THEME 1

ELECTION MANAGEMENT BODIES

JUDGEMENT OF

THE SUPREME COURT OF INDIA

AT

NEW DELHI

Dated the 14th day of July 1995

WRIT PETITION (CIVIL) NO. 805/1993
AND CONNECTED PETITIONS

ELECTION COMMISSION OF INDIA
Nirvachan Sadan, Ashoka Road
New Delhi – 110 001

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 805 OF 1993

T. N. Seshan,
Chief Election Commissioner of India — PETITIONER

V

Union of India & Others — RESPONDENTS

WITH

WRIT PETITION (CIVIL) NO. 791 OF 1993

Cho S. Ramaswamy — PETITIONER

V

Union of India & Others — RESPONDENTS

V

WITH

WRIT PETITION (CIVIL) NO. 825 OF 1993

B. K. Rai & Another — PETITIONERS

V

Union of India & Others — RESPONDENTS

WITH

WRIT PETITION NO. 268 OF 1994

Common Cause
A Registered Society — PETITIONER

V

Union of India & Others — RESPONDENTS

Elections *– Size of Election Commission – Independence of Commission – Business of Election Commission – President's power to increase size of Election Commission – Position and status of Members of Election Commission – Malafides in expansion of Election Commission – Chief Election Commissioner's behaviour – Legislative competence – Status of officers whose conditions of service are akin to those of Judges of The Supreme Court – Articles 123 & 324 of the Constitution of India.*

Background Facts: *The President of India, in exercise of powers conferred upon him by clause 1 of Article 123 of the Constitution of India, promulgated an Ordnance (No 32 of 1993) entitled "The Chief Election Commissioner and other Election Commissioners (Conditions of Service) Amendment Ordinance, 1993" (referred to as "the Ordinance") to amend the Chief Election Commissioner and other Commissioners (Conditions of Service) Act, 1991" (referred to as "the Act").*

The Act laid down the conditions of service of the Chief Election Commission (referred to as "the CEC") and Election Commissioners (referred to as "the ECs") appointed and Article 324 of the Constitution.

The Ordinance contained new provisions which regulate the procedures of Elections Commissions in their transaction of business, including the voting procedures.

On the date of the publication of the Ordinance, 1st October, 1993, the President fixed, pursuant to clause 2 of Article 324 of the Constitution of India, the number of Election Commissioners (other than the CEC) at two. By a notification on the same date, the President appointed Mr. S. Gill and Mr. G.V.G. Krishnamurthy as Election Commissioners with effect from 1st, October, 1993.

The CEC and others brought an action challenging the legality of the Ordinance and the appointment of the two Election Commissioners.

Held: *That the Ordinance and the notifications issued thereunder were lawful and valid. The Election Commission would be expanded to include the Chief Election Commissioner and two Election Commissioners.*

Before:

Ahmadi, C J I, J. S. Verma, J, N. P. Singh J, S. P. Bharucha J, M. K. Mukherjei J.

Cases Cited in Judgement:

S.S. Dhanoa v *Union of India & Others [1991] 3 SCC 567*
M.S. Gill v *Chief Election Commissioner (1978) 2 SCR 292*

JUDGEMENT

Ahmadi, C J I: The President of India, in exercise of powers conferred upon him by clause (1) of Article 123 of the Constitution of India, promulgated an Ordinance (No. 32 of 1993) entitled "The Chief Election Commissioner and other Election Commissioners (Conditions of Service) Amendment Ordinance, 1993" (hereinafter called "The Ordinance") to amend "The Chief Election Commissioner and other Commissioners (Conditions of Service) Act, 1991" (hereinafter called "The Act"). This Ordinance was published in the Gazette of India on October 1, 1993. Before we notice the amendments made in the 1991 Act by the said Ordinance it may be appropriate to notice the provisions of the 1991 Act. As the long title of the Act suggests it lays down the conditions of service of the Chief Election Commissioner (hereinafter called "The CEC") and Election Commissioners (hereinafter called "The ECs") appointed under Article 324 of the Constitution of India. Section 3(1) provides that the CEC shall be paid a salary which is equal to the salary of judge of the Supreme Court of India. Section 3(2) says that an EC shall be paid a salary which is equal to the salary of a judge of the High Court. Section 4 lays down the term of office of the CEC and ECs to be six years from the date on which the incumbent assumes charge of his office, provided that the incumbent shall vacate his office on his attaining, in the case of the CEC, the age of 65 years and the EC the age of 62 years, notwithstanding the fact that the term of office is for a period of six years. Section 8 extends the benefit of travelling allowance, rent-free residence, exemption from payment of income tax on the value of such rent-free residence, conveyance facility, sumptuary allowance, medical facilities, etc., as applicable to a judge of the Supreme Court or a Judge of the High Court of the CEC and the EC, respectively. By the Ordinance the title of the Act was sought to be amended by substituting the words "and to provide for the procedure for transaction of business by the Election Commission and for Matters" for the words "and for Matters". By the substitution of these words the long title to the Act got further elongated as an Act to determine the conditions of service of the CEC and other ECs and to provide for the procedure for transaction of business by the Election Commission and for matters connected therewith or incidental thereto. In section 1 of the Principal Act, for the words and brackets "the Chief Election Commissioner and other Election Commissioners (Conditions of Service)" the words and brackets "the Election Commission (Conditions of Service of Election Commissioners and Transaction of Business)" came to be substituted with the result that the amended provision read as the Election Commission (Conditions of Service of Election Commissioners and Transaction of Business) Act, 1991. The definition clause in section 2 also underwent a change, in that, the extant clause (b) came to be renumbered as clause (c) and a new clause (b) came to be substituted, by which the expression "Election Commission" came to be defined as Election Commission referred to in Article 324 of the Constitution of India. Consequent changes were also made elsewhere. In sub-section (1) of section 3, after the words "Chief Election Commissioner", the words "and other Election Commissioners" came to be inserted, with the result that they came to be placed on par with regard to salary payable to them and sub-section (2) came to be omitted. In section 4 the first proviso came to be substituted as below:

"Provided that where the Chief Election Commissioner or an Election Commissioner attains the age of 65 years before the expiry of the said term of six years, he shall vacate his office on the date on which he attains the said age."

Thus, the age of superannuation of both the CEC and the ECs was fixed at 65 years. If they attain the age of 65 years before completing their tenure of six years they would, in view of the proviso, have to vacate office on attaining the age of 65 years. In Section 6, sub-section (2), after the words "Chief Election Commission", the words "or an Election Commissioner" came to be inserted and for the words "sub-section (4)" the words "sub-section (3)" came to be substituted. It further provided for the deletion of sub-section (3) and the re-numbering of sub-section (4) as the words "or as the case may be, 62 years" shall be omitted. After section 8 in the Principal Act, by the Ordinance, a new Chapter came to be inserted comprising two provisions, namely, Sections 9 and 10. The new Chapter so inserted is relevant for our purpose and may be reproduced at this stage:

CHAPTER III

TRANSACTION OF BUSINESS OF ELECTION COMMISSION

9. The business of the Election Commission shall be transacted in accordance with the provisions of this Act.

10. (1) The Election Commission may, by unanimous decision, regulate the procedure for the transaction of business and also allocation of the business amongst the Chief Election Commissioner and other Election Commissioners.

(2) Save as provided in sub-section (1) all business of the Election Commission shall, as far as possible, be transacted unanimously.

(3) Subject to the provisions of sub-section (2), if the Chief Election Commissioner and other Election Commissioners differ in opinion on any matter, such matter shall be decided according to the opinion of the majority.

On the day of publication of the Ordinance, 1st October, 1993, the President of India, in exercise of powers conferred by clause 2 of Article 324 of the Constitution of India, fixed, until further orders, the number of Election Commissioners (other than the CEC) at two. By a further notification of even date, the President was pleased to appoint Mr. M. S. Gill and Mr. G.V.G. Krishnamurthy as Election Commissioners with effect from 1st October, 1993.

The first salvo was fired by Cho. S. Ramaswamy a journalist, on 13th October, 1993. By a Writ Petition (Civil) No. 791 of 1993, he prayed for a declaration that the ordinance was arbitrary, unconstitutional and void and for issuance of a writ of certiorari to quash the notifications fixing the number of Election Commissioners at two, and the appointments of Mr. M.S. Gill and Mr. G.V.G. Krishnamurthy made thereunder. This was followed by Writ Petition No. 805 of 1993 by the incumbent CEC himself, claiming similar reliefs on 26th October, 1993. Two other writ petitions were also filed, questioning the validity of the Ordinance and the notifications referred to earlier. Three of these writ petitions came up for preliminary hearing on 15th November, 1993. While admitting the writ petitions and directing rule to issue in all of them, in the writ petition filed by the CEC, notice on the application for interim stay, as well as for the production of documents, was ordered to be issued and an ad interim order to the following effect was passed:

> "Until further orders, to ensure smooth and effective working of the Commission and also to avoid confusion both in the administration as well as in the electoral process, we direct that the Chief Election Commissioner shall remain in complete overall control of the Commission's work. He may ascertain the views of other Commissioners or such of them as he chooses, on the issues that may come up before the Commission from time to time. However, he will not be bound by their views. It is also made clear that the Chief Election Commissioner alone will be entitled to issue instructions to the Commission's staff as well as to the outside agencies and that no other Commissioner will issue such instructions."

By a subsequent order dated 15th December, 1993, after hearing the learned Attorney-General for the Union of India and the learned Advocates General for the states of Maharashtra and West Bengal, the court directed that all the state governments who want to be heard will be heard through their counsel and further directed that the interim order shall continue till further orders. Lastly, it observed that since the questions involved related to the interpretation of article 324 in particular, the matters should be placed before a Constitution Bench.

During the pendency of the aforesaid Writ Petitions, the ordinance became an Act (Act No. 4 of 1994) on 4th January, 1994 without any change.

Before we proceed further it would be proper to notice article 324 of the Constitution. It reads as below:

> "324 Superintendence, direction and control of elections to be vested in an election commission (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).

(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.

(3) When any other Election Commissioner is so appointed the Chief Election Commissioner shall act as the chairman of the Election Commission.

(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 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 the tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may, by rule, determine:

> Provided that the Chief Elections Commissioner shall not be removed from his office except in like manner and on the like grounds as judge of the Supreme Court and 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 Regional Commissioner shall not be removed 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 Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission by clause (1)."

The abridged factual matrix on which the constitutional validity of the Ordinance (now Act) and the consequential orders and appointments of the ECs have been questioned in the above petitions may be broadly indicated at this stage as follows:

The present CEC claims that after his appointment on 12th December, 1990 he insisted on strict compliance with the model code of conduct by all political parties and candidates for election and

took stern action against factions thereof regardless of the political party or candidate involved. The ruling party at the centre was irked as a few of the by-elections of the ruling party leaders/cabinet ministers were put off because of the Government's failure to deploy sufficient staff and police forces for the elections, and the ruling party lost the elections in Tripura on account of the strict action taken by the CEC against erring officials and the consequent postponement of elections. The ruling party made attempts to influence the CEC but could not do so as he did not allow the emissaries of the party to meet him. The CEC also filed a writ petition in the Supreme Court for enforcing the constitutional right of the Election Commission to staff and police forces. The CEC declined to postpone elections to four State Assemblies despite requests from the ruling party. The ruling party, including the Prime Minister, became irritated by such an unbending attitude on the part of the CEC. The ruling party, therefore, with a view to freezing the powers of the CEC and to preventing him from taking any action against violations of the code of conduct, chose to amend the law and misused the power of the President under Article 324 (2) of the Constitution by issuing the notification dated 1st October, 1993, fixing the number of ECs at two and simultaneously appointing Mr. M. S. Gill and Mr. G. V. G. Krishnamurthy as the other two ECs.

The CEC not only imputes malafides to the issuance of the aforesaid notifications and appointments but also alleges that the intention behind issuing the ordinance was to sideline the CEC and to erode his authority so that the ruling party at the centre could extract favourable orders by using the services of the newly-appointed ECs.

Sections 9 and 10 of the Ordinance (now Act) are challenged as ultravires of the Constitution on the plea that they are inconsistent with the scheme underlying Article 324 of the Constitution, in that, the said Article 324 did not give any power to the parliament to frame rules for transaction of business by the Election Commission. Section 10 is also challenged on the grounds that it is arbitrary and unworkable. Similarly, the notification fixing the number of other ECs at two is challenged as arbitrary and in violation of Article 14 of the Constitution.

The writ petitions are resisted by the respondents, viz. the Union of India and the two other ECs, Mr. M.S. Gill and Mr. G. V. G. Krishnamurthy, as wholly misconceived. It is contended, on behalf of the Union Government, that various advisory bodies had, from time to time, called for a multi-member Election Commission. It denies the allegation that the decision to convert the Election Commission into a multi-member body had any connection with the alleged discomfiture of the ruling party at the centre on account of the staff attitude of the CEC. It is further stated that the multi-member body would not have been able to function without a supporting statute providing for dealing with different situations likely to arise in the course of transaction of business. The ordinance was framed keeping in view the observations made in this regard by this court in the case of *S.S. Dhanoa* v *U.O.I & Others* (1991) 3 SCC 567. It is strongly denied that the changes in the law were made malafide with a view to forcing the CEC into submission or to eroding his authority by providing that, in the event of a difference of opinion, the majority view would prevail. It is contended that the plain language of Article 324 (2) envisages a multi-

member Commission and, therefore, any exercise undertaken to achieve that objective would be consistent with the scheme of the said constitutional provision and could, therefore, never be branded as malafide or ultravires of the Constitution. A provision to the effect that, in the event of a difference of opinion between the three members of the Election Commission, the majority view should prevail, is consistent with democratic principles and can never be described as arbitrary or ultravires Article 14 of the Constitution. The Union of India, has, therefore, contended that the writ petitions are wholly misconceived and deserve to be dismissed with costs.

The preamble to our Constitution proclaims that we are a Democratic Republic. Democracy being the basic feature of our constitutional set-up, there can be no two opinions that free and fair elections to our legislative bodies alone would guarantee the growth of a healthy democracy in the country. In order to ensure the purity of the election process, it was thought by our Constitution-makers that the responsibility to hold free and fair elections in the country should be entrusted to an independent body which would be insulated from political and/or executive interference. It is inherent in a democratic set-up that the agency legislatures should be fully insulated so that it can function as an independent agency, free from external pressures from the party in power or executive of the day. This objective is achieved by the setting up of an Election Commission, a permanent body, under Article 324 (1) of the Constitution. The superintendence, direction and control of the entire election process in the country has been vested under the said clause in a commission called the Election Commission. Clause (2) of the said Article then provides for the constitution of the Election Commission by providing that it shall consist of the CEC and such number of ECs, if any, as the President may from time to time fix. It is thus obvious from the plain language of this clause that the Election Commission is composed of the CEC and, when they have been appointed, the ECs. The office of the CEC is envisaged to be a permanent fixture but that cannot be said of the ECs, as is made manifest from the use of the words "if any". Dr. Ambedkar, while explaining the purport of this clause during the debate in the Constituent Assembly, said:

> "Sub-clause (2) says that there shall be a Chief Election Commissioner and such other Election Commissioner as the President may, from time to time, appoint. There were two alternatives before the drafting committee, namely, either to have a permanent body consisting of four or five 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 Committee has steered a middle course. What the Drafting Committee proposes by sub-clause (2) is to have, permanently in office, one man called the Chief Election Commissioner, so that the skeleton machinery would always be available."

It is crystal clear from the plain language of the said clause (2) that our Constitution-makers realised the need to set up an independent body or commission which would be permanently in session with at least one officer, namely, the CEC, and leave it to the president to further add to the commission such number of ECs as he may consider appropriate, from time to time. Clause (3) of the said article makes it clear that when the Election Commission is a multi-member body, the CEC shall act as its chairman. What will be his role as a Chairman has not been specifically spelt out by the said article and we will deal with this question hereafter. Clause (4) of the said article further provides for the appointment of RCs to assist the Election Commission in the performance of its functions set out in clause (1). This, in brief, is the scheme of article 324 in so far as the constitution of the Election Commission is concerned.

We may now briefly examine the position of each functionary of the Election Commission. In the first place, clause (2) states that the appointment of the CEC and other ECs shall, subject to any law made on their behalf by Parliament, be made by the President. Thus, the President shall be the appointing authority. Clause (5) provides that, subject to any law made by Parliament, the conditions of service and the tenure of office of the ECs and the RCs shall be such as may be determined by rule made by the President. Of course, the RCs do not form part of the Election Commission but are appointed merely to help the Commission, that is to say, the CEC and the ECs, if any. As we have pointed out earlier, the tenure, salaries, allowances and other perquisites of the CEC and ECs were fixed under the Act as being equivalent to those of a judge of the Supreme Court and the High Court, respectively. These have undergone a change after the Ordinance which so amended the Act as to place them on par. However, the proviso to clause (4) of Article 324 says: (i) the CEC shall not be removed from his office except in like manner and on the like grounds as a judge of the Supreme Court, and (ii) the conditions of service of the CEC shall not be varied to his disadvantage after his appointment. These two limitations on the power of Parliament are intended to protect the independence of the CEC from political and/or executive interference. In the case of ECs, as well as RCs, the second proviso to clause (5) provides that they shall not be removed from office except on the recommendation of the CEC. It may also be noted that while, under clause (4), before the appointment of the RCs, consultation with the Election Commission (not CEC) is necessary, there is no such requirement in the case of appointments of ECs. The provision that the ECs and the RCs, once appointed, cannot be removed from office before the expiry of their tenure, except on the recommendation of the CEC by the first proviso to clause (5), means that the ECs and the RCs have been assured of independence of functioning by the provision that they cannot be removed, except on the recommendation of the CEC. Of course, the recommendation for removal must be based on intelligible and cogent considerations related to the efficient functioning of the Election Commission. That is so because this privilege has been conferred on the CEC to ensure that the ECs, as well as the RCs, are not at the mercy of the political or executive bosses of the day. It is necessary to realise that this check on the executive's power to remove is built into the second proviso to cause (5) to safeguard the independence, not only of these functionaries, but of the Election Commission as a body. If, therefore, the power were to be exercisable by the CEC as per his whim and caprice, the CEC himself would become an instrument of oppression and would

destroy the independence of the ECs and the RCs if they were required to function under the threat of the CEC recommending their removal. It is, therefore, needless to emphasise that the CEC must exercise this power only when there exist valid reasons which are conducive to the efficient functioning of the Election Commission. This, briefly stated, indicates the status of the various functionaries constituting the Election Commission.

The concept of plurality is writ large on the face of Article 324, clause (2), which clearly envisages a multi-member Election Commission comprising the CEC and one or more ECs. Visualising such a situation, clause (3) provides that, in the case of a multi-member body, the CEC will be its Chairman. If a multi-member Election Commission was not contemplated, where was the need to provide in clause (3) for the CEC to act as its Chairman? There is, therefore, no room for doubt that the Election Commission could be a multi-member body. If Article 324 does contemplate a multi-member body, the impugned notifications providing for the other two ECs cannot be faulted solely on those grounds. We may here quote, with approval, the observations of a two-judge bench of this court in *S.S.Dhanoa* v *Union of India and Others (1991)*3 SCC 567, vide paragraph 26:

> "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 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 to the tenets of the democratic rule. It is true that the independence 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 roles have to be clearly defined, if the functioning of the institution is not to come to nought."

It must be realised that these observations were made notwithstanding the fact that the learned judges were alive to and aware of the circumstances in which the President was required, in that case, to rescind the notifications creating two posts of ECs, and appointing the petitioner Dhanoa and another to them.

There can be no dispute and indeed there never was, that the Election Commission must be an independent body. It is also clear from the Scheme of Article 324 that the said body shall have the CEC as a permanent incumbent and, under clause (2), such number of other ECs, if any, as the President may deem it appropriate to appoint. The scheme of article 324, therefore, is that there shall be a permanent body to be called the Election Commission, with a permanent incumbent to be called the CEC. The Election Commission can therefore be a single member

body or a multi-member body if the President considers it necessary to appoint one or more ECs. Up to this point there is no difficulty. The argument that a multi-member Election Commission would be unworkable and should not, therefore, be appointed must be stated to be rejected. Our Constitution-makers have provided for a multi-member body. They saw the need to provide for such a body. If the submission is accepted that a multi-member body would be unworkable, it would be tantamount to destroying or nullifying clauses (2) and (3) of Article 324 of the Constitution. Strong reliance was, however, placed on Dhanoa's case to buttress the argument. The facts of that case were just the reverse of the facts of the present case. In that case, the President, by a notification issued in pursuance of clause (2) of Article 324, fixed the number of ECs, besides the CEC, at two, and a few days thereafter by a separate notification issued under clause (5) of Article 324, the President made rules to regulate their tenure and conditions of service. After watching the functioning of the multi-member body for some months, the President issued two notifications rescinding, with immediate effect, the notification by which the two posts of ECs were created and the notification by which the petitioner and one other were appointed thereto. The petitioner, S.S. Dhanoa, challenged the notifications rescinding the earlier notifications, first on the ground that, once appointed, an EC continues in office for the full term determined by rules made under clause (5) of article 324 and, in any event, the petitioner could not be removed except on the recommendation of the CEC. At the same time, it was also contended that the notifications were issued malafide under the advice of the CEC to get rid of the petitioner and his colleague because the CEC was, from the very beginning, ill-disposed or opposed to the creation of the posts of ECs. According to the petitioner, there were differences of opinion between the CEC on the one hand and the ECs on the other and, since the CEC desired that he should have the sole power to decide, he did not like the association of the ECs.

The principal question which the division bench of this court was called upon to decide was whether the President was justified in rescinding the earlier notifications creating two posts of ECs and the subsequent appointment of the petitioner and his colleague as ECs. The court found as a fact that there was no imminent need to create two posts of ECs and fill them by appointing the petitioner and his colleague. The additional work likely to be generated on account of the lowering of the voting age from 21 years to 18 years could have been handled by increasing the staff, rather than by appointing two ECs. So the Court took the view that from the inception, the Government had committed an error in creating two posts of ECs and filling them. We do not, at present, wish to comment on the question as to whether this aspect of the matter was justiciable. It was further found as fact that the attitude of the petitioner and that of his colleague was not co-operative, and had it not been for the sagacity and restraint shown by the CEC, the work of the Commission would have come to a standstill and the Commission would have been rendered inactive. It is for this reason that the Court observed that no-one need shed tears on the posts being abolished (vide paragraphs 20, 23, 24 and 25 of the judgment). The court, therefore, upheld the Presidential notifications rescinding the creation of the two posts of ECs and the appointment of the petitioner and his colleague thereon. Notwithstanding this bitter experience, the division bench made the observations in paragraph 26 extracted above with which we are in respectful agreement. We cannot overlook the fact the when the Constitution-makers provided

for a multi-member Election Commission, they were not oblivious of the fact that there may not be agreement on all points, but they must have expected such high-ranking functionaries to resolve their differences in a dignified manner. It is the constitutional duty of all those who are required to carry out certain constitutional functions to ensure the smooth functioning of the machinery without a clash of egos. This should have put an end to the matter, but the division bench proceeded to make certain observations touching on the status of the CEC vis-a-vis the ECs; the procedure to be followed by a multi-member body in decision-making in the absence of rules in that behalf etc., on which considerable reliance was placed by counsel for the petitioners.

We have already highlighted the salient features regarding the composition of the Election Commission. We have pointed out the provisions regarding the tenure, conditions of service, salary, allowances, removability, etc., of the CEC, the ECs and the RCs. The CEC and the ECs alone constitute the Election Commission, whereas the RCs are appointed merely to assist the Commission. The appointment of the RCs can be made after consulting the Election Commission since they are supposed to assist that body in the performance of the functions assigned to it by clause (1) of Article 324. If that be so, there can be no doubt that they would rank next to the CEC and the ECs. That brings us to the question regarding the status of the CEC vis-à-vis the ECs. It was contended by the learned counsel for the petitioners that the CEC enjoyed a status superior to the ECs for the obvious reason that: (i) the CEC has been granted conditions of service on par with a judge of the Supreme Court, which was not the case with the conditions of service of ECs before the Ordinance; (ii) the CEC has been given the same protection against removal from service as that available to a judge of the Supreme Court, whereas the ECs can be removed on the CEC's recommendation; (iii) the CEC's conditions of service cannot be altered or varied to his disadvantage after his appointment; (iv) the CEC has been conferred the privilege to act as Chairman of the multi-member Commission; and (v) the CEC alone is the permanent incumbent, whereas the ECs could be removed, as happened in the case of Dhanoa. Strong reliance was placed on the observations in paragraphs 10 and 11 of Dhanoa's case in support of the argument that the CEC enjoys a higher status vis-à-vis the ECs while functioning as the Chairman of the Election Commission. The observations relied upon read thus:

> "10. 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 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 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 recommendation of the Chief Election Commissioner, although

> not otherwise. It would thus appear that in these two respects not only are the Election Commissioners 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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> 11. 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 Election Commissioners as that of the Chief Election Commissioner. The Chief Election Commissioner does not, therefore, appear to be primus inter pares, i.e. first among 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 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..."

While it is true that under the scheme of Article 324, the conditions of service and tenure of office of all the functionaries of the Election Commission have to be determined by the President unless determined by law made by Parliament, it is only in the case of the CEC that the first proviso to clause (5) lays down that they cannot be varied to the disadvantage of the CEC after his appointment. Such a protection is not extended to the ECs. However, it must be remembered that by virtue of the Ordinance, the CEC and the ECs are placed on par in the matter of salary, etc. Does the absence of such provision for ECs make the CEC superior to the ECs? The second ground relates to removability. In the case of the CEC, he can be removed from office in like manner and on the like ground as a judge of the Supreme Court, whereas the ECs can be removed on the recommendation of the CEC. That, however, is not an indicia for conferring a higher status on the CEC. To so hold is to overlook the scheme of article 324 of the Constitution. It must be remembered that the CEC is intended to be a permanent incumbent and, therefore, in order to preserve and safeguard his independence, he had to be treated differently. That is because there cannot be an Election Commission without a CEC. That is not the case with the other ECs. They are not intended to be permanent incumbents. Clause (2) of the Article 324 itself suggests that the number of ECs can vary from time to time. In the very nature of things, therefore, they could not be conferred the type of irremovability that is bestowed on the CEC. If that were to be done, the entire scheme of article 324 would have to undergo a change. In the scheme of things, therefore, the power to remove in certain cases had to be retained. Having insulated the CEC from external political or executive pressures, confidence was reposed in this independent functionary to safeguard the independence of his ECs, and even RCs, by enjoining that they cannot be removed except on the recommendation of the CEC. This is evident from the

following statement found in the speech of Shri K. M. Munshi in the Constituent Assembly when he supported the amended draft submitted by Dr. Ambedkar:

> "We cannot have an Election Commission sitting all the time during those five years doing nothing. The Chief Election Commissioner will continue to be a whole-time officer performing the duties of his office and looking after the work from day to day but when major elections take place in the country, either Provincial or Central, the Commission must be enlarged to cope with the work. More members, therefore, have to be added to the Commission. They are, no doubt, to be appointed by the President. Therefore, to that extent, their independence is ensured. So there is no reason to believe that these temporary Election Commissioners will not have the necessary measure of independence."

Since the other ECs were not intended to be permanent appointees, they could not be granted the irremovability protection of the CEC, a permanent incumbent, and, therefore, they were placed under the protective umbrella of an independent CEC. This aspect of the matter escaped the attention of the learned judges who decided Dhanoa's case. We are also of the view that the comparison with the functioning of the executive under Articles 74 and 163 of the Constitution in paragraph 17 of the judgement, with respect, cannot be said to be apposite.

Under clause (3) of Article 324, in the case of a multi-member Election Commission, the CEC "shall act" as the Chairman of the Commission. As we have pointed out earlier, Article 324 envisages a permanent body to be headed by a permanent incumbent, namely, the CEC. The fact that the CEC is a permanent incumbent cannot confer on him a higher status than those not intended to be permanent appointees. Since the Election Commission would have a staff of its own dealing with matters concerning the superintendence, direction and control of the preparation of electoral rolls, etc., that staff would have to function under the direction and guidance of the CEC and, hence, it was in the fitness of things for the Constitution-makers to provide that, where the Election Commission is a multi-member body, the CEC shall act as its chairman. That would also ensure continuity and smooth-functioning of the Commission.

This brings us to the question of what role the CEC has to play as the Chairman of a multi-member Election Commission. Article 324 does not throw any light on this point. The debates of the Constituent Assembly also do not help. Although there has been a multi-member Commission in the past, no convention or procedural arrangement had been worked out then. It is this situation which compelled the Division Bench of this Court in Dhanoa's case to, inter alia, observe 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. Proceeding further in paragraph 18, it was said:

> "18. It is further 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 present and voting etc. In a case 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. 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. In the present case, admittedly, no such procedure has been laid down."

We must hasten to add that the accuracy of the statement, that in a multi-member body, the rule of unanimity would prevail in the absence of express provision to the contrary, was doubted by counsel for the respondent ECs. At the same time, counsel for the Union of India and the contesting ECs contended that the Ordinance was promulgated by the President strictly in conformity with the view expressed in Dhanoa's case.

From the discussion up to this point, what emerged is that, by clause (1) of Article 324, the Constitution-makers entrusted the task of conducting all elections in the country to a Commission referred to as the Election Commission and not to an individual. It may be that if it is a single-member body, the decisions may have to be taken by the CEC, but still they will be the decisions of the Election Commission and not of an individual. It may be that, if it is a single-member body, the decisions may have to be taken by the CEC, but still they will be the decisions of the Election Commission. They will go down as precedents of the Election Commission and not the individual. It would be wrong to project the individual and eclipse the Election Commission. Nobody can be above the institution which he is supposed to serve. He is merely the creature of the institution: he can exist only if the institution exists. To project the individual as mightier than the institution would be a grave mistake. Therefore, even if the Election Commission is a single-member body, the CEC is merely a functionary of that body: to put it differently, the alter ego of the Commission and no more. And if it is a multi-member body, the CEC is obliged to act as its chairman. "Chairman" according to the Concise Oxford Dictionary means a person chosen to preside over meetings, e.g. one who presides over the meetings of the Board of Directors. In Black's Law Dictionary, 6th Edition, page 230, the same expression is defined as a name given to a Presiding Officer of an assembly, public meeting, convention, deliberative or legislative body, board of directors, committee, etc. Similar meanings have been attributed to that expression in Ballentine's Law Dictionary, 3rd Edition, pages 189–190; Webster's New Twentieth Century Dictionary, Unabridged, 2nd Edition, page 299, and Aiyer's Judicial Dictionary, 11th Edition, page 328. The function of the chairman would, therefore, be to preside over meetings, preserve order, conduct the business of the day, ensure that precise decisions are taken and correctly recorded and do all that is necessary for the smooth transaction of business. The nature and duties of this office may vary depending on the nature of business to be transacted but, by and large, these would be the functions of a chairman. He must so conduct himself at the meeting

chaired by him that he is able to win the confidence of his colleagues on the Commission and carry them with him. This a chairman may find difficult to achieve if he thinks that others who are members of the Commission are his subordinates. The functions of the Election Commission are essentially administrative, but there are certain adjudicative and legislative functions as well. The Election Commission has to lay down certain policies; decide on certain administrative matters of importance as distinguished from routine matters of administration, and also adjudicate certain disputes, e.g. disputes relating to allotment of symbols. Therefore, besides administrative functions, it may be called upon to perform quasi-judicial duties and undertake subordinate legislation-making functions as well. See *M. S. Gill* v *Chief Election Commissioner* (1978) 2 SCR 272. We need say no more on this aspect of the matter.

There can be no doubt that the Election Commission discharges a public function. As pointed out earlier, the scheme of Article 324 clearly envisages a multi-member body comprising the CEC and ECs. The RCs may be appointed to assist the Commission. If that be so, the ECs cannot be put on par with the RCs. As already pointed out, ECs form part of the Election Commission, unlike the RCs. Their role is, therefore, higher than that of RCs. If they form part of the Commission, it stands to reason to hold that they must have a say in decision-making. If the CEC is considered to be a superior in the sense that his word is final, he would render the ECs non-functional or ornamental. Such an intention is difficult to cull out from Article 324, nor can we attribute it to the Constitution-makers. We must reject the argument that the EC's function is only to tender advice to the CEC.

We have pointed out the distinguishing features from Article 324 between the position of the CEC and the ECs. It is essentially on account of their tenure in the Election Commission that certain differences exist. We have explained why in the case of ECs the removability clause had to be different. The variation in the salary etc. cannot be a determinative factor, otherwise that would oscillate, having regard to the fact that the executive or the legislature has to fix the conditions of service under clause (5) of Article 324. The only distinguishing feature that survives for consideration is that, in the case of the CEC, his conditions of service cannot be varied to his disadvantage after his appointment, whereas there is no such safeguard in the case of ECs. That is presumably because the posts are temporary in character. But even if it is not so, that feature alone cannot lead us to the conclusion that the final work in all matters lies with the CEC. Such a view would render the position of the ECs as that of mere advisers, which does not emerge from the scheme of Article 324.

As pointed out earlier, neither Article 324 nor any other provision in the Constitution expressly states how a multi-member Election Commission will transact its business, nor has any convention developed in this behalf. That is why, in Dhanoa's Case, this Court thought the gap could be filled by an appropriate statutory provision. Taking a clue from the observations in that connection in the said decision, the President promulgated the Ordinance whereby a new chapter, comprising sections 9 and 10, was added to the Act, indicating how the Election Commission will transact its business. Section 9 merely states that the business of the Commission shall be

transacted in accordance with the provisions of the Act. Section 10 has three sub-sections. Sub-section (1) says that the Election Commission may, by unanimous decision, regulate the procedure for transaction of its business and for allocation of its business among the CEC and the ECs. It will thus be seen that the legislature has left it to the Election Commission to finalise both matters by a unanimous decision. Sub-section (2) says that all other business, save as provided in sub-section (1), shall also be transacted unanimously, as far as is possible. It is only when the CEC and the ECs cannot reach a unanimous decision in regard to its business that the decisions has to be by majority. It must be realised that the Constitution-makers preferred to remain silent as to the manner in which the Election Commission would transact its business, presumably because they thought it unnecessary and perhaps even improper to provide for the same, having regard to the level of personnel it had in mind to man the Commission. They must have depended on the sagacity and wisdom of the CEC and his colleagues. The bitter experience of the past, to which a reference is made in Dhanoa's case, made legislative interference necessary, once it was also realised that a multi-member body was necessary. It has manifested the hope in sub-sections (1) and (2) that the Commission will be able to make decisions with one voice. But just in case that hope is belied, the rule of the majority must come into play. That is the purport of section 10 of the Act. The submission that the said two sections are inconsistent with the scheme of Article 324, in as much as they virtually destroy the two safeguards, namely, (i) the irremovability of the CEC; and (ii) prohibition against variation in service conditions to his disadvantage after his appointment, does not cut ice. In the first place, the submission proceeds on the basis that the other two ECs will join hands to render the CEC non-functional, a premise which is not warranted. It betrays the CEC's lack of confidence in himself to carry his colleagues with him. In every multi-member Commission, it is the quality of leadership in the person heading the body that matters. Secondly, the argument necessarily implies that the CEC alone should have the power to make decisions which, as pointed out earlier, cannot be accepted because that renders the EC's existence ornamental. Besides, there is no valid nexus between the two safeguards and Sections 9 and 10; in fact, the submission is a repetition of the argument that a multi-member Commission cannot function, that it would be wholly unworkable and that the Constitution-makers had erred in providing for it. Tersely put, the argument boils down to this: erase the idea of a multi-member Election Commission from your minds or else give exclusive decision-making power to the CEC. We are afraid that such an attitude is not conducive to democratic principles. Footnote 6 to page 657 of Halsbury's Laws of England, 4th Edition (Re-issue), Vol. 7(1) posits:

> "The principle has long been established that the will of a Corporation or body can only be expressed by the whole or a majority of its principals, and the act of a majority is regarded as the act of the whole. (See Shakelton on the Law and Practice of Meetings, Eighth Edition, Compilation of AG, page 116.)"

The same principle was reiterated in *Grindley* v *Barker* 126 English Reporter 875 at 879 & 882. We do not consider it necessary to go through various decisions on this point.

The argument that the impugned provisions constitute a fraud on the Constitution, in as much as they are designed and calculated to defeat the very purpose of having an Election Commission, is begging the question. While in a democracy every right-thinking citizen should be concerned about the purity of the election process, this court is no less concerned about the same as would be evident from a series of decisions. It is difficult to share the inherent suggestion that the ECs would not be as concerned about it. And to say the CEC would have to suffer the humiliation of being overridden by two civil servants is to ignore the fact that the present CEC was himself a civil servant before his appointment as CEC.

The Election Commission is not the only body which is a multi-member body. The Constitution also provides for other public institutions to be multi-member bodies, e.g. the Public Service Commission. Article 315 provides for the setting up of a Public Service Commission for the Union and every State and Article 316 contemplates a multi-member body with a Chairman. Article 338 provides for a multi-member National Commission for SC/ST comprising a chairman, vice-chairman and other members. So there are also provisions for the setting up of certain other multi-member Commissions or Parliamentary Committees under the Constitution. These, too, function by the rule of majority and so we find it difficult to accept the broad contention that a multi-member Commission is unworkable. It all depends on the attitude of the chairman and its members. If they work in co-operation, appreciate and respect each other's point of view, there will be no difficulty, but if they decide from the outset to pull in opposite directions, they will, by their conduct, make the Commission unworkable and thus fail the system.

That brings us to the question of malafides. It is in two parts. The first part relates to events which preceded the Ordinance, and the second part to post-Ordinance and notification events. On the first part, the CEC contends that since, after his appointment, he had taken various steps with a view to ensuring free and fair elections and was constrained to postpone certain elections which were to decide the fate of certain leaders belonging to the ruling party at the centre, i.e. the National Congress (1), he had caused considerable discomfiture to them. His insistence on strict observance of the model Code of Conduct had also disturbed the calculations of the ruling party. According to him, he had postponed the elections in the Kalka Assembly Constituency, Haryana, because the Chief Minister of Haryana, belonging to the ruling party at the centre, had flouted the guidelines. Similarly, he had postponed the elections in the State of Tripura which ultimately led to the dismissal of the Government headed by the Chief Minster belonging to the ruling party at the centre. The postponement of the by-elections involving Shri Sharad Pawar and Shri Pranab Mukherjee also upset the calculations of the said party. He had also postponed the election of the Ranipet Assembly Constituency, Tamil Nadu, as the Chief Minister of the State had flouted the model Code of Conduct by announcing certain projects on the eve of the elections. Shri Santosh Mohan Dev, Union Minister, who belonged to the ruling party, was also upset because the CEC took disciplinary action against officials who were found present at his election meetings. The ruling party was also unhappy with his decision to announce general elections for the State Assemblies for Madhaya Pradesh, Uttar Pradesh, Rajasthan, Himachal Pradesh and the National Capital Territory of Delhi as the party was not ready for them. According to the CEC, he had

also spurned the request made through the Lieutenant Governor of Delhi by the said party for postponement of elections. According to him, emissaries were sent by the said party at the centre to him but he did not oblige, and he even took serious exception to the conduct of the Governor of Uttar Pradesh, Shri Moti Lal Vohra, for violating the model Code of Conduct. Since the ruling party at the centre failed in all its attempts to prevail upon him, it decided to convert the Election Commission into a multi-member body and, after having the Ordinance issued by the President, the impugned notifications appointing the two ECs were issued. The extraordinary haste with which all this was done while the CEC was at Pune, and the urgency with which one of the appointees, Shri M.S. Gill, was called to Delhi by a special aircraft betrayed the keenness on the part of the ruling party to install the two newly-appointed ECs. The CEC describes in detail the post-appointment events which took place at the meeting of 11th October, 1993 in paragraphs 18 (c) to (f) and (g) of the writ petition. According to him, by the issuance of the Ordinance and the notifications, the ruling party is trying to achieve indirectly that which it could not achieve directly. These, in brief, are the broad counts on the basis of which he contends that the ruling party at the centre was keen to dislodge him.

On behalf of the Union of India it is contended that the allegation that the power to issue an Ordinance was misused for a collateral purpose, namely, to impinge on the independence of the Election Commission, is wholly misconceived since it is a known fact that the demand for a multi-member Commission had been raised from time to time by different political parties. The Joint Committee of both Houses of Parliament had submitted a report in 1972 recommending a multi-member body, and the Tarkunde Committee, appointed on behalf of the Citizens for Democracy, also favoured a multi-member Election Commission in its report submitted in August 1974. Similarly, the Committee on electoral reforms appointed by the Janata Dal Government, in its report in May 1990, favoured a three-member Election Commission. Various Members of Parliament belonging to different political shades had also raised a similar demand from time to time. The Advocates General of various States, in their meeting held on 26th September, 1993 at New Delhi, had made a similar demand. It was, therefore, not correct to contend that the decision to constitute a multi-member Election Commission was abruptly taken with a malafide intention, to curb the activities of the present CEC. The allegation that the decision was taken because the ruling party at the centre was irked by the attitude of the CEC in postponing elections on one ground or the other is denied. The issue regarding the constitution of a multi-member Election Commission was a live issue and was discussed at various fora. Even the Supreme Court in Dhanoa's case had indicated that vast discretionary powers, with virtually no checks and balances, should not be left in the hands of a single individual, and it was desirable that more than one person should be associated with the exercise of such discretionary powers. It was, therefore, in the public interest that the Ordinance in question was issued, and two ECs were appointed to associate with the CEC. The deponent contends that this was a bone fide exercise and it was unfortunate that a high-ranking official like the CEC had alleged that one of the ECs had been appointed because he was a close friend of the Prime Minister, an allegation which was unfounded. It is, therefore, denied that the Ordinance and the subsequent notifications appointing the two ECs were intended to sideline the CEC and erode his authority. The Government bona

fide followed the earlier reports and the observations made in Dhanoa's, therefore, contended that Sections 9 and 10 do not suffer from any vice as alleged by the CEC. The two ECs have also filed their counter-affidavits denying these allegations. Shri G.V.G. Krishnamurthy, respondent No.3 in the CEC's petition, has pointed out that the CEC had made unprecedented demands, for example, (i) to be equated with Supreme Court Judges, and had pressurised the Government that he be ranked along with Supreme Court Judges in the Warrant of Precedence; (ii) that powers of contempt of court be conferred upon the Election Commission; (iii) that the CEC had refused to participate in meetings as ex-officio member of the delimitation Commission headed by Mr. Justice A.M. Mir, Judge of the High Court of J & K, on the grounds that his position was higher, he having been equated with judges of the Supreme Court; (iv) that the CEC be exempted from personal appearance in Court; (v) the Election Commission be exempted from the purview of the UPSC so far as its staff was concerned, etc.

The learned Attorney-General pointed out that no malafides can be attributed to the exercise of legislative power by the President of India under Article 123 of the Constitution. He further pointed out that, having regard to the express language of Article 324(2) of the Constitution, it was perfectly proper to expand the Election Commission by making appropriate changes in the extant law. The question whether it is necessary to appoint other ECs besides the CEC is for the Government to decide and that is not a justiciable matter. The demand for a multi-member Commission had been voiced for the last several years, and merely because it was decided to make an amendment in the statute through an Ordinance, it was not permissible to infer that the decision was actuated by malice. It was lastly contended that Article 324 nowhere stipulates that, before ECs are appointed, the CEC will be consulted. In the absence of an express provision in that behalf, it cannot be said that the failure to consult the CEC before the appointment of the two ECS vitiates the appointment.

One of the interveners, the petitioner of SLP No. 16940 of 1993, has filed written submissions through his counsel wherein, while supporting the action to constitute the multi-member Commission, he has criticised the style of functioning of the CEC and has contended that his actions have, far from advancing the cause of free and fair elections, resulted in hardships to the people as well as the system. It has been pointed out that several rash decisions were taken by the CEC on the off-chance that they would pass muster, but when challenged in court he failed to support them and agreed to withdraw his orders. It is, therefore, contended that the style of functioning of the present CEC is itself sufficient reason to constitute a multi-member Commission so that the checks and balances mechanism that the Constitution provides for different institutions may ensure proper decision-making.

There is no doubt that when the Constitution was framed, the Constitution-makers considered it necessary to have a permanent body headed by the CEC. Perhaps the volume of work and the complexity thereof could be managed by a single-member body.

At the same time it was realised that, with the passage of time, it may become necessary to have a multi-member body. That is why express provision was made in that behalf in clause (2) of Article 324. It seems that for about two decades the need for a multi-member body was not felt. But the issue was raised and considered by the Joint Committee which submitted a report in 1972. Since no action was taken on that report, the Citizens for Democracy, a non-governmental organisation, appointed a committee headed by Shri Tarkunde, a former Judge of the Bombay High Court, which submitted its report in August 1974. Both these bodies favoured a multi-member Commission but no action was taken and, after a lull, when the Janata Dal came to power, a committee was appointed which submitted a report in May 1990. That committee also favoured a multi-member body. Prior to that, in 1989, a multi-member Commission was constituted, but we know its fate (see Dhanoa's case). But the issue was not given up, and demands continued to pour in from Members of Parliament of different hues. These have been mentioned in the counter of the Union of India. It cannot, therefore, be said that this idea was suddenly pulled out of a bag. Assuming the present CEC had taken certain decisions not palatable to the ruling party at the centre, as alleged by him, it is not permissible to jump to the conclusion that that was the cause for the Ordinance and the appointments of ECs. If such a nexus is to weigh, the CEC would continue to act against the ruling party in order to keep the move for a multi-member commission at bay. We find it difficult to hold that the decision to constitute a multi-member Commission was actuated by malice. Therefore, even though it is not permissible to plead malice, we have examined the contention and see no merit in it. It is wrong to think that the two ECs were pliable persons who were being appointed with the sole object of eroding the independence of the CEC.

We may, incidentally, mention that the decisions taken by the CEC from time to time postponing elections at the last moment, of which he has made mention in his petition, have evoked mixed reactions. This we say because the CEC uses them to lay the foundation for his contention that the entire exercise was malafide. Some of his other decisions were so unsustainable that he could not support them when tested in Court. His public utterances at times were so abrasive that this Court had to caution him to exercise restraint on more occasions than one. This gave the impression that he was keen to project his own image. That he has very often been in the newspapers and magazines and on television cannot be denied. Against this backdrop, if the Government thought that a multi-member body was desirable, the Government certainly was not wrong and its action cannot be described as malafide. Subsequent events would suggest that the Government was wholly justified in creating a multi-member Commission. The CEC has been seen in a commercial on television and in newspaper advertisements. The CEC has addressed the Press, and is reported to have said that he would utilise the balance of his tenure to form a political party to fight corruption and the like (Sunday Times, Bombay, dated June 25th, 1995 page 28). Serious doubts may arise regarding his decisions if it is suspected that he has political ambitions, in the absence of any provision, such as Article 319 of the Constitution. The CEC is, it would appear, totally oblivious to the sense of decorum and discretion that his high office requires, even if the cause is laudable.

That brings us to the question of legislative competence. The contention is that, since Article 324 is silent, Parliament expected the Commission itself to evolve its own procedure for transacting its business, and since the CEC was the repository of all power to be exercised by the Commission falling within the scope of its activity, it did not see the need to engraft any procedure for transacting its business. If the Election Commission, at any time, saw the need for it, it would itself evolve its procedure, but Parliament cannot do so and hence Sections 9 and 10 are unconstitutional. Except for the legislation specifically permitted by clauses (2) and (5) of Article 324 and Article 327 and 328, Part XV of the Constitution does not conceive of a law by Parliament on any other matter and hence the impugned legislation is unconstitutional.

Now it must be noted at the outset that both clauses (2) and (5) of Article 324 contemplate a statute for the appointment of ECs and for their conditions of service. The impugned law provides for both these matters, and provisions to that effect cannot be challenged as unconstitutional since they are expressly permitted by the said clauses (2) and (5). Once the provision for the constitution of a multi-member Commission is unassailable, provisions incidental thereto cannot be challenged. It was urged that the legislation squarely fell within Entry 72 of List T of the Seventh Schedule. That entry refers to "Elections to Parliament, and Vice-President; the Election Commission". If, as argued, the scope of this entry is relatable and confined to clauses (2) and (5) of Article 324 and Article 327 and 328 only, it would be mere Lautology. If the contention that the CEC alone has decisive power is not accepted, and we have not accepted it, and even if it is assumed that the normal rule is of unanimity, sub-sections (1) and (2) of Section 10 provide for unanimity. It is only if there is no unanimity that the rule of majority comes into play under sub-section (3). Therefore, even if we were to assume that the Commission alone was competent to lay down how it would transact its business, it would be required to follow the same pattern as is set out in Section 10. We, therefore, see no merit in this contention either.

We would here like to make it clear that we should not be understood to approve of the ratio of Dhanoa's case in its entirety. We have expressly approved it where required.

One of the matters to which we must turn is the question of the status of an individual whose conditions of service are akin to those of the judges of the Supreme Court. This seems necessary in view of the reliance placed by the CEC on this aspect to support his case. In the instant case, some of the service conditions of the CEC are akin to those of the Supreme Court Judges, namely, (i) the provision that he can be removed from office in like manner and on like grounds as a Judge of the Supreme Court; and (ii) his conditions of service shall not be varied to his disadvantage after appointment. So far as the first is concerned, instead of repeating the provisions of Article 124 (4), the draftsman has incorporated the same by reference. The second provision is similar to the proviso to Article 125 (2). But does that confer the status of a Supreme Court Judge on the CEC? It appears from the D.O. No. 193/34/92 dated July 23, 1992 addressed to the then Home Secretary, Shri Godbole, that the CEC had suggested that the position of the CEC in the Warrant of Precedence needed consideration. This issue he seems to have raised in

his letter to the Prime Minister in December 1991. It becomes clear from Shri Godbole's reply dated July 25th, 1992, that the CEC desired that he be placed at No. 9 in the Warrant of Precedence at which position the Judges of the Supreme Court figured. It appears from Shri Godbole's reply that the proposal was considered but it was decided to maintain the CEC's position at No.11 along with the Comptroller and Auditor General of India and the Attorney-General of India. However, during the course of the hearing of these petitions it was stated that the CEC and the Comptroller and Auditor General of India were thereafter placed at No. 9A. At our request the learned Attorney-General placed before us the revised Warrant of Precedence which did reveal that the CEC had climbed to position No 9A, along with the Comptroller and Auditor General of India. Maintenance of the status of Judges of the Supreme Court and the High Courts is highly desirable in the national interest. We mention this because of late we find that even personnel belonging to other fora claim equality with the High Court and Supreme Court Judges merely because certain jurisdictions earlier exercised by those Courts are transferred to them, not realising the distinction between constitutional and statutory functionaries. We would like to impress on the Government that it should not confer equivalence or interfere with the Warrant of Precedence, if it is likely to affect the position of High Court and Supreme Court Judges, however pressing the demand may be, without first seeking the views of the Chief Justice of India. We may add that Mr. G. Ramaswamy, learned counsel for the CEC, frankly conceded that the CEC could not legitimately claim to be equated with Supreme Court Judges. We do hope that the Government will take note of this and do what is needful.

We have deliberately avoided going into the unpleasant exchanges that took place in the chamber of the CEC on 11th October, 1993, to which reference has been made by the CEC in paragraph 18 (c to f and g) of his petition. These allegations have been denied by Shri Krishnamurthy, and Shri Gill does not support the CEC when he says he was abused. Although these allegations and counter-allegations found their way into the press, we do not think any useful purpose will be served by washing dirty linen in public except to show both the CEC and Shri Krishnamurthy in a poor light. They have several years of experience as civil servants behind them. All of them have served in responsible positions at different levels. It is a pity they did not try to work as a team. The efforts of Shri Gill to persuade the other two to forget the past and to get on with the job fell on deaf ears. Unfortunately, suspicion and distrust got the better of them. We hope that they will forget and forgive, start on a clean slate of mutual respect and confidence and get going on the task entrusted to them in a sporting spirit, always bearing in mind the fact that the people of this great country are watching them with expectation. For the sake of the people and the country, we do hope that they will eschew their egos and work in a spirit of camaraderie.

In the result, we uphold the impugned Ordinance (now Act 4 of 1994) in its entirety. We also uphold the two impugned notifications dated 1st October, 1993. Hence, the writ petitions fail and are dismissed. The interim order dated 15th November, 1993 will stand vacated. If, as is reported, the incumbent CEC has proceeded on leave, leaving the office in charge of Shri Bagga, Shri Bagga will forthwith hand over charge to Shri Gill till the CEC resumes duty. The IAs will stand disposed of. In the facts and circumstances of the case, we direct parties to bear their

own costs. If the CEC has incurred the costs of his petition from the funds of the Election Commission, the other two ECs will be entitled to the same from the same source.

.....CJI

.....J.
(J. S. Verma)

.....J.
(N. P. Singh)

.....J
(S.P. Bharucha)

.....J
(M. K. Mukherjee)

New Delhi
14th July, 1995

JUDGEMENT OF THE HIGH COURT OF KARNATAKA

AT

BANGALORE

Dated the 24th day of November 1994

Before

THE HONOURABLE MR JUSTICE R V RAVEENDRAN

WRIT PETITION NO. 32175/1994

1. B. L. Shankar **2. Sri Srikanth S Vantagodi**

PETITIONERS

(By Sri Ko Channabasappa – Advocate)

V

1. The Chief Election Commission **2. The Chief Electoral Officer of Karanataka**

RESPONDENTS

Sri Jayaram & Jayaram and
Sri Sanjeev Ahuja – Adv. for R.1
Sri M B Prabkhakar – HCG for R.2)

Writ Petition is filed under Article 226 of the Constitution of India r/w Rule 2 and 3 of the Writ Proceedings Rules praying to quash the order dated 31st August 1994 vide Annexure A and the order dated 17th December 1994 vide Annexure B as unconstitutional and as such null and void and etc.

***Elections** – Candidates' election expenses – Keeping accounts – Power of Election Commission to issue Orders requiring specific manner of keeping accounts – Day-to-day keeping of accounts – Whether Election Commission could require a candidate to use prescribed register to keep accounts – Whether Election Commission had legal competence to issue orders – Whether Election Commission had right to inspect account before its submission.*

***Before**: R. V. Raveendram J*

***Background Facts:** The Election Commission issued two Orders: Order No. 76/93/J S II, dated 17th December 1993, and Order No. 76/ES003/94 JS II, dated 31st Agust 1994, containing instructions for guidance of contesting candidates in regard to maintenance of day-to-day expenses as required by Section 77 of the Representation of the People Act, 1951 and Rule 86 of the Conduct of Elections Rules 1961.*

The petitioner contended that the Election Commission had no competence, either under the Constitution of India or under the Representation of the People Act, to issue such Orders and hence they were null and void.

***Held:** That the Orders were valid.*

Cases cited in Judgement:

S. P. Gupta v *Union of India (1982) AIR SC 146*

Gadakh Yeshwantrao Kankarrao v *E. V. alias Belasaheb Vikhe Patil & Others (1993) Civil Appeal N. 2115*

Manwarlal Gupta v *Amarnath Chawla (1975) AIR SC 308*

P. Nalla Thamby v *Union of India (1985) AIR SC 1133*

T. Narayanswamy v *C. K. Jafeer Shariff (1994) 5JT SC 136*

All Party Hill Leader 'Conference, Shilling' v *Captain W A Sangwa (1977) AIR SC 2155*

Mohinder Singh Gill v *Chief Election Commission (1978) AIR SC 851*

Kanhiya Lall Omar v *R. K. Trivedi (1986) AIR SC 111*

This petition coming on for orders this day, the Court made the following:

ORDER

1. The first petitioner is the General Secretary of a recognised political party, and the Second Petitioner is an Independent candidate for election to the State Legislative Assembly. Both are voters in Karnataka. They seek the quashing of two orders issued by the Election Commission of India (the first respondent herein) that is, Order No. 76/93/J S II, dated 17th December 1993, and order No. 76/ES 003/94J S II, dated 31st August 1994 (Annexures A and B), containing the instructions for guidance of contesting candidates in regard to the maintenance of day-to-day expenses as required by Section 77 of the Representation of People Act, 1951 ("Act" for short) and Rule – 86 of the Conduct of Election Rules 1961 ("Rules" for short).

2. As reference to the directions contained in the said orders and the reasons for issue of such directions is necessary, the relevant portions of the said two orders are extracted below:

ORDER No 76/93/J S II, dated 17–12–1993

5. The increasing role of the power of money in elections is well known and is the end of maladies which sometimes reduce the process of election into a more force ??? by placing some privileged candidates with financial resources in a distinctly advantageous position compared to other candidates. The result of such an election cannot reflect the true choice of the people. The system also sometimes deprives qualified and able persons of the prerogative to represent the masses.

6. It is commonly perceived that the above quoted provisions of law (Section 77) have become utterly inadequate to check the corrupting influence of the power of money.

7. It is relevant to cite from a recent judgement of the Supreme Court in this context (Civil Appeal No. 2115 of 1993, *Gadakh Yeshwantrao Kankarro* v *E. V. alias Belasaheb Vikhe Patil and others* with Civil Appeal Nos 2116 of 1993, 2444 of 1993, 1758 of 1993):

> "The existing law does not measure up to the existing realities. The ceiling on expenditure is fixed only in respect of the expenditure incurred or authorised by the candidate himself but the expenditure incurred by the party or anyone else in his election campaign is safely outside the net of legal sanction. The spirit of the provision suffers violation through this escape route. The prescription of a ceiling on expenditure by a candidate is a mere eye-wash, and no practical check on election expenses for which it was enacted to attain a meaningful democracy. This lacuna in the law is, however, for the Parliament to fill lest the impression is reinforced that its retention is deliberate for the convenience of every one. If

this be not feasible, it may be advisable to omit the provision to prevent the resort to indirect methods for its circumvention and subversion of law, accepting without any qualm the role of money power in the elections. This provision has ceased to be even a fig leaf to hid the reality."

8. The Honourable Court has further expressed the fond wish in the above-quoted judgement that the "duty of the top echelons of leadership at the State and national level of all political parties is to set the trend for giving the needed information to the electorate by adopting desirable standards so that its percolates to the lower levels and provides a congenial atmosphere for a free and fair poll".

9. The Commission, as early as February 1992, had sent to the Government of India a detailed and self-contained note on electoral reforms proposing, among other things suitable amendment of the aforesaid provisions of law relating to election expenses to make them really effective and meaningful, and has since then been eagerly waiting for an acknowledgement of its proposals from the Government. The Commission has, in the meanwhile, carefully considered ways and means to render the accounts of election expenditure submitted by the candidates as close to the truth as possible, within bounds.

10. **The Commission directs as follows:**

10.1 The proforma prescribed for filing the returns of election expenditure vide Commissions letter No. 76/81, dated 18th September 1981, stands modified as Annexure I of this order. The revised proforma consists of two parts: Part I for maintaining the account from day-to-day; and Part II for showing the total expenditure with required details on various items listed therein.

10.2 Each candidate, while lodging the return of his election expenditure in the prescribed proforma, shall also file an affidavit on oath, as in Annexure II, that the expenditure shown as nil, if any, on items listed in Part II of the proforma or left blank herein, has not been incurred by him but by others mentioned in Explanation (1) to Section 77(1) of the Representation of the People Act, 1951. The affidavit will also clearly state that all election expenditure on listed items relating thereto has been completely and unexceptionally included in the return and there is nothing that has not been disclosed.

10.3 It is clarified here that while the above quoted provisions of law do not oblige a candidate to maintain a separate and correct account of the expenditure incurred by those mentioned in the said Explanation (1), there is no exemption from listing the tangible items of election expenditure by them which constituted a part of the election campaign – viz posters, public meetings, gates, arches, video displays etc., and to satisfy that expenditure on these items was not incurred or authorised by him.

10.4 Since the return of election expenditure filed by a candidate has to reflect the "correct" account of "all" election expenses, the District Election Officer, before accepting the account of the candidate as being in accordance with the manner prescribed, shall conduct such enquiry as he deems necessary, and at the time of communicating his report to the Commission as required under Rule 89 of the Conduct of Elections Rules, 1961, certify to the Commission, with reference to the documents filed before him and as verified by him through an appropriate enquiry, that the statement of accounts is in the manner prescribed.

10.5 The Commission intends to "supercheck" the authenticity of the returns filed through the above procedure and shall hold the candidates personally responsible for any lapse or misrepresentation.

ORDER No. 76/ES.003/94 J S III, dated 31st August 1994

3. It is significant to note that the above-quoted provisions of law and rules prescribe, inter alia, that a true and faithful account of all relevant expenditures will be "kept" "from day-to-day".

4. The Commission, being deeply aware of the increasingly vitiative role of unaccounted financial resources in elections, and the fragility of the existing law in curbing such vitiation, and to render the accounts of election expenses to be lodged under section 78 of the Representation of the People Act, 1951 truly and comprehensively reflective of the actual expenditure, has prescribed a procedure and proforma for the lodging of accounts of election expenses vide its order No. 76/93/JS II dated 17th December 1993, a copy of which is attached.

5. The superchecks conducted by the Commission in pursuance of para 10.5 of the above-mentioned order dated 17th December 1993, in a number of cases of accounts lodged by candidates at some recent elections, have revealed, inter alia, that many candidates do not "keep" a true record of day-to-day election expenditures as specifically required by the provisions of law and rules quoted above. In some cases, the date details and vouchers filed in support thereof, have been found to have been concocted, fabricated and put together in order to give a mere semblance of the fact that "a separate and correct account of all expenditure" was kept "from day-to-day".

6. The Commission is convinced that order No. 76/93/J S II, dated 17th December 1993, needs to be further fortified by additional regulatory measures. The Commission, in exercise of its power under Article 324 of the Constitution and in pursuance of section 77 of the Representation of the People Act and Rule 86 of the Conduct of Elections Rules 1961, directs as follows:

(1) A register in a standard proforma as shown in Annexure I to this order shall be issued to each candidate by the District Election Officer immediately after his nomination for keeping the day-to-day account of expenditure.

(2) This register shall be fully authenticated by the District Election Officer at the time of issue.

(3) All day-to-day accounts shall be faithfully recorded in this register, and in no other document, by the candidate or his agent authorised by him in this behalf.

(4) All documents such as vouchers, receipts, acknowledgements etc., in support of the expenditures incurred shall be obtained from day to day, as the expenditure is incurred, and maintained in the correct chronological order, along with the aforesaid register.

(5) The day-to-day account maintained in the aforesaid register, together with the supporting documents, shall be made available for inspection at any time during the process of election by the District Election Officer, Returning Officer, Election Expenditure Observer appointed by the Commission or any other such authority nominated by the Commission in this behalf. Failure to produce this register on demand will be considered a major default.

(6) While lodging the accounts of election expenditures under Section 78 of the Representation of People Act, 1951, the candidate shall file the prescribed register as a part of the proforma earlier prescribed vide Commission's order No. 76/93/J S II, dated 17th December, 1993.

3. CONTENTIONS OF PETITIONERS

The contentions of petitioners, in brief, are:

3.1 Under Article 324 of the Constitution of India, the Election Commission has been entrusted with the power of superintendence, direction and control of the conduct of the election. But the Election Commission cannot arrogate to itself any legislative power by virtually making laws in the guise of passing orders relating to election to the House of Parliament and the State Legislature. Any order passed by the Election Commission should be within the parameters laid down by Parliament in the Representation of People Act 1951 and The Conduct of Election Rules, 1961. While the Election Commission may issue directions in regard to any matter not expressly covered by any law made by Parliament, it cannot issue directions in regard to matters which are specifically provided for either in the Act or the Rules, by requiring anything contrary to or in addition to what is required by or provided for in the Act and the Rules. Any such transgression by the Election Commission should be held to be void.

3.2 The aforesaid two orders, dated 17th December 1993 and 31st August 1994, are not merely regulatory, in supervising, directing and controlling elections, but are virtually in the nature of amendments to the Act and the Rules, thereby encroaching upon the legislative powers of Parliament. The two orders introduce obligations which are contrary to the statutory provisions, and, in all events, seek to regulate matters which are specifically regulated by the Act and the Rules, and to that extent they are transgressions. While money power should not play any role in the elections and should be curbed to enable free and fair elections to the legislature, the Election Commission cannot arrogate to itself powers which are not traceable either to the Act or the Rules or Article 324 of the Constitution of India.

3.3 The said two orders transgress the statutory provisions by:

(a) requiring the candidates to maintain day-to-day accounts;

(b) requiring the candidates to maintain accounts in the Registers supplied by the Election Commission;

(c) requiring the candidates to file affidavits as prescribed in the Annexure to the order, dated 17th December 1993;

(d) providing for inspection of accounts of the candidates before they are lodged or submitted by the candidates as provided under Section 78 of the Act; and

(e) requiring candidates to maintain and submit accounts in regard to expenditure incurred by political parties, association or body of persons or individuals, in connection with the election of a candidate; and

(f) requiring anything to be done or not to be done, which is not provided either in Sec. 77 of the Act or Rule 86 of the Rules.

3.4 The said orders, in particular paras 9 and 10-3 of the order dated 17th December 1993 and para 6 of the order dated 31st August 1994, clearly show that they transgress the limits of law and exceed the provision of Section 77 of the Act and Rule 86 of the Rules. Para 9 of the order states that the Election Commission had suggested certain amendments to election law, and as there had been no response from the Government, the Commission was issuing directions contained in para 10, of the order dated 17th December 1993 virtually contain the amendments to law sought by the Election Commission, but not made by the Parliament. Similarly, para 6 of the order dated 31st August 1994 speaks of additional regulatory measures to fortify the existing directions and measures. Hence the two orders are liable to be struck down.

4. CONTENTIONS OF RESPONDENTS

4.1 The learned counsel for the first respondent contended that the petition itself was not maintainable for the following two reasons:

(a) the petition is in the nature of a public interest litigation and is not a petition by a person aggrieved by the orders. A public interest litigation is maintainable only if it is intended to promote and vindicate public interest which demands that there should (could ???) be a violation of constitutional or legal rights of a section of the public who are poor, ignorant or in a socially or economically disadvantaged position. Having regard to the principles relating to public interest litigation, the present petition is not maintainable;

(b) only a person affected by the two orders, that is, a candidate in the election, can challenge the two orders. As neither of the petitioners is an affected candidate, the petition is not maintainable;

(c) the election process having admittedly commenced, Article 329 (b) is a bar to this petition.

4.2 Dealing with merits, learned counsel for the first respondent submitted that the requirements to be fulfilled by the two impugned orders do not create or cast any fresh obligations, but merely enforce the law contained in the Act and the Rules, as they are only steps taken by the Election Commission to enforce and implement the provisions of the Act and the Rules which cast a duty on the candidates to maintain accounts. Enforcement of a law cannot be prevented by contending that such enforcement would be harsh on the subject or cause hardship to the subject. Even if the orders are construed as referring to matters which are not specifically provided for in Section 77 and Rule 86 or other Provisions of the Act and the Rules, they merely fill up blanks in law or gaps which are left uncovered, and the Election Commission has the power to issue such directions under Article 324. Proper and effective implementation of any existing law cannot, by any stretch of imagination, be termed as usurpation of the legislative power to make laws. Having regard to the provisions of the Act, the Rules and the Indian Penal Code, the inspection of accounts, even prior to the lodging of the accounts, was permissible and in fact, absolutely necessary. The two orders should not be viewed as a threat to the candidate, but as putting the candidate on notice regarding proper implementation of the Act and the Rules in the interest of maintaining the purity of elections.

5. POINTS FOR CONSIDERATION

5.1 On these contentions, the points that arise for consideration are as follows:

(i) Whether the two orders dated 17th December 1993 and 31st August 1994 are in accordance with law or transgress the limits prescribed in Section 77 of the Act, Rule 86 of the Rules and Article 324 and therefore liable to be quashed;

(ii) Whether Article 329 (b) of the Constitution of India is a bar for consideration of the petition or the granting of any relief under Article 226.

5.2 The first point does not require lengthy consideration. The learned counsel for the Election Commission has proceeded on the assumption that neither of the petitioners is a candidate in the ensuing election. But factually this assumption is erroneous. The second petitioner is stated to be an Independent candidate for election to the Arabhavi Constituency, and therefore, has sufficient interest to maintain this petition. Even otherwise, where it is alleged that a public authority has acted in violation of any constitutional or statutory obligation, resulting in any injury to the public interest, any member of public acting bona fide and having sufficient interest, can maintain an action for redressal against such public injury, vide decision of the Supreme Court in *S P Gupta* v *Union of India (AIR 1982 SC 146).* It is therefore, to be held that the petition is maintainable.

Re: Point (ii)

6. It is necessary to refer to the relevant provisions of law to consider the validity of the said two orders of the Election Commission.

6.1 Chapter VIII of the Act and the Rules deals with election expenses. Section 77 deals with the account of election expenses and maximum thereof, the relevant portion of which is extracted below:

> **SECTION 77: ACCOUNT OF ELECTION EXPENSES AND MAXIMUM THEREOF**
>
> (1) Every candidate at an election shall, either by himself or by his election agent, keep a separate and correct account of all expenditure in connection with the election incurred or authorised by him or by his election agent between the date on which he has been nominated and the date of declaration of the result thereof both days inclusive.
>
> **Explanation 1:** Notwithstanding any judgment, order or decision of any court to the contrary, any expenditure incurred or authorised in connection with the election of a candidate by a political party or by any other association or body of persons or by any individual (other than the candidate or his election agent) shall not be deemed to be, and shall not ever be deemed to have been expenditure in

connection with the election incurred or authorised by the candidate or by his election agent for the purposes of this sub-section:

Proviso (a) (b): omitted as not relevant.

Explanation 2: Omitted as not relevant.

(2) The account shall contain such particulars, as may be prescribed.

(3) The total of the said expenditure shall not exceed such amount as may be prescribed.

6.2 Section 78 requires every candidate at an election to lodge with the District Election Officer an account of his election expenses within thirty days from the date of election of the returned candidate.

6.3 Rule 86 prescribing the particulars of accounts of election expenditure to be kept by the candidates is extracted below:

RULE 86: PARTICULARS OF ACCOUNT OF ELECTION EXPENSES

(1) The account of election expenses to be kept by a candidate or his election agent under section 77 shall contain the following particulars in respect of each item of expenditure from day to day, namely:

(a) the date on which the expenditure was incurred or authorised;
(b) the nature of the expenditure (as for example, travelling, postage or printing and the like);
(c) the amount of the expenditure:
    (i) the amount paid;
    (ii) the amount outstanding;
(d) the date of payment;
(e) the name and address of the payee;
(f) the serial number of bills, if any, in the case of the amount outstanding;
(g) the name and address of the person to whom the amount outstanding is payable.

(2) A voucher shall be obtained for every item of expenditure unless from the nature of the case, such as postage, travel by rail and the like, it is not practicable to obtain a voucher.

(3) All vouchers shall be lodged, along with the account of election expenses, arranged according to the date of payment and serially numbered by the candidate

or his election agent and such serial numbers shall be entered in the account under item (f) sub-rule (1).

(4) It shall not be necessary to give the particulars mentioned in item (e) of sub-rule (1) with regard to items of expenditure for which vouchers have not obtained under sub-rule (2).

6.4 Rule 90 prescribes the maximum election expenses which can be incurred or authorised in an election.

6.5 Section 10 a requires the Election Commission to disqualify a candidate for a period of three years if he fails to lodge an account of the election expenses within the time and in the manner required. Section 7(b) defines "disqualified" as being disqualified for being chosen and being a member of either the House of Parliament or Legislative Assembly or the Legislative Council of a State.

6.6) Section 123 enumerates the corrupt practices for the purpose of the Act. Incurring or authorising expenditure in contravention of Section 77 shall be deemed to be a corrupt practice for the purpose of the Act, vide sub-section (6) of Section 123. Section 100 lists the grounds for declaring an election to be void. Under sub-section (1)(b), if the High Court is of the opinion that any corrupt practice has been committed by a returned candidate or his election agent or any other person with the consent of the returned candidate or his election agent, the election of the returned candidate shall be declared as void. Under sub-section (1)(d)(ii) and (iv), if the result of the election, in so far as it concerned a returned candidate, has been materially affected by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent, or by any non-compliance with the provisions of the Constitution or of the Act or any Rules or the orders made under the Act, then also, the election of the returned candidate can be declared void by the High Court.

6.7 Apart from these provisions, two Sections from the Indian Penal Code are also relevant. Section 171(H) deals with illegal payment in connection with an election and Section 171(I) relates to failure to keep election accounts. They are extracted below.

SECTION 171–H: ILLEGAL PAYMENTS, IN CONNECTION WITH AN ELECTION

Whoever, without the general or special authority in writing of a Candidate, incurs or authorises expenses on account of the holding of any public meeting, or upon any advertisement, circular or publication, or in any other way whatsoever for the purpose of promoting or procuring the election of such candidate, shall be punished with a fine which may extend to five hundred rupees.

Provided that any person, having incurred any such expenses not exceeding the amount of ten rupees without authority obtains, within ten days from the date on which such expenses were incurred, the approval in writing of the candidate, he shall be deemed to have incurred such expenses with the authority of the candidate.

SECTION 171–I: FAILURE TO KEEP ELECTION ACCOUNTS

Whoever being required by any law for the time being in force or any rule having the force of law to keep accounts of expenses incurred at or in connection with anelection fails to keep such accounts shall be punished with a fine which may extend to five hundred rupees."

7. Sub-section (1) of Section 77 of the Act requires every candidate at an election to keep separate and correct account of all expenditure in connection with the election incurred or authorised by him or by his election agent between the date on which he has been nominated and the date of declaration of the result thereof. The object of Section 77 was dealt with in great detail by the Supreme Court in *Manwarlal Gupta vs Amarnath Chawla,* decided on 3rd October 1994 (AIR 1975 SC 308), and the Supreme Court held that the limit on expenditure cannot be evaded by the candidate by not spending any money of his own but leaving it to the political party sponsoring him or his friends and supporters to spend an amount far in excess of the limit and thereby frustrate the object of imposing a ceiling on expenditure. Explanation (1) to sub-section (1) of Section 77 was inserted on 19th October 1974 to set at nought the above decision of the Supreme Court. The said explanation clarifies that any expenditure incurred or authorised in connection with the election of a candidate, by a political party or by any other association or body of persons or by any individual (other than the candidate or his election agent) shall not be deemed to be expenditure in connection with the election, incurred or authorised by the candidate or his election agent, for the purpose of sub-section (1).

7.1 The effect and validity of the explanation (1) of Section 77 was considered by the Supreme Court in *P. Nalla Thamby* v *Union of India (AIR 1985 SC 1133).* The Supreme Court, while upholding the validity of the explanation, held:

"We have referred to this large data in order to show that the influence of big money on the election process is regarded universally as an evil of great magnitude. But then, the question which we, as Judges, have to consider is whether the provision contained in Explanation 1 suffers from any constitutional infirmity and, particularly, whether it violates Article 14. On that question we

find it difficult, reluctantly though, to accept the contention that Explanation 1 offends against the right to equality. Under that provision, (i) a political party or (ii) any other association or body of persons or (iii) any individual, other than the candidate or his election agent, can incur expenses, without any limit whatsoever, in connection with the election of a candidate. Such expenses are not deemed to be expenditure in connection with the election, incurred or authorised by the candidate or by his election agent for the purposes of S.77(1).

Counsel for the petitioner urged that Explanation 1 renders the main provision in S.77(1) nugatory, by taking away with one hand what is given by the other. Assuming that this is so, the Explanation would not become unconstitutional for that reason. The argument really bears upon the interpretation of the Section and the Explanation, and not upon the validity of the Explanation. We do not agree that the Explanation denudes the section of its meaning and makes it purposeless. S.77(1) deals with the expenditure "incurred or authorised by" a candidate or his election agent, in connection with the election. It is obligatory to keep a separate and correct account of such expenditure. Explanation 1 deals with the expenditure incurred or authorised by a political party, or any other association or body of person or by an individual other than the candidate or his election agent. It is obligatory for the candidate or his election agent to keep a separate and correct account of such expenditure. This is for two reasons. In the first place, such expenditure is not incurred or authorised by the candidate or his election agent and therefore, in the very nature of things, they cannot keep an account of that expenditure. Secondly, the argument that expenditure of the kind described in Explanation 1 must be deemed to be incurred or authorised by the candidate or his election agent, is met by the provision in the Explanation that it shall not be so deemed. S.77(1) on the one hand and Explanation 1 on the other, deal with two different situations therefore the latter cannot render the former meaningless.

It is essential that the limited range of Explanation 1 ought not to be enlarged. The ceiling placed on election expenses is a basic commandment of the Act, not a pious edict. Its object is to keep a check on the expenditure incurred by candidates on their own elections, directly or through their election agents. They cannot be permitted to resort to subterfuges in order to evade the restraint imposed by Ss.77(1) and 77(3) of the Act. Homage to the principle of free and fair election has to be real, not formal."

7.2 The effect of Section 77 and Explanation 1 thereto, came up for consideration before the Supreme Court again in two cases, first, in *Gadakh Yashwantrao Kankar Rao* v *E. V. Alias Belasaheb Vikhe Patil & Others* (Civil Appeal Nos 2115 with 2116, 2444 and 1758 of 1993 disposed on 19th November 1993), the relevant portion of which is extracted in para 7 of the impugned order, dated 17th December 1993, extracted above. The second decision is *T.*

Narayanaswamy v *C. K. Jaffer reported in JT 1994 SC 136*, wherein the Supreme Court observed thus:

> As the law stands in India, today anybody, including a smuggler, criminal or any other anti-social element, may spend any amount over the election of any candidate in whom such person is interested, for which no account is to be maintained, or to be furnished and any such expenditure shall not be deemed to have been expenditure in connection with the election, incurred or authorised by the candidate or by his election agent for the purpose of sub-section (1) of Section 77, so as to amount to corrupt practice within the meaning of sub-section (6) of Section 123. It is true that, with the rise in the costs of the mode of publicity for support of the candidate concerned, the individual candidate cannot fight the election without proper funds. At the same time, it cannot be accepted that such funds should come from hidden sources which are not available for public scrutiny. According to us, sub-section (6) of Section 123 declaring "incurring or authorising of expenditure in contravention of Section 77" a corrupt practice has lost its significance and utility with the introduction of Explanation 1 aforesaid which encourages corruption by underhand methods. If the call for "purity of elections" is not to be reduced to a lip service or a slogan, then the persons investing funds, in furtherance of the prospect of the election of a candidate must be identified and located. The candidate should not be allowed to plead ignorance about the persons who have made contributions and investment for the success of the candidate concerned at the election. But this has to be taken care of by the Parliament.

8. Let me next refer to some decisions dealing with the powers of the Election Commission. In *All Party Hill Leaders' Conference, Shilling* v *Captain W. A. Sangma* (AIR 1977 SC 2155) the Supreme Court held that the Election Commission is empowered in its own right under Article 324 to make directions in general in the widest terms necessary and also in specific cases, in order to facilitate free and fair elections with promptitude. In *Mohinder Singh Gills* v *Chief Election Commission* (AIR 1978 SC 851), the Supreme Court held that power of the Election Commission under Article 324(1) is plenary in character, and Article 324 vests the whole responsibility for elections and, consequently, the necessary powers to discharge that function in the Election Commission. Article 324 operates in areas left unoccupied by legislation, and the words "superintendence", "direction" and "control", as well as conduct of all elections are the broadest terms which would include the power to make all provisions for free and proper elections. Article 324, on the face of it, vests vast functions, which may be powers or duties, essentially administrative and marginally even judicative or legislative. The Supreme Court further observed that "Even so, situations may arise which enacted law has not provided for. Legislators are not prophets but pragmatists. So it is that the Constitution has made comprehensive provision in Article 324 to take care of surprise situations. That power itself has to be exercised, not mindlessly nor *mala fide*, not arbitrarily nor with partiality, but in keeping with the guidelines of

the rule of law and not stultifying the Presidential Notification for existing legislation. More is not necessary to specify; less is insufficient to leave unsaid".

8.1 In *Kanhiya Lal Omar* v *R. K. Trivedi* (AIR 1986 SC 111) the Supreme Court reiterated that the words "superintendence", "direction" and "control" of the conduct of elections occurring in Article 324 operates in areas left unoccupied by legislation. The Supreme Court further observed:

> While construing the expression "superintendence", "direction" and "control" in Article 324(1), one has to remember that every norm which lays down a rule or conduct cannot possibly be elevated to the position of legislation or delegated legislation. There are some authorities or persons in certain grey areas who may be sources of rules of conduct and who at the same time cannot be equated to authorities or persons who can make law, in the strict sense in which it is understood in jurisprudence. A direction may means an order is issued to a particular individual or a precept which many may have to follow. It may be a specific or a general order. One has also to remember that the source of power in this case is the repository and source of all legal powers and any power granted by the Constitution for a specific purpose should be construed liberally so that the object for which the power is granted is effectively achieved.

8.2 These decisions make it clear that while the Election Commission has undoubtedly the power and authority to issue orders and directions in connection with superintendence, direction and control and conduct of elections, it cannot make laws in the garb of issuing orders under Article 324, contrary to any statute. In other words, the Election Commission is entitled to do everything necessary for the proper conduct of elections so long as the directions are not contrary to the provisions of the Constitution, Representation of Peoples Act, 1951, Conduct of Election Rules, 1960, or other statutory provisions.

9. In the light of the above principles, let me now examine whether the two orders dated 17th December 1993 and 31st August 1994 issued by the Election Commissioner transgress the provisions of Section 77(1) or Rule 86.

10. The first transgression complained of is that the Election Commission cannot require the candidates to maintain day-to-day accounts. It is contended that Section 77 does not contemplate maintaining of accounts from day to day and all that is required is that a candidate should maintain and lodge a true account of his expenses. It is pointed out that Section 77 does not use the words "day to day". Section 77(1) requires the candidate, either by himself or by his election agent, to keep a separate and correct account of all expenditures in connection with the election incurred or authorised by him or by his election agent, between the day on which the candidate has been nominated and the date of declaration of result of the election. Section 77(2) provides that the account shall contain such particulars as may be prescribed. Rule 86 requires that the

account of election expenses to be kept by a candidate or his election agent under Section 77 shall contain the particulars specified therein in respect of each item of expenditure from day to day. Section 171–1 of the Indian Penal Code provides that failure to "keep accounts of expenses" incurred at or in connection with an election as required by any law, shall be punished in the manner provided therein. Section 171–1 therefore contemplates inspection to find out whether accounts are "kept". The words "to keep accounts" means to maintain continuously, that is, to enter or write accounts regularly, from day to day. When expenditure is incurred day to day, accounts will also have to be maintained day to day. "To keep accounts" does not mean that the candidate can write the accounts at the end of the period for which the account is required to be maintained or keep accounts sporadically. Black's Law Dictionary (6th Edition Page 868) defines "to keep" books is to maintain books continuously and methodically for the purposes of a record. Hence, having regard to the specific provisions of Section 77(1) and (2) of the Act and Rule 86 of the Rules and Section 171–I of the Indian Penal Code, the requirement relating to maintaining "day-to-day" accounts cannot be termed a transgression.

11. The next complaint is in regard to the requirement relating to maintaining accounts in the Registers supplied by the Election Commission. The Order dated 31st August 1994 requires the candidate, or his agent authorised by him, to faithfully record the day-to-day accounts in the Register supplied by the District Election Officer and in no other document. The pro forma of the register (given in Annexure I to the Order dated 31st August 1994) shows that what is to be maintained in the Register is nothing more than what is required under Rule 86. The Register does not require entering or maintaining accounts in a different manner or the candidates to do anything not provided in Section 77 or Rule 86. The requirement to maintain accounts in the Register supplied by the Commission will ensure a uniform accounting practice, highlighting what is required under Section 77 and Rule 86, and also ensure day-to-day accounting, and make verification and inspection of accounts easy and convenient. It will also ensure that accounts are not maintained in loose sheets of paper or books, the authenticity of which cannot be verified later, and will prevent additions, alterations, substitutions or tampering. The entire idea behind the requirement is to facilitate easy verification and inspection of accounts by the District Election Officer, Returning Officer or Election Expenditure Observer or other Authority appointed by the Commission, ensuring that the accounts are properly maintained without giving room for any falsification/fabrication. Thus, the requirement is merely an effective way of implementing the provisions relating to maintenance of accounts and is not a transgression of any law.

12. The third complaint is in regard to requiring candidates to file affidavits as per pro forma contained in Annexure II of the Order dated 17th December 1993. The affidavit to be submitted merely requires affirmation that the accounts are properly maintained, and is in conformity with the requirements of Section 77 and Rule 86. The furnishing of such affidavits is part of the process of maintaining accounts and nothing more. The Election Commission is fully justified and empowered in requiring the furnishing of such affidavits.

13. The fourth complaint is in regard to provision for inspection of the accounts before they are lodged by the candidate under Section 78. There are two different and distinct consequences for not maintaining accounts. The first relates to the obligation of the lodging of an account of his election expenses (a true copy of the account kept by him under Section 77) with the District Election Officer within 30 days from the date of election of the returned candidate. If a candidate does not lodge an account as contemplated under Section 78, he incurs disqualification as provided under Section 10 a. The second relates to the obligation to maintain accounts regularly or properly, failing which the candidate commits an offence under Section 171–I of the Indian Penal Code and becomes liable for punishment, provided in the Section 171–I. The consequence of not lodging accounts under Section 78, and the consequence of not maintaining the accounts under Section 77 and Rule 86, are distinct and separate. Further, a person who does not maintain accounts also stands the risk of his election being declared void under Section 100(1)(h)(iv). If the accounts cannot be inspected before their submission, as contended by Petitioners, then it is not at all possible to find out whether a person has "kept" accounts or not. If the requirement relating to inspection of accounts is to be held as not provided for or not authorised, then it would mean that there can be no offence at all under section 171–I of the Indian Penal Code. Section 171–I of the Indian Penal Code clearly implies a power in the authority controlling elections or persons authorised by such authority, to inspect the accounts and prosecute the candidate if accounts are not kept.

14. The fifth transgression complained of is that, while Section 77 and Rule 86 contemplate and require the candidate to maintain and submit accounts in regard to the expenditure incurred by himself or his election agent, the Election Commission has exceeded its powers and jurisdiction by requiring the candidates to maintain and submit accounts in regard to the expenditure incurred by the political party to which the candidate belongs, or by any association or body of persons interested in the success of the candidate. It is contended that, whatever the position of law before the Amendment by Act 58 of 1974 introducing Explanation 1 to Section 77(1) with effect from 19th October 1974, the position now is that any expenditure incurred by any political party or any association or body of persons or any individual other than the candidate or his election agent, shall not be deemed to be expenditure in connection with the election agent; and therefore, the Election Commission cannot require the candidate to maintain accounts in regard to expenditure by a political party or others referred to in Explanation 1 to Section 77(1).

14.1 The said Explanation will have to be read keeping it in juxtaposition to Section 171–H of the Indian Penal Code which provides that whoever, without the general or special authority in writing of a candidate, incurs or authorises expenditure on account of the holding of any public meeting, or upon any advertisement, circulation or publication, or in any other way whatsoever for the purpose of promoting or procuring the election of such candidate, shall be punished with a fine which may extend to Rs. 500/-. While Section 171–H makes it an offence for any person to incur any expenditure for the purpose mentioned therein without the authority of the candidate, Explanation No. 1 to Section 77 provides that any expenditure incurred by a political or other person mentioned therein will not be deemed to be expenditure authorised by

the candidate or his election agent. The Parliament in its legislative wisdom did not choose to omit Section 171–H from the Indian Penal Code, while introducing Explanation (1) to Sec. 77(1) of the Act. Hence these provisions will have to be read harmoniously.

14.2 A careful reading of Explanation (1) to Section 77(1) would show:

(a) That the explanation refers and relates only to expenditure incurred by any political party or others (other than the candidate or his election agent) not authorised by the Candidate or his election agent; and it does not apply to any expenditure by any political party or others mentioned in the explanation, which is authorised by the candidate or his election agent, as any expenditure authorised by the candidate or his election agent becomes part of the candidate's election expenses.

(b) The explanation does not empower, authorise, or enable any political party or association or body of persons or individuals, to incur expenditure on behalf of the candidate, without the authority of the candidate. All that the explanation provides is that if any expenditure is incurred by a political party or by others (other than the candidate or an election agent), it should not be deemed to be expenditure in connection with the election, incurred or authorised by the candidate or his election agent.

(c) The insertion of Explanation (1) is to ensure that a candidate does not incur disqualification or is not accused of any corrupt practice on account of his political party or any third party spending money for his election, without his authority, thereby putting the candidate to the risks consequent upon exceeding the ceiling limit prescribed under Rule 90.

14.3 It therefore follows that if any expenditure is incurred by a political party or any other association or body of persons or by any individual, and if such expenditure is authorised by the candidate, then it becomes a part of candidate's election expenses. If, on the other hand, any political party or any association or body of persons or any individual incurs any expenditure in connection with the election of a candidate, and the candidate does not authorise such expenditure, then the same will not become part of the candidate's election expenditure, but such expenditure would be an unauthorised expenditure or "illegal payment" under section 171–H of the Indian Penal Code and the person committing such an illegal act will be subject to punishment as provided therein.

14.4 The introduction of Explanation (1) to Section 77(1) does not take away the effect of Section 171–H under which any expenditure without the general or special authority in writing of a candidate is an illegal act.

The position that emerges is thus. If a political party or any other person incurs any expenditure, and if it is authorised, it will be a part of the election expenditure of the candidate and will have

to be accounted in the manner prescribed. If is not authorised, then the candidate has no obligation to keep an account in that behalf and the candidate will not incur any disqualification or other consequences on account of such expenditure, but a person who incurs such expenditure commits an offence punishable under Section 171–H of the Indian Penal Code.

14.5 Having reached the conclusion that any expenditure incurred by a political party or by any other person, in connection with the election of the candidate, if authorised by the candidate, becomes a part of his election expenditure, the question is whether he should keep account of such expenditure or ignore that expenditure for the purpose of his accounting. The candidate will have to maintain accounts of the expenditure incurred or authorised by him or his election agent. Neither Section 77 nor Rule 86 makes any distinction between election expenses which can be traced to a political party or others. Once any expenditure is treated as the election expenses of the candidate, whatever may be the source, the candidate becomes liable to maintain accounts in respect of such expense, even if it is incurred by a political party or any other. The requirement that the candidate should account for all expenditure authorised by him, which may include any expenditure incurred by a political party, is thus justified.

15. Even though the preamble to the two impugned orders of the Election Commission may give room for an impression that the Commission is requiring something new, not provided under any existing law, an analysis of the directions contained in the orders will demonstrate that what is required to be performed by the two orders is nothing new, but what is contemplated and provided for in Section 77(1) of the Act, Rule 86 of the Rules and also Section 171–H and 171–I of the Indian Penal Code. The impugned orders do not transgress or exceed what is contained in the said provisions. They are wholly within the competence of the Election Commission having regard to Article 324. They merely implement the existing law in regard to the maintenance of accounts by candidates at Elections. The two orders may put the candidates to some inconvenience by requiring them to maintain accounts day to day in an elaborate manner, but such a requirement is well within the power of the Election Commission. The hardship or inconvenience that may be caused to the candidates in requiring them to maintain proper accounts is a very small price to be paid in the interest of the purity of elections. There is thus no merit in any of the contentions urged by the petitioners to challenge the said two orders.

RE: POINT (iii)

16. The learned counsel for the Election Commission submitted that the process of election having commenced, Article 329–B of the Constitution is a bar for grant of any relief in this petition. The petitioners contend that the subject matter of this petition is the validity of the impugned orders issued by the Election Commission, prior to the commencement of the election process, and that examination of the validity of the said orders and the decision thereon, will not come in the way of elections nor will it postpone any election nor will it affect any election. As I have upheld the validity of the two impugned orders and therefore rejected the petition, it is not

necessary to examine the question whether this Court can consider the validity of such orders passed by the Election Commission when the election process is on.

In view of the foregoing, this petition is rejected.

Sd/=Judge

IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CIVIL APPLICATION NO. 602 OF 1992

JARAMOGI OGINGA ODINGA & 3 OTHERS — **APPELLANTS**

V

ZACHARIAH RICHARD CHESONI
THE ATTORNEY-GENERAL — **RESPONDENTS**

Before: ***F. Abdullah, J, J.W. Mwera J and E. Githinji, J.***

Elections *– Motion to remove Chairman of Electoral Commission on grounds of unfitness – Order sought to stop voter registration exercise on ground of irregularities by Electoral Commission – whether procedures to bring action were proper - whether applicants had locus standi to bring action – Lack of personal interest on part of applicants.*

Background facts: *The applicants, political party leaders, asked the Court for declaration and orders on eleven grounds against the 1st respondent, Justice Chesoni, the Chairman of the Electoral Commission, and the 2nd respondent, the Attorney-General. The prayers were for orders that the first respondent had become unfit and unqualified to head the Electoral Commission; that the voter registration exercise which was going on was null and void for that reason and that, therefore, the Court should issue a restraint order against the first respondent from acting as the Chairman of the Electoral Commission and declare the voter registration exercise of no effect at all.*

Held*: That the applicants had no locus standi to bring the motion.*

Cases cited in the Judgement:

Mwangi Stephen Murthi v *Attorney General (1981) HCCC 1170 (unreported).*

Bayes v *Gathure [1969] EA 385.*

St Benoist Plantations Ltd v *Jean Felix (1954) 21 EACA 105.*

Masaba v *R [1967] EA 488.*

R v *Magistrates Court (1957) 5LGR 129.*

R v *Paddington Valuation Officer ex parte Peachey Property Corporation Ltd [1966]/QB 380.*

Kenneth Wallace Whitfield v *Attorney General (1989) Appeal No. 11 (Commonwealth Law Bulletin vol. 16 No. 3 July 1990).*

RULING

By their originating motion, dated 13th July 1992, the applicants Messrs Odinga, Kibaki, Nganga and Makau, Chairmen of FORD, D. P. KENDA and SDP-registered political parties, came to court asking for declarations and orders on 11 grounds against the first respondent, Justice Chesoni, the Chairman of the Electoral Commission, and second respondent the Hon. Attorney General.

Put together, the prayers are for orders that the first respondent had become unfit and unqualified to head the Electoral Commission; that the voter registration exercise which was going on then was null and void for that reason, and that therefore this court should issue a restraint against the first respondent from acting as the Electoral Commission Chairman, and another order should stop the voter registration, with the end result that the voters' cards so far issued should be destroyed. In essence, this court was being asked to declare the whole voter registration exercise of no effect at all.

Mr. M'Inot represented the applicants. Mr. Ransley and Miss Janmohamed appeared for the first respondent, while Mr. Keiuwa came in for the Attorney-General.

Before the hearing of the application, which touched on various subjects including universal suffrage, preliminary points of law were raised by the respondents' counsel. These can be categorised under four main heads:

(1) non-joinder of Electoral Commission as a party;
(2) the form and procedure adopted by the applicants in bringing this application;
(3) whether there was a cause of action; and
(4) applicants' locus standi.

(1) **Non-Joinder of Party:** This was Mr. Keiuwa's main point of objection. He associated himself fully with Mr. Ransley's points which will follow presently. Then for his part Mr. Keiuwa argued before us that the applicants had not joined the Electoral Commission as a party, although prayers were made for orders against it. Accordingly, he asked us to strike out grounds 1, 2(b), 6, 7, 8, 10 and 11 of the originating motion. Mr. M'Inoti countered this by referring to Order 1 R9 CPR:

> 9. No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

In accordance with this rule then, we could only dispose of the controversy between first and second respondent. But applicants could amend the motion to bring in the Electoral Commission, otherwise any orders would affect these two only, leaving out the Electoral Commission. Mr.

M'Inoti however argued that the Attorney-General was the principal adviser and counsel of the Government with its departments. The Electoral Commission was such a department, as is the Public Service Commission, and, thus, the Attorney-General was rightly sued. The Public Service Commission is another creature of the Constitution. Several cases were cited, and chief among them was the case of *Mwangi Stephen Murith v. Attorney-General HCCC 1170/1981* (unreported). In this matter the plaintiff had been retired by the Public Service Commission. He was not amused by that. He sued the Attorney-General. One of the points that was canvassed was whether the plaintiff was non-suited on those grounds. Hancox J., as he then was, heard the case. He concluded that Murithi's case constituted civil proceedings within section 12(1) of the Government Proceedings Act. Accordingly, the Attorney-General had been properly sued. But here we came upon a hitch. These proceedings are brought under an originating motion. This form and procedure is contested by Mr. Ransley. It is not indicated in the originating motion that the Attorney-General was being sued on behalf of the Electoral Commission as a government body. Indeed, this cannot appear in the originating motion where parties are hardly described. But even if that were so, the question remained to be answered. It was added that injunctions do not issue against the Government according to Government Proceedings Act S. 16(1)(i) Cap (40), yet those were asked for in prayers 9 and 11. Secondly, it was further argued, if the Attorney-General were here for the Electoral Commission as a whole, why was the first respondent, the Electoral Commission Chairman, sued separately? Although it can be done under Order 1 Rule 9, no move had so far been taken to effect amendments to join the Electoral Commission to the parties so that any errors are corrected and the case proceeds before us to determine matters in controversy with all due parties appearing. On reading the Government Proceedings Act, there is even the issue of a statutory notice under section 13A which ought to go to the Attorney-General if he is being sued for and on behalf of the Government. When referring to this Act, Mr. Keiuwa did not refer to this section and Mr. M'Inoti did not wish to say anything about the Act.

We were, however, satisfied that the Electoral Commission should be considered in the same class as the Public Service Commission on whose behalf the Attorney-General appears in court when it is sued. He was thus sued here on behalf of the Electoral Commission and so we did not sustain the objection raised on this point at all. As for suing the first respondent separately, we were of the view that the applicants in their prayers had made complaints specific to him as the Electoral Commission Chairman. And for the that reason it was proper that he appear as a separate party.

Accordingly, we concluded that there was no non-joinder of parties.

(2) **The Form and Procedure:** Mr. Ransley raised this issue and argued before us that the Constitution, as well as any other statutes which afford an aggrieved party recourse to court for redress, also spells out the mode to follow. Where a mode is not provided for, then an originating motion comes to the parties' aid. But where there is no provision or mode to follow, then a party must seek redress by filing a plaint.

Mr. Ransley continued that this originating motion was brought under sections 60 and 123 (8) of the Constitution. None of these refer to any mode of filing proceedings under them. Why then did the applicants file an originating motion? Three cases were cited to us regarding the form and procedure of filing proceedings.

In *Boyes* v *Gathure [1969] E A 385*, an application had been made to the Registrar of Titles to remove a caveat. A party applied to a judge in chambers to extend that caveat's life. It was accordingly extended. This mode of application was challenged because the relevant Act allowed a party to "apply by summons". In this matter, the Court of Appeal considered whether it was correct for the applicant to come to the High Court to extend the life of a caveat by way of a chamber summons as he had done, or if he ought to have filed an originating summons. The former is for interlocutory matters in an existing suit, while the latter brings parties to court in a specific action for the first time and with a view to having the parties' rights determined conclusively. The court agreed that the application, by way of chamber summons, was in the wrong form but that that did not invalidate the proceedings. The irregularity did not go to the court's jurisdiction and it did not occasion any failure of justice. The judge, however, should have struck out or rejected that application, because of the wrong form of bringing it. The application ought to have been by an originating summons.

E VS E,[1910] E A 604, was the next case cited to us. It also concerned the use of originating summons in the dissolution of a Mohammedan marriage. The defendant objected to this mode of instituting proceedings. The application for dissolution was struck out because it was brought under the originating summons instead of the correct mode of plaint. This is so because under the Mohammedan Divorce and Succession Act (chapter 156) no form or procedure for dissolution of a marriage is set out. This was in line with the court's view in Boyes & Gathure case (supra), namely striking out or rejecting proceedings brought to court under a wrong form.

The earlier case of *St. Benoist Plantations Ltd* v *Jean Felix* [1954] 21 EACA 105, was relied on by both sides. This case was also referred to in the *Boyes* case (supra). In this case, the respondent had moved the court by originating the motion for an order that the court appoint two chartered accountants to investigate the affairs of the company under section 136 of the Companies' Ordinance. The affidavit in support of this originating motion showed misappropriation of the company's funds and misconduct on the part of a director. The appellant company argued, inter alia, that the application for investigation was not in the proper form as the originating motion was not then known and applied in Kenya. In this case, the originating motion had been brought under (the now) Order 50 rule 1. It was observed at pp. 108:

> It seems clear...that if the local statute law provides a form of procedure for any specific proceedings, that form must be adopted. It is only where no form is provided that one is thrown back on the English procedure as at 12th August 1897. If the local law does not provide a suitable or at least a competent mode

> of procedure for an application under section 136, it must be made under the old English procedure...by originating motion.

The same point was repeated on the same page after describing the uses of either the originating summons or originating motion in England. The court observed:

> There is in England a general rule that where a statute provides for an application to the court but does not specify the form in which it is to be made, and the Rules do not expressly provide for any special procedure, the application may usually be made by originating motion.

Mr. M'Inoti argued that, under section 60 of the Constitution, his clients had a right to come to court for redress. That section did not provide for the mode and procedure by which to come to court. Accordingly, the applicants had adopted the originating motion as the avenue to travel to court. The respondents' side would not hear of this. They argued before us that there was no right or provision to come to court under section 60. That section did not give rights of action or causes of action whereupon it could be said that if it did not provide for a mode to seek redress when those rights were breached, then the originating motion could be the appropriate way. That is what formed the substantial part of the next two preliminary points regarding the cause of action and locus standi, which we will turn to next. But we are of the view that, where no mode of coming to court is provided for, yet one has a cause of action, the originating motion may be used. In fact, the party using will choose the mode. If it is found unsuitable, a proper one will have to be adopted so that justice is done to the parties. The court then commented thus at pp. 109:

> ....(it).... may be argued, first that a suit instituted by plaint is the omnibus procedure in this country or alternatively that applications should be made here by petition. We think that an application should properly be regarded as something distinct from an action or suit commenced by a plaint. In many cases the relief sought might be obtained by action – sometimes by claiming a declaration, but an application should in the ordinary sense be a summary proceeding, something simpler and shorter than an action.

So other modes of coming to court include plaints, petitions and applications.

Accordingly, it is clear that in such a situation where one has a cause but is not provided with the form and procedure to bring that cause to court for relief, the form and procedure adopted and used should be as appropriate. In our present case, if the applicants have a cause of action under section 60 (Constitution), how do they move? That section does not provide for a mode or procedure to come to court for redress. They should, as they did, file an originating motion. We were, therefore, satisfied that the applicants' originating motion is a competent form by which to come before us. The applicants are coming to us contending that their rights under the

Constitution are in jeopardy. In other jurisdictions where a party alleges violation of his rights under the Constitution while rules obtain as to mode and procedure to go about seeking redress, the position is different. The party simply goes by the rules laid down. For instance, in Uganda in 1967 they had such a clearly laid-down régime. The party had to come to court by way of an originating motion and no other (see Masaba v R [1967] E A 488).

(3) **Cause of Action**: It was argued for the applicants that they had a cause for action under section 60 (1) Constitution because that section says:

> Section 60 (1): There shall be a High Court which shall be a superior court of record, and which shall have *unlimited original jurisdiction* in civil and criminal matters and such jurisdiction and powers as may be conferred on it by this Constitution or any other law.

We did not agree with the counsel's submissions on the applicants' behalf that by such words this section created causes of action. On plain reading, the section establishes a High Court. It gives it a wide power to deal with matters known to law without being limited as to territorial or monetary value. This contrasts with the subordinate courts whose territorial and pecuniary, as well as subject matter jurisdiction is limited by specific statutes. The same with the Court the Appeal. It too operates within a given and specific law. In essence, matters which come before it are only on appeal. It needs to be stated that the High Court does not have to deal with any subject under the sun. The subject must be known to law; it must be a justiciable matter. Also, in its exercise of jurisdiction, the court will enforce rules of practice and suppress any abuses of its process to ensure that justice is done to the parties before it. The High Court does not have a general power to entertain at the insistence of anyone any matter raising a constitutional or any other issue. Its role is not that of standing as an ever-open forum for the ventilation of all grievances that draw upon the Constitution or any law for support. The court's unlimited powers ought to be and are used with judicial restraint and only in situations where the ends of justice may be defeated by failing to exercise them. To use these inherent or residual powers, the court must be satisfied on grounds placed before it that the powers should indeed be used. That, in our opinion, is what section 60 (1) provides for. It does not create causes of action or courses to follow in those actions. Section 123 (8) gives this court power to review the action of persons or authorities given duties and functions which they should execute without control and direction from any source. This court is thus mandated to determine questions arising from whether such body or authority has exercised such functions according to the legal provisions applicable. That is all.

We appreciate that for an aggrieved party to come to us for redress under the Constitution, only two sections avail. Section 84 is for a party whose fundamental rights and freedoms have been or are likely to be infringed. These rights fall between sections 70 – 83 of our Constitution. The mode to come to this court has been by way of an originating motion. Indeed, it can be added that if by application of other sections of the Constitution, one's fundamental rights and freedoms

are breached, by clearly showing that state of affairs as bringing that party under section 84 for redress, this court will hear him or her.

This court will also hear a party whose case falls under section 67 of Constitution. By this section, if a case is before a subordinate court and it appears to that court that a substantial question of law falls to be interpreted by the High Court, that court may, or if a party to the proceedings so requests it, refer the matter to the High Court for interpretation.

No other provision exists in our Constitution creating causes and courses of action. Indeed, it is not that all sections of the Constitution must be contended in court anyway. The provision for the Electoral Commission is such a section. Under section 41 (1), the Electoral Commission is established with its chairman plus the members. This is a presidential prerogative. The qualifications for Electoral Commission members are set out in section 41 (3). The manner to remove a Commission member is by a presidential tribunal appointed under section 41 and (6). Reasons for removal fall under sub-section (5). There is no room for this court to declare any Electoral Commission member "unfit and disqualified", thereby removing him from the Electoral Commission. That is how the Legislature intended it to be, and this court will not arrogate to itself the duty or anything regarding removal of Electoral Commission members. Following from the foregoing, prayers against the Electoral Commission or its Chairman, are untenable as causes of action before this court. In sum, we were not satisfied that section 60 creates any causes of action at all. Therefore, those which were claimed as such were not maintainable before us at all. The purpose of section 60 is explained above and that is all. And if a party has no cause of action, i.e. the basis on which he/she files proceedings before a court, then that court wastes no time in going through a form of hearing. It is futile. Accordingly we were satisfied that the applicants had no cause of action to bring before us to hear. The Constitution did not create any cause of action for them and we were not told that any other law did so at all.

(4) **Locus Standi:** Do the applicants have a legal standing before this court in the current proceedings? The argument on behalf of the applicants is that they indeed have the right to bring these proceedings. They are chairmen of registered political parties. They feel that any Electoral Commission irregularity in voter registration will affect and impair the electors' right to vote in the coming general elections. It is a trite law that a party coming to court for redress should have a genuine interest known to law which has been or is likely to be prejudiced. The court then is expected to apply the law to the facts of the case which may involve a broken contract, personal injury, damage to reputation or property, breach of statutory right or duty etc. and pronounce a verdict. But if the prejudice affects others' interests, and one purports to bring any action on their behalf, one will be taken to be a mere busybody who has no right to stand before court unless one satisfies the court as to one's capacity to come to it on behalf of others. For that reason it is necessarily procedural that a party describe himself vis à vis the action and relation to other parties. When it comes to the public interest, where a party suffers generally as any other, then relator actions lie. These actions fall under sub-sections 61 and 62 of the Civil Procedure Act and are limited to public nuisance and public charity. The Attorney-General is the principal

aggrieved party but two or more private persons, having interest in the given action, and with the Attorney-General's written consent, can sue. However, even in such a situation, if a private citizen has suffered or is likely to suffer more than the public generally, then he can sue on his own.

From reading the originating motion, it is quite apparent that what the applicants are praying declarations for is to the effect that if such declarations do not issue, the Kenyan public entitled to or registered to vote in the forthcoming general elections will be prejudiced. It is claimed that there are prejudicial defaults and irregularities as per the paragraphs of the originating motion. But what is the applicants' own interest in jeopardy to entitle them to come before us? As electors? We cannot advert to any other capacities and descriptions they may have. What is the applicants' locus standi? Lord Denning's Discipline of the Law was cited to us (pp.115). Therein, the learned and eminent Lord Justice referred to two cases. In R v. Magistrate's Court (1957) 5LGR 129, it was stated that one party had been allocated a plot. The applicant, who had no legal right to it, thought that he was entitled. Lord Denning was on the bench that heard the application. They held that the applicant had a locus standi. These local government reports (LGR) are not easily available here for our own reading to follow the arguments. But the other case quoted in the same book was R v. Paddington Valuation Office Ex parte Peachey Property Corporation Ltd. [1966] 1 QB 380. A valuation list had been prepared. The applicant was not affected by any errors that were found in that list, but he was allowed to complain and be heard that the list was invalid. Particularly with regard to the last case, we cannot say what the valuation law rules involved and how they were worded. We could not, therefore, say more about it. Yet, we are still far from discerning the applicants' rights to come before us. Is this a representative proceeding before us? We can hardly say so. Are applicants aggrieved parties? In connection with these proceedings, let us turn to the National Assembly and Presidential Election Act and Rules (Chapter 7). The electors' registration is provided for in the Constitution and this Act governs the process thereof.

The law is clear (both under the NAPE Act and Rules) that a voter who is aggrieved before and after the elections can come to court.

During voter registration, any aggrieved person who feels that there is any irregularity likely to affect his right to vote, e.g. faults and errors with his card, he can go to the local registration officer, and then to the subordinate court for redress. It does not allow for some busybody to raise a complaint on behalf of others in this respect.

After elections, if one is aggrieved about the results, he can go to the subordinate court for local authority elections by way of an application. Or he can move to the High Court by filing a petition. That shows that the aggrieved party has the ground on which he stands to be heard. There is no ground on which an individual can stand before us in the voter registration, claiming to do so on behalf of the public, who are described here as millions of Kenyans. Not even on the issue of I D cards. The applicants have no "personal interest" at stake – at least the prayers do

not disclose one. Yet, it was claimed that they had an interest at stake which gave them legal standing before us. We could hardly find statute or case law in support of such a stance. Only individual voters whose "personal interest" are at stake, if any, have a legal standing before this court. It is not for anybody who feels that voters may be aggrieved.

In the matter of what may be presumed as affecting the general public, and therefore prompting one of them to file a suit or constitutional reference, two cases from the West Indies lend support to the position that one coming to court in such proceedings should have locus standi.

One such case arose in the Bahamas – *Kenneth Wallace Whitfield and The Attorney-General of the Bahamas* in re: The Bahamas Court of Appeal (Appeal No. 11/89) (published in the Commonwealth Law Bulletin Vol. 16 No. 3 July, 1990). In this case, the Prime Minister agreed with the Chief Justice before he attained the retirement age of 65 that the latter would continue in office for two more years. As per the Constitution, the Prime Minister was obliged to consult with the Leader of the Opposition on this matter. The Prime Minister, through oversight, did not do so. The appellant sought by declaration that the Chief Justice had not been validly permitted to continue in office. He had sat on an election court which dealt with a matter involving the appellant.

The Court of Appeal, in dismissing the appeal, held, inter alia, that there was no legal right being claimed and the appellant had no locus standi. The appellant had not shown that he had suffered any disadvantage or detriment because of the alleged defect in the procedure.

It can be seen, therefore, that even a person who can demonstrate a special interest he thinks entitles him to a declaration or relief, the court must be satisfied, not only that the interest exists but also that it has been prejudiced, and therefore the litigant is entitled to relief from the court he has approached. In essence, it is even harder for the intending litigant who has shown no personal interest at all which has been prejudiced, as our instant case is.

Another case is from St. Vincent and the Grenadines, also in the West Indies. Briefly put, in that country, the Constitution allowed the Governor-General to appoint two senators from the opposition in Parliament. After elections, there was no opposition member elected to the House to be appointed, but four were appointed from the government side. The plaintiffs sought for a determination on questions, inter alia, whether the government was legally constituted. The High Court dismissed the application on the grounds that the plaintiffs had no locus standi to bring proceedings. They had not proved that their personal interest was being contravened in any way by the alleged improperly constituted government. The fact that they were tax-payers and registered voters of the nation did not confer on them locus standi. (See Commonwealth Law Bulletin Vol. 17 No. 1 Jan. 1991.) We were in agreement with these two decisions that the party coming to court must have locus standi. That is the law.

In conclusion, we were satisfied that the applicants had no locus standi in regard to the prayers they presented. They did not disclose that the applicants' "personal interest" was in jeopardy, which interest would give the applicants the right in the law to stand before this court to be heard.

We, accordingly, uphold two of the preliminary points of law raised and dismiss the application with costs.

Orders accordingly delivered this 13th day of November, 1992.

F. ABDULLAH
JUDGE

E. GITHINJI
JUDGE

J. W. MWERA
JUDGE

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 5936 OF 1992

JARAMOGI OGINGA ODINGA

GITOBU IMANYARA **PLAINTIFFS**

HASSAN KADIR

V

THE ELECTORAL COMMISSION **DEFENDANT**

Before: T. Mbaluto, J

Elections *– Competence of Attorney-General to rectify Electoral Act through Revision of Laws Act – Validity of ensuing Order – Consequences of rectification – Attitude of Electoral Commission – Reliance of Electoral Commission on rectification – Legal Status of Electoral Commission – Ability to sue or be sued.*

Background facts: *The Attorney-General issued a Legal Notice on 23rd October 1992 purporting to rectify Section 13 (3)(b)(1) of the National Assembly and Presidential Election Act. The Legal Notice was issued in exercise of the powers conferred on the Attorney-General by Section 13 of the Revision of the Laws Act. The amendment had a substantial and profound effect on the meaning of the section for it practically reduced to zero the number of days which a political party had to nominate a candidate after the publication of a notice pursuant to the Section.*

The Attorney-General's amendment had changed the word "less" to "more" in the following passage:

> ***The day or days upon which each political party shall nominate candidates to contest parliamentary elections in accordance with its constitution or rules which shall not be less than twenty-one days after the date of publication of such notice.***

The Electoral Commission acted on the purported rectification of the Act by the Attorney-General by issuing a Gazette Notice No. 4887 of 3rd November 1992 giving political parties only eight days to finalise the nomination of their candidates. This notice would not have been valid prior to the rectification.

The applicants challenged the action of the Attorney-General as being null and void and of no effect and, similarly, the action taken by the Electoral Commission in issuing Gazette Notice No. 4887 of 3rd November 1992.

Held: *That the amendment of law by the Attorney-General was null and void and of no effect; the notice issued by the Electoral Commission publish in Gazette Notice No. 4887 dated 3rd November 1992 was also null and void and of no effect.*

Cases cited in Judgement:

The Queen v *Commissioner of Patents; Ex parte Martin (953) 89 Commonwealth Law Reports pp 406.*

Giella v *Cassman Brain & Co Ltd (1973) E.A. 358.*

RULING

This an application for a temporary injunction.

The applicants, Jaramogi Oginga Odinga, Gitobu Imanyara and Hassan Kadir are the Chairman, Secretary-General and Treasurer respectively, of the political party known as Forum For the Restoration of Democracy, Kenya. They have filed a suit against the Electoral Commission seeking, inter alia:

(1) A declaration that the purported "rectification" by the Attorney-General by legal notice No 276 of 1992 of 23rd October 1992 of section 13(3)(b)(1) of the National Assembly and Presidential Election Act (Chapter 7) is and has, at all times, been null and void and of no effect.

(2) A declaration that the specification of times by the Electoral Commission in Gazette Notice No. 4887 of 1992 of 3rd November 1992 in paragraphs (b) and (c) thereof are and have, at all times, been null and void and of no effect.

(3) An Order to restrain the Electoral Commission from acting or acting any further in reliance on the said specification and the said Gazette Notice until the determination of the suit.

The temporary injunction, the subject matter of this application, seeks orders substantially similar to the order sought in the third prayer stated above.

Early this year Parliament enacted the Election Laws (Amendment) Act, 1992. Section 6 of that Act amended section 13 (3) (b) of the National Assembly and Presidential Election Act to read as follows:

> "Every writ shall be delivered to the Director of Election who shall, within 10 days after receiving it:
>
> (a) .....
>
> (b) Cause to be published in the Gazette a notice in the prescribed form which shall specify:
>
> (1) The day or days upon which each political party shall nominate candidates to contest parliamentary elections in accordance with its constitution or rules which shall not be less than twenty-one days after the date of publication of such Notice".

The Act was assented to on 20th March 1992 and was deemed to have come into effect on 9th March 1992. It remained undisturbed throughout the remaining part of the life of the last

Parliament until 23rd October 1992, long after Parliament had been prorogued when section 13(3)(b)(1) thereof was purportedly rectified by Legal Notice No. 276 of 23rd October 1992 by the Attorney-General in exercise of the powers conferred upon him by section 13 of the Revision of the Laws Act (Chapter 1 of the Laws of Kenya). The rectification was effected by the deletion of the word "less" appearing therein and the insertion in its place of the word "more". Although the amendment appears minor at first glance, it had a substantial and profound effect on the meaning of the Section for, at a stroke, it not only reduced to zero the numbers of days upon which a political party had to nominate a candidate after the publication of a notice pursuant to the section, but also rendered the said section wholly meaningless and nugatory.

No replying affidavit has been filed in this matter on behalf of the Electoral Commission and, consequently, its attitude or reaction to the rectification and its role or lack of it in the matter is unknown. Mr. Ransley, who appeared for the Commission, took a neutral role on the issue, neither supporting nor opposing the rectification but contending that the Commission had to operate within the law (that is the law rectified) as it found it. Whatever the views of the Commission are on the matter, it cannot be gainsaid that the Electoral Commission was aware of the rectified law and, indeed, took advantage of the change, because by Gazette Notice No. 4887 of 3rd November 1992, it published a Notice giving political parties only eight days to finalise the nomination of their candidates, which said notice would not have been valid prior to the rectification.

The applicants in this application say that the purported rectification and the Notice published by the Electoral Commission are null and void and of no effect. They therefore seek this court's order to restrain the Commission from acting further on the said notice.

The Attorney-General issued the order contained in legal notice No. 276 of 23rd October 1992 in exercise of the powers conferred upon him by Section 13 of the Revision of Laws Act. The Section reads as follows:

> "The Attorney-General may by Order in Gazette rectify any clerical or printing error appearing in the Laws of Kenya, or rectify in a manner not inconsistent with the powers of Revision conferred by this Act any other error so appearing".

It is manifestly clear from the wording of the above-section that the Attorney-General can only rectify a law where there is:

(i) a clerical error;
(ii) a printing error; or
(iii) in a manner not inconsistent with the power of revision conferred upon him by the Act, which effectively means powers conferred by Section 8.

As submitted by Mr Nowrojee, learned counsel for the applicants, the notion of an error within the meaning of the Revision of Law Act presupposes an error is the transcription of something already in existence. Clearly, in my view, it cannot have reference to a non-existing thing. In the Australian case of the Queen v. Commissioner of Patents Ex parte Martin (1953) (89 Commonwealth Law Reports at page 406) the court said:

> the characteristic of a clerical error is not that it is in itself trivial or unimportant but that it arises in the mechanical process of writing or transcribing.

I have had a chance to look at the Bill presented before Parliament for enactment of the Election Laws Amendment Act 1992 and particularly Section 6 thereof, and I can see not a single difference whatsoever between the Bill as presented by Parliament and the Act. There was therefore no printing or clerical error in the preparation of the Act either during or after its passage by Parliament. Since on the face of it, there is no "error" clerical or printing, in the word "less" affecting in section 13(3)(b)(i) of Chapter 7 which required rectification under section 13 of the Revision of Laws Act, and no evidence has been adduced to show what error was being rectified, I must take it that there was, in fact, no such error, and that the purported rectification was sneaked in mischievously for purposes other than those stated in the said Order.

As for the powers of revision conferred upon the Attorney-General by Section 8 of the Revision of Laws Act, they are only exercisable in the preparation of the annual supplement to the Laws of Kenya which was not the case in this matter.

In any event, Section 8(4) of the Revision of Laws Act makes it clear that in exercising the powers conferred by Section 8, the Attorney-General has no power to make any changes in the substance of the law. It provides:

> Nothing, in this section shall empower the Attorney-General to make any alteration or amendment in the substance of any Law.

The rectification being complained of by the applicant effected very substantial changes to the Election Laws. As I have said above, it reduced the number of days political parties have to nominate candidates to zero. It also altered what people thought was a safeguard for political parties against being caught by surprise into a meaningless and worthless piece of provision in the National Assembly and Presidential Elections Act. The objects of the Revision of Law Act was not to enable the Attorney-General to effect such an illegal amendment, and I am convinced that the order he made under Legal Notice No. 276 of 23rd October, 1992 was in excess of the powers conferred by Section 13 of the Revision of Laws Act. The purported rectification was therefore null and void and of no effect.

In opposing the application, Mr Ransley for the Electoral Commission did not really attack the substance of the applicants' ground. Instead, he raised a technical matter urging this court to

dismiss the application on the grounds that the Electoral Commission was not a legal identity which could be sued. The basis of his argument was that the Electoral Commission and the Commissioners were government servants who, by virtue of the Government Proceedings Act, should have been sued through the Attorney-General. That, in my view, is too legalistic a point to take in a matter of such a grave importance to the country, and I will not entertain it. In any event, since its institution, the new Electoral Commission under Mr Justice Chesoni has been preaching to the country the gospel that it is independent of the Government and that it does not receive any instructions from the Government in the discharge of its functions. That is, indeed, how it should be. It may of course be that there is a lacuna in the laws that are required to formalise the Electoral Commission's independence of and separation from the Government so that it can be in a position to sue or be sued without having to involve the Attorney-General. But, whatever the position, the Electoral Commission cannot have it both ways – one day independent of the Government and on another part of the Government. That is clearly untenable. For that reason I find that the Electoral Commission can be sued independently of the Government and can be compelled by Order to act in accordance with the Law. In respect of this application, the applicants have established that by reducing the number of days provided for under the law for nomination of candidates, the Commission has wrongly deprived them of a right which the law has provided to them. That is an actionable wrong.

Lastly, I think it needs to be observed that, except where there is clear delegation, only Parliament can legislate. In saying so, I do not wish to appear to be attempting to diminish the considerable powers the Attorney-General has under the laws of this country; indeed, the powers conferred upon him by the Revision of Laws Act are a good example of the powers he wields. However, all these powers are, notwithstanding the fact that, by virtue of Section 26 of the Constitution, the Attorney-General is the Government's principal legal adviser, to be exercised judicially and impartially for the benefit of all the inhabitants of this country and not just for the benefit of a group of persons or a particular political party.

By using the formal amending provisions of the Revision of the Law Act to effect a change or alteration in substantive registration so that it operates to the prejudice of one or more political parties by not affording them adequate time to arrange for the nomination of candidates, the Attorney-General's action can only be construed to have been a misuse, if not an abuse, of the powers conferred upon his office. In my view that was clearly illegal.

I think I have said enough to show that I am more than satisfied that the applicants have satisfied the tests set out in the case of *Giella* v *Cassman Brain and Co. Limited (1973) E.A. 358* for the grant of a temporary injunction. Accordingly, the application is granted in terms of the order sought in prayer number A of the Chamber Summons dated 6th November 1992. The applicants will have their costs of this application against the respondent.

Dated at Nairobi this 12th day of November, 1992.

T. MBALUTO
JUDGE

RECORD NO. 46369

IN THE SUPREME COURT OF MAURITIUS

In the matter of:

F. C. MOHAMMAD & ANOR **PETITIONERS**

V

E. A. AHMAD & ANOR **RESPONDENTS**

In the presence of:

ELECTORAL SUPERVISORY COMMISSION & OTHERS **CO-RESPONDENTS**

Before: Sir J. P. Glover, C.J. and R. Lallah, Senior Puisne Judge

Elections *– Appointment of electoral officers – Whether returning officer and deputy returning officer to be appointed by Electoral Supervisory Commission – Whether other electoral officers (senior presiding officers, presiding officers and poll clerks) should be appointed by the returning officer with approval of the Electoral Supervisory Commission – Whether such appointments, having been made by Head of Civil Service and Secretary for Home Affairs, to whom power to appoint had been delegated by the Public Service Commission, were valid – Whether, if power to make appointment was vested in the Public Service Commission, delegation of that power caused election to be tainted because power was delegated to "an officer" of the Prime Minister's Office while the Prime Minister was leader of a political party.*

Background facts: *An electoral petition was brought to overturn the results of a by-election on the grounds that the election was invalid because the election was conducted irregularly and contrary to law. These allegations were founded on the assumption that the election officers who conducted the election were appointed wrongly by an authority other than the Electoral Supervisory Commission which had been entrusted with the general responsibility for, and the duty to supervise, the conduct of election.*

Held: *That the electoral officers were properly appointed under the Constitution.*

JUDGEMENT

This electoral petition relates to a by-election for Constituency No. 3 held in October last, as a result of which the first respondent was returned. The petition avers that the latter's election was invalid because "the election was conducted irregularly and contrary to law". That averment is particularised as follows:

(a) the Returning Officer and the Deputy Returning Officer should, by law, have been appointed by the Electoral Supervisory Commission;

(b) the other electoral officers (Senior Presiding Officers, Presiding Officers and Poll Clerks) should have, by law, been appointed by the Returning Officer with the approval of the Electoral Supervisory Commission;

(c) the appointments referred to at (a) and (b) were made by the second respondent, the Head of the Civil Service and Secretary for Home Affairs, to whom the power to do so had been delegated by the Public Service Commission (co-respondent No. 4), while it had no power to appoint them and hence to delegate its alleged power;

(d) the appointments should in any event have been made as provided by law because Section 41(1) of the Constitution has entrusted the Electoral Supervisory Commission with general responsibility for, and the duty to supervise, the conduct of the elections of members of the National Assembly;

(e) even if the power to make those appointments was vested in the Public Service Commission, the election was tainted because (i) the power had been delegated to "an officer of the Prime Minister's Office" while the Prime Minister was the leader of the political party alliance which fielded the first respondent as its candidate and/or (ii) all the appointees were public officers, i.e. people "more prone to pressure and influence from the Prime Minister".

Before the enactment of the Representation of the People (Amendment) Act 1968 in May of the year, the law provided that the Governor was empowered to appoint Returning Officers and Deputy Returning Officers while the Returning Officer would, in respect of his constituency, appoint the other officers required to conduct an election, but subject to the Governor's approval.

The 1968 Act repealed and replaced the Regulations that contained those provisions by a new Schedule which sets out The National (then Legislative) Assembly Regulations 1968. Regulation 3(1) stipulated that the Electoral Supervisory Commission would henceforth appoint Returning and Deputy Returning Officers while the Returning Officers would, subject to that Commission's approval and pursuant to regulation 20(1) and (2), appoint the rest of the staff required for a poll.

When a by-election occurred in 1970 in Constituency No. 5, the Electoral Supervisory Commission appointed the Returning Officer and the Deputy Returning Officer and, one may assume, the Returning Officer also complied with the regulations as they stood in respect of other officers.

According to the evidence, when the next general election to be held under the 1968 regulations was due in 1976, the appropriate authorities, who had taken note of what were described in evidence as various malpractices in the selection of electoral staff, sought legal advice from the Attorney-General's Office. The Government was then advised that, since all persons appointed to be Returning Officer, Deputy Returning Officer, Senior Presiding Officer, Presiding Officer and Poll Clerk were the holders of a public office, the power to appoint them was vested in the Public Service Commission and, subject to its power to delegate any of its functions to a member of the Commission or to a public officer, to no-one else. In other words, the view was expressed that those provisions of the 1968 regulations which conferred power of appointment on the Electoral Supervisory Commission and the Returning Officer were unconstitutional. The Public Service Commission, no doubt for quite good reasons, decided initially to delegate its functions (which, we were told, involve the selection and appointment of some ten to twelve thousand persons for a general election) to the Secretary to the Cabinet, who at the time performed the duties of Head of the Civil Service, and later to the Head of the Civil Service and Secretary for Home Affairs. It was further decided that, as from 1976, only established public officers should be selected to work at elections. That practice has been in operation ever since, for five successive general elections, and the evidence indicates that no-one has ever complained of, or found fault with, the system. Indeed, learned counsel for the petitioners stated that the alleged irregularity they now complain of did not in any way affect the result of the impugned by-election.

Little was said by counsel for the petitioners to counter the legal proposition that, ever since it became exclusively vested with its powers of appointment by the Constitution that came into operation on the 12th August 1967, it was the Public Service Commission's sole privilege to appoint all the officers concerned with the conduct of elections. Mention was made of the status of officers of a temporary nature, and there was a passing reference to part of paragraph 61 of the Report of the Commission of Enquiry on the Recruitment of Community Service Workers in 1982.

We note that the Constitution does indeed cater for such cases in section 89, which provides that:

> (3) This section shall not apply to:
>
> (a) .....
>
> (b) .....
>
> (c) .....
>
> (d) .....
>
> (e) .....
>
> (f) .....

(g) any office prescribed by the Public Service Commission acting with the concurrence of a Minister, being an office the emoluments attaching to which are paid at daily rates; or

(h) any office of a temporary nature, the duties attaching to which are mainly advisory and which is to be filled by a person serving under a contract on non-pensionable terms.

It is, moreover, apposite to quote fully relevant extracts from the Report of the Commission of Enquiry referred to, which read as follows:

> 51. What immediately concerns us in this enquiry is appointments, whether temporary, acting or permanent in the public service, other than the Police Service or the Judicial and Legal Service. The Constitution has conferred exclusive power in this regard to the Public Service Commission (The PSC). There are limitations, of course, to this power. For example, in order to ensure in a greater measure the answerability of Ministers to Parliament in respect of the administration of their Ministry, the appointment of supervising officers (The Secretary to the Cabinet, the Financial Secretary, Permanent Secretaries or, in certain Ministries, Principal Assistant Secretaries) cannot be made without the concurrence of the Prime Minister who, it must be assumed, takes the wishes of his Ministers into account with regard to the appointment of the heads of their respective ministries. In addition to this limitation, there are others which are set out in detail in section 89 of the Constitution.
>
> 52. The PSC may divest itself of the power to appoint persons in the public service in respect of officers, whether temporary or permanent, the emoluments attaching to which are paid at daily rates. And the PSC can only do so by making appropriate Regulations or Orders acting with the concurrence of a Minister (section 89(3) (g) of the Constitution). The Minister concerned here must, presumably, be the Prime Minister since he has the portfolio for establishment matters and the public service generally. No such Regulations or Orders have so far, presumably for good reasons, been made by the PSC. The result is that appointments of the kind that were made in respect of the Community Service Workers still vests in the PSC. The question arises whether it would not have been possible for the PSC to delegate to a public officer, like the PAS or Mr Rajah Gopal, the power to appoint these workers who were intended to be paid at daily rates.
>
> 53. The PSC can, under section 89(2) of the Constitution, delegate any of its powers of appointment or disciplinary control to a member of the PSC or to a public officer under such conditions as it thinks fit. The question has, I know,

been mooted before whether, since specific provision has been made in section 89(3)(g) with regard to the manner in which, and the kind of offices in respect of which, the PSC may divest itself of its powers of appointment and disciplinary control, it would be open to the PSC to delegate its powers under section 89(2) rather than divest itself completely of this power. My own view is that the manner in which the section has been drafted provides an unequivocal answer. The purpose of sub-section (3) is to exclude the application of the section to certain types of offices, including the daily paid workers by means of appropriate Regulations or Orders. But if they are not so excluded under sub-section (3), they necessarily remain included among the other offices in respect of which the PSC has jurisdiction. And, in respect of those offices, the PSC can, as we know, delegate its powers of appointment. Be that as it may, the power to appoint the workers we are concerned with was not removed from the PSC, either by delegation of authority or by Regulations or Orders.

. . . . . .

61. The kind of parliamentary democracy which our Constitution has established for this country requires that elections be conducted fairly and freely. Institutional provisions provide an infrastructure independent of the political executive to organise and conduct elections in a manner designed to ensure their fairness and freedom. I have in mind the Electoral Supervisory and Boundary Commissions, the highest organs of the Judiciary which arbitrate on the rights of electors and candidates alike and, lastly, public officials whose appointment is outside the control of the political executive.

It is therefore clear that persons appointed to an office of emolument paid from public funds in the service of the State in a civil capacity in respect of the government of the country, as electoral staff patently are, must, since they do not fall within either of the categories catered for in section 89(3)(g) or (h), hold that appointment from the Public Service Commission or from a person to whom the power to appoint has been validly delegated.

We now turn to the provisions of the Constitution regarding the control and supervision of elections and shall quote Sections 40 and 41:

40. **Electoral Commissioner**

(1) There shall be an Electoral Commissioner, whose office shall be a public office and who shall be appointed by the Judicial and Legal Service Commission.

(2) No person shall be qualified to hold or act in the office of Electoral Commissioner unless he is qualified to practise as a barrister in Mauritius.

(3) Without prejudice to section 41, in the exercise of his functions under this Constitution, the Electoral Commissioner shall not be subject to the direction or control of any other person or authority.

41. **Functions of Electoral Supervisory Commission and Electoral Commissioner**

(1) The Electoral Supervisory Commission shall have *general responsibility for*, and shall supervise, the registration of electors for the election of members of the Assembly and the conduct of elections of such members and the Commission shall have such powers and other functions relating to such registration and such elections as may be prescribed.

(2) The Electoral Commissioner shall have such powers and other functions relating to such registration and elections as may be prescribed, *and he shall keep the Electoral Supervisory Commission fully informed concerning the exercise of his functions and shall have the right to attend meetings of the Commission and to refer to the Commission for their advice or decision any question relating to his functions.*

(3) Every proposed Bill and every proposed regulation or other instrument having the force of law relating to the registration of electors for the election of members of the Assembly or to the election of such members shall be referred to the Electoral Supervisory Commission and to the Electoral Commissioner *at such time as shall give them sufficient opportunity to make comments* thereon before the Bill is introduced in the Assembly or, as the case may be, the regulation or other instrument is made.

(4) *The Electoral Supervisory Commission may make such reports to the Governor-General* concerning the matters under their supervision, or any draft Bill or instrument that is referred to them, as they may think fit and if the Commission so requested in any such report, other than a report on a draft Bill or instrument, that report shall be laid before the Assembly.

(5) *The question whether the Electoral Commissioner has acted in accordance with the advice of or a decision of the Electoral Supervisory Commission shall not be enquired into in any court of law.* (Emphasis added.)

But it is also necessary, in this context, to refer to Section 3 of the Representation of the People Act which reads as follows:

3. Electoral Commissioner and his Deputy

(1) *The Electoral Commissioner shall have all the powers* of the registration officer and *of the returning officer* in an electoral area.

(2) There may be appointed a barrister-at-law to be Deputy Electoral Commissioner for an electoral area.

(3) Subject to the authority, directions and control of the Electoral Commissioner, the Deputy Electoral Commissioner shall have all the powers and may perform any of the functions of the Electoral Commissioner in the electoral area or areas for which he is appointed.

(4) Every appointment made under this section shall be published in the Gazette.

(5) (a) *The Electoral Commissioner shall ensure that* the register of electors is prepared and *the elections are conducted in any electoral area in accordance with this Act.*

(b) For the purposes laid down in paragraph (a), *the Electoral Commissioner may:*

(i) require information from any officer appointed under this Act with respect to any matter relating to the functions of the officer;

(ii) subject to this Act, *issue general instructions to an officer,* with respect to the performance of his duties.

(c) *All officers shall comply with the requirements and instructions of the Electoral Commissioner.* (Emphasis added).

A proper reading of those provisions cannot, in our judgment, produce the result that, notwithstanding the clear expression of the powers of the Public Service Commission in section 89, and the relevant definitions of the terms "public office", "public officer" and "public service" in Section 111, Section 41(1) of the Constitution, which only refers to the Electoral Supervisory Commission's general responsibility and duty of supervision, will override those other provisions in matters of the appointment of electoral staff. If the framers of the Constitution had intended to give the power of appointment to the latter Commission, they would have so stated expressly. We may add that we have notice of the fact that a fair number of Returning Officers at a general election are officers in the legal and judicial service and that, before those persons are appointed, the Judicial and Legal Service Commission is, as is required by Section 89(6) of the Constitution, duly consulted.

We turn now to the two other complaints made by the petitioners. The evidence, which we accept, shows that, in exercising the powers delegated to him by the Public Service Commission, the Head of the Civil Service and Secretary for Home Affairs relied entirely on advice tendered to him by the Electoral Commissioner and by the Returning Officer, who have, over the years, compiled a list of persons who have wide experience in the conduct of elections. The evidence further shows that, although the letters of appointment bear the heading "Prime Minister's Office", that is so only because the Head of the Civil Service and Secretary for Home Affairs is posted in the Prime Minister's Office, and that the Prime Minister was not at all involved in the process. Finally, in this connection, reference was made to the fact that the Head of the Civil Service and Secretary for Home Affairs can only, just like Permanent Secretaries and others, be initially appointed to his office with the concurrence of the Prime Minister. Having regard to the rest of the evidence, we are unable to find that the Public Service Commission has, by delegating its powers of appointment to the holder of that office, violated the principles underlying the democratic process.

The other, and last, submission for the petitioners refers to the fact that only the holders of an established public office are appointed to work at elections. As stated earlier, this complaint is based on an averment to the effect that public officers are "more prone to pressure and influence from the Prime Minister". No attempt was even made to bring any evidence to substantiate such an allegation which the Civil Service as a whole may well look upon as totally gratuitous. Moreover, the evidence, which we accept, has shown that, for a number of practical reasons, it is preferable to have recourse to public officers for the performance of duties connected with the conduct of a poll.

For all those reasons, the petition is set aside, with costs.

V. J. P. GLOVER
Chief Justice

R. LALLAH
Senior Puisne Judge

June 1993

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 6026 OF 1993

ELECTION COMMISSION OF INDIA — APPELLANT

V

STATE BANK OF INDIA STAFF ASSOCIATION
LOCAL HEAD OFFICE UNIT, PATNA & OTHERS — RESPONDENTS

WITH

CIVIL APPEAL NO. 4611 OF 1989

ELECTION COMMISSION OF INDIA — APPELLANT

V

NORTHERN ZONE INSURANCE EMPLOYEES'
ASSOCIATION THROUGH ITS DIVISIONAL
SECRETARY SHRI DURGAMAL TRIPATHI — RESPONDENT

Heard by: Ahmadi, C J I, S. Mohan, J and N. P. Singh, J

Staff of Election Commission – Power to request the President, a State Governor or a local authority to provide election staff – Whether such power of the Election Commission extends to the State Bank of India – Whether the order of District Election Officer to the State Bank of India to supply a list of officers and staff for appointment as presiding officers and Polling Officers is valid.

***Background facts**: Under Clause (6) of Article 324 of the Constitution and the Representation of the People Act, 1951 (Section 159), the Election Commission is empowered to request the President or the Governor of a State (Clause (6) of 324) or a Regional Commissioner may request a local authority, to make available such staff as may be necessary for the discharge of any functions in connection with an election. Purporting to act under these powers, a District Election Officer, on behalf of the Commission, sent an order to the Chief General Manager of the State Bank of India, Patna, requiring the officials and staff of the Bank to serve as presiding officers and polling officers at an election.*

***Held:** That the relevant provisions of the Constitution and election laws applied only in respect of officers of Central or State Governments or local authorities and not to agencies such as the State Bank of India.*

***Cases cited**:*

K P Roy v *D Rudra, District Magistrate, Howrah AIR (1971) Calcutta 461 and Civil Appeal No. 4611 1989.*

Digrijay Mote v *Union of India and Others (1993) (3) SCC 175.*

Sukhder Singh v *Bhagatram (1975) (3) SCR 619.*

Shyam Lal Sharma v *Life Insurance Corporation & Another (1970)2FLR 357*

JUDGEMENT

AHMADI, CJI

Both these appeals can be disposed of by this common judgment as the question under consideration in both cases bears on the language of clause (6) of Article 324 of the Constitution of India.

The Election Commission of India is the appellant in both the appeals. Article 324 of the Constitution vests in the Election Commission the power of superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to Parliament and to this Legislature of every State.

Clause (6) of Article 324 reads as below:

> "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 Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission by Clause (1)."

Article 327 enables Parliament to make provision with respect to all matters relating to, or connected with, elections to either House of Parliament or to the House or either House of the Legislature of a State, including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses.

In exercise of the power vested in the Parliament under these Articles, it enacted the Representation of the People Act, 1950 and the Representation of the People Act, 1951 (hereinafter referred to as 'the 1950 and 1951 Acts', respectively). The 1950 Act provides for the allocation of seats and the delimitation of constituencies for the purpose of elections to the House of People and the Legislatures of the States, the qualifications of voters at such elections, the preparation of electoral rolls and the matters connected therewith. The 1951 Act provides for the conduct of elections to the Houses of Parliament and to the House or Houses of the Legislature of each State, the qualifications and disqualifications for membership of those Houses, and the corrupt practices and other offences at or in connection with such elections. Section 26 of the 1951 Act enables a District Election Officer to appoint a Presiding Officer for each polling station. Section 159 of the said Act reads as follows:

> 159. Staff of every local authority to be made available for election work. Every local authority in a State shall, when so requested by a Regional Commissioner appointed under clause (4) of article 324 or the Chief Electoral Officer of the

State, make available to any returning officer such staff as may be necessary for the performance of any duties in connection with an election.

From a conspectus of the above provisions it seems clear to us that, on the request of the Election Commission, the President or the Governor of the State must make available to the Election Commission such staff as may be necessary for the discharge of functions conferred on the Election Commission under Clause (1) of Article 324. In view of Clause (6) of Article 324, the President or the Governor of the State, when requested, will make available to the Election Commission the services of such staff as may be necessary for the discharge of the functions conferred on the Election Commission. By this, it is meant that the persons whose services may be placed at the disposal of the Election Commission must be persons who are either employees of the Central Government or of the State Government. Again, in view of Section 159 extracted above, when a requisition is made by the Regional Commissioner, the local authority shall make available its staff for the purpose of duties in connection with an election.

Thus far there is no dispute, but controversy arises in view of the action taken by the District Election Officer making the following requisition:

"OFFICE OF THE DISTRICT ELECTION OFFICER-cum-DISTRICT MAGISTRATE."

Ref: No. 522/Elec. Patna, the 22nd September, 1991

ELECTION TOP PRIORITY

To: Chief General Manager
State Bank of India
Jajej Road, Patna

Subject: List of Officers & Staff for appointment as Presiding Officers & Polling Officers in Mid-Term Parliamentary Election 1 Assembly By-Election 1991.

Sir,

I am to inform you that the services of a large number of officers & staff will be required for appointment as Presiding Officers, Polling Officers and Patrolling-cum-Ballot Box Collecting Officers in the forth-coming mid-term Parliamentary Election & Assembly By-Election 1991 in this district.

You are requested to send a complete list of the officers and staff of your office and the field offices located in the Patna District under you in the pro-forma given below in TRIPLICATE, through a Special Messenger to Shri Keshav

Prasad, Additional District Magistrate (Establishment), Patna Collectorate, Patna, by 5th October, 1991 at the latest. Any such officer or staff member who is either female or disabled or appointed as a cashier or deployed on night Guard duties, or is unavoidably necessary to be retained as skeleton staff in your office should be suitably indicated in the remarks column against his/her name in the list so that they may be considered for exemption from Election Duties as far as possible and practicable. You are also requested to certify that no officer or staff member has been left out.

Please give the full name and exact location and address of the office at the top of the list to facilitate service or appointment letters. The telephone number of your office and residence, if available, may also be indicated below the address.

I sincerely hope that you will extend your full co-operation, and that the list relating to your office, complete in all respect, will be made available to Shri Keshav Prasad, Additional District Magistrate (Establishment), Patna Collectorate by 5th October, 1991 at the latest.

Please accord the highest priority. Please acknowledge receipt.

Yours faithfully
Sd/-
(ARBIND PRASAD)
DISTRICT ELECTION OFFICER
cum-District Magistrate
PATNA".

It appears that on 30th October 1991 and 1st November 1991, certain orders were issued by the said District Election Officer appointing and deputing some of the employees of the State Bank of India on election duty in connection with the Elections to the Barh Parliamentary Constituency and the Pali Assembly Constituency which were to be held on 16 November 1991. Thereupon, the first respondent filed a writ petition (CWJC No. 7815 of 1991) in the High Court of Patna praying for the quashing of these communications on the grounds that the District Election Officer had no authority to requisition the services of the Bank employees for election duty.

While this writ petition was pending, some time in May, 1993, in connection with the polling to be held in 35-Patna Parliamentary Constituency, similar letters of appointment for election duty of employees of the State Bank of India were issued by the District Election Officer, Patna. Therefore, the first respondent moved an application for amendment to include a challenge to these letters of appointment as well. The amendment was allowed.

The High Court, by the impugned judgment dated 21st May 1993, held that the District Election Officer had no power under Section 26 of the 1951 Act to requisition the services of employees of the State Bank of India for election duty. The High Court took the view that the State Bank of India was not a local authority within the meaning of Section 159 of the 1951 Act. Accordingly, the High Court quashed the orders and issued a writ in the nature of mandamus, commanding the Election Commission of India not to requisition the services of the employees of State Bank of India in exercise of its power under Section 26 of the 1951 Act.

It may here be mentioned that during the pendency of the writ petition, the counsel for the Election Commission brought to the notice of the High Court, that by a judgment dated 7th November 1989, the High Court of Rajasthan had quashed the order of the District Election Officer, Ajmer dated 8th August 1989, by which he had requisitioned the services of the employees of the Life Insurance Corporation of India, Ajmer for election duty. This was in Writ Petition No. 4644 of 1989. Civil Appeal No. 4611 of 1989 is against that judgment.

The submissions of Mr S. Muralidhar, learned counsel for the appellant, Election Commission of India, in Civil Appeal No. 6026 of 1993 run thus:

Under Article 324, the superintendence, direction, control and the conduct of all elections to Parliament and to the Legislature of every State is vested in the Election Commission. These elections have to be conducted fairly and properly. A large number of officers are required to man a number of polling stations that are required to be set up in each State. For each polling station, five personnel are required at the minimum. That is why Clause (6) of Article 324 of the Constitution of India envisages that when a request is made by the Election Commission or a Regional Commissioner, the President or the Governor will provide such staff as may be necessary for discharging the functions stated in Clause (1) thereof. The question then is, whether the words "such staff" occurring in Clause (6) are to be confined only to the staff under the Government. In this connection, Article 327 may also be seen. In regard to all matters concerning the elections, the Parliament can make provisions by law. In the exercise of that power, the 1950 and 1951 Acts came to be enacted. Therefore, in ascertaining the meaning of "such staff" we will need to look at the 1950 and 1951 Acts.

Section 13A of the 1950 Act deals with the Chief Electoral Officer for each state. He will have to be a government servant. Similarly, Section 13AA deals with the District Election Officers. Under Section 13CC, officers and staff members employed in connection with the preparation, revision and correction of the electoral rolls are deemed to be on deputation. They are subject to the control, superintendence and discipline of the Election Commission. Similarly, under Section 28A of the 1951 Act, Returning Officers, Presiding Officers etc. are deemed to be on deputation and are subject to the control, superintendence and discipline of the Election Commission.

Section 21 of the 1951 Act enables the Election Commission to nominate a Returning Officer. Similarly, an Assistant Returning Officer can be appointed by the Election Commission. Both are expected to be government officers or employees of a local authority. In contrast, under Section 26, a Presiding Officer for a polling station could be anyone, not necessarily a government servant or an employee of a local authority. This is an important distinction. Section 134 talks of breaches of official duty in connection with election and includes the District Election Officers, Returning Officers, Polling Officers etc. Similarly, Rules 17(C), 34, 35 and 53(2) speak of non-government servants as well. In support of the submissions, reliance was placed on the decisions in *K.P. Roy v. D. Rudra, District Magistrate, Howrah* AIR 1971 Calcutta 461, and the judgment in Civil Appeal No. 4611 of 1989. In the first case, railway employees were involved, while in the latter, employees of the Life Insurance Corporation were involved.

Before the High Court, an argument was raised that the State Bank of India must be held to be a local authority under Section 159 of the 1951 Act. That argument is not advanced before us.

Mr Dushyant Dave, learned counsel for respondents 1 to 5 in Civil Appeal No. 6026 of 1993 countered: the source of power to requisition the services being Article 324, the Court should first read the plain words of Clause (6). That clause clearly states that the request must be made to the President or the Governor of a State. On receipt of such a request from the Election Commission, such staff as may be necessary for the discharge of the function under Clause (1) must be made available to the Election Commission or Regional Commissioner. No doubt, under Article 327, the Parliament may empower the drafting of the services of others by enactment of law. That is why Section 29 of the 1950 Act and Section 159 of the 1951 Act talk of the obligation of the local authority to make its staff available. Merely because anyone could be appointed as Presiding Officer Polling Officer does not necessarily lead to the conclusion that the services of any person, even though not a government servant could be sought under Article 324 (6). If the power, as contended by the appellant, is granted to the Election Commission, it will become an imperium in imperio. Therefore, it was expressly negatived by this Court in *Digvijay Mote* v *Union of India and Others* 1993 (3) SCC 175 at 178.

Now, we come to Article 324. It will be useful to extract the following clauses of the said Article which have a bearing on the issues involved:

> "324, Superintendence, direction and control of elections to be vested in an Election Commission. (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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> xxx xxx xxx xxx xxx

> 324 (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 Commissioners as he may consider necessary to assist the Election Commission in the performance of the functions conferred on the Commission by Clause (1)."

We have already extracted Clause (6) of Article 324 which empowers the Election Commission to request the President or the Governor of the concerned State to make available such staff as may be necessary for it to carry out its duty under Clause (1). Such a provision was necessary for the obvious reason that since the Election Commission has to hold elections at intervals it is not required to maintain a huge staff at considerable expense to the exchequer, and therefore the power to seek on request such staff as is necessary came to be engrafted in the Constitution itself.

We assume that the powers of the Election Commission under Article 324 are plenary. Therefore, the Election Commission may issue any direction in the matter of conduct of elections. But the question is, in the garb of conduct of elections, can the Election Commission usurp the power not vested in it? This will depend on the understanding of Clause (6) of Article 324. For the conduct of elections, when the Election Commission is to make available the staff they are obliged to provide the services. What is the meaning of "such staff"? According to Mr Dushyant Dave, we should refer to Article 310 which talks of a member of the Civil Service (in contra-distinction to Defence Service of the Union or the State), holding office during the pleasure (durante bene placito) of the President or the Governor. Obviously "such staff" can only mean that staff which is under the control of the President or the concerned Governor and not any staff over which they do not exercise control. It could mean only that staff over which the President or the Governor, as the case may be, would be in a position to exercise disciplinary powers should they refuse the President's or Governor's directive. Although the Constitution-makers did not say the Union or the State Governments but only the President or the Governor, it is obvious they would have to act consistently with Articles 74(1) and 163(1), respectively. Therefore, in response to a request by the Election Commission, the services of those government servants who are appointed to public services and posts under the Central or State Governments will have to be made available for the purpose of the election. When the Constitution came into force, the services of these officers were readily available. Of course, there were also local authorities and the services of the employees of the local authorities and were also available. That is why Section 159 of the 1951 Act provides that, on request from the Regional Commissioner or the Chief Electoral Officer of the State, the local authority of the State shall make available to any Returning Officer such staff as may be necessary to carry out the duties in connection with an election.

It is important to note that their services came to be made available as Returning Officers and Assistant Returning Officers under Section 21 and 22 of the 1951 Act introduced by Amendment Act 47 of 1966. Barring the services of these officers, does the Election Commission have power

to requisition the services of any other person? The argument of the appellant is based on several sections of the 1950 and 1951 Acts. We have referred to the relevant provisions of the two Acts above.

Merely because the provisions of the two Acts require that they must be officers of Government or local authority, unlike in the case of officers falling under Section 27 of the 1951 Act, it does, in our opinion, follow that the services of the officers of the State Bank of India could be requisitioned. Section 26 of the 1951 Act is not a source of power at all. It does not, in any manner, enable the Election Commission to draft in the services of officers other than officers of Government and local authority. To draw inspiration from these sections to support an argument that the services of any person could be drafted for the purpose of an election is untenable. It may be that to conduct the elections many polling stations are set up. Consequently, the services of many persons may be required. It may be that the Election Commission may draw the minimum staff from the banks to ensure that the banking business is not disrupted, but the question here is of power and not discretion. If there is power, it may be exercised with circumspection, and minimum staff may be requisitioned, but if there is no power, the question is of the mode of its exercise of power and not the manner of its exercise.

Article 324 does not enable the Election Commission to exercise untrammelled powers. The Election Commission must trace its power either to the Constitution or the law made under Article 327 or Article 328. Otherwise, as was held by this Court in Digvijay Mote's case (supra) in which one of us,(Mohan, J) was a party, it would become an imperium in imperio which no one is under our constitutional order.

K. P. Roy's case (supra) dealt with the appointment of railway employees as Polling or Presiding Officers. The question was whether the consent of these officers whose services were requisitioned was necessary. This has no bearing on the issue under our consideration. Besides, railway employees are government servants.

The penalty provisions under the two Acts on which reliance was placed cannot but relate to those officers who are covered thereunder and not any person as is urged by the Election Commission. There can be no question of invoking the penalty provisions against those employees whose services the Election Commission cannot requisition. We are, therefore, unable to appreciate how these provisions found in two statutes can be of any assistance in determining the scope and ambit of the power to requisition the services of employees belonging to different organisations. In our view, there is no co-relation.

The decision of this Court in *Sukhdev Singh* v *Bhagatram* (1975) 3 SCR 619 and the decision of the Allahabad High Court in the case of *Shyam Lal Sharma* v *Life Insurance Corporation & Another* (1970) 2 F LR 357 are not relevant for our purpose. The question there was whether rules or regulations framed in the exercise of statutory powers prohibiting employees from

indulging in political activities and taking part in electioneering etc. could be legally made. No such question arises here.

In view of the foregoing discussion, we hold that the impugned communications issued by the District Election Officer-cum-District Magistrate, Patna, have been rightly quashed by the High Court of Patna. Equally so, the High Court of Rajasthan was right in quashing the order of the District Election Officer, Ajmer dated 8th August 1989. We, therefore, uphold the impugned judgments of the High Courts. The civil appeals are accordingly dismissed. However, there shall be no order as to costs.

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(S. Mohan)

. . . . . .J.
(N. P. Singh)

New Delhi,
February 7th, 1995