



***A 5-page summary of the 378-page judgment of a 5-Judge Bench:*

For Delhi Law Academy students:**

Anoop Baranwal v. Union of India

March 2, 2023

Supreme Court of India

Judgment

1. In this clutch of writ petitions maintained under Article 32 of the Constitution, the Court is called upon to consider the true effect of Article 324 and, in particular, Article 324(2) of the Constitution. The said sub-Article reads as follows:

*“The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the *appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made **by the President.***”*

196. When Article 324(2) provides that the appointment of the Chief Election Commissioner and the other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President, in view of Article 74, it would, undoubtedly, mean that the President is bound to make appointments in accordance with the advice of the Council of Ministers. Taking into consideration Article 77 also and, in view of the Rules of Business made, *the appointment, till a law is made by Parliament, would be made by the President in accordance with advice of the Prime Minister.* It was precisely such an appointment, which was the cause of unanimous concern to the Members of the Constituent Assembly, which we have already adverted to.



203. We may at once observe as follows:

We have noticed in the context of the Constituent Assembly debates, as also what preceded it in the form of Sub-Committee Reports, that there was general agreement that a law must be made by Parliament and the amended draft Article 289 came to be, accordingly, further amended and approved, leading to the insertion of the words 'subject to the law to be made by Parliament' in Article 324(2). In other words, *the purpose for which the provision was made, as also the imperative need to make such a law, has been eloquently articulated in the views of the Members of the Constituent Assembly.....* It will be again noticed that Article 324(2) does not provide for consultation with any one and it appears to place the power to make appointments, exclusively with the Executive as the President is bound by the advice of the Prime Minister. However, *it is precisely to guard against the abuse by the exclusive power being vested with the Executive that instead of a consultative process being provided, Parliament was to make a law.* This clearly was the contemplation of the Founding Fathers.

215. We have set down the legislative history of Article 324, which includes reference to what transpired, which, in turn, includes the views formed by the members of Sub-Committees, and Members of the Constituent Assembly. They unerringly point to one conclusion. *The power of appointment of the Members of the Election Commission, which was charged with the highest duties and with nearly infinite powers, and what is more, to hold elections, not only to the Central Legislature but to all the State Legislatures, was not to be lodged exclusively with the Executive.* It is, accordingly that the words 'subject to any law to be made by Parliament' were, undoubtedly, incorporated.

216. No law, however, came to be enacted by Parliament.

219.The Founding Fathers clearly contemplated a law by Parliament and did not intend the executive exclusively *calling the shots in the matter of appointments to the Election Commission. Seven decades have passed by. Political dispensations of*

varying hues, which have held the reigns of power have not unnaturally introduced a law. A law could not be one to perpetuate what is already permitted namely appointment at the absolute and sole discretion of the Executive. A law, as Gopal Sankaranarayanan points out, would have to be necessarily different. The absence of such a law does create a void or vacuum.

220.The vacuum in the case of Article 324 (2) is the absence of the law which Parliament was contemplated to enact.

226.We have already elaborated and found that core values of the Constitution, including democracy, and Rule of Law, are being undermined. It is also intricately interlinked with the transgression of Articles 14 and 19.

227. In the unique nature of the provision, we are concerned with and the devastating effect of continuing to leave appointments in sole hands of the Executive on fundamental values, as also the Fundamental Rights, we are of the considered view that the time is ripe for the Court to lay down norms. In other words, *the vacuum exists on the basis that unlike other appointments, it was intended all throughout that appointment exclusively by the Executive was to be a mere transient or stop gap arrangement and it was to be replaced by a law made by the Parliament taking away the exclusive power of the Executive.* This conclusion is clear and inevitable and the absence of law even after seven decades points to the vacuum.

Protection against removal from office

Contentions

232. One of the contentions raised by the petitioners is this Court must provide for the same protection to the Election Commissioners as is available to the Chief Election Commissioners.

.....Thus, it is pointed out, the Court must adopt the following interpretation. An Election Commissioner or Regional Commissioner can be removed only in the like manner and on like grounds as a Judge of the Supreme Court of India. A further safeguard is, however, provided to the Election Commissioner, viz., that he can be removed from Office only on the recommendation of the Chief Election Commissioner.

Supreme Court

233.More importantly, even on a plain reading of Article 324(5), we are of the view that in regard to the prayer that the Election Commissioner must be accorded the same protection as is given to the Chief Election Commissioner, the argument appears to be untenable. This prayer was rejected, in fact, in T.N. Seshan. It is clear as day light that the first proviso protects the Chief Election Commissioner alone from removal by providing for protection as is accorded to a Judge of the Supreme Court of India. It is still further more important to notice that the first proviso interdicts varying of the conditions of service of the Chief Election Commissioner to his disadvantage after the appointment.

It is, thereafter, that the second proviso appears. The second proviso exclusively deals with any other Election Commissioner, inter alia. The word 'any other Election Commissioner' has been provided to distinguish him from the Chief Election Commissioner.

Therefore, *for the Election Commissioners other than the Chief Election Commissioner, the protection which is clearly envisaged as against his removal is only that it can be effected only with the recommendation of the Chief Election Commissioner.* We are of the view that in the context of the provision, the words 'provided further' cannot be perceived as an additional protection to the Election Commissioner. It is intended only to be a standalone provision, specifically meant to deal with the categories of persons mentioned therein.

.....However, we only would observe that in the light of the fact that Election Commissioners have become part of the Election Commission, perhaps on the basis of the volume of work that justifies such an appointment and also the need to have a multi-Member team otherwise, *it is for Parliament acting in the constituent capacity to consider whether it would be advisable to extend the protection to the Election Commissioners so as to safeguard and ensure the independence of the Election Commissioners as well.* This goes also as regards variation of service conditions after appointment.

The Final Relief

239. The Writ Petitions are partly allowed and they are disposed of as follows:

I. We declare that as far as appointment to the posts of Chief Election Commissioner and the Election Commissioners are concerned, the same shall be done by the President of India on the basis of the advice tendered by a Committee consisting of the Prime Minister of India, the Leader of the Opposition in the Lok Sabha and, in case, there is no such Leader, the Leader of the largest Party in the Opposition in the Lok Sabha having the largest numerical strength, and the Chief Justice of India. This norm will continue to hold good till a law is made by the Parliament.

II. As regards the relief relating to putting in place a permanent Secretariat for the Election Commission of India and charging its expenditure to the Consolidated Fund of India is concerned, the Court makes a fervent appeal that the Union of India/Parliament may consider bringing in the necessary changes so that the Election Commission of India becomes truly independent.
