be tested within the above parameters.
>
> ....
>
> 14. The above statement of law has been quoted with approval by our Supreme Court in G.B. Mahajan v. The Jalgaon Municipal Council (AIR 1991 SC 1153). In our system of responsible Government, executive powers can be exercised only by those who are answerable to the Legislature. This Court under the guise of judicial review cannot usurp executive functions. This Court is also not concerned whether an administrative decision is wise or foolish. It is trite law that, if a decision is intra vires, this Court is not concerned whether that decision is right or wrong according to its notions, because such examination is the function of an appellate authority. In fact, this Court

is concerned whether the decision is ultravires. Ultravires means 'without authority or power or jurisdiction'. The juristic basis of judicial review is the doctrine of ultra vires. Professor Wade says:

> "The simple proposition that a public authority may not act outside its powers (ultra vires) might fitly be called the central principle of administrative law .....To a large extent, courts have developed the subject by extending and revising this principle, which have many ramifications and which in some of its aspects attains high degree of artificiality".

67. It is urged that the charges against the Applicant would be considered in departmental proceedings. The allegations made in the order of suspension cannot be made subject matter of Writ Petition. A judgement of Full Bench of Patna High Court in **Bhup Narayan Jha Vs. State of Bihar and others**, 1984 LAB. I.C. 1155 has been cited in favour of the above proposition. It has been held thus:

> "26. It is common ground that the matter at issue is as yet the subject matter of an exhaustive departmental enquiry against the writ petitioner and others. It is beyond the scope of the writ jurisdiction to enter the thicket of facts in this context and at this stage, I see no reason to reject the firm stand of the respondent State on affidavit regarding the prima facie irregularities and violation of Rules and the alleged corruption, which is sought to be laid at the door of the writ petitioner. The submission in this context has, therefore, to be also rejected."

68. In **U.P. Rajya Krishi Utpandan Mandi Parishad and others Vs. Sanjiv Rajan,** 1993 Supp (3) SCC 483, it was held thus by the Honourable Supreme Court:

> "5. ....Whether the charges are baseless, malicious or vindictive and are framed only to keep the individual concerned out of the employment is a different matter. But even in such a case, no conclusion can be arrived at without examining the entire record in question and hence it is always advisable to allow disciplinary proceedings to continue unhindered. It is possible that in some cases, the authorities do not proceed with the matter as expeditiously

as they ought to, which results in prolongation of the sufferings of the delinquent employee. But the remedy in such cases is either to call for an explanation from the authorities in the matter, and if it is found unsatisfactory, to direct them to complete the inquiry within a stipulated period and to increase the suspension allowance adequately...."

....

"10.....The Division Bench has given no reason for upholding the learned Single Judge's order revoking the suspension order. In matters of this kind, it is advisable that the concerned employees are kept out of mischief's range. If they are exonerated, they would be entitled to all their benefits from the date of the order of suspension. Whether the employee should or should not continue in their office during the period of inquiry is a matter to be assessed by the authority concerned and ordinarily, the Court should not interfere with the orders of suspension unless they are passed malafide and without there being even a prima facie evidence on record connecting the employees with the misconduct in question."

This view has been reiterated by the Honourable Supreme Court in State of Orissa Vs. Bimal Kumar Mohanty (supra).

69. It is urged that the Honourable High Court of Kerala in **State of Kerala Vs. Ivan Rathinam**, 2009 (2) KLT 543 also held that unless the view taken by the Government was described as arbitrary or perverse or one which no man in his senses would take, the Court should not interfere with such order. The High Court was dealing with a case in which the employee, an IPS officer had been proceeded against departmentally but not placed under suspension initially and placed under suspension later on. It was observed that:

"While reviewing an **administrative action,** the court should bear in mind that on the same set of facts, difference views are possible. Even if the view taken by the Government is different from the view entertained by the Court, it is not a ground to interfere with the administrative action concerned."

The learned Addl. A.G. would further advert to the judgement of the Honourable Supreme Court in **S. Partap Singh Vs. State of Pubjab,** AIR 1964 SC 72 in which it is held that the order of suspension is an administrative order and the rule of *audi alteram partem* would not apply before placing an employee under suspension.

70. The learned Addl. A.G. would also take exception to the argument that prior sanction of the Government before going abroad is not necessary by arguing first that the aforesaid contention is against the admission of the Applicant. In his letter dated 12.04.2010 addressed to the Chief Secretary (Annex A-3), the Applicant has mentioned that he had given prior intimation of his visit abroad to the Chief Secretary. The learned Addl. A.G. would contend that it is very clear from Annex R-1 (f), which is a letter issued by the DoP&T to the Chief Secretaries of the State Governments that prior permission of the State Government would be necessary for an officer before going on foreign visit. By this letter, the DoP&T informed the State Governments that approval of the Central Government for travel abroad of Members of All India Services would not be required in some cases. However, it would be clear from paragraph 3 of the aforesaid letter that prior approval of the State Government would be required. Paragraph 3 *ibid* reads thus:

> "3. While considering the requests of the member of an All India Service for grant of leave to proceed abroad, all the State Governments/ Ministries to the Government of India are requested to satisfy themselves regarding the funding of such visits made by the officer concerned in each case and to see that no cadre officer accepts hospitality from a foreign government/ private body other than a close relative."

He would repel the argument on behalf of the Applicant that such requirement was no longer necessary in view of the letter dated 5.12.2007 (Annex A-13) because by this letter only some modifications in the letter dated 7.03.2003 have been brought about and further delegation of power has been made. He would contend that reading of this letter would make it very clear that the power has been delegated to the State Government to allow permission for private visits abroad. In this context, our attention has been drawn to the following provision in the aforesaid letter:

> "**Further delegation**:- It has been decided that State Governments and Ministries/ Departments of the Government of India be delegated the power to allow permission for such private visits in which the government is not bearing any expenditure subject to the condition that the total period of ex-India leave does not exceed three weeks....."

It is further mentioned in the aforesaid letter, as pointed out in paragraph 3 (c), that:

> "3.(c) In cases whether a member of the Service proceeds for a visit abroad without obtaining necessary cadre clearance, the period of his absence shall be treated as `dies non' apart from other consequences under the service rules."

71. The learned Addl. A.G. has also taken us through the DoP&T's OM dated 18.05.1994, placed at Annex R-1 (g) in which it is stated thus in paragraph 2:

> "2. Attention of the Ministries/Departments is invited in this connection to the provisions of FR 11 which provides that `unless in any case it be otherwise distinctly provided the whole time of a Government servant is at the disposal of the Government which pays him....' Article 56 of the

> Civil Service Regulations also provides that `no officer is entitled to pay and allowance for any time he may spend beyond the limits of his charge without authority.' It is implicit in these provisions that a Government servant is required to take permission for leaving station/ headquarters. It is thus clear that such permission is essential before a Government servant leaves his station or headquarters and more so when he proposes to go abroad during such absence, as such visit may have wider implications."

The learned Addl. A.G. would forcefully contend that the Applicant's contention that Fundamental Rules do not apply to All India Service officers is totally misplaced. It is pointed out that FR 2 makes it clear that these Rules would apply to all officers. FR 2 reads thus:

> "F.R. 2 The Fundamental Rules apply, subject to the provisions of Rule 3 to all Government servants whose pay is debitable to Civil Estimates and to any other class of Government servants too which the President may, by general of special order, declare them to be applicable."

It is further stated that in the OM dated 5.10.2004 placed at Annex R-1 (h) also, it has been clarified that the Government servant should take permission for leaving station/ headquarters especially for private visits abroad. It is contended that it is nowhere mentioned that this order only would apply to the officers of Central Civil Service and not to All India Service officers. It is further stated by adverting to the leave application of the Applicant, which has been placed before us and which we have taken on record that the application is under Kerala State Rules. It is clearly mentioned in this application for leave that in clause 12 the purpose for which the leave is applied for is availing of LTC. In the application for LTC also, it is mentioned in clause 6 that the leave is proposed to be availed for LTC. He would contend that it would be wrong to argue on the basis of the order dated 3.06.2008 at Annex A-9 that the permission of the Government

was not needed for private visit abroad because the order makes it clear that permission of leave sanctioning authority should be obtained before undertaking such journey. The leave sanctioning authority in case of the Applicant was the State Government. Repelling the argument that the State Government has made no rules for visit abroad, the learned Addl. A.G. would point to Rule 2 (b) of All India Services (Conditions of Service Residuary Matters) Rules, 1960, which reads thus:

> "2. (b) in the case of persons serving in connection with the affairs of a State by the rules, regulation and orders applicable to officers of the State Civil Services, Class I, subject to such exceptions and modifications as the Central Government may, after consultation with the State Government concerned, by order in writing, make."

It is the argument that the Applicant would be governed as per Rules of Class-I officers of the State Civil Service.

72. It is further contended that the cases of Sri P.C. Sanalkumar, IAS and Smt. R. Sreelekha, IPS, which have been cited by the Applicant in his defence to state that there has been discrimination, are different in facts and circumstances from the case of the Applicant. In this context, paragraphs 23 and 24 of the counter affidavit have been adverted to, which are quoted below:

> "23. Moreover in the OA certain instances were being pointed out to show that the applicant is treated differently. As a matter of fact the applicant clearly knows that the case of Sri Sanalkumar IAS as well as Smt. Sreelekha IPS are not comparable with that of the applicant. In the case of Sanalkumar the allegation was that he had went to USA for a function organized by the FOKANA, an organization of Malayalies in the USA. As a matter of fact Sri Sanalkumar was holding the post of Secretary, Land Board and not a post in the police hierarchy. Moreover, Sri Sanalkumar had already filed an

application seeking permission for going abroad and because of some official delay it was not sanctioned before he went. Even then Sri Sanalkumar was subjected to disciplinary proceedings and he was issued with charge memo. Because of disciplinary proceedings he lost 3 promotions, ultimately on the eve of retirement i.e. on 15.6.09. The action against Sri Sanalkumar was dropped, considering the fact the he was due to retire on 30.6.2009. A true copy of the order dated 15.6.09 is produced herewith and marked as **Annexure R1(k).**

24. In the case Smt. Sreelekha IPS also, she was holding a post of the Managing Director of Rubber Marketing Federation and not holding any post in the police force. As a matter of fact she went to Thailand as sponsored by the Rubber Mark Rubber Industries (P) Ltd., a subsidiary company of Rubber Mark and she was sent for preparing a project report which otherwise would have cost a sum of Rs. 25 lakhs. Because of her visit, she was able to organize the project report which cost only the traveling expenses to the Company. Even then disciplinary proceedings were initiated against Smt. Sreelekha IPS and considering the actual situation including the fact that she was not holding a post in the Police force and that she was sent for a purpose of the Government sponsored organization, further proceedings was dropped, taking into consideration the explanation given by her."

It is urged that differences in both the cases are obvious and such contention regarding discriminatory treatment *vis-à-vis* the aforesaid officers would not advance the cause of the Applicant.

73. The learned Addl. A.G. would further contend that the visit of the Applicant to the foreign countries, attracted media attention and several allegations were made against the Applicant, as detailed in paragraph 9 of the counter affidavit. The paragraph 9 reads thus:

"9. However, the Government came to know that in total violation of the permission granted by the Government for availing of LTC and keeping the Government in dark regarding his whereabouts, the applicant did not go to Gangtok, the capital of Sikkim, but had flown to foreign countries in the gulf on 2.4.2010, without family members. It is learnt that he returned to India after visiting 4 foreign countries viz. UAE, Muscat, Behrain and Kuwait on 12.4.2010. There was much media speculation regarding the unauthorized visit of the applicant to the above said 4

> foreign countries without sanction from the Government. As a matter of fact, there was allegation by certain responsible youth organizations including the State Secretary of Youth League that the applicant had went to the above said 4 countries and stayed at hotels where the daily room rent is coming to more than Rs. 5 lakhs. There were also allegations by certain quarters that the applicant had made certain suspicious dealings and contacts in Gulf countries."

It is in this context that it became necessary to investigate the conduct of the Applicant and he was requested by the Additional DGP (Intelligence) to inform the latter about his travel plans, to which the Applicant, as contended earlier, never responded.

74. The learned Addl. A.G. would also rely on the judgement of the Honourable Kerala High Court dated 13.04.2007 in WP © No.28804/2006 in which it was held that the allegations had to be established in the disciplinary proceedings based on reliable material and the stage of suspension would be too early to enter a finding about the merits of the case. Specific reference has been made to paragraph 19 of the aforesaid judgement in which, *inter alia,* it has been held thus:

> "19. .....This is a case where the disciplinary authority has not framed any charges against the petitioner. As rightly contended by the Senior Govt. Pleader, there is a distinction between the prima facie materials and allegations which may find place in an order of suspension and the specific charges with statement of allegations in a charge memo under Rule 15 or 16 of the Kerala Civil Services (Classification, Control and Appeal) Rules. At the time of passing the order of suspension it is not a legal requirement that the disciplinary authority should have in its possession all the materials necessary to prove the allegations. If the materials already on record show that the allegations are grave and that the suspension of the delinquent employee will be necessary in public interest, the authority which passes the order of suspension can be said to be exercising the power conferred on it under Rule 10 of K.C.S. (C.C.&A) Rules, legitimately. I find merit in the contention of the learned Senior Govt. Pleader that this

> Court may not record any definite opinion regarding the sustainability of the charges that may or may not be framed against the petitioner based on the materials to be collected including those referred to in Ext. P10, because any such opinion will prejudice either of the parties. Such a detailed in-depth examination of the materials is not required or called for, at this stage."

It is further contended that the ratio laid down in Mohinder Singh Gill (supra) would not apply in this case as it is only an order of suspension and not a final order in departmental inquiry. Under AIS (D&A) Rules, 1969, suspension is resorted to having regard to the circumstances in any case. It is urged that those circumstances have been considered in detail before placing the Applicant under suspension. It is further contended that the case of Francis John Aranha (supra) would also not apply in this case as that is distinguishable on facts. The allegations against the Applicant in the departmental inquiry are regarding fabrication of documents and keeping the government in dark about his whereabouts. He would contend that the judgement in the aforesaid case is in favour of the Respondents in as much as it has been held that prior permission of the government would be necessary for visit abroad. He would further contend that in addition to the Memorandum of Charge already served on the Applicant, which is placed at page 130 of the paper book, additional charge-sheet is also contemplated.

Reply on behalf of the Applicant

75. The learned senior counsel for the Applicant would in reply contend that the past record of the Applicant has not been made part of the Articles of Charge and has only been cited in the counter affidavit to prejudice the Tribunal. The learned senior counsel also placed before us copy of a document purported to be part of the

despatch register to show that the letter dated 31.03.2010 had been sent. We are not considering this as it is a matter considering disputed facts, which cannot be considered in judicial review. The learned senior counsel would also contend that there was no suppression of facts and it could not be expected from the Applicant to inform that he had been previously warned about his visit to Singapore. He would contend that this cannot be treated as suppression of facts. He would also contend that the All India Services (Conditions of Service Residuary Matters) Rules, 1960 would not apply because the leave rules are already in existence and these are full codes and there would be no need to read any other rules in this regard.

Conclusions

76. We have given our utmost consideration to the arguments advanced by the learned counsel for the parties and we have minutely perused the record placed before us with their assistance.

77. A reading of the Rules of Business of Government of Kerala would reveal that these rules have been framed by the Governor under Article 166 (2) of the Constitution, as pointed out by the learned Addl. A.G. It would, therefore, not be right to say that rules for authentication have not been framed and the impugned order of suspension could not have been communicated under the signatures of the Chief Secretary and that the Governor should have signed the order personally. We hold that the order of suspension has been authenticated properly.

78. The Rules of Business have been framed under Article 166 of the Constitution. Article 166 (3) speaks of the `transaction of the business of the Government of the State', whereas Article 162 of the Constitution is concerned with the executive power of the State, which only extends to the matters for which the Legislature of the State has power to make laws. However, business of the Government has wider connotation. It is not limited as is the executive power of the State Government. Powers conferred under the Central Legislation like by the AIS Rules would also be covered under this. This has been made clear by the judgements of the Honourable Supreme Court in Samsher Singh (supra), State of M.P. Vs. Dr. Yashwant Trimbak (supra) and Godavari Shamrao Parulekar (supra). We have cited the relevant parts of the aforementioned judgements in the preceding paragraphs. It is also now too well settled that the satisfaction required by the Governor is not the personal satisfaction of the Governor. Under the constitutional scheme the Minister acts *qua* the Governor as elucidated by the Apex Court in Samsher Singh (surpa), P.U. Myllai Hlychho (supra) and Dr. B.L. Wadhera (supra). We find that though the Applicant has relied on Samsher Singh (supra) for his arguments to the contrary, yet it would not be of any assistance to him.

79. As regards the advice tendered by the Council of Ministers, the Courts/Tribunal cannot go into the question (i) whether any and (ii) what advice was tendered by Ministers to the Governor. In S.R. Bommai (supra), it was held that that only the material, which for was the basis for the advice is justiciable. This was held in E. Royappa (supra) also. It was also held that the advice tendered by the Minister is the advice tendered by the Council of Ministers.

80. We do not agree that the Chief Minister was not competent to place the Applicant under Suspension, because he had no powers even under the Rules of Business, merely by virtue of holding the General Administration Department (GAD). GAD is, *inter alia*, responsible for All India Services and serial number B (i) under General Administration Department includes the administration of Rules framed under the AIS Act. Moreover, Rules 7, 22 and 34 (xiv) of the Rules of Business make the point very clear that the Chief Minister is competent to pass the order of suspension of an officer of the All India Service. We have already extracted these rules in paragraph 54 of this order.

81. On the basis of the above discussion, based on judicial precedents, we hold that the Chief Minister was well within his jurisdiction to pass the order of suspension against an officer of All India Service under AIS (D&A) Rules, 1959. We further hold that the impugned order has been properly authenticated under the Rules of Business framed by the Governor.

82. We may mention here that although the reference has been differently worded, yet learned counsel for the parties in this *lis* agreed that the purport of the same is as decided in the preceding paragraph.

83. On the question of maintainability, we agree with the contention of the Applicant that it is now too late in the day to throw out the case of the Applicant on the ground that alternative remedy of appeal before the Central Government has not been availed. `Ordinarily' the Tribunal would not have heard the case at all and directed the Applicant at the outset that he should approach the appellate authority

and approach the Tribunal only after exhausting the remedy, if necessary. It would be an exceptional case at this stage after hearing of the matter thrice by the Tribunal [interim stay, DB and Full Bench] and hearing once by the Honourable Kerala High Court, to direct the Applicant to seek the remedy of appeal. We hold that in the peculiar facts and circumstances of this case, the OA is maintainable before this Tribunal.

84. Now coming to the merits of the case, we take note of the fact that the order of suspension is an administrative order. On the basis of judicial precedents, considered above, we are of the opinion that it is not necessary to put an employee to notice before placing him/her under suspension. Principles of natural justice are not violated if an employee has not been given an opportunity of being heard before being placed under suspension. It is true that suspension affects an employee adversely in many ways, as has been held by the courts in several judgments, which have been cited before us and have been adverted to also by us in preceding paragraphs and also that due caution should be exercised before placing an employee under suspension. However, if the order of suspension is not without jurisdiction, the Tribunal has to consider all the aspects most carefully before interfering with such an order.

85. We are convinced that it is necessary for an officer of All India Service to take prior permission of the State Government before proceeding on visit to foreign country (ies). The case of Francis John Aranha (supra) would not be of any assistance to the Applicant because it has been held in that case by this Tribunal that instructions

regarding prior permission for visiting a foreign country have to be followed, even though it may not be a specific misconduct under the All India Services (Conduct) Rules. The letter dated 7.03.2003 from the DOP&T addressed to the Chief Secretaries of the State Governments, as quoted in paragraph 70 above, would make it abundantly clear that prior permission of the State Government is necessary before an officer of the All India Service may go abroad. Paragraph 3 mentions "while considering the requests of the member of an All India Service to proceed abroad". The request thus has to be considered before the officer proceeds abroad, i.e., prior to his going abroad. The power has been delegated to the State Government. It is even directed that the period of absence of a member of service would be treated as *'dies non'* if he goes abroad without prior permission. This makes it clear that prior approval is necessary. It would be of no avail to contend, as has been done on behalf of the Applicant that the State Government has not made any rules regarding foreign visits after delegation of powers by the Central Government. First, because instructions can be issued to fill gaps in the rules and these instructions partake the character of rules [See (**M. Srinivasa Prasad and Others Vs. Controller and Auditor General of India & Others**), 2008 (1) AISLJ 229 (SC)]. Second, the All India Services (Conditions of Service Residuary Matters) Rules, 1960 make it clear that the Applicant would be governed as per the Rules of Class I officers of the State Civil Service. We have carefully considered the cases of Mr. Sanalkumar and Ms. Sreelekha, both officers of the All India Services and in whose case the visits to foreign countries were held to be of minor infringement. These cases have different facts and circumstances. These are cases of departmental proceedings. Moreover, it had been

held thus in the case of the Applicant also, when he visited Singapore. But he was warned not to repeat it. Repetition of the same mistake would surely weigh on the mind of the authority, which decided the matter regarding the suspension of Applicant. Further, serious doubts have been cast on the authenticity of the letter dated 31.03.2010 in as much as it has been alleged that it is a fabricated document. It was alleged that it had not been sent on 31.03.2010 but only after the Applicant returned from his visit abroad. We cannot give a finding about allegations in the order of suspension, as these would eventually be considered in the departmental proceedings and proved or disproved, as the case may be. We also cannot accept the contention that it was falsely stated in the order of suspension that departmental inquiry is pending. 'Pending inquiry' would not be construed as 'inquiry is pending'. It would mean, in this context, that disciplinary proceedings are contemplated.

86. Considered in the above conspectus, allegations against the Applicant including the allegation of fabrication of letter dated 31.03.2010 are sufficiently serious. The Applicant is a very high ranking officer of IPS. He had been given serious responsibilities commensurate with his rank. The competent authority has found the allegations sufficiently grave to warrant his suspension. In such circumstances the Tribunal cannot substitute any other view in place of the view of the competent authority. We have no hesitation in holding that in this case no interference by the Tribunal in the impugned order is merited. Having said so, we would also direct the State Government to complete the departmental inquiry against the Applicant as expeditiously as possible but not later than four months from the date

of receipt of this order. We are confident that the Applicant will fully cooperate in the inquiry. There will be no order as to costs.

87. Before we part with this order, we would like to place on record our appreciation of the assistance given by the learned senior counsel for the Applicant and the learned Addl. AG.

(K. Noorjehan)	(George Paracken)	(L.K. Joshi)
Memebr (A)	Member (J)	Vice Chairman (A)

/dkm/ /sk/

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A.No.337/2010

Friday this, the 18th day of June, 2010

CORAM:
HON'BLE MR.JUSTICE K.THANKAPPAN, JUDICIAL MEMBER
HON'BLE MR.K.GEORGE JOSEPH, ADMINISTRATIVE MEMBER

Tomin J.Thachankary IPS(KL-87),
S/o. The late Joseph Thomas, aged 46 years,
Inspector General of Police,
Kannur Range(Under Orders of suspension),
Range House, Near Municipal Office, Kannur-670 002. ... Applicant

By Advocate : Sri O.V.Radhakrishnan, Senior with Mr.Prakash Kesavan

vs.

1. State of Kerala, represented by its Chief Secretary,
   Government Secretariat,
   Thiruvananthapuram-695 001.

2. Union of India, represented by its Secretary,
   Ministry of Home Affairs,
   New Delhi-110 001. .. Respondents

By Advocate:Mr. Renjith Thamban, Addl. Advocate General
Mr.P.Santhosh Kumar, Spl.GP(R-1)
Mr.N.K.Thankachan,GP
Mr.Sunil Jacob Jose, SCGSC(R-2)

The Application having been heard on 10.06.2010, the Tribunal on 18.06.2010 delivered the following:-

ORDER

HON'BLE MR.JUSTICE K.THANKAPPAN,JUDICIAL MEMBER:

The applicant while working as the Inspector General of Police, Kannur Range, has been granted leave for 7 days to avail Leave Travel Concession for his journey to Gangtok with family as per the Government

Order (Rt.) No.2209/2010/GAD dated 30-03-2010 . In the same order the applicant was also granted earned leave for 7 days from 3.4.2010 to 9.4.2010 prefixing 1st and 2nd April,2010 and suffixing 10th and 11th April, 2010. However the applicant utilized the earned leave sanctioned to him to visit abroad without availing the Leave Travel Concession facilities and the visit the applicant made in the foreign countries was without prior permission of the Govt. Hence after having reports from the Director General of Police and the Additional Director General of Police and on considering the reports, the Govt. passed an order on 17.4.2010 suspending the applicant from service in contemplation/framing of charges for disciplinary proceedings against him for violation of the Government Orders regarding foreign private visits by the Govt. employees. This Tribunal heard the matter to a certain extent and as per the order dated 23.04.2010 this Tribunal stayed the operation of the said suspension order with liberty to the respondents the State to file their reply statement, if any, within a specified time. The said interim order passed by this Tribunal has been challenged before the Hon'ble High Court of Kerala in W.P.(C) No.14203/2010 by the Govt. On hearing the counsel appearing for the parties, the Hon'ble High Court of Kerala, without considering the merits of the order passed by this Tribunal, ordered as follows:-

> "5. For the aforesaid reasons, clarifying that this Court has not expressed anything on the merits of the matter, we direct that the writ petitioner State of Kerala will complete its pleadings before the Central Administrative Tribunal on or

24th May, 2010, without fail; the first respondent, the applicant would have a couple of days to file his further reply or rejoinder, if any; the State of Kerala would, if needed, place further pleadings immediately so that the Tribunal will make every endeavour to finally hear the parties on the original application preferably on the 28th of May, 2010 to which day, it is submitted, the proceedings are listed before the Tribunal for final hearing. Normally, it is not the practice of this Court to fix the board of a Tribunal. But, we deem it appropriate, having regard to the totality of the facts and circumstances, to request the Tribunal to make endeavour to complete final hearing of the matter by taking up the case on 28.5.2010 itself so that final orders could be pronounced at the earliest.

In the aforesaid view of the matter, the undertaking given by the first respondent before this Court on 4.5.2010 that he would not insist for reinstatement as directed in the impugned order till 17.5.2010 and that he would not move any petition for contempt for non-compliance of the direction in the said order under challenge till then, would stand extended for a period of four weeks or till such time the Tribunal delivers its final order, whichever is earlier. The writ petition ordered accordingly."

2. After the disposal of the Writ Petition, the matter came up for further

consideration before this Tribunal. This Tribunal heard the counsel appearing for the parties. While arguing the matter on merits, the learned Sr.Counsel, Sri O.V.Radhakrishnan,appearing for the applicant had raised so many contentions challenging the suspension order passed by the Govt. The learned Sr.Counsel raised a question of law regarding the jurisdiction of the State Govt. to pass the suspension order as the applicant is an All India Service employee, an I.P.S. Officer holding the post of Inspector General of Police, Kannur Range, at the time of passing the order. Arguments were concluded by both the parties. When the matter is reserved for orders it is felt by this Tribunal that a decision on the question of law raised will have far reaching effects and consequences, in the light of the question of law raised regarding the jurisdiction of the State Govt. to pass the impugned order and on considering the various constitutional provisions regarding the executive power and the executive action of the State Govt. The counsel also relies on the Apex Court judgments reported in AIR 1963 SC 395(Bachhittar Singh vs. State of Punjab); AIR 1974 SC 555 (E.P.Royappa vs. State of Tamil Nadu); AIR 1964 SC 1128(Godavari v. State of Maharashtra); AIR 1974 SC 2192(Shamsher Singh v. State of Punjab);(2003)5 SCC 134(J.P.Bansal v. State of Rajasthan & Ors.);(2008)4 SCC 409(M.Balakrishna Reddy v. Director, CBI, New Delhi) and (1996) 2 SCC 305(State of M.P. & Ors. v. Dr. Yashwant Trimbak) and the order in OA 2944 of 2009 of Central Administrative Tribunal, Principal Bench, New Delhi (Francis John Arahna Vs. Union of India & Ors.). The main point raised by the learned Sr.Counsel is that as per Rule 3 of the All India Services (Discipline and Appeal)Rules,1969 provides that :-

"... ... If, having regard to the circumstances in any case and where articles of charge have been drawn up, the nature of the charges, the Government of a State or the Central Government, as the case may be, is satisfied that it is necessary or desirable to place under suspension a member of the service, against whom disciplinary proceedings are contemplated or are pending, that Government may, -

(a) if the member of the service is serving under that Government, pass an order placing him under suspension, or

(b) if the member of the service is serving under another Government, request that Government to place him under suspension,

pending the conclusion of the disciplinary proceedings and the passing of the final order in the case."

The Sr.Counsel for the applicant relying on the judgments aforesaid contends that as per Articles 154, 162, 163, 164 and 166 of the Constitution of India the executive power of a State vests with the Governor of the State and the Governor has got the jurisdiction or power to execute the executive actions of the State Govt. in 2 ways, i.e. firstly, as per his discretion on the basis of the constitutional power vested on the Governor as well the power given to the Governor by

statutes which were promulgated by the State Legislatures or in other words, the executive action of the Governor can be transacted only on the subjects for which the State Legislature has got the power to legislate, and secondly,the Governor can execute the executive functions of the State which are on the basis of the statutes promulgated by the State Legislatures as contemplated under Article 162 of the Constitution of India. The Sr.Counsel further contends that the power conferred on the State under Rule 3 of the All India Services (Discipline and Appeal)Rules, is not a conferred on the Governor by way of any legislation made by the State Legislature. It is made by the Parliament. If so, the execution of any executive function of the Governor should have been only on the basis of advice of the Council of Ministers as provided under Article 166 of the Constitution of India. Further the Sr.Counsel submits that by promulgating the rules for transacting the executive function of the Government, will not include the power vested on the Governor on the basis of a Central Legislation.

3. To the above contentions, the learned Additional Advocate General Mr.Renjith Thamban, contended that the rules as per the provisions of Article 166 of the Constitution of India, the Governor of the State can exercise all executive functions or actions by promulgating the Rules of Business and delegating such power to any sub-ordinate functionaries like the Chief Minister or other Ministers. The learned Advocate General also relies on the judgments of the Apex Court reported in AIR 1974 SC 2192; AIR 1964 SC 1128 and AIR 1959 SC 308 and contended that the

Governor the State can execute all executive functions vested with the Governor by delegating such power to his sub-ordinates including the Chief Minister or other Ministers or Secretaries of the State.

4. On considering these questions now raised, we are of the view that the answer to be drawn to the questions have got far reaching consequences with regard to the power of the Governor of the State, vis-a-vis the order impugned, hence we feel that it is a fit case to have a decision of a Larger Bench. One of us Mr. K. George Joseph is differing with my (Justice K. Thankappan) views that the State Government has no power or jurisdiction. Hence we are framing the following questions to be answered by the Larger Bench:-

(i) Whether the Governor has got the jurisdiction to order the suspension of an All India Service employee under Rule 3 of the All India Services (Discipline & Appeal) Rules,1969 without the advice of the Chief Minister or the Council of Ministers?

(ii) Whether for suspending an All India Service employee, the Governor has got the executive power of the State Govt. which is conferred by a statute promulgated by the Parliament or the Central Government,even if any delegation is there to the State Govt. by such statute, to take disciplinary action against an All India Service employee without the advice of the Council of Ministers?

Accordingly the matter is placed before the Registry for getting the sanction of the Hon'ble Chairman for constituting a Larger Bench for the above purpose. It is also to be informed that the direction given by the Hon'ble High Court is there. Hence the matter may be urgently placed before the Hon'ble Chairman.

(K.GEORGE JOSEPH)
MEMBER(A)

(JUSTICE K.THANKAPPAN)
MEMBER (J)

/njj/

Central Administrative Tribunal
Ernakulam Bench

R.A. No. 37/2010 in O.A. 337/2010

Dated this the 11th day of February, 2011

C O R A M

HON'BLE MR. L.K.JOSHI, VICE CHAIRMAN (A)
HON'BLE MRS. K. NOORJEHAN, ADMINISTRATIVE MEMBER
HON'BLE MR. V. AJAY KUMAR, JUDICIAL MEMBER

Tomin J. Thachankary IPS (KL-87),
S/o the late Joseph Thomas, aged 47 years,
Inspector General of Police,
Kannur Range (Under Orders of suspension),
Range House, Near Municipal Office,
Kannur ....Applicant

(Through Mr. O.V. Radhakrishnan, Senior Advocate with M/s K. Radhamani Amma & K. Ramachandran, Advocates, Old Railway Station Road, Kochi-682 018)

Versus

1. State of Kerala represented by its Chief Secretary,
Government Secretariat,
Thiruvananthapuram-695001

2. Union of India represented by its Secretary,
Ministry of Home Affairs,
New Delhi-110001 ...Respondents

(Through Mr. P. Nandakumar, Sr. GP)

This Review Application having been heard on 18.1.2011, the Tribunal delivered the following

ORDER

HON'BLE MRS. K. NOORJEHAN, ADMINISTRATIVE MEMBER

This Review Application is filed by the Applicant in O.A. No. 337/2010, which was moved to set aside Annexure A-8 Go dated 17.4.2010 suspending the Review Applicant from service pending disciplinary proceedings and for other consequential reliefs. The O.A. was finally heard and disposed of by order dated 13.8.2010 by a Full Bench declining to interfere with the order of suspension. However, the Tribunal directed the State Government to complete the departmental inquiry against the Review Applicant as expeditiously as possible but not later than four months from the date of receipt of the said order (Annexure RA-1). According to the Review Applicant there was no argument or submission or relief prayed for in the O.A. for such a direction. Aggrieved by the direction, the Applicant has filed this R.A. to review the order dated 13.8.2010 and to vacate the direction to complete the enquiry within a period not later than 4 months from the date of receipt of the said order.

2. In O.A. 337/2010 the Applicant has sought the following reliefs:

> (i) to declare that Annexure A-8 order of suspension as illegal, ultra vires and without authority of law having been passed in the purported exercise of power under Rule 3 of the AIS (Discipline and Appeal) Rules before commencing the Departmental Proceedings and wrongly stating that the order of suspension has been issued pending disciplinary proceedings which is a non-existant fact.
>
> (ii) to call for the records leading to Annexure A-8 GO dated 17.4.2010 and to set aside the same.
>
> (iii) to issue appropriate direction or order directing the respondents to reinstate the applicant forthwith.

(iv) to issue appropriate direction or order directing the respondents to pass an order treating the period of suspension as duty for all purposes and to grant him full service benefits including arrears of pay and allowances for the period he has been kept under suspension unlawfully.

(v) to grant such other reliefs which this Hon'ble Tribunal may deem fit and proper in the circumstances of the case and

(vi) to allow the above O.A with costs to the applicant."

3. The operative portion of the order of the Full Bench is extracted below:

"Para 86:- Considered in the above conspectus, allegations against the applicant including the allegation of fabrication of letter dated 31.3.2010 are sufficiently serious. The applicant is a very high ranking officer of IPS. He had been given serious responsibilities commensurate with his rank. The competent authority has found the allegations sufficiently grave to warrant his suspension. In such circumstances, the Tribunal cannot substitute any other view in place of the view of the competent authority. We have no hesitation in holding that in this case no interference by the Tribunal in the impugned order is merited. Having said so, we would also direct the State Government to complete the departmental inquiry against the applicant as expeditiously as possible but not later than four months from the date of receipt of this order. We are confident that the applicant will fully cooperate in the enquiry."

4. The Review Applicant has filed M.A. 812/2010 to condone the delay of 25 days in filing the Review Application. It is stated that the copy of the order dated 13.8.2010 was received by the Review Applicant on 13.8.2010 and the R.A. was filed only on 18.10.2010 and that he genuinely believed that the direction to complete the inquiry would become infructuous, in view of RA-2 and RA-3 interim order in O.A. 478/2010, staying the disciplinary proceedings. This position

changed in view of the direction given in O.A. 337/10 and vacation of the stay. Admittedly, there is delay of 25 days in filing the R.A. The reason stated by the Applicant in the M.A. that he genuinely believed that the direction of the Full Bench has become unworkable and impossible of compliance and thus become infructuous, is not acceptable.

5. We have heard learned counsel for the parties.

6. The learned senior counsel for the Applicant strenuously argued that the direction in the order of the Full Bench is an error of law and fact patent and apparent on the face of the record and is therefore liable to be reviewed and recalled *ex debito justitiae*. The Senior counsel relied on the decisions of the Apex Court in A.R. Antulay Vs. R.S. Nayak and another (1988) 2 SCC 602, Union of India and Ors Vs. Dipak Mali (2010) 2 SCC 223 and Union of India Vs. E.I.D. Parry (India) Ltd. (2000) 2 SCC 223 in support of his contention.

7. On merit, the Review Applicant has raised three grounds. The first ground raised by the Applicant is that the direction to the Respondents to complete the departmental enquiry as expeditiously as possible but not later than 4 months from the date of receipt of the said order is an error of law and fact patent and apparent on the face of the record and is liable to be reviewed and recalled *ex debito justitiae*. A perusal of the reliefs sought for by the Applicant in the O.A would show that the Applicant has challenged the suspension within one week of issue of the order and sought a relief among other reliefs to grant such other reliefs which this Tribunal may deem fit and proper in the circumstances of the case. The Tribunal after elaborate hearing took a conscious decision in the interest of justice not to prolong the

disciplinary proceedings which will adversely affect the Applicant, and thus directed the respondents to complete the enquiry proceedings within four months. This direction was expected to be in favour of the Applicant and not to prejudice his case in any way. Therefore, we do not find any error apparent on the face of the records.

8. Another ground raised is that the Review Applicant challenged the Articles of Charge served on him through O.A. 478/2010. That O.A. which was filed on 4.6.2010 was admitted on 7.6.2010 and interim order staying further proceedings passed. The reliefs sought in the O.A. are different. In O.A. 337/2010 he is challenging his suspension whereas in O.A. 478/2010 the Applicant is challenging the issuance of a charge memo. It may be true that the Tribunal has passed interim order to keep in abeyance further proceedings pursuant to Annexure A-8 Charge memo. When O.A. 337/2010 was heard on 19.7.2010, the learned counsel for the applicant had not brought to the notice of the Bench that he had filed O.A. 478/2010 and obtained an interim stay of the inquiry proceedings. In State of West Bengal and Others Vs. Kamal Sengupta and Others, (2008) 8 SCC 612, the Hon'ble Supreme Court has held that:

> "35.(vii) While considering an application for review, the tribunal must confine its adjudication with reference to material which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent."

9. The third ground raised is that O.A. 478/2010 and 862/2010 are independent proceedings which cannot be controlled or governed by the directions and orders issued in an O.A. instituted on a different

cause of action earlier to the filing of O.A. 478/2010 and O.A. 802/2010. We notice that all the OAs filed by the Applicant are connected with the suspension of the Applicant and arose as a consequence of his suspension. The Applicant has challenged the suspension, issuance of charge memo and appointment of inquiry officer separately and now avers that the cause of action are interlinked. In that view, the contention of the Applicant that the direction of the Full Bench in O.A. 337/2010 will adversely affect him cannot be accepted.

10. The learned counsel for the State Government has confined his argument to the non-maintainability of the R.A., on ground of delay and cited Civil Appeal No.6213/2008, Union of India and Ors. Vs. Chitra Lekha Chakraborty where delay was not condoned in support of his plea. In this case, the appellant before the Hon'ble Supreme Court, Union of India (Ministry of Railways) had filed a review petition before the Calcutta Bench of the Central Administrative Tribunal and the same was rejected on the ground that it was filed beyond thirty days as prescribed under Rule 17 of the Central Administrative Tribunal (Procedure) Rules, 1987. The High Court confirmed the order passed by the Calcutta Bench of the Tribunal. In this context, the Hon'ble Supreme Court observed thus:

> "Learned Addl. Sol. General for the Union of India contended that the review petition filed by the appellant should have been allowed as there was sufficient cause for extending the period of limitation prescribed under Rule 17 of the 1987 Rules. Learned Addl. Sol. General has placed reliance on a decision of this Court in Consolidated Engg. Enterprises Vs. Principal Secretary, Irrigation Dept. & Ors., reported in 2008(7) SCC p.169, wherein it was held that Section 14(2) of the Limitation Act, 1963 was applicable to an application submitted under Section 34(1) of the Arbitration and Conciliation Act, 1996. It was further held

> that as per Section 43 of the Arbitration Act, the Limitation Act, 1963 was applicable to the application filed under Section 34 of the Arbitration and Conciliation Act for setting aside the award. In other words, a specific provision was made in the Arbitration and Conciliation Act for application of Limitation Act. In the instant case a specific provision in Rule 17 of 1987 Rules has been made for filing a review application before the C.A.T. and therefore, Section 5 of the Limitation Act was not applicable to a petition filed under Rule 17. The High Court was justified in concluding that the Tribunal has rightly dismissed the application filed beyond 30 days."

11. We further notice that the order of the Full Bench in O.A. 337/2010 was challenged by the Applicant before the High Court of Kerala along with G.O. (Rt) No. 5283/2010/GAD dated 14.7.2010 of the 1st respondent in WP(C) No.26289/2010 and that the High Court vide order dated 20.8.2010 has observed as follows:

> "6. As rightly pointed out by the learned senior counsel for the petitioner, even this Court had indicated in an earlier round that it would be neither in the interest of the State Government nor in the interests of the officer to have the proceedings dragged on indefinitely, having regard to the State and public interest of maintaining discipline among the forces and the employees in service. Under such circumstances, we are of the view that the Full Bench of the Tribunal was justified in giving a direction that the disciplinary proceedings should be concluded in a time bound manner."

The said W.P. is still pending. The R.A. was filed only on 18.10.2010. When High Court has taken cognizance of the matter and issued the order supra, there was absolutely no need to have filed this R.A. The issues sought to be raised in review now, could have been and should have been raised before the Hon'ble High Court in the Writ Petition. This is in accordance with Order XLVII Rule 2 of the Code of Civil Procedure, 1908, which reads thus:

> "(2) A party who is not appealing from a decree or order may apply for a review of judgment

> notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review."

12. We do not find any merit in the grounds raised by the Review Applicant. In fact, the respondent State Government which may find it difficult to implement the direction of the Full Bench has not taken recourse to filing any review of the order. We do not find any room for prejudice to the Applicant.

13. We are not discussing the various judgements cited by the learned senior counsel mentioned in paragraph 6 above because it would unnecessarily burden this order, as we are of the considered opinion that those judgements do not advance the cause of the Review Applicant.

14. In this view of the matter, we do not find any merit in the R.A. It is accordingly dismissed on merit as well as on delay. No costs.

Dated 11.2.2011

V.2-ajay kumar

(V. Ajay Kumar)	(K. Noorjehan)	(L.K. Joshi)
Judicial Member	Administrative Member	Vice Chairman (A)

Kmn