S.S. DHANOA

v.

UNION OF INDIA AND ORS.

JULY 24, 1991

[M.H. KANIA AND P.B. SAWANT, JJ]

Constitution of India, 1950: Article 324. Election Commission—President's Notification—Determination of number and appointment of Election Commissioners—Rules providing tenure of 5 years or upto superannuation age of 65 years—Subsequent notification by President —Abolition of the post of Election Commissioners—Whether mala fide, whether affects independence of Election Commission—Material loss to incumbents—Whether exigency of employment—Flashing of photographs of Election Commissioners while announcing their removal on TV deprecated.

Election Commission—Salient features and composition of— Appointment of Chief Election Commissioner is obligatory—Appointment of other Election Commissioners is not obligatory—Commission's work should warrant appointment of other Election Commissioners— Distinction in service conditions and tenure of the Chief Election Commissioner and other Election Commissioners—What is—Chief Election Commissioner whether primus inter partes—Need for laying down the procedure for transacting the business of Election Commission emphasised.

Article 324(2) of the Constitution empowers the President to fix and appoint such number of Election Commissioners as he may from time to time determine. By a notification dated 7.10.1989 the President fixed the number of Election Commissioners at two. By another notification dated 16.10.89, the President appointed the petitioner and another person as Election Commissioners. Simultaneously, the President also promulgated the rules regulating the conditions of service and tenure of the Election Commissioners under which an Election Commissioner was to hold office for a term of five years or until he attained the age of 65 years whichever was earlier.

However, on 1st January, 1990, the President issued two notifications rescinding the earlier two notifications dated 7.10.89 and 16.10.89. Consequently, the two posts of Election Commissioners were abolished and the appointment of the petitioner and the other Election Commissioner came to an end.

A The petitioner filed a writ petition in this Court challenging the legality of the notifications dated 1st January, 1990 contending that: (a) the Election Commission being an independent body, the abolition of the posts of Election Commissioners and their consequent removal tampered with the independence of the Election Commission directly or indirectly; (b) in view of the service rules made by the President the B Election Commissioners were entitled to continue in office for full tenure of five years or until they attained the age of 65 years whichever was earlier; (c) the notification abolishing the two posts and removing the petitioner and the other Election Commissioner were issued *mala fide* under the advice of the Chief Election Commissioner; (d) Petitioner's removal affected him materially; and (e) the C flashing of the photographs of the petitioner and other Election Commissioner while announcing their removal on the television during a news bulletin subjected them to severe loss of dignity and reputation.

Dismissing the petition, this Court,

D HELD: 1. The Election Commission as envisaged by the Constitution is an independent institution and has to function as such. In the discharge of its duties and functions it is not amenable to the control of any other body. The salient features of the composition of the Election Commission as given in Article 324 are that the Commission shall always consist of a permanent incumbent, viz. the Chief Election Com- E missioner. But the President has also been given the power to appoint such number of other Election Commissioners as he may, from time to time, fix. While the appointment of the Chief Election Commissioner is a must, the appointment of the other Election Commissioner or Commissioners is not obligatory. The number of other Election Commissioners is left to the discretion of the President depending upon the need F felt from time to time. [169A-B-C]

1.1 However, in the matter of the conditions of service and tenure of office of the Election Commissioners, a distinction is made between the Chief Election Commissioner on the one hand and Election Commissioners and Regional Commissioners on the other. Whereas the con- G ditions of service and tenure of office of all are to be such as the President may, by rule determine, a protection is given to the Chief Election Commissioner in that his conditions of service shall not be varied to his disadvantage after his appointment, and he shall not be removed from his office except in like manner and on the like grounds as a judge of the Supreme Court. These protections are not available either to the Elec- H tion Commissioners or to the Regional Commissioners. Their conditions

of service can be varied even to their disadvantage after their appointment and they can be removed on the recommendation of the Chief Election Commissioner, although not otherwise. Thus in these two respects not only the Election Commissioners are not on par with the Chief Election Commissioner, but they are also placed on par with the Regional Commissioners although the former constitute the Commission and the latter do not and are only appointed to assist the Commission. [169H, 170A-B-C] A B

Article 324(4) though spells out the relationship between Election Commission and Regional Commissioners does not help to throw light on the relationship between the Chief Election Commissioner and Election Commissioners *inter se.* The fact that the Regional Commissioners are to be appointed by the President in consultation with the Commission to asist the Commission to perform its functions, though places the Election Commissioners on a higher pedestal than the Regional Commissioners does not raise them to the status of the Chief Election Commissioner. The Chief Election Commissioner does not, therefore, appear to be *primus inter partes,* i.e. first among the equals, but is intended to be placed in a distinctly higher position. Therefore, it cannot be held that the Election Commissioners have the same powers and the authority as the Chief Election Commissioner, and it may well be that the Chief Election Commissioner has the power to disregard and override the views of the Election Commissioners the abolition of their posts therefore least infringed on the independence of the Commission. [175B, 174H, 175A, 170E, 180B] C D E

1.2 The petitioner and the other Election Commissioners were appointed when the work of the Commission did not warrant their appointment. It is evident from record that the then Government had thought it fit to make the two appointments although there was no need to do so. What other considerations weighed with the then Government in making the appointment is anybody's guess, and the Court does not propose to go into them. However, it was expected that the Union of India would candidly admit the initial mistake of making the said appointments rather than defend them on non-existent grounds. Not only there was no need for the said appointments, but also the appointments in the absence of the definition of their roles in the Commission were creating an untoward and unworkable situation rendering the Commission internally torn and ineffectual in its functioning. Thus the manner of appointment of the Election Commissioners and the attitude adopted by them in the discharge of their functions was hardly calculated to ensure free and independent functioning of the Commission, much less its smooth working. [175E, 179C-D, E, 178C] F G H

A 1.2.1 In view of the fact that there was no need for the posts of the Election Commissioners at the time the appointments were made and that in the absence of a clear definition of their role in the Commission, particularly, vis-a-vis the Chief Election Commissioner, the appointments were an oddity, the abolition of the posts far from striking at the independence of the Commission paved the way for its smooth and
B effective functioning. [179H, 180A]

2. The instant case is not a case of a premature termination of service. It is a clear case of the abolition of posts and the termination of the service is a consequence thereof. Hence the termination of service is not open to challenge on the ground of any illegality. [180D-E]

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3. The allegations of *mala fides* against the Chief Election Commissioner are hard to accept. The removal of the Election Commissioners was not on the recommendations of the Chief Election Commissioner under the 2nd proviso to clause (5) of the Article 324. Nothing has been brought on record to show that even otherwise the Govern-
D ment while abolishing the posts had acted on the suggestion of the Chief Election Commissioner. On the other hand, the records shows that although there were bickerings even on petty issues, all the decisions were taken ultimately unanimously. It is, however, another thing that this unison in working, in the circumstances, could not have been guaranteed for all time to come, and the Government if they desired the
E continuance of the two Commissioners had an option to make the rules of business. That the Government chose one rather than the other option is no ground to allege *mala fides* against them and much less against the Chief Election Commissioner. [181B; 180F-H, 181A]

4. Material loss on account of cutting short of the tenure is not
F unknown in a service career and is one of the exigencies of employment. The creation and abolition of post is the prerogative of the executive, and in the present case of the President. Article 324(2) leaves it to the President to fix and appoint such number of Election Commissioners as he may from time to time determine. The power to create the posts is unfettered. So also is the power to reduce or abolish them. If, therefore,
G the President, finding that there was no work for the Election Commissioners or that the Election Commission could not function, decided to abolish the posts, that was an exigency of the office held by the petitioner. [181C-D]

5. The flashing of the photographs of the petitioner and the other
H Election Commissioner in the news bulletin by the Doordarshan was

clearly uncalled for. Although there is nothing on record to show at whose instance it was done, yet the act deserves condemnation in the strongest language. It was within the powers of the Government to investigate the incident and it could have offered to investigate the event and to make proper amends to the petitioner and the other Election Commissioner. Instead it has casually dismissed the incident by a mechanical denial of it. The attitude adopted by the Government towards the erstwhile public servants is strongly disapproved. [182E-F-G-H, 183A]

6. It appears that there is an impression in some quarters that if the Government admits its mistake whether it is committed by the same Government or the earlier Government, it loses its face. Nothing can be farther from reality. In a democratic regime, the Government represents the people. It adds to its respectability and credibility, if the Government also owns its mistakes frankly. [179D-E]

7. In the absence of rules to the contrary, the members of a multi-member body are not and need not always be on par with each other in the matter of their rights, authority and powers. [174C]

7.1 It is an acknowledged rule of transacting business in a multi-member body that when there is no express provision to the contrary, the business has to be carried on unanimously. The rule to the contrary such as the decision by majority, has to be laid down specifically by spelling out the kind of majority—whether simple special of all the members or of the members present and voting etc. [174E]

7.2 In a case such as that of the Election Commission which is not merely an advisory body but an executive one, it is difficult to carry on its affairs by insisting on unanimous decisions in all matters. No procedure has been laid down for transacting the business when Election Commissioners are appointed. Hence, a realistic approach demands that either the procedure for transacting business is spelt out by a statute or a rule either prior to or simultaneously with the appointment of the Election Commissioners or that no appointment of Election Commissioners is made in the absence of such procedure. [174F-G]

8. There is no doubt that two heads are better than one, and particularly when an institution like the Election Commission is entrusted with vital functions, and is armed with exclusive uncontrolled power to execute them, it is both necessary and desirable that the powers are not exercised by one individual, however, all-wise he may be. It ill-conforms the tenets of the democratic rule. It is true that the inde-

pendence of an institution depends upon the persons who man it and not on their number. A single individual may sometimes prove capable of withstanding all the pulls and pressures, which many may not. However, when vast powers are exercised by an institution which is accountable to none, it is politic to entrust its affairs to more hands than one. It helps to assure judiciousness and want of arbitrariness. The fact, however, remains that where more individuals than one man an institution, their role have to be clearly defined, if the functioning of the institution is not to come to a naught. [178E-G]

ORIGINAL JURISDICTION: Writ Petition (C) No. 235 of 1990.

(Under Article 32 of the Constitution of India).

Gopal Subramanium, Ms. Binu Tamta and S. Murlidhar for the Petitioner.

Altaf Ahmad, Additional Solicitor General, Ms. A. Subhashini, K. Swami, C.S. Vaidyanathan and S.R. Setia for the Respondents.

The Judgment of the Court was delivered by

SAWANT, J. On 7th October, 1989, by a notification issued in exercise of the powers conferred by clause (2) of Article 324 of the Constitution, the President fixed, until further orders, the number of Election Commissioners (other than the Chief Election Commissioner), at two. By a subsequent notification of 16th October, 1989 issued under the same provisions, the President appointed the petitioner and one Shri V.S. Seigell as Election Commissioners w.e.f. the afternoon of that day. On the same day, by another notification issued in exercise of the powers conferred by clause (5) of Article 324 of the Constitution, the President made rules to regulate the conditions of service and tenure of office of the Election Commissioners (other than the Chief Election Commissioner). These conditions laid down, among other things, that an Election Commissioner shall hold office for a term of five years or until he attains the age of 65 years whichever happens earlier.

2. On 1st January, 1990, in exercise of the powers conferred under Article 324(2) of the Constitution, the President issued two notifications-one rescinding, with immediate effect, the notification of 7th October, 1989 creating the two posts of Election Commissioners

and another rescinding, with immediate effect, the notification of 16th October, 1989 by which the appointment of the petitioner and Shri V.S. Seigell was made. It is these two notifications of 1st January, 1990 which are being assailed in the present petition.

3. The grounds of attack are, firstly, once appointed, an Election Commissioner continues in office for his full tenure determined by the rules made under Article 324(5) of the Constitution which is five years or till the attainment of 65 years of age whichever is earlier. The President could remove the petitioner only on the recommendation of the Chief Election Commissioner. He had otherwise no power to cut short the tenure either under the Constitution or under the rules. Hence, the rescission of the notifications of 7th and 16th October, 1989 by the impugned notifications of 1st January, 1990 is illegal. Secondly, it is urged that the Election Commission is an independent body and its independence is vital to free and fair elections which are a *sine qua non* for democracy. Any interference with the working of the Election Commission, directly or indirectly, is bound to have adverse effect on the health of our democracy. Hence, it is of paramount importance to the democracy enshrined in our Constitution that its independence is not eroded in any manner. The device adopted in the present case, viz., of the rescission of the notification creating the posts and thereby abolishing the posts and thus removing the petitioner and the other Election Commissioner was an attempt to remove the Election Commissioners which removal could not be effected otherwise either under the Constitution or under the service rules. The third attack is that the two notifications were issued *mala fide* under the advice of the Chief Election Commissioner with the sole object of getting rid of the petitioner and the other Election Commissioner because the Chief Election Commissioner was from the beginning ill-disposed towards the creation of the posts of the Election Commissioners. It is also alleged that there were differences of opinion between the Chief Election Commissioner on the one hand and the Election Commissioners on the other and the former desired that he should have the sole power of decision-making in all matters. Lastly, it is contended that the petitioner's removal affected him materially since after a distinguished career as a civil servant he had joined the Bihar Public Service Commission as its Chairman only on 30th September, 1989 and had resigned the said post on 14th October, 1989 to join as Election Commissioner on 16th October, 1989. His career was abruptly ended within less than three months thereafter. It was also urged that while announcing the removal, his photograph was flashed on the television during a news-bulletin of 2.1.1990 subjecting him to severe

loss of dignity and reputation. This act also shows *mala fides* of the Janata Dal which was a part of the succeeding government and had a prejudice against him.

4. The petition is resisted by the 1st respondent (Union of India) and the 2nd respondent (the then Chief Election Commissioner). No separate counter-affidavit is filed on behalf of the 3rd respondent-Election Commission. After the sad demise of the 2nd respondent during the pendency of the petition, he was deleted as a party to the petition. However, the reply filed by him is being relied upon on behalf of the other respondents. In the reply filed by the 1st respondent, it is contended that the President had issued the impugned notification rescinding the notification of 7th October, 1989 in *bona fide* exercise of his power under the first part of clause (2) of Article 324 of the Constitution which authorises the President to determine the strength of the Election Commission and fix the number of Election Commissioners from time to time. There is no limitation on the power of the President to determine and fix the strength of the Election Commission from time to time. The exercise of the said power is based on the subjective satisfaction of the President formed on the advice tendered by the Counsel of Ministers. In support of this contention, it is pointed out that whereas Article 324(2) creates an obligation that the Election Commission shall consist of the Chief Election Commissioner, as regards the appointment of the other Election Commissioners and their number, the matter is left, without any limitation, to the discretion of the President. It is further pointed out that when the President had issued the notifications of 7th and 16th October, 1989, he had expected that on account of the reduction in the lower-age limit of the voters from 21 to 18 years necessitating revision of the electoral rolls and the impending statutes, viz., the Panchayat Raj and Nagar Palika Bills, which were then before the Parliament, the work of the Election Commission would increase, and to cope up with the same, the augmentation of the strength of the Election Commission was necessary. However, the electoral rolls became ready and the two Bills in question lapsed on 13th October, 1989. Hence, the augmented strength was considered surplus to the requirement. A decision was, therefore, taken to abolish the posts and the impugned notification of 7th October, 1989 was rescinded. Consequent upon it, the appointments of the petitioner and the other Election Commissioner came to an end. It was not necessary to issue another notification to rescind the notification of 16th October, 1989 by which the said appointments were made. However, by way of abundant precaution, the notification of 16th October, 1989 was also rescinded by another notification

of 1st January, 1990. It was, thus, according to the 1st respondent, a case of a termination of service of the petitioner consequent upon the abolition of the post. It was not a case of a removal of the petitioner from service as alleged by the petitioner. In the affidavit filed by the 2nd respondent, he has been candid in stating that there was in fact no need of any Election Commissioner and the Chief Election Commissioner along with his then machinery was capable of coping with the work. However, after the appointment of the Election Commissioners, the Election Commission took decisions on all matters unanimously although there were differences of opinion. There was no occasion for the Chief Election Commissioner either to resent the appointment of the petitioner and the other Election Commissioner or to recommned their removal. In fact, the petitioner himself has admitted in the petition that the Chief Election Commissioner had at no stage made any recommendation for his removal or for the removal of the other Election Commissioner. He has also vehemently denied the allegations made against him qua the various incidents and has contended the all his actions were in conformity with law and the past practices of the Commission.

5. Article 324 of the Constitution reads as follows:

> "324. Superintendence, direction and control of elections to be vested in an Election Commssion.—(1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament, and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission).
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> 2. The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President.
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> (3) When any other Election Commissioner is so appointed the Chief Election Commissioner shall act as the Chairman of the Election Commission.

A (4) Before each general election to the House of the People and to the Legislative Assembly of each State, and before the first general election and thereafter before each biennial election to the Legislative Council of each State having such Council, the President may also appoint after consultation with the Election Commission such Regional B Commissioners as he may consider necessary to assist the Election Commission in the performance of the functions conferred on the Commission by clause (1).

(5) Subject to the Provisions of any law made by Parliament, the conditions of service and tenure of office of C the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine:

Provided that the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and D the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment:

Provided further that any other Election Commissioner or a Regional Commissioner shall not be removed E from office except on the recommendation of the Chief Election Commissioner.

(6) The President, or the Governor of a State, shall, when so requested by the Election Commission, make available to the Election Commission or to a Regional F Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission by clause (1)."

The provisions of clause (1) of the Article show that the superintendence, direction and control of the preparation of the G electoral rolls for and the conduct of all elections to Parliament and to the Legislature of every State and of elections to the offices of the President and Vice-President are vested in the Election Commission. The relevant provisions of the Representation of the People Act, 1950 and of the Representation of the People Act, 1951 further show that various functions are entrusted to, and powers are conferred upon, the H Commission in the matter of the conduct of election to the Parliament

and to the Legislatures of the States. In the discharge of these duties and in the exercise of these powers, the Commission has to act on its own and to take various dicisions and implement them as an independent body. In the discharge of its duties and functions, it is not amenable to the control of any other body. There is no doubt, therefore, that the Election Commission as envisaged by the Constitution is an independent institution and has to function as such.

6. The salient features of the composition of the Election Commission as given in clauses (2), (3) and (4) of the Article are that the Commission shall always consist of a permanent incumbent, viz., the Chief Election Commissioner. But the President has also been given the power to appoint such number of other Election Commissioners as he may, from time to time, fix. In other words, while the appointment of the Chief Election Commissioner is a must, the appointment of the other Election Commissioner or Commissioners is not obligatory. What is further, the number of other Election Commissioners is left to the descretion of the President depending upon the need felt from time to time. This would mean that both the increase and the reduction in the number of the Election Commissioners would depend upon the requirements of the time as assessed by the President.

7. The power given to the President to appoint the Chief Election Commissioner and other Election Commissioners is subject to the provisions of any law that may be made by the Parliament in that behalf. The Parliament has thus reserved to itself the power to regulate these appointments. It is obvious from clauses (2) and (3), that when the Commission consists only of Chief Election Commissioner, it is he who alone constitutes the Commission and acts as such. However, when other Election Commissioners are appointed, the Commission consists of both the Chief Election Commissioner and the other Election Commissioners and together they constitute the Commission. In such a case, the Chief Election Commissioner acts as the Chairman of the Election Commission.

8. Clause (4) of the Article gives power to the President to appoint, after consulting the Election Commission, such Regional Commissioners as he may consider necessary to assist the Election Commission in the performance of the functions conferred on the Commission. The Regional Commissioners abviously do not constitute the Commission but are appointed to assist it.

9. However, in the matter of the conditions of service and

A tenure of office of the Election Commissioners, a distinction is made between the Chief Election Commissioner on the one hand and Election Commissioners and Regional Commissioners on the other. Whereas the conditions of service and tenure of office of all are to be such as the President may, by rule determine, a protection is given to the Chief Election Commissioner in that his conditions of service shall B not be varied to his disadvantage after his appointment, and he shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court. These protections are not available either to the Election Commissioners or to the Regional Commissioners. Their conditions of service can be varied even to their disadvantage after their appointment and they can be removed on the C recommendation of the Chief Election Commissioner, although not otherwise. It would thus appear that in these two respects not only the Election Commissioners are not on par with the Chief Election Commissioner, but they are placed on par with the Regional Commissioners although the former constitute the Commission and the latter do not and are only appointed to assist the Commission.

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10. It is necessary to bear these features in mind because although clause (2) of the Article states that the Commission will consist of both the Chief Election Commissioner and the Election Commissioners if and when appointed, it does not appear that the framers of the Constitution desired to give the same status to the E Election Commissioners as that of the Chief Election Commissioner. The Chief Election Commissioner does not, therefore, appear to be *primus inter partes*, i.e., first among the equals, but is intended to be placed in a distinctly higher position. The conditions that the President may increase or decrease the number of Election Commissioners according to the needs of the time, that their service conditions may be F varied to their disadvantage and that they may be removed on the recommendation of the Chief Election Commissioner militate against their being of the same status as that of the Chief Election Commissioner. In this connection, the controversy as to whether there should be a one member Commission or a multi-member Commission also assumes a little importance since it throws light both on the genesis of G Article 324 as well as its implications. We may first refer to the relevant discussion on the subject in the Constituent Assembly.

11. In the Draft Constitution, the present Article 324 was numbered as Article 289. It appears from Dr. Ambedkar's introductory comments on the Article (Constituent Assembly Debates, Vol. H VIII p. 905) that the Drafting Committee appointed on the Fundamen-

tal Rights had made a report that the independence of the elections and the avoidance of any interference by the executive in the elections to the legislature should be regarded as a Fundamental Right and provided for, in the Chapter dealing with Fundamental Rights. When the matter came up before the House, it was decided to treat it as of fundamental importance but to provide for it in some other part of the Constitution and not in the chapter dealing with Fundamental Rights. The House had affirmed without any kind of dissent that in the interests of purity and freedom of elections, the Commission should be free from any kind of interference from the executive of the day. Article 289 (now Article 324) was designed to carry out that part of the decision of the House. Explaining the provisions of clause (2) of the Article, Dr. Ambedkar stated that there were two alternatives before the Drafting Committee, viz., either to have a permanent body consisting of 4 or 5 members of the Election Commission who would continue in office throughout without any break, or to permit the President to have an *ad hoc* body appointed at the time when there is an election on the anvil. The Drafting Committee had steered a middle course. What the Committee proposed by the said clause was to have permanently in office one man called the Chief Election Commissioner so that the skeleton machinery would always be available. This was felt sufficient, taking into consideration all exigencies. At the same time, it was felt that *when the elections come up*, the President may add to the machinery by appointing other members of the Commission. Commenting upon clause (4) of the then Article 289 (now clause (5) of Article 324), Dr. Ambedkar stated as follows:

> "So far as clause (4) is concerned, we have left the matter to the President to determine the conditions of service and the tenure of office of the members of the Election Commission, subject to one or two conditions, that the Chief Election Commissioner shall not be liable to be removed except in the same manner as a Judge of the Supreme Court. If the object of this House is that all matters relating to Elections should be outside the control of the Executive Government of the day, it is absolutely necessary that the new machinery which we are setting up, namely, the Election Commission should be irremovable by the executive by a mere fiat. We have, therefore, given the Chief Election Commissioner the same status so far as removability is concerned as we have given to the Judges of the Supreme Court. *We, of course, do not propose to give the same status to the other members of the Commission. We have left the*

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> *matter to the President* as to the circumstances under which *he would deem fit* to remove any other member of the Election Commission, subject to one condition that the Chief Election Commissioner must recommend that the removal is just and proper.
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> (Emphasis supplied)

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Prof. Shibban Lal Saksena wanted, among other things, the appointment of the Chief Election Commissioner as well as of the Election Commissioners to be confirmed by two-third majority in a joint session of both Houses of Parliament. He also wanted both the Chief Election Commissioner and the Election Commissioners to be C removed by the same process, viz., in like manner and on the like grounds as a Judge of the Supreme Court, and non-variation of the service conditions of the Election Commissioners to their disadvantage as was provided for in the service conditions of the Chief Election Commissioner. This amendment was supported, among others, by Pandit Hriday Nath Kunjru. The amendments were not accepted by D the House, and the distinction between the Chief Election Commissioner and the Election Commissioners with regard to the security of the service conditions and the procedure of their removal was maintained as was proposed.

12. It appears that the issue whether the Commission should be E uni-member or multi-member had remained alive even after the adoption of the Constitution, and it cannot be said that it has lost its relevance even today. This is clear from the Election Commission's reports of the earlier period. The 2nd respondent in the Commission's report for 1986-87, had referred to this issue and observed therein, as pointed out by the petitioner himself, as follows:

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> "though three of the former Chief Election Commissioners have opposed a multi-member body on the ground, *inter alia,* that quick decisions are needed in Election matters and the Commission acts in actual practice in consultations with various authorities, agencies and that a process of G deliberation precedes its decisions and there is considerable force in what they have said, it would, in view of the demand from certain quarters for a multi-member Commission, be desirable to examine the proposal and take a decision after ascertaining the views of the various political parties. A suggestion to this effect was made to the H Government by the Commission through its letter dated

October 29, 1986 to the Law Minister". A

As stated by the 2nd respondent, the then Prime Minister had categorically stated in Parliament in December 1988 that he was against a multi-member Election Commission. It is presumed that this statement was made by the Prime Minister after the Government had considered the views expressed by the 2nd respondent in his letter of B 29th October, 1986 to the Law Minister.

13. Unfortunately, there was no discussion in the Constituent Assembly on the subject of the procedure to be adopted by the Commission in transacting its business when Election Commissioners are appointed in addition to the Chief Election Commissioner. We are C also not aware as to what precise relationship between the Chief Election Commissioner and the other Election Commissioners, if and when appointed, was assumed by the earlier three Chief Election Commissioners when they opposed the multi-member Election Commission or what suggestion was made by the 2nd respondent with regard to the said relationship in his letter of 29th October, 1986 to the Law D Minister. As we have seen from the provisions of clause (3) of Article 324, all that the Article says is that when any other Election Commissioner is appointed, the Chief Election Commissioner shall act as the Chairman of the Election Commission.

14. What is, therefore, evident from the discussion of the E framers of the Constitution is, firstly, they did not want to give the same status to the Election Commissioners as of the Chief Election Commissioner and, secondly, they wanted the Chief Election Commissioner to be in overall control of the business of the Commission. The nearest analogy of another Constitutional institution that comes to our mind in this connection, is that of the Council of Ministers under F Articles 74 and 163 of the Constitution. The Prime Minister and the Chief Minister, as the case may be, are at the head of the Council of Ministers and they together with the other Ministers constitute the Council. They are, however, not bound by the views of the other Ministers and may even override them. Nor have the other Ministers the same power as the Prime Minister or the Chief Minister. There is G also some similarity between the powers of the Prime Minister and the Chief Minister on the one hand and the Chief Election Commissioner on the other, in the matter of recommendations for the removal of the other Ministers and Commissioners respectively. There is no doubt that there is an important distinction between the Council of Ministers and the Election Commission in that whereas the Prime Minister or H

A the Chief Minister is appointed by the President or the Governor and the other Ministers are appointed by the President or the Governor on the advice of the Prime Minister or the Chief Minister, the appointment of both the Chief Election Commissioner and the other Election Commissioners as the law stands today, is made by the President under Article 324(2) of the Constitution. It has, however, to be noted that
B the provisions of the said Article have left the matter of appointment of the Chief Election Commissioner and the other Election Commissioners to be regulated by a law to be made by the Parliament, and the President exercises the power of appointing them today because of the absence of such law which has yet to be made. In pointing out these similarities we do not intend to place the two institutions on par.
C Instead, we want to stress that in the absence of rules to the contrary, the members of a multi-member body are not and need not always be on par with each other in the matter of their rights, authority and powers. In the case of the functioning of the Council of Ministers there is the Westministerial Convention crystallised into an unquestionable rule, to back it. We are not aware if there is any Election Commission
D in a similar Constitutional framework as ours in any other part of the world and of its composition and the manner of its working. But, if there is one, the method of its working will be worth studying, in this connection.

15. It is further an acknowledged rule of transacting business in
E a multi-member body that when there is no express provision to the contrary, the business has to be carried on unanimously. The rule to the contrary such as the decision by majority, has to be laid down specifically by spelling out the kind of majority—whether simple, special, of all the members or of the members present and voting etc. In a case such as that of the Election Commission which is not merely
F an advisory body but an executive one, it is difficult to carry on its affairs by insisting on unanimous decisions in all matters. Hence, a realistic approach demands that either the procedure for transacting business is spelt out by a statute or a rule either prior to or simultaneously with the appointment of the Election Commissioners or that no appointment of Election Commissioners is made in the absence of such
G procedure. In the present case, admittedly, no such procedure has been laid down.

16. For this reason, again, we are not impressed by the stress laid on behalf of the petitioner on the provisions of clause (4) of Article 324 in relation to the appointment of the Regional Commis-
H sioners. The fact that the Regional Commissioners are to be appointed

by the President in consultation with the Commission to assist the Commission to perform its functions, though places the Election Commissioners on a higher pedestal than the Regional Commissioners, does not raise them to the status of the Chief Election Commissioner. The provision is intended to vest the President with the powers of appointment of the Regional Commissioners for a particular purpose, and the framers of the Constitution, it appears, desired to give a constitutional status to the Regional Commissioners also, as and when they are appointed. The provision, though spells out the relationship between Election Commission and Regional Commissioners, does not help to throw light on the relationship between the Chief Election Commissioner and Election Commissioners *inter se*. On the other hand, clause (5) of the Article, by placing the Election Commissioners and Regional Commissioners on par in the matter of service conditions and their removability, reinforces the assumption that Election Commissioners do not enjoy the same status and authority as that of the Chief Election Commissioner.

17. The experience of the short period during which the petitioner and the other Election Commissioners were in the Commission, as has been brought out in the petition and in the counter filed by the then Chief Election Commissioner, shows that were it not for the restraint and sagacity shown by the Chief Election Commissioner, the work of the Commission would have come to a standstill and the Commission would have been rendered inactive.

18. In the first instance, the petitioner and the other Election Commissioners were appointed when the work of the Commission did not warrant their appointment. The reason given by the 1st respondent (Union of India), that on account of the Constitution (61st Amendment) Act reducing the voting age and the Constitution (64th Amendment) and (65th Amendment) Bills relating to election to the Panchayats and Nagar Palikas, the work of the Commission was expected to increase and, therefore, there was need for more Election Commissioners, cuts no ice. As has been pointed out by the 2nd respondent, the work relating to revision of electoral rolls on account of the reduction of voting age was completed in all the States except Assam by the end of July 1989 itself, and at the Conference of the Chief Electoral Officers at Tirupati, the 2nd respondent had declared that the entire preparatory work relating to the conduct of the then ensuing general elections to the Lok Sabha would be completed by August in the whole of the country except Assam. Further, the Constitution (64th and 65th Amendment) Bills had already fallen in Parliament, before the

A appointments. In fact, what was needed was more secretarial staff for which the Commission was pressing, and not more Election Commissioners. What instead was done was to appoint the petitioner and the other Election Commissioner on 16th October, 1989. Admittedly, further the views of the Chief Election Commissioner were not ascertained before making the said appointments. In fact, he was presented with them for the first time in the afternoon of the same day, i.e., 16th October, 1989.

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What follows is more instructive and interesting for it lends considerable force to what the 2nd respondent has stated in this connection in his reply. Barely 24 hours after the appointment of the Election Commissioners, the Principal Secretary to the Prime Minister called on the 2nd respondent in the forenoon of 17th October, 1989 and conveyed to him the desire of the Prime Minister that the general elections to the Lok Sabha should be held on a particular date and that the announcement in that behalf should be made by the Commission forthwith and before 2 p.m. on that day, in any case. It appears that the 2nd respondent took the stand that it was for the Commission and not for the Government to fix the date of the election. The new Election Commissioners joined issue with him with regard to his said stand and insisted that the Commission forthwith make an announcement of the date of election as desired by the Prime Minister.

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E 19. We do not propose to refer to all the other disputes which arose between the Chief Election Commissioner on the one hand and the petitioner and the other Election Commissioner on the other. But it appears from the contents of the petition and of the reply filed by the 2nd respondent that the petitioner and the other Election Commissioner probably misunderstood their role and thought that they were appointed to control the Chief Election Commissioner at every stage. This is evident from two instances, among others. It appears that a Writ Petition No. 3205 of 1989 [*Indian National Congress* v. *Election Commission and Ors.*] was filed in the Delhi High Court on November 9, 1989, and a notice of the same was received by the Commission at about 6 p.m. on the same day. According to the said notice, the writ petition was scheduled to come up for hearing before the High Court on the following day, i.e., November 10, 1989. By the time the notice was received in the office of the Commission, the 2nd respondent as well as the Election Commissioners had left the office. The Deputy Election Commissioner contacted the 2nd respondent at his residence over the phone and mentioned the names of some counsel and also referred to the consistent practice of the Commission not to engage as

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its counsel law officers of the Government of India in cases where the party in power is a party to the suit. To the 2nd respondent it was a matter of a routine nature in view of the established practice of the Commission, and he suggested the name of one more counsel in addition to the names mentioned by the Deputy Election Commissioner. Accordingly, a senior advocate, Shri V (we are not mentioning the full names of the Counsel here although they are candidly disclosed in the reply) was engaged, and he was briefed in the matter from about 8 p.m. to 9 p.m. on that day, i.e., 9th November, 1989. Later on, the petitioner herein rang up the 2nd respondent to say that Shri D, the then Additional Solicitor General be engaged to represent the Commission and he also told him that he was so advised by the Union Law Secretary. The 2nd respondent told him that firstly it was too late and secondly it was contrary to the practice of the Commission. Later on, it transpired that the petitioner rang up the other Election Commissioner, Shri V.S. Seigell and thereafter rang up the Deputy Election Commissioner and directed him to withdraw the brief from Shri V with a view to entrust it to Shri D. In order to avoid any controversy, the 2nd respondent acquiesced in the proposed appointment of Shri D. In the morning of 10th November, 1989, Shri D was approached to act as Commission's counsel. He, however, expressed his inability to do so. In the meanwhile, the petitioner had sent a note against the alleged violation of the procedure in that he and his other colleague were not consulted while appointing Shri V. The withdrawal of the brief from Shri V and the refusal of Shri D to appear in the matter placed the Election Commission in an embarrassing position before the High Court since the Commission was not represented by any counsel as none of the standing counsel of the Central Government at the Delhi High Court was also willing to act as the Commission's counsel. An application for adjournment of the matter to the following day, i.e., 11th November 1989 was made on behalf of the Commission which was reluctantly granted by the Court as the following day happened to be a non-working day of the Court. It appears that confronted with the said situation, the petitioner and the other Commissioner realised their mistake and later agreed to the engagement of any other suitable counsel. Thereafter, Shri R, another senior advocate was engaged who represented the Commission before the High Court on 11th November, 1989.

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The second instance gives a glimpse of a still more contentious attitude adopted by the petitioner. It appears that a "closed door" meeting of the Chief Electoral Officers was held on December 14, 1989 and the Chief Election Commissioner in his inaugural speech had

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A referred to the policies, procedures and practices to be followed. The petitioner objected to this speech insisting that before making the speech he should have been consulted. He also objected to the manner in which the Chief Election Commissioner handled the subjects and the decisions were taken in the meeting. This was so in spite of the fact that the petitioner and the other Election Commissioner had partici-
B pated in the Conference, and everyone participating in it including the juniormost Chief Election Officer was free to express his opinion on the matters covered in the address and the decisions were arrived at on the basis of the views expressed by the majority of the Chief Election Officers.

C 20. Although the whole foundation of the contentions advanced on behalf of the petitioner is the need to safeguard the independence of the Commission, we are afraid that the manner of appointment of the petitioner and the other Election Commissioner, and the attitude adopted by them in the discharge of their functions was hardly calculated to ensure free and independent functioning of the Commis-
D sion, much less its smooth working. In the circumstances and in the absence of rules to regulate the relationship between the Chief Election Commissioner and the other Election Commissioners no one need shed tears that the posts were abolished.

21. There is no doubt that two heads are better than one, and
E particularly when an institution like the Election Commission is entrusted with vital functions, and is armed with exclusive uncontrolled powers to execute them, it is both necessary and desirable that the powers are not exercised by one individual, however, all-wise he may be. It ill-conforms the tenets of the democratic rule. It is true that the independence of an institution depends upon the persons who man it
F and not on their number. A single individual may sometimes prove capable of withstanding all the pulls and pressures, which many may not. However, when vast powers are exercised by an institution which is accountable to none, it is politic to entrust its affairs to more hands than one. It helps to assure judiciousness and want of arbitrariness. The fact, however, remains that where more individuals than one, man
G an institution, their roles have to be clearly defined, if the functioning of the institution is not to come to a naught.

22. It is true that the Union of India in their reply have not been all that candid with the reasons for the abolition of the posts. They have merely stated that since the Constitution (64th & 65th Amend-
H ment) Bills had lapsed and the revision of electoral rolls on account of

the lowering of the age was also completed before the general elections which took place in November, 1989, the reasons and events which occasioned the appointment of the Election Commissioners ceased to exist, and the Government on assessing the prevailing position *bona fide* came to the conclusion that the volume of work in the changed context and circumstances did not warrant the continuance of the posts. These reasons are not convincing since, as we have pointed out earlier from the contents of the reply filed by the 2nd respondent, they had ceased to be relevant even before the appointment of the two Commissioners was made on 16th October, 1989. Yet, the appointments were made and the rules governing their service conditions were also promulgated simultaneously, which assured them the tenure of five years or upto the superannuation age of 65 years whichever happened earlier. The facts as they appear from record, therefore, show that the then Government had thought it fit to make the two appointments although there was no need to do so. What other considerations weighed with the then Government in making the appointments is anybody's guess, and we do not propose to go into them. But we expected that the Union of India would candidly admit the initial mistake of making the said appointments rather than defend them on non-existent grounds. It appears that there is an impression in some quarters that if the Government admits its mistake whether it is committed by the same Government or the earlier Government, it loses its face. Nothing can be farther from reality. In a democratic regime, the Government represents the people. It adds to its respectability and credibility, if the Government also owns its mistakes frankly. The truth of the matter as is apparent from the record is that not only there was no need for the said appointments, but the appointments in the absence of the definition of their roles in the Commission, was creating an untoward and unworkable situation rendering the Commission internally torn and ineffectual in its functioning. There was, of course, an option before the Government, viz., to continue with the experiment of the multi-member Commission by defining the roles of the new Commissioners. This course, however, might have required either framing of the rules of business or enactment of a statute or an amendment to the provisions of Article 324 in view particularly of the provisions of the 2nd proviso to clause (5) thereof. We express no opinion on the same except stating that if the said course was thought of, it might have taken a considerable time. In the meanwhile, the intractable situation in the Commission's working would have continued and might even have deteriorated.

23. In the view that we have taken, namely, that there was no

need for the posts of the Election Commissioners at the time the appointments were made and that in the absence of a clear definition of their role in the Commission, particularly, vis-a-vis the Chief Election Commissioner, the appointments were an oddity, the abolition of the posts far from striking at the independence of the Commission paved the way for its smooth and effective functioning. In view further of the fact that for reasons stated above, it is not possible to hold that the Election Commissioners have the same powers and the authority as the Chief Election Commissioner, and it may well be that the Chief Election Commissioner has the power to disregard and override the views of the Election Commissioners, the abolition of their posts least infringed on the independence of the Commission. Hence, we are not enamoured of the second contention advanced on behalf of the petitioner, viz. that the abolition of the posts tampered directly or indirectly with the independence of the Commission.

24. As regards the first contention, namely, that in view of the service rules, the Election Commissioners were entitled to remain in their posts for a period of five years or till they attained the age of 65 years whichever event occurred earlier, we are of the view that this is not a case of a premature termination of service. It is a clear case of the abolition of posts on account of the reasons stated earlier and the termination of the service is a consequence thereof. Hence, the termination of service is not open to challenge on the ground of any illegality. For the same reason, we are also not attracted by the argument that the notifications abolishing the two posts and removing the petitioner and the other Election Commissioner were issued *mala fide* at the instance of the Chief Election Commissioner who allegedly wanted to get rid of them. We are satisfied, on the basis of the record, that the Chief Election Commissioner had never recommended their removal. In fact, the petitioner himself has admitted that his removal and the removal of the other Election Commissioner was not on the recommendation of the Chief Election Commissioner under the 2nd proviso to clause (5) of Article 324. There is further nothing brought on record by the petitioner to show that even otherwise the Government while abolishing the posts had acted on the suggestion of the Chief Election Commissioner. On the other hand, it is clear from the contents of the petition as well as the reply filed by the 2nd respondent that although there were bickerings even on petty issues, all the decisions were taken ultimately unanimously. It is, however, another thing that this unison in working, in the circumstances, could not have been guaranteed for all time to come, and the Government if they desired the continuance of the two Commissioners has an option to make the

rules of business etc. as stated earlier. That the Government chose one rather than the other option is no ground to allege *mala fides* against them and much less against the Chief Election Commissioner. It may be pointed out in this connection that as admitted by the petitioner himself although the earlier three Chief Election Commissioners had opined against a multi-member Commission, the second respondent-Chief Election Commissioner was inclined in favour of the concept. Hence, the allegations of *mala fides* against the Chief Election Commissioner are hard to accept.

25. The last of the contentions advanced on behalf of the petitioner is in two parts. The first part relates to the material loss on account of the cutting short of the tenure of the petitioner. Such loss is not unknown in a service career and is one of the exigencies of employment. The creation and abolition of post is the prerogative of the executive, and in the present case of the President. Article 324(2) leaves it to the President to fix and appoint such number of Election Commissioners as he may from time to time determine. The power to create the posts is unfettered. So also is the power to reduce or abolish them. If, therefore, the President, finding that there was no work for the Election Commissioners or that the Election Commission could not function, decided to abolish the posts, that was an exigency of the office held by the petitioner. In fairness to the petitioner, we may record here that Shri Gopal Subramaniam appearing for him made it clear at the very outset that the petitioner had not approched the court to make a grievance of his material loss but to assert the principle that the independence of the Election Commission should not be permitted to be tampered with, either directly or indirectly by the subterfuge of the abolition of the posts. We have dealt with this aspect earlier in quite some detail.

26. We, however, find, some force in the second part of the contention. The petitioner in paragraph 30 of his petition has averred as follows:

> "The abolition of the post of Election Commissioners was (lead news) in the Doordarshan Hindi News Bulletins at 7.30 pm and 8.40 pm with photos of the two 'removed' Commissioners being flashed on the TV screen. They quoted the Government Press Note which sought to justify abolition of the two posts on the basis of a review of the work of the Election Commission but before that an earlier left-out shot of the Prime Minister's Press Conference was

A shown in which viewers were made to hear a question of a Press report casting aspersions on the two newly appointed Election Commissioners with the Prime Minister answering that the Government would review these appointments along with other electoral reforms. This was clearly defamatory and it was clear to every viewer that the two Election Commissioners had been 'removed' for the reasons contained in the insinuation of the press reporter and the official reasons justifying abolition of the posts were a mere eye-wash. ....."

In their reply to this paragraph the Union of India in paragraph 27 have stated:

"With reference to para 30, it is submitted that the allegations and contentions contained therein are irrelevant and have no bearing on the issues arising in the writ petition. The said allegations in any event are not admitted and the petitioner is put to strict proof thereof."

Although we do not find any substance in the grievance of the petitioner against the answer given by the Prime Minister to the Press Reporter in the Press Conference, we do find that the flashing of the photos of the petitioner and the other Election Commissioner in their Hindi News Bulletin at 7.30 pm and 8.40 pm by the Doordarshan was clearly uncalled for. There is nothing on record to show at whose instance it was done. But the act deserves condemnation in the strongest language. This may probably be the first instance where the photos of the officers whose services were terminated had been flashed on the TV screen. That the Government should casually dismiss this incident by a mechanical denial of it, adds poignancy to the episode. We wish that the Government had adopted a reasonable attitude and given a plausible answer to the allegation. It was within their powers to investigate the incident. Instead, they have non-chalantly stated in the reply that "the said allegations in any event are not admitted and the petitioner is put to strict proof thereof". We must record our strong disapproval of the attitude adopted by the Government towards the erstwhile public servants. It has neither enhanced the prestige of the Government nor of the public service. That the flashing of the photos on the TV screen had nothing to do with the validity of the abolition of the posts and the consequential termination of the services of the petitioner and the other Election Commissioner is no argument to justify the event. Government could have offered to investigate the

event and to make proper amends to the petitioner and the other Election Commissioner. This event was cited by the petitioner as a proof of vindictiveness of the Janta Dal which was a partner in the then Government and which was allegedly aggrieved by the stand taken by the two Commissioners in the dispute relating to its symbol in the 1989 elections. It was, therefore, all the more necessary to deal with it seriously. We, however, leave the matter here because for the reasons we have discussed earlier, the incident has no bearing on the result of the petition. A B

27. The petition, thus, fails and the rule is discharged. In the circumstances of the case, there will be no order as to costs. C

T.N.A. Petition dismissed.