

**SUPREME COURT OF INDIA                      REPORTABLE**

**Bench: Justices Sanjiv Khanna and Dipankar Datta**

**Date of Decision: 22nd January 2024**

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 13 OF 2024

WRIT PETITION (CIVIL) NO. 11 OF 2024

WRIT PETITION (CIVIL) NO. 87 OF 2024

WRIT PETITION (CIVIL) NO. 191 OF 2024

WRIT PETITION (CIVIL) NO. 14 OF 2024

**DR. JAYA THAKUR & ORS. .... PETITIONER**

**VERSUS**

**UNION OF INDIA & ANR. .... RESPONDENT**

**Legislation:**

Article 32 of the Constitution of India

Chief Election Commissioner and other Election Commissioners (Appointment, Conditions of Service, and Term of Office) Act, 2023

Article 324(2) of the Constitution of India

**Subject:** Challenge to the vires of Section 7(1) of the Chief Election Commissioner and other Election Commissioners (Appointment, Conditions of Service, and Term of Office) Act, 2023, concerning the process of appointing Election Commissioners.

**Headnotes:**

Constitutional Law – Electoral Process – Appointment of Election Commissioners – The Supreme Court considered the constitutional validity of the process of appointment of Election Commissioners under Section 7(1) of the Chief Election Commissioner and other Election Commissioners (Appointment, Conditions of Service, and Term of Office) Act, 2023, as challenged in multiple writ petitions filed under Article 32 of the Constitution of India. [Para 1-2]

Challenge to the Appointment Process – raised – concerns over the substitution of the Chief Justice of India with a Union Cabinet Minister in the Selection Committee for the appointment of the Chief Election Commissioner and other Election Commissioners, arguing it impacts the transparency and fairness of elections, a foundational element of democracy. Also questioned were procedural irregularities in the selection process, including the inadequate provision of candidate information to the Selection Committee members. [Para 2-3, 6-7]

Response from Union of India – provided – justification for the 2023 Act, outlining the formation and actions of the Selection and Search Committees as per the Act. Emphasized the preponement of the selection meeting, the constitution of the committees, and the resignation of an Election Commissioner. [Para 4-8]

Judicial Restraint in Granting Interim Orders – emphasized – the Court's cautious approach in matters involving the constitutionality of legislations, upholding the principle that unless a provision is ex facie unconstitutional, interim orders should not be granted to suspend statutory provisions. [Para 10]

Rejection of Interim Order for Re-selection – decided – the Court refused to direct a fresh selection process with the Chief Justice of India as a member of the Selection Committee, stating that it would be inappropriate without declaring Section 7(1) unconstitutional and would amount to the Court enacting new law. [Para 11]

Impact on Forthcoming Elections – considered – The Court declined to intervene with the appointments of the Election Commissioners, citing the potential for causing confusion and constitutional breakdown ahead of the scheduled 18th General Elections for the Lok Sabha. [Para 12-13]

Procedural Concerns in Selection – noted – While expressing concern over the selection procedure's shortcomings, the Court refrained from issuing any directive or interim order, emphasizing the importance of proper deliberation and the examination of candidates' backgrounds in such selections. [Para 14]

Constitutional Functioning of Appointees – reminded – The Court highlighted the expectation that constitutional post holders, once selected, will adhere to constitutional roles and propriety, referencing Dr. B.R. Ambedkar's views on the functioning of a constitution irrespective of its quality. [Para 15]

Conclusion – Applications for Stay Dismissed – The Supreme Court, upon consideration, dismissed the applications for stay and other related

applications, maintaining that its observations in this order are tentative and not final, as the matter is sub-judice. [Para 16-19]

**Referred Cases: None cited directly.**

## **ORDER**

1. This order records reasons and decides the applications for stay of selection and appointment of the Election Commissioners<sup>1</sup>, in the writ petitions filed under Article 32 of the Constitution of India<sup>2</sup>, *inter alia*, challenging the *vires* of Section 7(1) of the Chief Election Commissioner and other Election Commissioners (Appointment, Conditions of Service, and Term of Office) Act, 2023.<sup>3</sup>
2. The primary grounds of challenge are twofold. First, Section 7(1) of the 2023 Act dilutes, if not amends or modifies, the judgment of this Court's Constitution Bench in *Anoop Baranwal v. Union of India*<sup>4</sup>, by substituting the Chief Justice of India<sup>5</sup> with a Union Cabinet Minister nominated by the Prime Minister in the Selection Committee for the post of the Chief Election Commissioner<sup>6</sup> and the ECs. Secondly, the provision has a direct and potential impact on the conduct of transparent, free and fair elections, one of the foundational requirements of democracy.
3. That apart, the selection process of the ECs, as adopted in the present case, has been challenged on the ground of procedural irregularity, affecting the fairness, transparency and objectivity in the selection process in question. The Leader of Opposition in the House of the People<sup>6</sup> was not furnished necessary details of the six shortlisted candidates in advance to effectively participate in the selection process<sup>7</sup>. The names and details were statedly furnished minutes before the meeting for the selection of the ECs was held

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<sup>1</sup> For short, "EC".

<sup>2</sup> For short, "Constitution".

<sup>3</sup> For short, "2023 Act".

<sup>4</sup> (2023) 6 SCC 161.

<sup>5</sup> For short, "CJI".  
<sup>6</sup> For short, "CEC".

<sup>6</sup> For short, "LoP". As per Explanation to Section 7(1) of the 2023 Act the leader of the single largest party in opposition of the Government in the House of the People shall be deemed to be the LoP, in case where the LoP has not been recognized.

<sup>7</sup> Reliance is placed on the letter dated 12.03.2024 of Mr. Adhir Ranjan Chowdhury requesting for bio-profiles of the persons short-listed by the Search Committee well before the meeting of the Selection Committee.

on 14.03.2024<sup>8</sup>. Thus, he has been denied the opportunity to choose and have his voice heard. Further, the writ petition challenging the *vires* of the 2023 Act was *sub-judice* before this Court since 02.01.2024, and therefore soon after the resignation of one of the ECs, applications for stay were filed, mentioned and directed to be listed for hearing before this Court on 15.03.2024. However, the selection and appointment of two ECs was made on 14.03.2024.<sup>9</sup>

4. The Union of India has filed a conjoint reply to the applications for stay *inter alia*, stating that: -
  - a) The 2023 Act has been enacted as contemplated by Article 324(2) of the Constitution and was brought into effect on 02.01.2024.
  - b) On 01.02.2024, the Selection Committee, under Section 7(1) of the 2023 Act, was constituted, and consists of the Prime Minister, the Home Minister and the LoP.
  - c) On 01.02.2024, the Search Committee, under Section 6 of the 2023 Act, was constituted, and is chaired by Minister of State, Law and Justice, Government of India<sup>11</sup> with the Home Secretary, Gol and Secretary, Department of Personnel and Training, Gol as members.
  - d) On 04.02.2024, notice was issued for convening meeting of the Selection Committee on 07.02.2024 for filling one vacancy to the post of EC, as an EC had demitted office.<sup>10</sup> However, the meeting was postponed on 07.02.2024.
  - e) On 09.03.2024, notice was issued for meeting of the Selection Committee to be held on 15.03.2024.
  - f) On 09.03.2024, Mr. Arun Goel, EC, tendered his resignation, which was accepted w.e.f. 09.03.2024, thereby resulting in the second vacancy.

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<sup>8</sup> Reliance is placed on the report dated 14.03.2024 published in the Indian Express quoting Mr Adhir Ranjan Chowdhury.

<sup>9</sup> An earlier vacancy to the post of EC was created by virtue of EC - Mr. Anup Chandra Pandey demitting office on 14.02.2024. The second vacancy to the post of EC occurred by virtue of the resignation of EC - Mr. Arun Goel on 09.03.2024. <sup>11</sup> For short, "GoI".

<sup>10</sup> See *supra* note 10.

- g) In view of the second vacancy, a revised note dated 09.03.2024 was issued for the meeting of the Selection Committee to be held on 14.03.2024 for filling up the two vacant posts of EC.

It is highlighted by the respondent – Union of India that the meeting fixed for 15.03.2024 was preponed to 14.03.2024 on 09.03.2024, prior to the listing of the stay applications by this Court on 15.03.2024.

5. However, it is to be noted that I.A. No. 63879/2024 in Writ Petition (C) No. 87 of 2024 was filed on 12.03.2024<sup>11</sup> and I.A. No. 66382/2024 in W.P. (C) 11/2024 was filed on 14.03.2024<sup>12</sup>.
6. Mr. Adhir Ranjan Chowdhury, Member of the Selection Committee<sup>13</sup>, on 12.03.2024 had requested the Secretary, Legislative Department, Gol to share details of the shortlisted names. On 13.03.2024, the Secretary, Legislative Department, Gol, had sent a list of eligible persons, more than 200 in number, being considered by the Search Committee to Mr. Adhir Ranjan Chowdhury. The Search Committee had not carried out the shortlisting exercise by then.
7. The Search Committee, in its meeting on 13.03.2024, could not finalise and shortlist the names. In the meeting held on 14.03.2024, the Search Committee recommended a panel of six names for consideration of the Selection Committee, which were then circulated and forwarded to the members of the Selection Committee, including Mr. Adhir Ranjan Chowdhury.
8. On 14.03.2024 the Selection Committee met and recommended the names of Mr. Gyanesh Kumar and Dr. Sukhbir Singh Sandhu to the President of India

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<sup>11</sup> Application filed by Association of Democratic Reforms praying, *inter alia*, for the stay of implementation of Section 7 of the 2023 Act.

<sup>12</sup> Application filed by Naman Sherstra praying, *inter alia*, for stay of the effect of the 2023 Act. Earlier I.A. No. 4223/2024 in W.P. (C) 13/2024 was filed on 05.01.2024, I.A. No. 30286/2024 in W.P. (C) No. 87 of 2024 was filed on 05.02.2024, albeit stay was not granted by this court.

<sup>13</sup> Being the leader of the single largest party in opposition in the House of the People.

for appointment as ECs. The President of India had thereupon approved the recommendation on 14.03.2024.

9. We would not, at this stage, go into the depth and details of the challenge to the *vires* of Section 7(1) of the 2023 Act. The judgment in *Anoop Baranwal* (supra) notices the appointments of the CEC and ECs made from the 1950s till 2023,<sup>14</sup> but this Court intervened in the absence of any legislation. Article 324(2) postulates the appointment of the CEC and ECs by the President of India in the absence of any law made by the Parliament. The judgment in *Anoop Baranwal* (supra) records that there was a legislative vacuum as the Parliament had not made any enactment as contemplated in Article 324(2). Given the unique nature of the provision and absence of an enactment, this Court had issued directions constituting the Selection Committee as a pro-tem measure. This is clear from the judgment, which states that the direction shall hold good till a law is made by the Parliament. It is also observed that the Court is neither invited, nor if invited, would issue a mandamus to the legislature to make a law. We would also add that the Court would not ‘invite’ the legislature to make a law in a particular manner. However, the Constitutional Court within the framework of the Constitution exercises the power of judicial review and can invalidate a law when it is violative of the Fundamental Rights, on application of the principle of proportionality, etc.
10. It is well-settled position of law that in matters involving constitutionality of legislations, courts are cautious and show judicial restraint in granting interim orders. Unless the provision is *ex facie* unconstitutional or manifestly violates fundamental rights, the statutory provision cannot be stultified by granting an interim order.<sup>15</sup> Stay is not *ipso facto* granted for mere examination or even when some cogent contention is raised. Suspension of legislation pending

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<sup>14</sup> See paragraphs 63-72, *Anoop Baranwal* (supra).

<sup>15</sup> *Health for Millions v. Union of India*, (2014) 14 SCC 496.

consideration is an exception and not the rule. The said principle keeps in mind the presumption regarding constitutionality of legislation as well as the fact that the constitutional challenge when made may or may not result in success. The courts do not, unless eminently necessary to deal with the crises situation and quell disquiet, keep the statutory provision in abeyance or direct that the same be not made operational. However, it would not be appropriate to pen down all situations as sometimes even gross or egregious violation of individual Fundamental Rights may on balance of convenience warrant an interim order. The Courts strike a delicate balance to step-in in rare and exceptional cases, being mindful of the immediate need, and the consequences as to not cause confusion and disarray.

11. The applicant-petitioners urge that this court may by an interim order direct fresh selection with the CJI as a member of the Selection Committee. This would be plainly impermissible, without declaring Section 7(1) as unconstitutional. Further, we would be enacting or writing a new law replacing or modifying Section 7(1) of the Act, as enacted by the Parliament, if such a contention were accepted.
12. Moreover, any interjection or stay by this Court will be highly inappropriate and improper as it would disturb the 18<sup>th</sup> General Election for the Lok Sabha which has been scheduled and is now fixed to take place from 19.04.2024 till 01.06.2024. Balance of convenience, apart from *prima facie* case and irreparable injury, is one of the considerations which the court must keep in mind while considering any application for grant of stay or injunction. Interlocutory remedy is normally intended to preserve *status quo* unless there are exceptional circumstances which tilt the scales and balance of convenience on account of any resultant injury. In our opinion, grant of stay would lead to uncertainty and confusion, if not chaos. That apart, even when the matter had come up earlier and the applications for stay were pressed, we had refused to grant stay.

13. Given the importance and humongous task undertaken by the Election Commission of India, presence of two more ECs brings about a balance and check. The concept of plurality in Article 324 of the Constitution, which has been noticed and approved by this Court in *T.N. Seshan v. Union of India*<sup>16</sup>, is necessary and desirable.

14. We must, however express our concern on the procedure adopted for selection of the incumbents to the two vacant posts of ECs, a significant constitutional post. Such selections should be made with full details and particulars of the candidates being circulated to all members of the Selection Committee. Section 6 of the 2023 Act postulates five prospective candidates which, *prima facie*, appears to mean that for two vacant posts ten prospective candidates should have been shortlisted. Procedural sanctity of the selection process requires fair deliberation with examination of background and merits of the candidate. The sanctity of the process should not be affected. Nevertheless, in spite of the said shortcoming, we do not deem it appropriate at this stage, keeping in view the timelines for the upcoming 18<sup>th</sup> General Elections for the Lok Sabha, to pass any interim order or direction. As indicated above, this would lead to chaos and virtual constitutional breakdown. Remand at this stage would not resolve the matter. It may also be relevant to state that the petitioners have not commented or questioned the merits of the persons selected/appointed as Ecs.

15. Further, EC being a constitutional post, it is wise to remind ourselves that once a constitutional post holder is selected, they are duty bound to act in accordance with the letter and spirit of the Constitution. The assumption is that they shall adhere to constitutional role and propriety in their functioning. To borrow from Dr. B.R. Ambedkar, Chairman, Drafting Committee of the Constituent Assembly of India:

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<sup>16</sup> (1995) 4 SCC 611.



“However good a Constitution may be, if those who are implementing it are not good, it will prove to be bad. However bad a Constitution may be, if those implementing it are good, it will prove to be good.”

16. Having regard to the aforesaid position, we are not inclined to accept the prayer for grant of stay. Accordingly, the applications seeking stay are dismissed. We would clarify that the observations in this order are tentative and are not to be treated as final and binding, as the matter is *sub-judice*.
17. Recording the aforesaid, applications seeking stay in I.A. No. 66382/2024 in W.P. (C) 11/2024, I.A. No. 4223/2024 in W.P. (C) 13/2024, I.A. No. 62608/2024 in W.P.(C) No. 14/2024, I.A. No. 68091/2024 in W.P. (C) 87/2024, I.A. No. 30286/2024 in W.P. (C) 87/2024, I.A. No. 63879 of 2024 in W.P. (C) No. 87 of 2024 and I.A. No. 69713/2024 in W.P. (C) 191/2024 are dismissed.
18. Applications seeking intervention in I.A. No. 64017/2024 in W.P.(C) 14/2024 and I.A. No. 66282/2024 in W.P. (C) 87/2024 are dismissed.
19. Learned counsel for the intervenor in I.A. No. 71728/2024 in W.P. (C) 14/2024 prays for and is granted the permission to withdraw the intervention application. Accordingly, I.A. No. 71728/2024 in W.P. (C) 14/2024 is dismissed as withdrawn.

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