
Before T.H.B. Chalapathi, J

COURT ON ITS OWN MOTION,—*Petitioner*

versus

UNION OF INDIA AND OTHERS,—*Respondents*

CRL. M. No. 30331/M of 1999

30th May, 2000

Representation of People Act, 1951—S. 62—Indian Penal Code, 1860—Ss. 21 and 171—Code of Criminal Procedure, 1973—Ss. 190 and 197—Election Commissioner verbally directing the C.M. Haryana to return to the Headquarters of the State under threat of taking a drastic action—C.M. failed to exercise his franchise—E.C. failed to place before the High Court all the facts and circumstances which prompted him to issue such a verbal direction—The action of the E.C. giving verbal directions without assigning any reason deserves to be condemned and deprecated—Law does not authorise any authority to pass verbal orders—S. 197 Cr. P.C. prohibits the Court from taking cognizance of any offence against a public servant except with the previous sanction of Central Govt.—Though the action of the E.C. is not warranted under law yet High Court cannot give direction to prosecute him—Petition dismissed with liberty to the representationist to launch the prosecution in a competent Court of law.

Held that, electoral has been defined in Section 171-A I.P.C. *inter alia* either to vote or refrain from voting at an election. When the Election Commissioner without assigning any reason directed the Chief Minister of the State of Haryana to return to the Headquarters of the State, it amounts to restraining the Hon'ble Chief Minister from exercising his franchise at Sirsa where he has been registered as a voter since the direction was to stay at the State Headquarters.

(Para 12)

Further held, that the action of the Election Commissioner giving oral instructions deserves condemnation and to be deprecated. The Election Commission is not supposed to act as a super authority. It has to function within limits of law. No one in this country, however high he may be, can be above law. No material has been placed by the Election Commissioner before this court what prompted him to issue such a direction to an elected representative of the people of the State and who is leading the State as its Chief Minister particularly when

no allegations of violence in the electoral process have been either reported in the media or stated in the verbal directions.

(Para 14)

Further held, that law does not authorise any authority, however high it may be, to pass verbal orders. The orders must be written and must be specific and the grounds for such orders must be stated. This is a basic rule of law. Even otherwise, the Election Commissioner should have send a confirmation in writing of what he has directed orally on telephone to Chief Electoral Officer. No more is required to be said in regard to the action of the Election Commissioner, but his action deserves to be deprecated and condemned.

(Para 16)

Further held, that the Election Commissioner is a public servant as defined under section 21 IPC. Section 197 of the Cr. P.C. prohibits the Court from taking cognizance of any offence except with the previous sanction of Central Government in case of a person who is employed in connection with the affairs of the Union. The Election Commissioner is employed in connection with the affairs of the Union, since it is the duty of the Central Government to hold election under the provisions of law and he can only be removed from the office only on the recommendations of the Chief Election Commissioner by the President of India. The President of India has to act on the aid and advice of the Council of Ministers of the Central Government as provided under Article 74 of the Constitution of India. Therefore, the Election Commissioner can be removed only by the Central Government. Therefore, section 197 comes into play. When the Magistrate cannot take cognizance of the offence under section 190 of Cr.P.C. because of the bar provided in section 197 Cr. P.C. this Court cannot direct the Magistrate to take cognizance of the offence against the Election Commissioner. Thus, this Court cannot give any direction to prosecute the Election Commissioner though it is satisfied that his action is not warranted under law and it is also in violation of the electoral right of the Hon'ble Chief Minister of the State, who is an elected representative of the people of the State of Haryana.

(Paras 19 & 20)

Argued by—

R.S. Cheema, Senior Advocate with Hemant Sarin, Advocate and
D.S. Hooda, Advocate.

H.S. Mattewal, A.G., Punjab.

Amarjeet Singh, Additional A.G. Haryana for Chief Minister,
Haryana.

Yash Pal, A.A.G., Haryana for the State of Haryana.

P.N. Panday, Advocate for Union of India.

JUDGMENT

T.H.B. Chalapathi, J

(1) This petition has been registered on the basis of a representation of Shri Kanti Parkash Bhalla, resident of Panchkula, addressed to this Court and also on the basis of the reports of the media.

(2) The general elections for the Parliament took place on 5th of September, 1999. The Chief Minister Shri Om Parkash Chautala was campaigning in the said election in Bhiwani Constituency. While so, on 4th of September, 1999, the Election Commissioner Mr. J.M. Lyngdoh spoke to Mr. Bhaskar Chaterjee, Chief Electoral Officer of Haryana that the Chief Minister should go back to State Headquarters and leave Bhiwani Parliamentary Constituency otherwise the Election Commission would be compelled to take drastic action. The Chief Electoral Officer conveyed the same to Shri S.C. Chaudhary, Special Principal Secretary to the Chief Minister and also Shri Sanjiv Kaushal, Additional Principal Secretary to the Chief Minister for conveying the message to the Chief Minister. It was brought to the notice of the Principal Secretary to Chief Minister. According to the allegations in the petition, a representation made to this Court and also the media reports, the Chief Minister of Haryana State was prevented from casting his vote as he was directed by the Election Commissioner Shri J.M. Lyngdoh to leave Bhiwani Parliamentary Constituency and return to State Headquarters and therefore the Election Commissioner Shri Lyngdoh violated the provisions of section 62 of the Representation of People Act and also committed an offence under section 171 of the Indian Penal Code.

(3) Notice of this petition has been given to the State of Haryana, the Chief Minister, Election Commission of India and also the Election Commissioner Shri J.M. Lyngdoh.

(4) The Chief Electoral Officer, Haryana, Shri Bhaskar Chaterjee, I.A.S., filed an affidavit stating as follows :—

“That on 4th September 1999 around 9 A.M., I received a telephone call from Mr. J.M. Lyngdoh, Election Commissioner, Election Commission of India from Delhi. He desired that Chief Minister Ch. Om Parkash Chautala should go back to State Headquarters at Chandigarh and leave Bhiwani Parliamentary Constituency, otherwise the Election

Commission of India would be compelled to take drastic action. The same directions were immediately passed on to Shri S.C. Chaudhary, I.A.S., Special Principal Secretary to Chief Minister and also to Mr. Sanjeev Kaushal, I.A.S., Additional Principal Secretary to Chief Minister for conveying to the Chief Minister.”

(5) Shri Vijai Vardhan, I.A.S., Joint Secretary to Government, Haryana, Political and Services Departments, also filed an affidavit wherein he stated as follows :—

“That the facts leading to the said situation are that the Election Commissioner Mr. J.M. Lyngdoh, spoke to Mr. Bhaskar Chaterjee, I.A.S., Chief Electoral Officer, Haryana over the telephone on 4th September, 1999 and desired that the Chief Minister Ch. Om Parkash Chautala should go back to the State Headquarters and leave the Bhiwani Parliamentary Constituency and it was further conveyed that in case the Chief Minister did not comply with the directions, the Election Commission would take drastic action.”

(6) Shri O.P. Chautala, Hon'ble Chief Minister, Haryana, filed a reply wherein he stated as follows :—

That it is matter of record and fact that upon the directions issued by the Election Commissioner Mr. J.M. Lyngdoh, the deponent left the State of Haryana on 4th September, 1999 and could not cast his vote.

That the facts leading to the said situation are that the Election Commissioner Mr. J.M. Lyngdoh, spoke to Mr. Bhaskar Chaterjee, IAS, Chief Electoral Officer, Haryana, on telephone on 4th September, 1999 that the deponent should go back to the State headquarters and leave the Bhiwani Parliamentary Constituency and it was further conveyed that in case, the deponent did not comply with the directions, the Election Commission would take drastic action.

That the said directions were immediately passed on to Mr. S.C. Chaudhary, I.A.S., Spl. Principal Secretary to Chief Minister and also to Mr. Sanjeev Kaushal, I.A.S., Additional Principal Secretary to Chief Minister which were then conveyed to the deponent. The above directions were also brought to the notice of Mr. Vishnu, Bhagwan, I.A.S., Principal Secretary to the Chief Minister.

That Mr. Subas Pani, Secretary, Election Commission of India also rung up Mr. R.S. Verma, Chief Secretary, Haryana on 4th September, 1999 and asked him to provide State aircraft to the deponent in order to enable him to leave the area immediately which was otherwise not permissible for the Chief Minister to use in view of the Model Code of Conduct.”

(7) It is also averred by the Hon’ble Chief Minister that he represented the facts to the Chief Election Commissioner Dr. M.S. Gill and also to the Hon’ble President of India.

(8) A reading of the affidavit of the Chief Minister clearly indicates that he felt humiliated.

(9) A short reply has been filed by Shri J.M. Lyngdoh, Election Commissioner, Election Commission of India, New Delhi in which he has taken the following pleas :—

“That the deponent is a public servant as defined in section 21 of the Indian Penal Code, 1860 and no Court can take cognizance of any offence, alleged against him, in the discharge of his constitutional duties without the previous sanction of the Central Government i.e. the President of India, which is the mandatory requirement of section 197 Code of Criminal Procedure, 1973. To the knowledge of the deponent, no such sanction has been sought for or granted till today. Consequently, the rule *nisi* issued by this Hon’ble Court deserves to be discharged on this ground alone.

That it has not been brought to the notice of this Hon’ble Court that Shri Om Parkash Chautala is registered as a Voter at Sl. No. 297 in Part No. 151 in village Chautala, Tehsil Dabwali, District Sirsa falling on 84—Dabwali (SC) Assembly Constituency comprised within 10—Sirsa (SC) Parliamentary Constituency. Even according to the complaint, no order/direction was ever issued restraining Shri Chautala from going to Sirsa (where he is registered as a voter) or from casting his vote on 5th September, 1999.

That no illegality, much less an electoral offence, has been committed by the deponent as whatever steps were taken by the Election Commission of India were taken to ensure free and fair elections to ensure the purity of the election process and level playing field for all concerned. All this was done in the *bona fide* discharge of the constitutional duties bestowed upon the deponent by the Constitution of India.”

(10) A reading of the reply-affidavit of Shri J.M. Lyngdoh clearly shows that he never denied the averments made in the petition and also in the press reports that he orally talked to the Chief Electoral Officer on phone on 4th September, 1999 desiring that the Chief Minister, Haryana, should go back to State Headquarters and leave the Bhiwani Parliamentary Constituency and if the Chief Minister did not comply with the direction, the Election Commission would take drastic action. In his affidavit, Shri J.M. Lyngdoh stated that he reserves his right to answer the allegations made against him on merits in order to avoid prejudicing his case at a later stage. It is pertinent to note that the Election Commission has not denied the averments that the Election Commissioner would take drastic action in case of failure of the compliance of his direction that the Chief Minister should go back to the State Headquarters.

(11) From the affidavits filed above, the following facts emerge :—

That the Mid Term Elections for Lok Sabha have taken place on 5th of September, 1999. On 4th of September, 1999, the Hon'ble Chief Minister of State of Haryana was campaigning at Bhiwani Parliamentary Constituency. According to the affidavit of Chief Electoral Officer Mr. Bhaskar Chatterjee the Election Commissioner Mr. J.M. Lyngdoh orally conveyed to him on phone that the Chief Minister of Haryana, Mr. Om Parkash Chautala should leave the Bhiwani Constituency and return to the Headquarter of the State, otherwise drastic action has to be taken. According to the representation of Kanti Parkash Bhalla this oral direction of the Election Commissioner amounts to an offence as defined under Section 171(C) of the Indian Penal Code. Further according to him, the directions given by the Election Commissioner directing the Chief Minister of the State of Haryana to return to the State H.Qs amounts to an interference with the free exercise of the electoral right of the Chief Minister of Haryana.

(12) Electoral right has been defined in Section 171-A I.P.C. *inter alia* either to vote or refrain from voting at an election. When the Election Commissioner without assigning any reason directed the Chief Minister of the State of Haryana to return to the Headquarters of the State, it amounts to restraining the Hon'ble Chief Minister from exercising his franchise at Sirsa where he has been registered as a voter since the direction was to stay at the State Headquarters.

(13) It is no doubt true that as per the affidavit of Shri Bhaskar Chaterjee, Chief Electoral Officer, there was no direction of the Election Commissioner that the Hon'ble Chief Minister should not exercise his franchise. But the very fact that Shri Bhaskar Chaterjee had sworn affidavit stating that the Election Commissioner specifically directed the Hon'ble Chief Minister to return to the State Headquarters immediately under threat of taking a drastic action, will certainly amount to interfering with the electoral right to Mr. Om Parkash Chautala. Unfortunately the Election Commissioner, Mr. J.M. Lyngdoh has not chosen to deny the averments made by the Chief Electoral Officer of Haryana Mr. Bhaskar Chaterjee and also the averments made in the affidavit of Mr. Vijai Vardhan, Joint Secretary to Government, Haryana, and also the averments made in the affidavit filed by the Hon'ble Chief Minister except saying that "whatever steps were taken by the Election Commission of India, were taken to ensure free and fair election process and level playing field for all concerned." There is no elaboration of this statement. In all fairness, the Election Commissioner should have stated the reasons which prompted him to issue such a direction directing Mr. O.P. Chautala to leave the Bhiwani Parliamentary Constituency and to return to State Headquarters thereby refraining Mr. O.P. Chautala, who is the elected representative of the State of Haryana, and is holding responsible office of the Chief Minister from exercising his franchise.

(14) There cannot be any dispute that the Election Commission has to function within the frame work of law and any order passed by it must be traceable to some existing law. On the facts of this case, it is very clear and it cannot be disputed nor doubted that the Election Commissioner Mr. J.M. Lyngdoh has only passed verbal orders directing the Chief Minister of the State of Haryana to return to the State Headquarters. This is very unfortunate situation. The Election Commissioner should have put in writing his direction so that there cannot be any ambiguity. It is not as though the facilities are not available for the Election Commissioner to sent written orders or communications instead of verbal orders. Both the Election Commission and the Chief Electoral Officer in the State have been provided with the fax machines. What prevented Mr. J.M. Lyngdoh to communicate the orders on fax, it is best known to him only. The action of Mr. J.M. Lyngdoh giving oral instructions deserves condemnation and to be deprecated. The Election Commission is not supposed to act as a super authority. It has to function within limits of law. No one in this country, however high he may be, can be above law. No material has been placed by the Election Commissioner Mr. J.M. Lyngdoh before this Court what prompted him to issue such a direction to an elected

representative of the people of the State and who is leading the state as its Chief Minister particularly when no allegations of violence in the electoral process have been either reported in the media or stated in the verbal directions.

(15) Further I fail to understand under what authority the Election Commissioner had issued oral directions directing the Hon'ble Chief Minister to return to State Headquarters. Will, under this situation, it be possible for the Hon'ble Chief Minister to go to Sirsa to exercise his franchise especially when he was prevented from leaving Chandigarh, the Headquarters of the State of Haryana. The affidavit of Mr. J.M. Lyngdoh furnishes no answer. A person who is holding high office of Election Commissioner is expected to place before the Court all the facts and circumstances which prompted him to issue such an unexpected direction. Mr. J.M. Lyngdoh failed to discharge this obligation to the Court. There is every justification for the Hon'ble Chief Minister to feel that he has been humiliated by the action of the Election Commissioner and he has been hurt.

(16) No material has been placed before this Court that what act Mr. O.P. Chautala, has done which compelled the Election Commissioner to direct him to leave Bhiwani Parliamentary Constituency and return to State Headquarters. The Election Commissioner did not support his allegations in the affidavit filed in this Court. Further he sought to reserve the right to answer the allegations made against him on merits in order to avoid prejudicing his case at a later stage, if any. This is not fair to the Court. When the Court issued notice to him he must have placed all the material on record which prompted him to issue such a verbal direction for which he was not authorised to issue while holding such a high and responsible office. The verbal orders do not have any support of legal provisions. Nobody can find fault with if one thinks that Mr. J.M. Lyngdoh acted as he is the Supreme authority and can issue any orders verbal or written. Law does not authorise any authority, however high it may be, to pass verbal orders. The orders must be written and must be specific and the grounds for such orders must be stated. This is a basic rule of law. Even otherwise, the Election Commissioner should have sent a confirmation in writing of what he has directed orally on telephone to Chief Electoral Officer. No more is required to be said in regard to the action of Mr. J.M. Lyngdoh, but his action deserves to be deprecated and condemned. I trust and hope the Chief Election Commissioner will take necessary action to prevent such misuse or abuse of the powers of the Election Commission by issuing necessary guidelines in this regard in consultation with other Commissioners.

(17) In this context, reference may be made to the judgment of the Apex Court in *Mohinder Singh Gill and another v. Chief Election Commissioner, New Delhi and others* (1), at page 431 wherein it has been held as follows :—

Article 324, which we have set out earlier, is a plenary provision vesting the whole responsibility for national and State Elections and, therefore, the necessary powers to discharge that function. It is true that Article 324 has to be read in the light of constitutional scheme and the 1950 Act and 1951 Act. Shri Rao is right to the extent he insists that if competent legislation is enacted and visualised in Article 327, the Commission cannot shake itself free from the elected prescriptions. After all as Mathew, J. has observed in *Indira Gandhi* (supra) (P 523) (SCC P. 136, Paras 335-6) :

In the opinion of some of the Judges constituting the majority in *Bharati's* case, Rule of law is a basic structure of the Constitution apart from democracy. The rule of law postulates the pervasiveness of the spirit of law throughout the whole range of government in the sense of excluding arbitrary official action in any sphere. And supremacy of valid law over the Commission argues itself. No one is an imperium in our constitutional order. It is reasonable to hold that the Commissioner cannot defy the law armed by Article 324. Likewise, his functions are subject to the norms of fairness and he cannot act arbitrarily. Unchecked power is alien to our system.

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 nor existing legislation. More is not necessary to specify, less is insufficient to leave unsaid. Article 324 in our view, 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. Myriad maybes, too mystic to be precisely presaged, may call for prompt action to reach the goal of free and fair election. It has been argued that this

will create a constitutional despot beyond the pale of accountability, a Frankenstein's monster who may manipulate the system into elected depotism—instances of such phenomena are the tears of history. To that the retort may be that the judicial branch, at the appropriate stage, with the potency of its benignant power and within the leading strings of legal guidelines, can call the bluff, quash the action and bring order into the process. Whether we make a triumph or travesty of democracy depends on the man as much as on the Great National Parchment. Secondly, when a high functionary like the Commissioner is vested with wide powers the law expects him to act fairly and legally. Article 324 is geared to the accomplishment of free and fair elections expeditiously. Moreover, as held in *Virendra and Harishankar* discretion vested in a high functionary may be reasonably trusted to be used properly, not perversely. If it is misused, certainly the Court has power to strike down the act. This is well established and does not need further case law confirmation. Moreover, it is useful to remember the warning of Chandrachud, J.

But the electorate lives in the hope that a sacred power will not so flagrantly be abused and the moving finger of history warns of the consequences that inevitably flow when absolute power has corrupted absolutely. The fear of perversion is no test of power."

(18) But the question is whether this Court can direct the prosecution of Mr. J.M. Lyngdoh for the offence cognizable under Section 171-F of the Indian Penal Code. There is no doubt that the offence punishable under Section 171-F is non-cognizable. Therefore, there cannot be any direction to register an FIR against Mr. Lyngdoh for the said offence.

(19) The next question which oscillates whether this Court can direct the Magistrate to take cognizance of the offence said to have been committed by Mr. J.M. Lyngdoh. The Election Commissioner Mr. J.M. Lyngdoh is a public servant as defined under Section 21 of the Indian Penal Code. Under clause 11th of Section 21 every person who holds any office in virtue of which he is empowered to conduct an election is a public servant. Therefore, Mr. J.M. Lyngdoh is a public servant. Section 197 of the Code of Criminal Procedure prohibits the Court from taking cognizance of any offence except with the previous sanction of Central Government in case of a person who is employed in connection with the affairs of the Union. Mr. J.M. Lyngdoh is employed in connection with the affairs of the Union since it is the duty of the Central

Government to hold election under the provisions of law and he can only be removed from the office only on the recommendations of the Chief Election Commissioner by the President of India. The President of India has to act on the aid and advice of the Council of Ministers of the Central Government as provided under Article 74 of the Constitution of India. Therefore, the Election Commissioner can be removed only by the Central Government. Therefore Section 197 Cr. P.C. comes into play. When the Magistrate cannot take cognizance of the offence under Section 190 of the Code of Criminal Procedure because of the bar provided in Section 197 Cr. P.C., I cannot direct the Magistrate to take cognizance of the offence against Mr. J.M. Lyngdoh, the Election Commissioner.

(20) In this view of the matter, I cannot give any direction to prosecute Mr. J.M. Lyngdoh, the Election Commissioner, though I am satisfied that the action of Mr. J.M. Lyngdoh is not warranted under law and it is also in violation of the electoral right of the Hon'ble Chief Minister of the State, who is an elected representative of the people of the State of Haryana.

(21) In view of my foregoing discussion, I have no other option except to dismiss the petition with liberty to Mr. Kanti Parkash Bhalla, who made representation to this Court or any other aggrieved person to launch the prosecution in accordance with law in a competent Court.

(22) With the above observations, the petition is disposed of.

R.N.R.

Before G.S. Singhvi & Nirmal Singh, JJ

BHORUKA POWER CORPORATION LTD.,—*Petitioner*

versus

THE STATE OF HARYANA AND OTHERS,—*Respondents*

CWP No. 14615 of 1999

3rd July, 2000

Constitution of India, 1950—Arts. 14, 15, 16 & 226—Doctrine of equality—Haryana Govt. formulating policy for setting up power plants by private sector—Haryana State Energy Development Agency (HAREDA) inviting proposals only for private sector participation for setting up Mini Hydro Plants—Petitioner & respondent No. 3 submitting proposals for Dadupur site—Respondent No. 3 not entitled to submit proposal in terms of the advertisement—High Powered