A T.N. SESHAN, CHIEF ELECTION COMMISSIONER OF INDIA ETC.

v.

UNION OF INDIA AND OTHERS

JULY 14, 1995

B

[A.M. AHMADI, CJ, J.S. VERMA N.P. SINGH, S.P. BARUCHA AND M.K. MUKHERJEE, JJ.]

Constitution of India : Clause (1) of Art. 123.

C

Promulgation of Ordinance—Exercise of Power by the President, under Art 123(1) of the Constitution of India—Ordinance (No. 32 of 1993) entitled "The Chief Election Commissioner & other Election Commissioners (Conditions of Service) Amendment Ordinance 1993", amended, substituted, and inserted certain provisions to the "Chief Election Commissioner & other D *Commissioners (Condition of Service) Act 1991"—Determining the conditions of service of the Chief Election Commissioner and other Election Commissioners and to provide for the procedure for transaction of the business by the Election Commission and for matters connected therewith or incidental thereto.*

E

Constitution of India—Art 324.

Superintendence, direction and control of elections to be vested in an Election Commission Exercise of Powers under Art. 324(2), of the Constitution of India—Number of Election Commissioner, beside the CEC was fixed F *at two—By subsequent notification, two ECs were appointed—Validity of the Ordinance, notifications and the consequential orders and appointments—Whether arbitrary and ultra vires the Constitution.*

*Interpretation of clause 2 of Article 324—Whether envisages a multi-*G *member Election Commission. Distinction between CEC and other ECs—Whether essentially on account of their tenure—By virtue of Ordinance, CEC and ECs are placed at par in the matter of salary etc.*

*First proviso to clause (5) of Art. 324—Whether the type of ir-*H *removability conferred on the Chief Election Commissioner is an indicia for conferring a higher status on him vis-a-vis the other Election Commissioners.*

in a multi-member body—Whether Chief Election Commission is obliged to act as its Chairman—Function of Election Commissioner—Whether merely advisory—Idea of exclusive decision making power in the Chief Election Commissioner—Not conducive to democratic principles. A

The Chief Election Commissioner and other Election Commissioners (Condition of Service) Ordinance, (now Act) 1993. B

Chapter III of the Chief Election Commissioner and other Election Commissioners (Condition of Service) Act, 1993,—Sec. 9, 10—Constitutional validity of—Question of legislative competence—Clauses 2 and 5 of Article 324, contemplates and expressly provides a statute for appointment of Election Commissioners and for their conditions of service—Hence provisions to that effect cannot be challenged as unconstitutional. C

Status of Chief Election Commissioner—Whether akin to a judge of the Supreme Court of India—The position of Chief Election Commission in the Warrant of precedence—Whether requires reconsideration—Government 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. D

E

By an amendment Ordinance (now Act) entitled "The Chief Election Commissioner and other Election Commissioners (Condition of Service) Ordinance, 1993." (hereinafter referred to as the Ordinance) the "Chief Election Commissioner and other Commissioners (Condition of Service Act) 1991" was sought to be amended and accordingly the number of Election Commissioners, besides the Chief Election Commissioner was fixed two. Subsequently, in exercise of its powers under Clause 2 Art. 324, the President of India, by notification dated 1.10.1993 appointed the two Election Commissioners. F

The validity of the said Ordinance as well as the consequential notification was assailed by the incumbent Chief Election Commissioner and another, as being arbitrary and unconstitutional. Writ Petitions were filed in the Supreme Court for a declaration that the ordinance was arbitrary, ultra vires the Constitution and hence void and also for quashing the said notification and the appointments of the two Election Commissioners. G H

A In support of the petitions, it was contended that (a) The intention behind issuing the ordinance was purely *malafide*, in order to sideline the Chief Election Commissioner 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 Election Commissioner. (b) Article 324 of the Constitution, does not give any power to the Parliament to frame rules for B transaction of business of the Election Commission. Hence, Sec. 9 and 10 of the ordinance are inconsistent with the scheme underlying article 324 and therefore ultra vires the Constitution. Also the provisions laid down by the said Sections are arbitrary and unworkable, (C) The notification fixing the number of Election Commissioners at two is arbitrary and C violative of Article 14 of the Constitution.

The respondents on the other hand, resisted the petitions contending that :

(a) The language of Article 324(2) envisages a multi- member Com- D mission and therefore, any excise 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 ultra vires the Constitution. (b) The decision to convert the Election Commission into a multi member body had not connection with the alleged discomfiture of E the ruling party at the centre on account of the stiff attitude of the Chief Election Commissioner. (c) The Ordinance was framed keeping in view the observations made by this Court in the case of *S.S. Dhanoa* v. *Union of India and Ors.*, [1991] 3 SCC 567. (d) A multi- member body would not have been able to function without a supporting statute providing for, dealing with different situations likely to arisen the course of transaction F of its business. A provision that lays down the rule of majority in the event of a difference of opinion amongst its members is, therefore consistent with the democratic principles and can never be described as arbitrary or *ultra vires* Article 14 of the Constitution.

G Dismissing the writ petitions, this Court

HELD : 1.1. Our constitution makers entrusted the responsibility to hold free and fair elections and the task of conducting such elections in the country to an independent body, insulated from political and/or executive interference. This objective is achieved by setting up an Election H Commission, a permanent body under Article 324(1) of the Constitution.

Clause (2) of Art. 324 provides that the said Commission shall consist of the Chief Election Commissioner and such number of Election Commissioners, if any, as the President may fix from time to time. [119-E-G] A

1.2. The concept of plurality is writ large on the face of Article 324, Clause (2) whereof clearly envisages a multi- member Election Commission comprising of the Chief Election Commissioner and one or more Election Commissioners. [121-H; 122-A] B

S.S. Dhanoa v. *Union of India and Ors.*, [1991] 3 SCC 567, referred to.

C

2.1. It may be that if the Election Commissioner is a single member body, the decisions may have to be taken by the Chief Election Commissioner but still they would be decisions of the Election Commissioner and not of the individual. No body can be above the institution which he is supposed to serve. To project the individual as mightier than the institution would be a grave mistake. Therefore even if the Election Commissioner is a single member body, the Chief Election Commissioner is merely a functionary of that body; to put it differently the alter ego of the Commissioner and no more. [129-B-D] D

2.2. If the Election Commission is a multi-member body, the Chief Election Commissioner is obliged to act as its Chairman. The functions of the Chairman would, therefore be to do all that is necessary for smooth transaction of its business. He must conduct himself in such a manner so that he is able to win the confidence of all his colleagues on the Commissioner carry them along with him. This, a Chairman might find difficult to achieve if he thinks that others who are members of Commission are his subordinates. [129-D-H] E F

Concise *Oxford Dictionary,* Black's *Law Dictionary* 6th Ed. Page 230, Ballentines *Law Dictionary* 3rd Ed. Pages 189-190, Webster's *New 20th Century Dictionary,* unabridged, 2nd Ed. Page 299 and Aiyer's *Judicial Dictionary* 11th Ed. Page 238—Referred to, for the meaning of 'Chairman". G

3. The Election Commissioner discharges a public function. The functions of the Election Commission are essentially administrative but there certain adjudicative and legislative functions as well. Besides administrative functions it may be called up to perform quasi judicial duties and H

A undertake subordinate legislation making functions. Election Commissioners form a part of the Election Commission unlike the Regional Commissioners, and hence have a say in decision making. If the Chief Election Commissioner is considered to be a superior in the sense that his word is final, he would render the other Election Commissioners non-functional or ornamental. Such an intention is difficult, to cull out from Art. 324 of the B Constitution of attribute it of our Constitution makers. [129-H; 130-C-E]

M.S. Gill v. *Chief Election Commissioner*, [1978] 2 SCR 272, referred to.

C 4.1. The distinguishing feature between the position of the Chief Election Commissioner and the Election Commissioners as is envisaged in Art. 324 is essentially on account of their tenure. [130-E,F]

4.2. The first proviso to clause (5) of Art. 324 of the Constitution lays down that the conditions of service in case of the Chief Election Commis- D sioner cannot be varied to his disadvantage after his appointment. Such a protection is not extended to the Election Commissioners. That is presumably because the posts of Election Commissioner are temporary in character. But even if it is not so, that feature alone cannot lead to the conclusion that the final word in all matters lies with Chief Election E Commissioner. [126-E-F]

4.3. The second ground relates to removability. In case of the Chief Election Commissioner, he can be removed from office in like manner and on the like ground as a Judge of the Supreme Court whereas the Election Commissioners can be removed on the recommendation of the Chief F Election Commissioner. That, however, is not an indicia for conferring a higher status on the Chief Election Commissioner. The Chief Election Commissioner is intended to be permanent incumbent and therefore in order to preserve and safeguard his independence, he had to be treated differently. There cannot be an Election Commission without a Chief Election Commissioner, while that is not the case with the other Election G Commissioners. In the very nature of things. The Election Commissioners could not be conferred the type of irremovability that is bestowed on the Chief Election Commissioner. If that were to be done, the entire scheme of Art. 324 would have to undergo a change. But the fact the Chief Election Commissioner is a permanent incumbent cannot confer on him a higher H status than the Election Commissioner. [126-F-H; 127-A, B]

5. Neither Article 324 nor any other provision in the Constitution expressly states how a multi-member Election Commissioner will transact its business nor has any convention developed in this behalf. That is why keeping in mind the bitter experience of the past of which a reference has been made in *Dhanoa's* case, this Court, thought that the gap could be filled by an appropriate statutory provision, thereby making legislative interference necessary in this regard. Taking a clue from the said decision, the President of India promulgated the ordinance whereby a new chapter comprising Sec. 9 and 10 was added to the Act, indicating how the Election Commission will transact its business. Although the said provisions have manifested the hope that the Commission will be able to take decisions with one voice, in case that hope is belled, the rule majority must come into play. Section 10 clearly provides for unanimity. Even if it is to be assumed 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 Sec. 10. [131-A-B, F]

6. Although some of the service conditions of the Chief Election Commissioner are akin to those of the Supreme Court Judges, the Chief Election Commissioner could not legitimately claim to be equated with a Supreme Court Judge. Maintenance of the status of the Judges of the Supreme Court and the High Court is highly desirable in the national interest. Personnel belonging to other for a claim equation to High Court and Supreme Court judges merely because certain jurisdiction earlier exercised by those courts are transferred to them, not realising the distinction between constitutional and statutory functionaries. The Government, therefore, should not confer equivalence or interfere with the Warrant of Precedence, if it is likely to affect the position of the High Court and Supreme Court Judges without first seeking the view of the Chief Justice of India. [139-A, B, F-H; 140-A]

7. In the facts and circumstances of the present case the argument that the imugned provisions constitute a fraud on the constitution inasmuch as they are designed and calculated to defeat the very purpose of having an Election Commission is begging the question. [132-E, F]

Both clauses (2) and (5) of Article 324 contemplate a statute for the appointment of Election Commissioners 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 provided for by Clauses (2) and (5) of Art. 324. Once the provision for the Constitution of a multi-member Commission is unassailable, provisions incidental thereto cannot be challenged. [138-D]

8. The impugned ordinance, notification and the consequential orders and appointments are upheld in their entirety. [140-F]

CIVIL ORIGINAL JURISDICTION : Writ Petition (C) No. 805 of 1993 Etc. Etc.

(Under Article 32 of the Constitution of India.)

M.K. Banerjee, Attorney General of India, M.Chandra Sekhar, Additional Solicitor General, G. Ramaswamy, N.A. Palkhivala, Ram Jethmalani, O.P. Sharma P.P. Rao, Soli J. Sorabjee, K.K. Venugopal, K. Parasaran, A.K. Ganguli, G. Rajagopal, S. Murlidhar, Sanjay Hegde, N.L. Ganapathi, S. Walia, Mohit Mathur, H. Devarajan, Niranjan Reddy, Shimona Khanna, Abha R. Sharma, Ms. Kamini Jaiswal, Ranjan Dewivedi, R.S. Sharma, H.D. Shourie (In-person) for the Petitioner in W.P. No. 825/93, M.M. Kashyap, N.N. Gooptu, H.K. Puri, A.V. Rangam, A.Ranganadhan, Sumant Bhardwaj, A.S. Bhasme, S.K. Ningomban, Sunil Dorga, E.R. Kumar, Gopal Jain, W.C. Chopra, Pankaj Chopra, Amariarputham, Aruna Mathur, P.R. Seetharaman, Ms. Neeta Agrawal, N. Janardhanan, K.R. Nagaraja, E.C. Agarwala, Mahesh Agarwal, Atul Sharma, Purnima Bhat Kak, A.V. Palli, Dr. Subramian Swamy, (In-person) for Respondent in C.A. No. 504/94., Mukul Mudgal, Ms. Indu Malhotra, Ms. Shirin Khajuria, K.V. Vishwanathan, Ms. A Subhashini, P. Parmeshwaran, Sushil Prakash, A. Subbarao, Navin Prakash and R.B. Misra for the appearing parties.

The Judgment of the Court was delivered by

AHMADI, CJ. 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 (Condition of Service) amendment Ordinance, 1993" (hereinafter called 'the Ordinance') to amend "The Chief Election Commissioner and other Commissioners (Condition 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 a 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 a 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 valve of such rent free residence, conveyance facility, sumpulary allowance, medical facilities, etc., as applicable to a Judge of the Supreme Court or a Judge of the High Court to 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 (Condition of Service)" the words and brackets "the Election Commission Conditions of Service of Election Commissioner and Transaction of Business)" came to be substituted with the result that the amended provision read as the Election Commission (Condition 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",

A B C D E F G H

A the words "and other Election Commissioners" came to be inserted with the result they came to be placed at par in 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 under :

> B "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 C 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 Commissioner" 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 D sub-section (3) and for renumbering sub-section (4) as sub-section (3) and provided that in clause (b) the words "or as the case may be, 62 year" shall be omitted. After section 8 in the Principal Act, by the Ordinance a new Chapter came to be inserted comprising of two provisions, namely, Sections 9 and 10. The new Chapter so inserted is relevant for our purpose and may E be reproduced at this stage :

"CHAPTER III

TRANSACTION OF BUSINESS OF ELECTION COMMISSION

F

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 transaction of the business as also G 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.

H (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 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 petition came up for preliminary hearing on November 15, 1993. While admitted the writ petitions and direction 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 production of documents was ordered to issue 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 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."

A By a subsequent order dated 15.12.1993, 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 though their counsel and further directed that the interim order shall continue till further orders. Lastly, it observed that since questions involved related to B 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) of 4th January, 1994 without any change.

C

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

"324. Superintendence, direction and control of elections to be vested in an Election Commission.-- (1) The superintendence, D 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 Com- E mission).

(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 F 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. G

(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, H 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). A

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

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

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

(6) The President, or the Government 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)." E

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 : F

The present CEC claims that after his appointment on 12.12.1990 he insisted on strict compliance with the model Code of Conduct by all political parties and candidates for election and took stern action against in fractions thereof regardless of the political party or candidate involved. The ruling party at the centre was irked as a few of the bye-elections of the ruling party leaders/cabinet ministers were put off for the Government's failure to deploy sufficient staff and police force for the elections and the ruling party lost the election in Tripura on account of strict action taken by the CEC against erring officials consequent postponement of elections. The ruling party made attempts to influence the CEC G H

A hut 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 for staff and force. The CEC declined to postpone elections for four State assemblies despite requests from the ruling party. The ruling party, including the Prime Minister, got irritated with such unbending attitude of the CEC. The ruling B party, therefore, with a view to freeze the powers of the CEC and to prevent him from taking any action against violation of 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 appoint- C ing Mr. M.S. Gill & Mr. G.V.G. Krishnamurthy as the other two ECs.

The CEC not only imputes *malafides* for the issuance of the aforesaid notifications & 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 D using the services of the newly appointed ECs.

Sections 9 & 10 of the Ordinance (now Act) are challenged as *ultra vires* 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 E not give any power to the Parliament to frame rules for transaction of business of the Election Commission. Section 10 is also challenged on the ground that it is arbitrary and unworkable. So also the notification fixing the number of other ECs at two is challenged as arbitrary and violative of Article 14 of the Constitution.

F

The writ petitions are resisted by the respondents, viz., the Union of India and the two other ECs. Mr. M.S. Gill & 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 G 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 stiff 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 H 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. & Ors.*, [1991] 3 SCC 567. It is strongly denied that the changes in the law were made *malafide* with a view to laming the CEC into submission or to erode his authority by providing that, in the event of 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* 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 of our Constitution proclaims that we are a Democratic Republic. Democracy being the basic feature of the constitutional set up, there can be no two opinion 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 which is entrusted the task of holding election to the 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 to 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 Commissioners 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 proposed 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 atleast one officer, namely, the CEC, and left 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 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 spell 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 insofar as the constitution of the Election Commission is concerned.

We may now briefly notice 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 in that 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 had been fixed under the Act as equivalent to a Judge of the Supreme Court and the High Court, respectively. This has undergone a change after the Ordinance which has 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 the CEC. It may also be noticed 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 provission 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 ensures their independence. The scheme of Article 324 in this behalf is that, after insulting the CEC by the first proviso to clause (5), the ECs and the RCs have been assured independence of functioning by providing that they cannot be removed except on the recommendation of the CEC. Of course, the recommendation for removal must be based on intelligible, and cognate considerations which would have relation to 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 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 clause (5) to safeguard the independence of not only these functionaries but 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 in instrument of oppression and would destroy the independence of the ECs and the RCs if they are 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 efficient functioning of the Election Commission. This, briefly stated, indicated the status of the various functionaries constituting the Election Commission.

A B C D E F G

The concept of plurality is writ large on the face of Article 324, clause (2) whereof clearly envisages a multi-member Election Commission com- H

A prising 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 B multi-member body, the impugned notifications providing for the other two ECs cannot be faulted solely on that ground. 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:

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> "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 an desirable that the powers are not exercised by one individual, however, D all-wise he may be. It ill conforms the tenets of the democratic rule. It is true that the independence of an institution depends upon the persons who main 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 E 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 F of the institution is not to come to a naught."

It must be realised that these observations were made, notwithstanding the fact that the learned Judges were alive to and award 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 G 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 H permanent incumbent and under clause (2) such number of other ECs, if

any, as the President, may deem 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. Upto 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 that a multi-member body would be unworkable is accepted it would 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 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 few days thereafter by a separate notification appointed the petitioner and one another as ECs. By yet another 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 about a couple of 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 another were appointed thereto. The petitioner S.S. Dhanoa challenged the notifications rescinding the earlier notifications firstly 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 advise 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.

A B C D E F G

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

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A appointments 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 up 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 B rather than appoint 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 up. We do not at the present desire to comment on the question whether this aspect of the matter was justiciable. It was further found as a fact that the petitioner's and his colleagues attitude was not cooperative and had it not been for the sagacity and restraint shown C 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 D the two posts of ECs and the appointments of the petitioner and his colleague thereon. Notwithstanding this bitter experiences, the Division Bench made the observations in paragraph 26 extracted hereinbefore, with which we are in respectful agreement. We cannot overlook the fact that when the Constitution-makers provided for a multi-member Election Commission they were not oblivious of the fact that there may be not be E 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 the clash of egos. This should have put an end to the matter, but F 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.

G 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 H 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-a-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 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 offered 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-a-vis the ECs while functioning as the Chairman of the Election Commission. The observation 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 the Election Commissioner are not on par with the Chief Election Commissioner, but they are placed on par with the Regional

A Commissioners although the former constitute the Commission and the latter do not and are only appointed to assist the Commission.

11. It is necessary to bear these features in mind because although clause (2) of the article states that the Commission will consist of B 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 C primus inter partes, i.e., first among the equals, but is intended to be placed in a distinctly higher position. The conditions that the President may increase or decrease the number of Election Commissioners according to the needs of the time, that their service conditions may be varied to their disadvantage and that they may be removed on the recommendation of the Chief Election Com- D missioner 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 E 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. But it must be remembered that by virtue of the F 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 confer- G ring 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 H not the case with other ECs. They are not intended to be permanent

incumbents. Clause (2) of Article 324 itself suggests that the number of ECS can very 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, as 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 judgment 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

A status than the ECs for the simple reason that the latter are 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
B hence it was in the fitness of things for the Constitution-makers to provide that whether 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.

That brings us to the question: what role has the CEC to play as the
C 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 had 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
D 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
> E a multi-member body that when there is no express provision to the contrary, the business has to be carried on unanimously. The rule to the contrary such as the decision by majority has to be laid down specifically by spelling out the kind of majority - whether simple, special, of all the members or of the members present and
> F voting etc. In a case such as that of the Election Commission which is not merely an advisory body but an executive one, it is difficult to carry on its affairs by insisting on unanimous decisions in all matters. Hence, a realistic approach demands that either the procedure for transacting business is spell out by a statute or a rule either prior to or simultaneously with the appointment of the
> G 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
H multi-member body the rule of unanimity would prevail in the absence of

express provision to the contrary was doubled by counsel for the respondents-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 upto this point what emerges 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. 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 29, and Aiyer's *Judicial Dictionary,* 11th Edition, page 238. 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 smooth transaction or 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 meetings 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 Commis-

A sion 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-
B 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
C public function. As pointed out earlier, the scheme of Article 324 clearly envisages a multi-members body comprising the CEC and the 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
D 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 this word is final, he would render the ECs non-functional or ornamental. Such an intention is difficult to call out from Article 324 nor can we attribute it to the Constitution-makers. We must reject the argument that the ECs' function is only to
E tender advise 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.
F 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 con-
G sideration 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 word in all matters lies with the CEC. Such a view would render the position of the ECs to that a mere
H 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 observation 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 the matters by a unanimous decision. Sub-section (2) says that all other business, save 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 decision 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 will 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 yet manifested the hope in sub-sections (1) and (2) that the Commission will be able to take decisions with one voice. But just in case that hope is belied the rule of 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 inasmuch 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 this 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-

A member commission it is the quality of leadership of the person heading the body that matters. Secondly, the argument necessarily implies that the CEC alone should have the power to take decisions which, as pointed out earlier, cannot be accepted because that renders the ECs' existence ornamental. Besides, there is not valid nexus between the two safeguards and Section 9 and 10; in fact the submission is a repetition of the argument B 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 given exclusive decision making power to the CEC. We are afraid such an attitude is not C condusive to democratic principles. Foot Note 6 at 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 principles, and the act of a majority is regarded as the act D of the whole. (See Shakelton on the Law and Practice of Meetings, Eight 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 E various decisions on this point.

The argument that the impugned provisions constitute a fraud on the Constitution inasmuch 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 F 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 that the CEC would have to suffer the humiliation of being overridden by two civil servants is to ignore the fact that the present G 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. For example, the Public Service Commission. Article 315 provides for the setting up of a Public Service Commission for H 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 also there were provisions for the setting up of certain other multi-member Commissions or Parliamentary Committees under the Constitution. These also 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 would be no difficulty, but if they decide from the outset to put in opposite directions, they would by their conduct make the Commission unworkable and thus fail the system.

That takes us to the question of *mala fides*. 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 belong to the ruling party at the Centre i.e., the National Congress (I), he had caused considerable discomfiture to them. His insistence on strict observance of the model Code of Conduct has also disturbed the calculations of the ruling party. According to him, he had postponed the elections in Kalka Assembly constituency, Haryana, because the Chief Minister of Haryana, belonging to the ruling party at the Centre, had flouted the guidelines. So also he had postponed the elections, in the State of Tripura which ultimately led to the dismissal of the Government headed by the Chief Minister belonging to the ruling party at the Centre. The postponement of the bye-elections involving Shri Sharad Pawar and Shri Pranab Mukherjee also upset the calculations of the said party, He had also postponed the election in Anipet 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 Deb, Union Minister, belonging 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 election for the State Assemblies for Madhya Pradesh, Uttar Pradesh, Rajasthan, Himachal pradesh and the National Capital Territory of Delhi as the party was not ready for the same. According to the CEC he had also spurned the request made through the Lieutenant Governor of Delhi by

A the said party for postponement of the Delhi 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 regarding the conduct of the Government 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 B attempts to prevail upon to 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 were 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 C on the part of the ruling party to install the two newly appointed ECs. The CEC described in details 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 D it could not achieve directly. These, in brief, are the broad counts on the basis whereof the 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 collateral purpose, E 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 to different political parties. The Joint Committee of both Houses of Parliament had submitted a report in 1972 recommending a multi-member body and the F 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 G 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 *mala fide* intention, to curb the activities of the present CEC. The allegation that the H 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 the same was dismissed at various fora and 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 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 *bona 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* case to which a reference has already been made. It is, 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) the powers of contempt of court be conferred upon the Election Commission, (iii) 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 Court of J&K, on the ground that his position was higher, he having been equated with judges of the Supreme Court, (iv) 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 *mala fides* 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 extent law. The question whether it is necessary to appoint other ECs besides the CEC is for the Government to decide

A and that is not a justiciable matter. The demand for a multi-member Commission was being voiced for the last several years and merely because it was decided to make an amendment in the statute through an Ordinance, it is 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 appointments 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 itself is sufficient reason to constitute a multi-member Commission so that the check and balance 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, 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 palable to be 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 appointments of the ECs. If such a nexus is to weigh, the CEC would continue to act against the ruling party 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 *mala fide*. 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. In 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 25, 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 sense of decorum and discretion that his high office requires even if the cause is laudable.

A That takes 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 the power to be exercised by the Commission falling within the scope of its activity, it did not see the need to engraft any B 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 the legislation specifically permitted by clauses (2) and (5) of Art. 324 and Articles 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 C is unconstitutional.

Now it must be noticed 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 D 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 I of the Seventh E Schedule. That entry refers to "Elections to Parliament, to Legislatures of States and to the Offices of President 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 Articles 327 and 328 only, it would be mere tautology. If the contention that the CEC alone has decisive power is not accepted and we have not accepted it, and even it is assumed that F 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 G as is set out in Section 10. We, therefore, see no merit is this contention also.

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 H expressly approved it where required.

One of the matters to which we must, advert 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 services 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), this 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, the CEC had suggested that the position of the CEC in the Warrant of Precedence needed reconsideration. This issue he seems to have raised in his letter to the Prime Minister in December 1991. It becomes clear from Shri Godbole' reply dated July 25, 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 the CEC had claimed 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 Court is highly desirable in the national interest. We mention this because of late we find that even personnel belonging to other fora claim equation with 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

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A 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 the needful.

B We have deliberately avoided going into the unpleasant exchanges that took place in the chamber of the CEC 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 C do not think any useful purpose will be served by washing dirty linen in public except showing both the CEC and Shri Krishnamurthy in poor light. The CEC and the ECs are high level functionaries. 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 D past and to get going with the job fell on deaf ears. Unfortunately, suspicion and distrust got the better of them. We hope they will forget and forgive start on a clean state of mutual respect and confidence and get going with 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 expecta- E tion. For the sake of the people and the country we do hope 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 F 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 G 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.

T.W. Petitions dismissed.