IN THE HIGH COURT OF KARNATAKA AT BANGALORE

(ORIGINAL JURISDICTION)

WRIT PETITION NO.22801 OF 2014 (SER)

BETWEEN:
Dr.Smt.Mangala Sridhar

Petitioner/s

AND:
State of Karnataka And Anr. **Respondents/s**

List of Authorities relied upon by the Counsel for the Petitioner (K.V.Dhananjay and I.S.Pramod Chandra):

Constitution of India –
Article 315 – Status of Public Service Commissions under the Constitution
Article 316 – Appointment and term of office of members of PSCs
Article 317 – Removal and suspension of a member of a PSC / specifically, Article 317(2) – "*...in respect of whom a reference has been made to the Supreme Court…"*

A Court of law must gather the spirit of the Constitution from the language used therein and what one may believe to be the spirit of the Constitution cannot prevail if not supported by its language:

Constitutional Law of India – A Critical Commentary – Fourth Edition – H.M.Seervai – Universal, 1999 – Volume 1	Chapter – II – Entire opening page – Preface, 2.1 and 2.2
Indian Constitutional Law – M.P.Jain – Fifth Edition, 2003 – Volume 2	Pg. 1849 – d
Supreme Court - Keshavan Madhava Menon – State of Bombay - AIR 1951 SC 128 – Constitution Bench	Pg.129 – para (5) – *An argument…..support that view*
Key to Supreme Court judgments (1950-2008), AIR, Nagpur	Pg.9 – *Keshavan v. State of Bombay* (AIR 1951 SC 128) never doubted, diluted or dissented from
Supreme Court - State of Rajasthan v. Leela Jain - AIR 1965 SC 1296 – Unless the words give no meaning, words in a statute are not to be rejected in favour of a notion of alternative policy or better reason.	Pg.1296 – Headnote a) – *Unless the words…long title* Pg.1299 – para 11 – *With due respect….or long title* Pg.1300–1301 – para 16 – *It is, no doubt…on that ground*

Well-established rules of interpretation require that the meaning and intention of the framers of the Constitution must be ascertained from the language of that Constitution itself:

Maxwell on The Interpretation of Statutes, Twelfth Edition, Lexis Nexis	Pg.1–2 - *Lord Greene M.R …..hands of Parliament* Pg.28 – *The safer…make the law* Pg.29 – *Where the language ….to others*

Principles of Statutory Interpretation – Sri G.P.Singh – Tenth Edition, 2006	Pg.11–12 - *In all ….underlying the statute* Pg.47-48 – *When the words…policy of the Act*

Technical meaning of the words "*has been made*" is no different from the common meaning of those words:

Stroud's Judicial Dictionary of Words and Phrases – Seventh Edition – 2008 – Volume 2 – F-O	Pg.1175 – Generally - **Has**, **Have** Pg.1176 – *Has Been – Hath been construed…continuous fact* Pg.1579 – Generally – **Made** Pg.1579 – *An order…Ch.D.326* Pg.1580–1581 - *Application is made…3 PLR 121* Pg.1581 – *Made within the context ….brought into existence* Pg.1581 – *Made in connection with….Crim LR 866*
KJ Aiyer's Judicial Dictionary – Fourteenth Edition – Lexis Nexis	Pg.501 – Generally – Has Been Pg.502 – Generally – Has Been - denote a past event

The power to suspend a member of a State PSC is exercisable by the Governor under Article 317(2) only after a reference has been made by the President to the Supreme Court under Article 317(1)

High Court of Patna – Shiva Balak Choudhary v. State of Bihar – LPA No.385 of 2008 – 03-Jul-2008 – Division Bench (R.M.Lodha, CJ And Kishore K.Mandal J)	Pg.1 – Facts – *appellant no.1…Case no.1 of 2007* Pg.2 – paras 2, 3, 4 Pg.2 – para 5 – *Mr.Naresh Dikshit…bad in law* Pg.3 – para 7 Pg.4 – para 8 in full - Specifically (*…The power of suspension is exercisable only after the reference has been made…*)
High Court of Patna – Dr.Ram Ashray Yadav v. State of Bihar – Civil Writ 1297 of 1997 – 03-Oct-1997 – (A.K.Ganguly, J)	Pg.1 – paras 1, 2, 3 Pg.1 – para 4 – *The petitioner's…cannot be sustained* Pg.1-2 – para 7 Pg.2-3 – para 8, para 13 and 14 (*No requirement that the Governor should act only on the advice of council of ministers*) Also, (*14. The order of suspension under Art.317(2) of the Constitution is consequential to a reference under Art.317(1) by the President of India…*)
The question did not arise	However, Pg.382 – paras 12, 13

directly in the judgment of the Supreme Court in the case of Ram Kumar Kashyap v. Union of India (2009) 9 SCC 378 – (K.G.Balakrishnan, C.J., P.Sathasivam and J.M.Panchal,JJ)	Similarly, this question did not arise in a reference decision of the Supreme Court cited by the Respondents. So the statement in the said decision that a suspension after the Governor has communicated to the President is presumed to have been made by complying with the applicable statutory provision – after the President had made a reference to the Supreme Court. It is an elementary principle of law that *"it is words in statutes alone that are to be construed and not the words in a judgment"*.

Article 361 does not bar a judicial challenge to the actions of a Governor when alleged to contravene a constitutional provision or requirement:

Supreme Court – B.R.Kapur v. State of Tamil Nadu – (2001) 7 SCC 231 – Constitution Bench	Pg.281–282 – Facts – paras 1 to 9 Pg.300-301 – paras 48,49,50, 51 Pg.302–303 para 54, 58, 59
Supreme Court – Rameshwar Prasad v. Union of India – AIR 2006 SC 980 – Constitution Bench	Pg.988 – paras 1,2 Pg.990 – paras 13,14,15 Pg.995 – para 20 and 20(4) Pg.1001 – para 52 Pg.1007 – para 85 Pg.1026 – para 136 specifically *(…Clearly, the Governor has misled the Council of Minister…*) Pg.1034 – 1035 - point No.4. (2 lines) and para 166 *(…The personal immunity from….file an affidavit)* Pg.1036 – paras 170, 171, 172 (*The immunity granted by Article 361(1) does not, however, take away the power of the Court to examine the validity of the action including on the ground of malafides*)
Bombay High Court – State v. Kawas Manekshar Nanavati – AIR 1960 Bom 502 – 30-Mar-1960 - Constitution Bench	Headnote (b) Pg.505 – para 7 - *Article 161….conformity with it*. (please note that the opening argument of counsel merges with the observation of the Court)

An order affecting employment of a public servant passed in violation of the Constitution is inoperative and void from the very beginning and has no legal effect whatsoever:

Madhya Pradesh High Court – Union of India v. P.V.Jagannath Rao – AIR 1968 MP 204 – (T.C.Shrivastava and G.P.Singh, JJ)	Pg.205–206 - para 1 - *…It was found…Government of India Act, 1935…* Para 3, 4 (*It is thus clear….superfluous*)

Denial to be specific or else, allegation is deemed to be admitted:

Delhi High Court – Asha Kapoor v. Hari Om Sharda – (2010) 171 DLT 743 – (V.B.Gupta, J)	Pg.744-746 – paras 13 to 20

Prerogative of the Government to deal with a public servant yields to specific and express constitutional limitations made in respect of such class of public servants:

Federal Court – Punjab Province v. Tara Chand – AIR 1947 FC 23 – (Spens C.J., Zafrulla Khan and Kania JJ)	Pg.26–27 paras 14 to 16

Members of a Public Service Commission are subject to a relatively greater constitutional protection and cannot be dealt with otherwise:

Supreme Court – Mehar Singh Saini v. Haryana Public Service Commission – (2010) 13 SCC 586 – (S.H.Kapadia, C.J., K.S.P.Radhakrishnan and Swatanter Kumar, JJ)	Pg.599 – para 5 Pg.603-604 – para 14 and 15 (first three lines, pls see the date) Pg.611-612 – para 29 (first three lines), para 31 Pg.615 – para 40 (*The purpose of Article 317(1)…will of Parliament*) Pg.650-651 – paras 151, 152 (a reference proceeding is independent of the underlying criminal proceeding, if any)

Date: 22-Jul-2014
Place: Bangalore

Advocates for Petitioner
K.V.DHANANJAY AND I.S.PRAMOD CHANDRA

IN THE HIGH COURT OF KARNATAKA AT BANGALORE
(ORIGINAL JURISDICTION)
WRIT PETITION NO.22801 OF 2014 (SER)

BETWEEN:
Dr.Smt.Mangala Sridhar **Petitioner/s**
AND:
State of Karnataka And Anr. **Respondents/s**

WRITTEN ARGUMENT OF THE COUNSEL FOR THE PETITIONER (K.V.DHANANJAY AND I.S.PRAMOD CHANDRA)

The controversy before this Hon'ble Court rests on a very narrow compass. *Article 317(2)* of the *Constitution* provides that the Governor may suspend a member of the State Public Service Commission only after the President has made a reference to the Supreme Court in respect of such person's alleged misbehavior. Despite such a mandatory pre-condition, the Governor has ignored the same in the instant case and has suspended the petitioner who is a member of the Karnataka State Public Service Commission. Therefore, the order of the Governor purporting to suspend the petitioner while acting under *Article 317(2)* is constitutionally infirm and is bound to be struck down by this Hon'ble Court on that short ground.

The Public Service Commissions established in pursuance of *Article 315* are clearly accorded a constitutional status. Consequently, the various protections that have been conferred upon members of such bodies in the subsequent provisions of the *Constitution* are required to be mandatorily observed by those cast with the duty of such observance.

Although the Governor of a State is conferred with the power to appoint a member of the State Public Service Commission, *Article 317* of the *Constitution* vests in the President, the exclusive power to remove such person and correspondingly, the Governor has been divested of any power to remove the Chairman or members of a State Public Service Commission. *Article 317(1)* of the *Constitution* expressly limits the power of the President to remove a member of the Union Public Service Commission or of the State Public Service Commission only to those cases wherein he has made a reference to the Supreme Court in relation to the alleged misbehavior of such a member and the Supreme Court has, upon such a reference, reached an opinion that the member in question deserves to be removed from office on the ground of such misbehavior.

Article 317(2) of the *Constitution* provides a limited form of authority to the Governor of a State to suspend a member of the State Public Service Commission only after the President has made a reference to the Supreme Court in respect of such a member in terms of *Article 317(1)*. This position is clearly borne out by the plain language of both the *Articles 317(1) and 317(2).*

The crucial phrase for the purpose of this Writ Petition is that contained in *Article 317(2)* which reads as: ***"…in respect of whom a reference has been made to the Supreme Court…"***

Accordingly, there can be no manner of doubt over the proper meaning of the language contained in *Article 317(2)*. In the instant case, it is not in dispute that the Governor has purported to act in exercise of authority conferred upon him under *Article 317(2)* of the *Constitution.* The impugned order unequivocally says: (Annexure B, Pg.21-22 of the Writ Petition)

> *"NOW, therefore, I, Hansraj Bharadwaj, Governor of Karnataka, in exercise of the powers vested in me under clause (2) of Article 317 of the Constitution of India do hereby suspend Dr.Mangala Sridhar from office of the member of Karnataka Public Service Commission with immediate effect and until an order is passed by the Hon'ble President".*

The only question that arises for the consideration of this Hon'ble Court under the aforesaid circumstances is whether there was any reference from the President to the Supreme Court of

India in respect of the alleged misbehavior of the petitioner. In answer to the said question, the counsel for the Petitioner submits that the impugned order makes no reference whatsoever to there being any reference from the President to the Supreme Court. This does raise a strong presumption that there was in fact, no such reference from the President to the Supreme Court.

Also, the counsel for the Petitioners have made specific enquiries at the office of the Supreme Court registry and have been informed, as of 18-July-2014, that no such reference has been filed in it by the office of the President in respect of the name of Dr. Mangala Sridhar, the petitioner herein.

As such, in view of the inescapable conclusion that as on the date of passage of the impugned order, there simply was no reference from the President to the Supreme Court in respect of the Petitioner and even thereafter, as of this day, there has been no such reference from the President to the Supreme Court, the impugned order is bound to be considered as having been made in express violation of the pre-condition mandated by *Article 317(2)*. The impugned order is, therefore, liable to be set aside.

Further, the impugned order does state that the order of suspension shall be valid until an order is passed by the President and in the facts and circumstances of this case, the President is under no constitutional obligation to pass any order at all on the communication he has received from the Governor if only he would choose to not make any reference to the Supreme Court and he may very well, in the facts of this case, choose to not make any such reference at all to the Supreme Court and this aspect alone would render the impugned order of suspension as being made for an open-ended length of time and that too in respect of a constitutional functionary whose term is limited to a fixed tenure of 6 years only. For this additional reason, the impugned order further renders itself wholly unsustainable in law.

Article 361 of the *Constitution* merely provides for personal immunity to a Governor and the said provision is not capable of being even remotely construed as conferring any immunity to the actions of the Governor. A provision in a statute that merely confers personal immunity upon a holder of certain office does not also confer any immunity from judicial challenge to the actions of such an office-holder as the two aspects are separate and distinct from each other and the latter proposition may only follow if modern statutes are considered to be a 'logical code' and it is an elementary principle of statute law that statutes are never to be read as 'logical codes'.

It has been too well established in our country that our Constitution incorporates the principle of 'Rule of Law' and not of any 'Rule of Men'. Therefore, it would be wholly opposed to the 'rule of law' to claim that the actions of a Governor even when shown to be contrary to the *Constitution* are wholly beyond the scope of judicial review merely by reason of the personal immunity conferred by *Article 361* of the *Constitution.* Moreover, the established law leaves no manner of doubt over the legality of judicial review in respect of decisions and actions of a Governor whenever it is alleged that such decisions or actions breach one or more constitutional requirements.

There is absolutely no discretion vested in the Governor to disregard an express mandate of the *Constitution.* There is a precondition for the exercise by the Governor of power taken in the name of *Article 317(2)* of the *Constitution.* It is an elementary aspect of administrative law that discretion presupposes the existence of a power to act. When applied in the context of a written constitution, this rule is even more fortified than when applied to the realm of a 'prerogative'. Where there is a lack of power or jurisdiction to do a thing, there exists no discretion whatsoever to do that very thing and the position of the Governor in the instant case is such that he had not the power to suspend the petitioner in view of there being no reference from the President to the Supreme Court. Therefore, there was simply no occasion for him to exercise any discretion whatsoever in such a matter where he completely lacked the power to act in the very first place. The decision of the Governor to suspend the Petitioner from discharging her services as a member of the Karnataka Public Service Commission is therefore, not an exercise of any

discretion conferred upon him as the very question of discretion would not arise where it is clearly seen that he had principally lacked the very power to suspend the petitioner in view of the absence of any reference from the President to the Supreme Court. As such, any argument of there being any manner of discretion in the Governor to do as he pleased under the circumstances of this case is wholly without any merit whatsoever.

The Petitioner would completely deny all the charges leveled against her and would state that she is fully innocent of the crimes that have been alleged against her. The petitioner further states that the charges against her are baseless and have no legal merit and would not hold up in any court of law. Though the charges against the petitioner would appear to be serious on its face, the same would not furnish any basis to the Governor to disregard the express mandate of *Article 317(2)* of the *Constitution* and to proceed to suspend her even when he is fully aware that the President had not made any reference to the Supreme Court.

Date: 22-Jul-2014
Place: Bangalore

Advocates for Petitioner
K.V.DHANANJAY AND I.S.PRAMOD CHANDRA

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

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BETWEEN:
Dr.Smt.Mangala Sridhar **Petitioner/s**

AND:

State of Karnataka And Anr. **Respondents/s**

WRITTEN ARGUMENT OF THE COUNSEL FOR THE PETITIONER (EXTENDED)
(K.V.DHANANJAY AND I.S.PRAMOD CHANDRA)

The controversy before this Hon'ble Court rests on a very narrow compass. *Article 317(2)* of the *Constitution* provides that the Governor may suspend a member of the State Public Service Commission only after the President has made a reference to the Supreme Court in respect of such person's alleged misbehaviour. Despite such a mandatory pre-condition, the Governor has ignored the same in the instant case and has suspended the petitioner who is a member of the Karnataka State Public Service Commission. Therefore, the order of the Governor purporting to suspend the petitioner while acting under *Article 317(2)* is constitutionally infirm and is bound to be struck down by this Hon'ble Court on that short ground.

The petitioner is a member of the Karnataka State Public Service Commission and the same is not in dispute. *Article 315* of the *Constitution* provides for the compulsory establishment of a Union Public Service Commission for the Union and a State Public Service Commission for each of the States and a Joint Public Service Commission for two or more states. Thereby, the Public Service Commissions established in pursuance of *Article 315* are clearly accorded a constitutional status. Consequently, the various protections that have been conferred upon members of such bodies in the subsequent provisions of the *Constitution* are required to be mandatorily observed by those cast with the duty of such observance. *Article 316* of the Constitution confers upon the President, the power to appoint the Chairman and members of the Union Public Service Commission and the Joint Public Service Commission whereas the power to appoint the Chairman and members of a State Public Service Commission has been conferred upon the Governor of a State. Accordingly, the Governor of Karnataka had appointed the petitioner, Smt. Dr. Mangala Sridhar as a member of the Karnataka Public Service Commission on 31-May-2012 (Annexure A, pg. 20 of the Writ Petition).

Although the Governor of a State is conferred with the power to appoint a member of the State Public Service Commission, *Article 317* of the *Constitution* vests in the President, the exclusive power to remove such person and correspondingly, the Governor has been divested of any power to remove the Chairman or members of a State Public Service Commission. In other words, the power to remove a member of the State Public Service Commission has been divested from the Governor though he is in fact, the appointing authority in respect of such a person. Moreover, *Article 317(1)* of the *Constitution* expressly limits the power of the President to remove a member of the Union Public Service Commission or of the State Public Service Commission only to those cases wherein he has made a reference to the Supreme Court in relation to the alleged misbehaviour of such a member and the Supreme Court has, upon such a reference, reached an opinion that the member in question deserves to be removed from office on the ground of such misbehaviour.

Article 317(2) of the *Constitution* provides a limited form of authority to the Governor of a State to suspend a member of the State Public Service Commission only after the President has made a reference to the Supreme Court in respect of such a member in terms of *Article 317(1).* This

position is clearly borne out by the plain language of both the *Articles 317(1)* and *317(2)*. The same read as under:

> **317. Removal and suspension of a member of a Public Service Commission**
>
> *(1) Subject to the provisions of clause (3), the Chairman or any other member of a Public Service Commission shall only be removed from his office by order of the President on the ground of misbehaviour after the Supreme Court, on reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed in that behalf under article 145, reported that the Chairman or such other member, as the case may be, ought on any such ground to be removed.*
>
> *(2) The President, in case of the Union Commission or a Joint Commission, and the Governor in the case of a State Commission, may suspend from office the Chairman or any other member of the Commission in respect of whom a reference has been made to the Supreme Court under clause (1) until the President has passed orders on receipt of the report of the Supreme Court on such reference.*

The crucial phrase for the purpose of this Writ Petition is that contained in *Article 317(2)* which reads as: ***"…in respect of whom a reference has been made to the Supreme Court…"***

Accordingly, there can be no manner of doubt over the proper meaning of the language contained in *Article 317(2)*. In the instant case, it is not in dispute that the Governor has purported to act in exercise of authority conferred upon him under *Article 317(2)* of the *Constitution*. The impugned order unequivocally says: (Annexure B, Pg.21-22 of the Writ Petition)

> *"NOW, therefore, I, Hansraj Bharadwaj, Governor of Karnataka, in exercise of the powers vested in me under clause (2) of Article 317 of the Constitution of India do hereby suspend Dr.Mangala Sridhar from office of the member of Karnataka Public Service Commission with immediate effect and until an order is passed by the Hon'ble President".*

The only question that arises for the consideration of this Hon'ble Court under the aforesaid circumstances is whether there was any reference from the President to the Supreme Court of India in respect of the alleged misbehaviour of the petitioner. In answer to the said question, the counsel for the Petitioner submits that:

The impugned order makes no reference whatsoever to there being any reference from the President to the Supreme Court. This does raise a strong presumption that there was in fact, no such reference from the President to the Supreme Court.

The statement of objection that has been filed by the Government of Karnataka does not rebut the principal allegation of the petitioner that there was in fact, no such reference from the President to the Supreme Court. It may be noted that the first and the foremost objection in the Writ Petition concerns the absence of a reference from the President to the Supreme Court (Pg.12 of the Writ Petition). This allegation has not been refuted in any manner in the 'statement of objection' filed by the Government of Karnataka on 11-Jun-2014. What however has been denied is that such a reference is a pre-condition for any order of suspension. In terms of *Order 8*, *Rules 3* to *5* of the *Code of Civil Procedure, 1908* that allows a Court to infer an admission in the absence of a specific denial in response to a specific allegation, the lack of refutation about there being any such reference from the President to the Supreme Court should be deemed to be an admission by the respondent.

Also, the counsel for the Petitioners have made specific enquiries at the office of the Supreme Court registry and have been informed, as of 18-July-2014, that no such reference has been filed in it by the office of the President in respect of the name of Dr. Mangala Sreedhar, the petitioner herein.

As such, in view of the inescapable conclusion that as on the date of passage of the impugned order, there simply was no reference from the President to the Supreme Court in respect of the

Petitioner and even thereafter, as of this day, there has been no such reference from the President to the Supreme Court, the impugned order is bound to be considered as having been made in express violation of the pre-condition mandated by *Article 317(2)*. The impugned order is, therefore, liable to be set aside.

Further, the impugned order does state that the order of suspension shall be valid until an order is passed by the President and in the facts and circumstances of this case, the President is under no constitutional obligation to pass any order at all on the communication he has received from the Governor if only he would choose to not make any reference to the Supreme Court and he may very well, in the facts of this case, choose to not make any such reference at all to the Supreme Court and this aspect alone would render the impugned order of suspension as being made for an open-ended length of time and that too in respect of a constitutional functionary whose term is limited to a fixed tenure of 6 years only. For this additional reason, the impugned order further renders itself wholly unsustainable in law.

Response to the various arguments of the Government of Karnataka:

Argument of the Government: The actions of the Governor cannot be called into question before this Hon'ble Court in view of the immunity conferred upon his office by virtue of *Article 361* of the *Constitution*.

Response of the Petitioner's Counsel: *Article 361* of the *Constitution* merely provides for personal immunity to a Governor and the said provision is not capable of being even remotely construed as conferring any immunity to the actions of the Governor. A provision in a statute that merely confers personal immunity upon a holder of certain office does not also confer any immunity from judicial challenge to the actions of such an office-holder as the two aspects are separate and distinct from each other and the latter proposition may only follow if modern statutes are considered to be a 'logical code' and it is an elementary principle of statute law that statutes are never to be read as 'logical codes'.

It has been too well established in our country that our *Constitution* incorporates the principle of 'Rule of Law' and not of any 'Rule of Men'. Therefore, it would be wholly opposed to the 'rule of law' to claim that the actions of a Governor even when shown to be contrary to the *Constitution* are wholly beyond the scope of judicial review merely by reason of the personal immunity conferred by *Article 361* of the *Constitution*. All that *Article 361* bars a court from doing is to compel a Governor to furnish an answer to that court on any allegation touching upon any action or conduct of the Governor. By reason of such immunity, the duty to defend the actions of a Governor in a court of law would alternatively fall upon the Government of the State where the State could be considered to be principally interested in defending the decision of the Governor. As such, there can be no quarrel over the established law that nothing in *Article 361* bars the institution or adjudication of this petition before this Hon'ble Court. Further, there is no support to be had from the language of *Article 361* itself to say that the actions of the Governor are beyond the pale of judicial review. *Article 361(1)* reads as under:

> ***361. Protection of President and Governors and Rajpramukhs***
> *(1) The President, or the Governor or Rajpramukh of a State, shall not be answerable to any court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties:*
> *Provided that the conduct of the President may be brought under review by any court, tribunal or body appointed or designated by either House of Parliament for the investigation of a charge under Article 61:*
> *Provided further that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Governor of India or the Government of a State*

A natural question that would follow a reading of the first few lines in *Article 361(1)* is – *"If the Governor is to have personal immunity in respect of his actions, who then should be arrayed in a court of law to defend his decisions if the same are shown to be contrary to the Constitution"?* It is precisely to answer such an obvious question that is simply bound to arise the moment the *Constitution* is seen to have conferred personal immunity upon the Governor that the concluding part of *Article 361(1)* has provided a ready guidance that it would be the Government of the State or the Central Government that could be considered to be legally interested in defending the actions of the Governor on the ground of violation of a constitutional requirement. The concluding lines in *Article 361* would lose all meaning if an answer is not seen in those lines as in above. In other words, even when one merely falls back upon the plain language of *Article 361(1)* without relying upon any judicial decision on that subject, one is bound to notice that there is no indication whatsoever in it that is even remotely capable of being construed as a bar to judicial review of the actions of a Governor.

Moreover, the established law leaves no manner of doubt over the legality of judicial review in respect of decisions and actions of a Governor whenever it is alleged that such decisions or actions breach one or more constitutional requirements. Also, even in the specific facts and circumstances of this case, in order to answer the question whether there was any reference by the President to the Supreme Court on 14-May-2014 (the date of the impugned order), this Hon'ble Court could simply direct its own registry to correspond with the registry of the Supreme Court with a view to find out whether there has been any such reference from the President to the Supreme Court. However, this course of action is being stated only for the purpose of impressing upon this Hon'ble Court that a court may decide on how far the decision of a Governor purporting to be made in pursuance of the constitutional provision is in accordance with the *Constitution* even without drawing any assistance from both parties to the case, although such a course of action is simply unnecessary in the specific facts of this case and the fact of there being no reference from the President to the Supreme Court ought to be established to the satisfaction of a judicial mind.

Argument of the Government: The Governor is well within his discretion to have suspended the petitioner from discharging her services as a member of the Karnataka Public Service Commission. This discretion is absolute and cannot be challenged in any court of law, even assuming that the actions of the Governor are open to judicial review.

Response of the Petitioner's Counsel: There is absolutely no such discretion vested in the Governor to disregard an express mandate of the *Constitution*. There is a precondition for the exercise by the Governor of power taken in the name of *Article 317(2)* of the *Constitution*. It is an elementary aspect of administrative law that discretion presupposes the existence of a power to act. When applied in the context of a written constitution, this rule is even more fortified than when applied to the realm of a 'prerogative'. Where there is a lack of power or jurisdiction to do a thing, there exists no discretion whatsoever to do that very thing and the position of the Governor in the instant case is such that he had not the power to suspend the petitioner in view of there being no reference from the President to the Supreme Court. Therefore, there was simply no occasion for him to exercise any discretion whatsoever in such a matter where he completely lacked the power to act in the very first place. The decision of the Governor to suspend the Petitioner from discharging her services as a member of the Karnataka Public Service Commission is therefore, not an exercise of any discretion conferred upon him as the very question of discretion would not arise where it is clearly seen that he had principally lacked the very power to suspend the petitioner in view of the absence of any reference from the President to the Supreme Court. As such, any argument of there being any manner of discretion in the Governor to do as he pleased under the circumstances of this case is wholly without any merit whatsoever.

Argument of the Government: The petitioner has engaged in massive corruption and that it was only proper and necessary for the Governor to have suspended her services as a member of the

Karnataka Public Service Commission in view of the grave charges made out against the petitioner.

Response of the Petitioner's Counsel: The Petitioner would completely deny all the charges leveled against her and would state that she is fully innocent of the crimes that have been alleged against her. The petitioner further states that the charges against her are baseless and have no legal merit and would not hold up in any court of law.

The Counsel for the petitioner would state that this Hon'ble Court is not called upon to decide on whether the petitioner is indeed corrupt to the extent that has been alleged against her. Though the charges against the petitioner would appear to be serious on its face, the same would not furnish any basis to the Governor to disregard the express mandate of *Article 317(2)* of the *Constitution* and to proceed to suspend her even when he is fully aware that the President had not made any reference to the Supreme Court. It is too well established that where the *Constitution* mandates that a precondition be satisfied before any further step is taken thereupon, that further step can only be taken subject to the observance of the precondition and the *Constitution* cannot now be re-read by the office of the Governor merely because in their view, the petitioner is seen to be highly corrupt. It is simply not enough for the Governor to form a satisfaction that the petitioner is corrupt in order to decide to invoke power under *Article 317(2)* of the *Constitution*. Something more must have happened. Even if both the Governor as well as the State Government were of the honest impression that the petitioner was gravely corrupt and did not deserve to continue as a member of the Karnataka Public Service Commission, that determination would simply not be enough for the Governor to override the express mandate of *Article 317(2)*.

The protection to a member of the Public Service Commission as enshrined in *Article 317* would count for nothing if the State Government or the Governor would be free to introduce into that provision, considerations that do not exist at all in that provision. Further, there already is a very stringent anti-corruption statute in the form of the *Prevention of Corruption Act, 1988* and should the petitioner be thought to be guilty of the crimes that have been alleged against her and the Government thinks that a formal declaration from a competent court to that effect involves no difficulty whatsoever, it ought to have focused more towards prosecuting the petitioner for those alleged crimes rather than resorting to a re-designing of the *Constitution* of our country. There is nothing in the *Constitution* that provides any immunity to a member of a Public Service Commission from arrest or prosecution in respect of any penal offence and the State Government, acting through the police, was and continues to be competent to subject the petitioner to a trial under the provisions of the said statute after obtaining the requisite sanction in terms of *Section 19* therein. In other words, the first priority of the Government ought to have been to subject the petitioner to a trial and even possibly secure a conviction therefrom, if only it could, rather than resort to a far lesser punishment of suspension by depriving her of a constitutional protection. As such, there is simply no merit to the argument of the Government that the allegations of grave corruption against the petitioner do furnish a good enough excuse for the Governor to have suspended her from discharging her services as a member of the Karnataka Public Service Commission.

It should also be noted that if only the investigating agency had considered the arrest of the petitioner to have become necessary, the same would have been effected and the petitioner would have been hard pressed to obtain bail from a competent court had only the charges against her been as grave as alleged by the Government. Rather, the petitioner was never arrested by the investigating police and the petitioner continues to maintain that she is fully innocent of the crimes that have been alleged against her.

The grievance of the complainant is that she was extorted by the petitioner to pay a certain sum of money in return for a promise from the petitioner to award more marks and that, due to the refusal of the complainant to pay the petitioner any bribe at all, the complainant was awarded much less marks than she would have otherwise got. To begin with, the nature of the evidence

that has been marshaled against the petitioner trickles down merely to the word of the complainant and nothing more. The complainant in this case has much to explain on why she did take more than two months to lodge a complaint against the petitioner and even then, why she would not proceed to the designated police station but would instead approach a legal officer of this Hon'ble Court. The complainant, an aspirant to higher echelon of Government service, was bound to be aware of the existence of the institution of Lokayuktha and of the ready availability of trapping mechanism with the Lokayuktha and could have conveniently got the petitioner trapped if only she had a truthful case against the petitioner. The complainant did no such thing.

The central allegation of the complainant holds no substance whatsoever as the marks that came to be awarded to the complainant were not awarded at the sole discretion of the petitioner and that the petitioner was a member of a four person committee that went on to award the marks in question and the petitioner had no manner of influence or sway over the decision of her peers. The allegations against the petitioner suffer from such other grave infirmities and the petitioner would respectfully submit that the charges against her are not true and are fully likely to be disproved in a court of competent jurisdiction. Therefore, the counsel for the petitioner would submit that it would be futile for this Hon'ble Court to enter into the question of whether the charges against the petitioner are grave or not as this Hon'ble Court is in no position to give any finding either way and that there is simply no occasion for this Hon'ble Court to enter into the said issue for the purpose of deciding this particular case.

Argument of the Government: The Constitution should be interpreted in a purposive manner so as to weed out corruption and to prevent persons such as the petitioner from discharging services as a member of the Karnataka Public Service Commission.

Response of the Petitioner's Counsel: The principles that govern the interpretation of a written Constitution are too well established and the principles that govern the interpretation of our *Constitution* are not open to any doubt or disagreement. The corruption that the Government speaks about is merely an allegation and even if the Government had truly believed that the said allegation is too well founded, that belief is simply immaterial for the purpose of interpretation of our constitutional provisions. It would rather surprise right-thinking members of our society that the Government has assumed that the deterrent punishment for a person alleged to have committed corruption is a mere suspension from office when in fact the law contained in the *Prevention of Corruption Act could* not have been more stringent. The Government is not without a remedy and the Governor too was not without a remedy in this case and the Governor could have called upon the State Government to ensure speedy trial to the Petitioner and the Government could have readily hoped to secure the conviction of the Petitioner if only the charges against her were such as to be fully established in a court of law. In this view of a ready option that already was available to the State Government to isolate any public servant from discharge of official function once he or she is alleged of grave corruption crimes, the argument of the Government that in order to address increasing corruption, the Court must let the Governor to re-design of the *Constitution* is without any legal merit.

Further, the argument of the Government is also deeply flawed in the sense that the Government could not have made any such argument without first damagingly assuming that the President of the Union would not have the best interests of the State if he would not act on the representation made to him by the Governor. Such an argument is rather disruptive to the federal fabric of our *Constitution* as it could only stem from a deep distrust of the office of the President. This argument simply overlooks the various other constitutional provisions and in particular, that the tenure of the Governor is simply subject to the pleasure of the President and that in the very scheme and working of our Constitution, it would not be possible to make any reasoned argument that the Governor of a State is somehow more concerned about the welfare of that State whereas the President is not as much concerned as the Governor and due to such divergence, the interest of the State would suffer. Matters of administration often come down to the courage of conviction on the part of the administrator and the State Government has

numerous other options such as to write more often to the President, through the Governor, to ensure that his office accords greater attention to the file concerning the petitioner.

There are more than 200 countries in the world today and half of all of those countries have fully failed. The reason for such failure cannot be traced to their individual charters at all as a good number of those countries too have grand and well-defined constitutions. Rather, the reason for such failure of their Governments must be traced to the fact that those who were given the responsibility to enforce their constitution did not have the discipline to stick to the written word and the spirit that was to be gathered from the written word of their constitution. Therefore, the argument of the Government that the alleged corruption on the part of the petitioner does furnish to the Governor, the power that is explicitly opposed to what is contained in *Article 317(2)* of the Constitution must necessarily fail to pass every known constitutional test.

Argument of the Government: It is enough if the Governor would make a reference to the President and the making of such a reference itself is the starting point of the President's subsequent reference to the Supreme Court. In that view of the matter, mere forwarding of files by the Governor to the President itself should be construed as the making of a reference from the President to the Supreme Court.

Response of the Petitioner's Counsel: It would be difficult to imagine a more absurd argument than the one stated above. The President is the one who is to make a reference to the Supreme Court and it is not for the Governor to decide on such a reference. The role of the Governor, at the most, is to forward relevant materials for the consideration of the President and the satisfaction that must underlie the making of a reference to the Supreme Court is of the President only and not of the Governor. As such, it is for the President alone to decide whether to make a reference to the Supreme Court and the responsibility of the President in that regard is not jointly shared with the Governor.

In fact, the Governor is fully free to anticipate that the President would definitely make a reference to the Supreme Court but that freedom to anticipate does not give him the power to say that a reference is inevitably bound to be made by the President to the Supreme Court. Going further, even if there would be room in the given facts of a case for the Governor to be absolutely certain that the President would make a reference to the Supreme Court, the plain requirement of *Article 317(2)* is such that the decision by the Governor to suspend a member of the Public Service Commission must necessarily be preceded by an objective act of the President in making an actual and known reference to the Supreme Court. The words *"has been made"* are ordinary words of the English language and the common meaning of these words is no different than the technical meaning that these words have acquired through judicial pronouncements in different cases. A reference to the materials that have been cited by the counsel for the petitioner would show that the words *"has been made"* essentially mean that an objective past event must have occurred or that there must be a verifiable past event that has taken place. In the circumstances of this case, that past event is simply the *'reference by the President to the Supreme Court'*. Further, it is not even enough if the President has sent the reference to the Supreme Court but the same has not reached the registry of the Supreme Court. The words *"has been made"* mean that the President has forwarded a reference to the Supreme Court and the registry of the Supreme Court has received the reference in question. It is only upon such receipt of the reference by the Supreme Court would it be possible to affirm that *"there has been"* a reference from the President to the Supreme Court for the purpose of *Article 317(2)* of the *Constitution*.

Argument of the Government: *Article 317(2)* of the *Constitution* gives to the Governor of a State, the prerogative to suspend a member of the State Public Service Commission.

Response of the Petitioner's Counsel: The best interests of a State lie in due and scrupulous observance of the provisions of the *Constitution*. Where the *Constitution* imposes a precondition for the exercise by the Governor of a power to suspend a member of the State Public Service Commission, one could explore dozens of reasons why such a precondition was imposed in the

first place. Equally, one could also argue that the imposition of a pre-condition in the manner done by *Article 317(2)* is not productive of greater efficiency in the working of the Public Service Commissions. The task before this Hon'ble Court comes down to the interpretation of not just a statutory provision but of a constitutional provision. The task of such interpretation cannot be satisfactorily discharged if only this Hon'ble Court were to begin to ask whether the provision in question represents a good or worse policy. One may very well reason that the imposition of a precondition in *Article 317(2)* was not the best mode of ensuring efficiency in the working of a State Public Service Commission. Law making is not an exact science and it is always possible for reasonable men to disagree on what a prospective law should be. However, the dignity of a constitutional court would be gravely undermined should it begin to proclaim on what the *Constitution* should have been rather than expound on what the *Constitution* actually says. All the same, we do notice a number of reasons to say that the pre-condition laid down in *Article 317(2)* is the best means of ensuring protection to the members of a State Public Service Commission. So long as the task before this Hon'ble Court is limited to the exposition of the constitutional provision in question, there would simply be no room for the making of such argument by the Government notwithstanding that the Government has fervently taken the plea that the constitutional provision in question here should not receive its plain and literal interpretation and that this court should recognise a special power in the hands of the Governor to suspend a member of the State Public Service Commission. It remains only to be said that the task of interpretation before this court can never be satisfactorily discharged if the proposed meaning of the words in question is such as to do violence to the plain words contained in that provision.

It is too well settled that the task of interpretation would be highly unreliable and unsatisfactory if a court of law were to assign a meaning to words which those words are not capable of bearing and which meaning must necessarily do violence to the language contained in those words.

We have numerous arguments to make on why such a pre-condition is absolutely essential to ensure independence and protection to the members of the State Public Service Commission and arguments on both sides on the wisdom or otherwise of *Article 317(2)* are arguments that must necessarily border on speculation in view of the fact that this Hon'ble Court is not concerned with the giving of any decision on whether *Article 317(2)* represents a good or worse policy. Therefore, the argument of the Government that the Governor of a State must have a special power to suspend a member of the State Public Service Commission must necessarily fail when such power is exercised contrary to the plain meaning that the said provision is capable of bearing.

Argument of the Government: The President may take an inordinate amount of time to decide on a request of the Governor and such a delay may do substantial damage to the working of a State Public Service Commission if a patently corrupt member of such commission is allowed to function in office.

Response of the Petitioner's Counsel: The order of suspension was passed by the Governor on 14-May-2014 and as of this day, slightly more than two months have taken place since the date of the passage of the said order. It may be seen from a decision of the Supreme Court in *Meher Singh Saini v. Haryana Public Service Commission (2010) 12 SCC 586* that the request from the Governor to the President was made on 16-Jan-2007 and the President had proceeded to make a reference to the Supreme Court only a full 18 months later on 31-Jul-2008. Thereafter, the Supreme Court was pleased to consider the reference and to pass an order by stating that the member in question deserves to be removed from office in view of the fact that the misconduct alleged against such member came to be established to the satisfaction of the court. That very case will clearly illustrate that the President could take a greater amount of time to reflect on whether to make a reference or not and the steps taken thereafter could still achieve the true intent of *Articles 317(1)* and *317(2)*.

Moreover, it is to be noted from the record furnished by the Government to this Hon'ble Court that although the Governor had passed the order of suspension on 14-May-2014, there appears to be no satisfaction reached by the Hon'ble Governor himself that his communication to the President had already reached the President on that date before passing the order of suspension. It is to be noted that the office of the President has acknowledged only on 22-May-2014 that they came to receive the request of the Governor dated 14-May-2014. It would be open to argue under such circumstances that on the date that the Governor did pass the order of suspension, he might not even have been satisfied that the President was properly informed of the case against the petitioner. Such haste would be plainly detrimental to the working of our *Constitution*. At this juncture, it would also be necessary to note that the office of the Governor appears to have entertained grave ignorance over the actual meaning of *Article 317(2)* itself. The language employed in *Article 317(2)* could not have been more clear and it simply means that the Governor may consider suspending a member of the State Public Service Commission after he has learnt that the President has made a reference to the Supreme Court in regard to the alleged misbehaviour of such person. Despite such clarity of words in *Articles 317(1)* and *317(2)*, the Hon'ble Governor is seen to have passed an order stating that 'a reference should be made to the Supreme Court in respect of the petitioner's alleged misbehaviour'. This serious ignorance is readily evident in page 6 of the statement of objections filed by the Government of Karnataka wherein it has been said:

> *"...After examination of this case, I order that on the basis of the result of investigation against her, a reference under Article 317 be made to the Supreme Court and she may be placed under suspension pending reference and orders passed by the Supreme Court..."*

As may be seen from the aforesaid order passed by the Governor himself, his office appears to have entertained serious ignorance on the proper meaning of *Articles 317(1)* and *317(2)* and the Governor appears to have been informed that it is he who should be making a reference to the Supreme Court and therefore is competent to order for the making of such a reference to the Supreme Court. Such ignorance is truly unfortunate and the various arguments advanced by the Government of Karnataka before this Hon'ble Court similarly demonstrate grave ignorance of the proper interpretation of our *Constitution*. That the impugned order makes no mention whatsoever about any reference to the Supreme Court, it is only reasonable to assume that the Governor took that his prior direction that a reference be made to the Supreme Court will be automatically implemented by the State Government after the order of suspension came to be passed by him.

Argument of the Government: The court must interpret the Constitution for the purpose of curtailing the mischief shown to it and should draw guidance from the decisions of the Supreme Court in *Keshavananda Bharathi v. State of Kerala [AIR 1973 SC 1461]* and the judge's decision, *Supreme Court Advocates on Record Association v. Union of India (1993) 4 SCC 441* in order to uphold the order of suspension:

Response of the Petitioner's Counsel : The decision of the Hon'ble Supreme Court in the case of *Keshavananda Bharathi v. State of Kerala* is based on well-established principles of law wherein the court went on to hold that the power to amend the *Constitution* under *Article 368* was limited to preserving the basic structure of the *Constitution*. In saying so, the court was merely drawing from the well-established tenet of interpretation of a statute, the *'doctrine of implied prohibition'*. *Article 368* of the *Constitution* provides for a power to amend the provisions of the *Constitution*. Upon a plain reading of the said provision, there appears to be no limitation upon the power of amendment of the *Constitution* except to the extent explicitly stated therein. On that consideration, one could have very well stated that the open-ended nature of power conferred under *Article 368* was such as to allow to the legislature, the power to altogether abolish democracy and to reinstate it with an autocratic or a totalitarian form of Government. In fact, the argument of the Government of India does go that far in this case. The majority judgment simply reasoned that the power to amend the *Constitution* carried with it an implied limitation upon the extent of amendment that could be affected upon the *Constitution*. In other words, the court

reasoned that the power of the legislature to amend the *Constitution* was traceable to the very authorization conferred by *Article 368* and implied within the giving of such authorisation was that the legislature was not free to traverse beyond a point so as to arrogate to itself, the power to determine the ultimate nature of the amended *Constitution*. Therefore, the task of the court in that case was beset with the difficulty of identifying what precisely was the core of the *Constitution* that should remain immune from the conferred power of amendment. In order to answer the said question, the majority judgment went on to recognise certain basic features of the Constitution which it went on to hold is also the very core and that the power of amendment cannot reach to the core and that the core should remain immune from any amendment effected under *Article 368*. Therefore, the decision of the Supreme Court in the case of *Keshavananda Bharathi v. State of Kerala* did not involve any violence to the language of *Article 368* and that the meaning of *Article 368* was gathered not merely from the plain language therein but also with reference to various other factors and in the process of arriving at that final meaning, the court had done no violence to the actual words of *Article 368* and that the final meaning assigned to that provision had not strained the meaning that those words were capable of bearing.

Further, the Supreme Court did also recognise that its previous decisions that had gone on to hold that the power of amendment was not so limited had to be respected to the extent that the same were relied upon by the legislature in some cases and the court chose to give effect to the new judicial meaning of *Article 368* only prospectively and not retrospectively. Such a prospective meaning was very much in comport with the well-established principle of law that not even a legislation could retrospectively take away vested rights of the citizens and that judicial pronouncements that had the effect of upsetting the previous law could not have operated retrospectively without causing grave and unjustifiable injury to those who had relied upon those previous decisions of the court. Therefore, the counsel for the petitioners would submit that the petitioner in this case is entitled to the benefit of the law as it stood on 14-May-2014 and the right that was available to her as on that day was not merely a vested right but was also a constitutional right that deserves to be protected from any novel interpretation of the *Constitution* and that even if this Hon'ble Court is inclined to adopt a very novel interpretation of the *Constitution*, such an interpretation must necessarily respect the vested right and the constitutional right that had already accrued to the petitioner and that any such novel interpretation should not have the effect of frustrating the vested and constitutional right of the petitioner. Therefore, no worthwhile purpose would be served by relying upon the decision of the Hon'ble Supreme Court in the case of *Keshavananda Bharathi v. State of Kerala*.

In so far as the *judge's* case is concerned, it must be said that the decision therein is without a parallel and should be considered to be a judicial reaction to an extreme set of events that must necessarily be confined to the strict facts of that case and not as a guidance for future cases. The facts before the Hon'ble Supreme Court in that case were such as to show a drastic and reckless interference by the executive in the matter of appointment and transfer of judges of the High Court. There was unimpeachable evidence of the same before the court. The Hon'ble Supreme Court went on to take a purposive interpretation of certain words so as to meet extraordinary circumstances that had then threatened the judicial power of the country. Therefore, the decision of the Hon'ble Supreme Court in the *judge's* case cannot furnish any basis in the facts and circumstances of this case. There was stark evidence before the Supreme Court in that case which had warranted it to resort to such an unconventional interpretation of the *Constitution* and there is absolutely not the slightest indication let alone any evidence before this Hon'ble Court to call for any drastic interpretation of the relevant constitutional provisions involved in this case. As such, reliance on the *judge's* case must appear to be wholly misplaced in the specific facts and circumstances of this case. Also, the decision of the Supreme Court in the said *judge's* case was only prospective and had not the effect of upsetting past appointments and transfers. In and of itself, the said judgment should shed light on the fact that the case at hand is such that the interpretation sought by the Government cannot affect the vested and constitutional right of the petitioner and even if the Government could succeed somehow in persuading this Hon'ble Court to follow the example in the *judges* case, this Hon'ble Court would lack the judicial power to

retrospectively apply a proposed novel interpretation of our *Constitution* and that, at any rate, the vested and constitutional right of the petitioner is bound to be fully honored.

Further arguments of the Petitioner's Counsel: The impugned order is essentially void ab initio and is of no legal effect whatsoever and any declaration by this Hon'ble Court that the said order would be void ab-initio is a declaration that must readily be traced to the very date of the passage of the impugned order and not to the date on which such a declaration came to be made by this Hon'ble Court as the matter presents no difficulty of any kind to leave the actual status of the constitutional law on 14-May-2014 to be in any state of doubt whatsoever. And that the later declaration by this Court must necessarily relate back to the date of passage of the impugned order and accordingly, the petitioner is entitled to the full benefits and salaries that she would have received but for the said illegal suspension.

Date: 22-Jul-2014
Place: Bangalore

Advocates for Petitioner
K.V.DHANANJAY AND I.S.PRAMOD CHANDRA