

ITEM NO.3

COURT NO.2

SECTION XIA

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Petition(s) for Special Leave to Appeal (Civil) No(s).8891/2011

(From the judgement and order dated 21/03/2011 in WPC No. 8178/1911
of The HIGH COURT OF KERALA AT ERNAKULAM)

ELECTION COMMN.OF INDIA

Petitioner(s)

VERSUS

RAJAJI MAHTEW THOMAS & ORS.

Respondent(s)

(With appln(s) for permission to place addl. documents on record and
prayer for interim relief and office report)

Date: 30/03/2011 This Petition was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE ALTAMAS KABIR
HON'BLE MR. JUSTICE CYRIAC JOSEPH

For Petitioner(s) Mr. Ashok Desai, Sr. Adv.
Mr. S.K. Mendiratta, Adv.
Ms. Meenakshi Arora, Adv.
Mr. Mohit D. Ram, Adv.

For Respondent(s) Mr. L. Nageswara Rao, Sr. Adv.
Mr. G. Prakash, Adv.
Ms. Beena Prakash, Adv.
Mr. Santosh Krishnan, Adv.

Mr. Deepak Prakash, Adv.
Mr. Biju P. Raman, Adv.
Ms. Usha Nandini, Adv.
Ms. Sumita Hazarika, Adv.

UPON hearing counsel the Court made the following

O R D E R

General elections to the Kerala State Legislative Assembly were announced by the Election Commission on 1st March, 2011. Subsequently, the elections were notified on 19th March, 2011. Prior to the announcement of elections, on 25th February, 2011, the State Government issued an Order granting administrative sanction to a scheme to extend the existing scheme of providing food grain at the rate of Rs.2/- per kilogram to certain categories of people in the State, namely, the ration-card holders categorized as BPL/AAY, the families of fishermen, Scheduled Castes, Scheduled Tribes and Ashraya Scheme and the workers of forty-one unorganized/traditional sectors including those who have worked under the National Employment Guarantee Scheme for at least 50 days, to all the ration-card holders in the State, subject to certain conditions.

On 5th March, 2009, the Election Commission of India, the petitioner in the present Special Leave Petition, had written to the Chief Secretaries to the Governments of all States and Union Territories, regarding the enforcement of the Model Code of Conduct, which had been framed and promulgated by the Election Commission. In paragraph 3 of the said letter, it was indicated that after the Model Code of Conduct came into effect, the Ministry of Finance of either the Central or the State Government would need to take prior approval of the Commission on any policy announcements, fiscal measures, taxation related issues and such other financial relief. Similarly, other Ministries/Departments would also need to take prior approval of the Commission before announcing any relief/benefit.

Pursuant to issuance of the aforesaid Order dated 25th February, 2011, certain complaints were received by the Election Commission of India and the Chief Electoral Officer

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from various quarters, including a sitting Member of Parliament, two members of the Legislative Assembly, one of whom is the former Chief Minister of Kerala, and others. The District Collectors of Kollam and Kannur, also sought certain clarifications from the respondents Nos.1 and 2 regarding implementation of the scheme for distribution of rice at Rs.2/- per kilogram in terms of the Government's decision dated 25.2.2011. The matter was thereupon forwarded by the Government to the Election Commission for obtaining its permission for implementing the scheme. In reply thereto, on 7th March, 2011, the Chief Electoral Officer and Principal Secretary to Government, Election Department, Government Secretariat, Thiruvananthapuram, observed as follows:

"Extension of the scheme to new beneficiaries as per G.O. NO.11/2011/F&CS, dated 25th February, 2011, may be deferred till the election process is over."

The aforesaid view of the Chief Electoral Officer was ratified by the Election Commission by its letter dated 11th March, 2011, addressed to the Chief Electoral Officer, Kerala, Thiruvananthapuram, which has been made Annexure P-16 to the Special Leave Petition.

Aggrieved thereby, the respondent No.1 herein, filed Writ Petition No.8178(S) of 2011, in the Kerala High Court, which was disposed of by the Division Bench of the High Court by its judgment and order dated 21st March, 2011, holding that the impugned direction of the Election Commission and the Chief Electoral Officer to defer the implementation of the decision taken by the State Government on 25th February, 2011, to extend the benefits of the scheme, which was already in existence in relation to

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others, as wholly arbitrary and unconnected with the purpose sought to be achieved for securing a level playing field to all the political parties contesting the elections.

It is the aforesaid order of the Division Bench of the Kerala High Court, which is the subject matter of challenge in this Special Leave Petition, which has been filed by the Election Commission of India.

From a glance at the Model Code of Conduct for the guidance of political parties and candidates, it appears that in relation to the conduct of a party in power, it has been indicated that from the time elections are announced by the Commission, Ministers and other authorities shall not, inter alia, announce any financial grants in any form or promises thereof. In the letter of 5th March, 2009, referred to hereinbefore, it has also been indicated that only certain works and actions could be taken or continued without reference to the Election Commission. It has also been indicated that certain types of activities such as extension or expansion of area of operation of any projects/schemes/programmes would require prior permission of the Election Commission.

On behalf of the Election Commission, it has been submitted by Mr. Ashok Desai, learned senior advocate, that the Election Commission had no objection to the continuance of the scheme which was in operation prior to 25th February, 2011. However, as far as extending the benefits to new sections of the populace of the State are concerned, the same would amount to disturbing the level playing field for all political parties in the election process. It was submitted that the same would come strictly within the prohibition indicated in paragraph 10(d) of the letter dated 5th March, 2009, written to the Chief Secretaries to the

Governments of all States and Union Territories, the Chief Electoral Officer of all States and Union Territories and all recognized political parties. Mr. Desai, submitted that the action taken by the Election Commission in requesting the State Government to defer the proposed extension of the scheme to new sections of the people, was neither arbitrary nor meant to prevent any benefit being given to such sections of the people, except during the period of election.

However, on behalf of the Principal Secretary, Department of Food and Civil Supplies, Government of Kerala, Mr. L. Nageswara Rao, learned senior advocate, urged that there was an area of doubt as to whether the Election Commission could have at all formulated the Model Code of Conduct, since it neither had any authority or power to do either under Article 324 of the Constitution of India or under the provisions of the Representation of the People Act, 1951. In fact, in support of his submission, Mr. Rao referred to the decision of this Court in Election Commission of India v. State Bank of India Staff Association Local Head Office Unit, Patna and others, reported in 1995 Supp (2) SCC 13, in which this Court held that Article 324 does not enable the Election Commission to exercise untrammelled powers and that the Election Commission has to trace its power either to the Constitution or the law made under Articles 327 or 328, as otherwise it would become an imperium in imperio. He has also referred to the decision of this Court in Ram Phal Kundu v. Kamal Sharma reported in 2004 (2) SCC 759, wherein in the context of the Election Symbols (Reservation and Allotment) Order, 1968, it was observed that applying the principle, which was laid down in

Taylor v. Taylor, (1876) 1 Ch 426 and Nazir Ahmad v. King Emperor, AIR 1936 PC 253, that the procedure to be followed has to be according to the one, which is laid down and not

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otherwise, the Court held that who should be deemed to have been set up by a political party has to be determined strictly in accordance with paragraphs 13 and 13-A of the Symbols Order and extrinsic evidence cannot be looked into for this purpose unless it was pleaded that the signature of the authorized person on Form B in question had been obtained by him under threat or by playing fraud upon him.

Mr. Rao, accordingly, submitted that since the decision to extend the scheme to new sections of the people was taken prior to the announcement of the elections in Kerala, it could not be said that the same had been hit by the Model Code of Conduct, which was promulgated subsequently.

In our view, the first submission made by Mr. Rao, requires further consideration as to the powers of the Election Commission under Article 324 of the Constitution and the provisions of the Representation of the People Act, 1951, though the same had not been raised before the High Court. However, as to the second contention, we are inclined to agree with Mr. Desai, at this stage, that what was intended by the Model Code of Conduct was that no action should be taken by a party in power in close proximity to the date on which the elections are announced so as to derive any benefit therefrom during the elections or to disturb the level playing field for all political parties involved in the electoral process. Furthermore, although, the administrative sanction to the proposed extension of the scheme to the new sections of the population was given on 25th February, 2011, prior to the announcement of the elections, its implementation could not have been possible prior to the announcement of the elections on account of the various procedures involved in giving effect to the same.

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In fact, the said position would be clear from the reference made by the State Government to the Election Commission seeking permission to implement the scheme and was also corroborated by the learned counsel appearing for the State admitting that the scheme, as extended, had been implemented only after the impugned judgment of the High Court. The decisions cited by Mr. Rao do not come to the aid of the respondents and are distinguishable on facts.

We have also heard learned counsel for the respondent No.1, and we are not convinced that any new point has been made out to take a view different from what we intend to take.

We, therefore, issue notice on the Special Leave Petition and direct that in the meantime, the impugned judgment of the High Court shall remain stayed. The respondents will be entitled to file their respective counter affidavits to the Special Leave Petition within four weeks. Rejoinder thereto, if any, may be filed within four weeks thereafter.

Liberty to mention.

(Chetan Kumar)
Court Master

(Juginder Kaur)
Court Master