

(2006) 03 MAD CK 0013

In the Madras High Court

Case No : Writ Petition No"s. 40026 of 2005 and 4323 of 2006

S.R. Balasubramaniyan, M.L.A.

APPELLANT

Vs

State of Tamil Nadu and Others

RESPONDENT

Date of Decision : 16-03-2006

Acts Referred:

Constitution of India, 1950 — Article 14, 243K, 243K(4)
Tamil Nadu Panchayats Act, 1994 — Section 239(2)

Citation : (2006) 3 CTC 129 : (2006) 2 LW 314 : (2006) 2 MLJ 244

Hon'ble Judges : A.P. Shah, C.J;Prabha Sridevan, J

Bench : Division Bench

Advocate : G. Masilamani for T. Sathiyamoorthy and P.P. Shanmugasundaram, for the Appellant; N.R. Chandran A.G. for Respondents 1 and 2 and K. Rajasekaran, for Respondent 3, for the Respondent

Judgement

A.P. Shah, C.J.—The Legislative Assembly of the State of Tamil Nadu passed the Tamil Nadu Panchayats (Second Amendment) Act,

2005 (Act 15 of 2005) amending the provision of Section 239(2) (b) of the Tamil Nadu Panchayats Act, 1994. This Act received the assent of

the Governor on 12th October, 2005, and was published in the Government Gazette on 13th October, 2005. Before we notice the amendment

made in the 1994 Act, by the said Amending Act, it may be appropriate to notice the provision of Section 239(2)(b) as it stood before the

amendment. Section 239(2)(b) provides that the State Election Commissioner shall hold Office for a term of two years, and shall be eligible for re-

appointment for two successive terms. The first proviso to Section states that no person shall hold office of the State Election Commissioner for

more than six years in the aggregate. The second proviso states that the person appointed as the State Election Commissioner shall retire from

office, if he completes the age of sixty two years during the terms of his office. By Tamil Nadu Act 15 of 2005, the words ""for two successive

terms"" and the provisos in Clause (b) of Sub-section (2) of Section 239 stood omitted and the amended section 239(2)(b) reads as follows: -

(b) The T.N. State Election Commissioner shall hold Office for a term of two years and shall be eligible for re-appointment.

In view of the amendment, it now turns out that the post of State Election Commissioner continues to be a tenure post i.e., for a period of two

years. However, the incumbent shall be eligible for reappointment without any limit of terms. Further, in view of the retirement age of 62 having

been deleted, a person of any age can be appointed to the post and reappointed without any age limit. The amending Act has been brought into

force with effect from 13th July 2005. The third respondent was functioning as the State Election Commissioner at the time the amending Act came

into force. He was first appointed on 15.2.2002 for a term of two years, and after the expiry of the said term, he was re-appointed. He attained

the age of 62 on 02.01.2006. Now he has been appointed for the third term for two years with effect from 2nd January 2006 to 1st January 2008.

The amended provision of Section 239(2)(b) as well as the order of re-appointment of the third respondent are being assailed in these petitions.

2. The main ground of attack is that in view of the amended Act, for the post of the State Election Commissioner, a retired civil servant of any age

can be appointed and also he can be reappointed for any number of terms at the will of the State Government de hors his age. This would lead to a

situation that if a State Government remains at office for successive terms which is possible in our democracy, the State Election Commissioner of

its choice, who may act according to the whims and fancies of it, may be appointed and reappointed till it lasts and also for any number of terms.

That would lead to complete erosion of the credibility of the office of the State Election Commission and the functions to be carried out by the

State Election Commissioner. Such appointment shall not be conducive to democracy and proper and impartial conduct of election which is the

foundation of Panchayat Raj. When enough and more officers within the normal superannuation age are available for such appointment, there is no

need to perpetuate the same person, or to appoint a person beyond retirement age to this constitutional and very important position, especially

when such person cannot be removed easily like a civil servant. The Constitution nowhere provides for appointment to the post of a civil servant,

government servant, public servant, or Judges of the High Courts and Supreme Court without any age limit or specific number of terms. The

amended Section 239(2)(b) is thus totally arbitrary and irrational and violates Article 14 of the Constitution.

3. A counter affidavit was filed on behalf of the State of Tamil Nadu by Shri Maqsood Ali Khan, Deputy Secretary to Government, Rural

Development Department, after rule nisi was issued in the writ petitions. It is stated in the affidavit that in the All India State Election

Commissioners Conferences held on 25.6.2003 and 21.2.2004 it was felt that the tenure and the maximum age limit of the State Election

Commissioners vary from State to State and therefore, it was suggested that there should be uniform tenure and period of office for State Election

Commissioners; that the Tamil Nadu State Election Commission accordingly suggested to the Government of Tamil Nadu to raise the age limit of

State Election Commissioner from 62 to 65 years so as to enable the local bodies to use his knowledge and experience gained over a period; that

the Government of Tamil Nadu therefore decided to remove the restrictions as to the age and as to the maximum period of holding the office of the

Tamil Nadu State Election Commissioner and amended Sub-section (2) of Section 239 of the Tamil Nadu Panchayats Act suitably for the said

purpose and that Article 243K(4) of the Constitution of India permits the State Legislature to make provisions with respect to matters relating to or

in connection with election to the Panchayat and as such, the Tamil Nadu Act 15/2005 is not violative of the Constitution of India as alleged. The

affidavit further states that general elections to the village panchayats, panchayat union councils and district panchayats are held once in five years

and the Tamil Nadu State Election Commissioner may not have an opportunity to conduct the general elections within the two successive terms of

two years of reappointment and therefore, to enable the Tamil Nadu State Election Commissioner to use his knowledge and experience gained

over a period to conduct atleast one general election to the said Panchayats, the Government decided to remove the restrictions as to the age and

as to the maximum period for holding the office of the Tamil Nadu State Election Commissioner and to amend Sub-section (2) of Section 239 for

the said purpose. The affidavit asserts that the impugned Act 15 of 2005 is not ultravires the Constitutional provisions contained in Article 243K of

the Constitution in as much as the Constitution does not provide any age limit for the post of State Election Commissioner.

4. An additional counter affidavit was filed on behalf of the State of Tamil Nadu and that affidavit was also sworn by Shri Maqsood Ali Khan,

Deputy Secretary to Government, Rural Development Department stating that the Government had a re-look into the matter and taken a decision

to fix an upper age limit for the Tamil Nadu State Election Commissioner as 68 years and the State is proposing to promulgate an Ordinance to

give effect to this decision. Since an amendment can be brought only by a legislation emergent steps are being taken to introduce the same by

promulgating an Ordinance. This affidavit came to be filed on 1st March 2006. Even before this affidavit was filed, adjournments were taken by

the State Government on the ground that the State Government was exploring the possibility of promulgating an Ordinance for fixing an upper age

limit to the post of State Election Commissioner. No Ordinance has been issued till date.

5. Mr. G.Masilamani, learned senior counsel appearing for the petitioner urged that the Election Commission is an independent body and its

independence is vital to free and fair elections which is a sine qua non for democracy. Hence, it is of paramount importance to the democracy

enshrined in our Constitution that its independence is not eroded in any manner. Learned counsel urged that by the impugned amendment, the post

of the State Election Commissioner is virtually converted into a life tenure without prescribing any age of retirement with the sole object of

continuing the present incumbent in the post of State Election Commissioner. The impugned amendment confers an unfettered and arbitrary power

in the hands of the Government and is violative of Article 14 of the Constitution. He submitted that the legislation is not in the interest of the general

public but for an individual's interest and any such legislation would be violative of Article 14 of the Constitution and has to be quashed. Learned

counsel also submitted that considering the position of the State Election Commissioner which is equated by the Constitution makers with the High

Court Judges in that he can be removed only by process of impeachment, any legislation which prescribes re-appointment to the post would be

invalid. According to the learned counsel, an appointee to the post with the knowledge that he would come back to his substantive post would be

susceptible to Executive and Ministerial influence, which he would find difficult to resist. In other words, he cannot be said to be independent and

impartial to discharge the vital functions of the Election Commission. Secondly, it would mean that the legislature could prescribe the term of office

into several slots of one year or even less, thereby placing the appointee perennially at the mercy of the Executive and making him implicitly carry

out the wishes of the Executive and allow great deal of room for Executive domination over the manner in which he performs his functions.

6. Mr. N.R.Chandran, learned Advocate General reiterated the defence taken by the State in the counter affidavit viz., that the intention of the

Legislature was only to provide an upper age limit for the State Election Commissioner with a view to use the experience of the incumbent in the

post and with this object, the provision relating to maximum age limit was deleted. Learned Advocate General hastened to add that the State

having become aware that there cannot be a tenure without any age of retirement, has decided to issue an Ordinance in order to provide the upper

age limit as 68 years. Learned Advocate General, however, vehemently contended that a provision for re-appointment of the State Election

Commissioner for one or more terms could not be said to be un-constitutional. He submitted that the status of irremovability has no nexus with the

tenure of the post and merely because section permits re-appointment for one or more terms, it cannot be branded as unconstitutional. He cited

several examples in respect of various posts providing for re-appointment of the incumbent at the discretion of the Government. In particular, he

highlighted the provision in the Administrative Tribunals Act providing that Chairman, Vice-Chairman or other member of the Administrative

Tribunal shall be eligible for re-appointment for another term of 5 years subject to age-limit of 65 years in the case of Chairman and Vice-

Chairman and 62 years in the case of the member. In this connection he placed reliance on the decision in Durgadas Purkyastha Vs. Union of India

(UOI) and Others, where the validity of the said provision has been upheld by the Supreme Court.

7. The Preamble of our Constitution proclaims that we are a Democratic Republic. Democracy being the basic feature of our constitutional set-up,

there can be no two opinions 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 with the task of holding elections 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 (See T.N. Seshan, Chief Election Commissioner Vs. Union of India (UOI) and Others, vide paragraph - 10). Dr.Rajendra Prasad while explaining the importance of independence of the post of Election Commissioner during the debate in the Constituent Assembly said (vide page 991 of Volume X of the Constituent Assembly Debates Official Report):

...We have provided another important authority, i.e., the Election Commissioner whose function it will be to conduct and supervise the elections to the Legislatures and to take all other necessary action in connection with them. One of the dangers which we have to face arises out of any corruption which parties, candidates or the Government in power may practice. We have had no experience of democratic elections for a long time except during the last few years and now that we have got real power, the danger of corruption is not only imaginary. It is therefore as well that our Constitution guards against this danger and makes provision for an honest and straightforward election by the voters. In the case of the Legislature, the High Courts, the Public Services Commission, the Comptroller and Auditor-General and the Election Commissioner, the Staff which will assist them in their work has also been placed under their control and in most of these cases their appointment, promotion and discipline vest in the particular institution to which they belong thus giving additional safeguards about their independence.

During the Constituent Assembly debates it was further highlighted by Dr. Ambedkar that it is absolutely necessary that the new machinery which has been set up, namely, the Election Commission should be irremovable by the executive by a mere fiat and therefore, the Chief Election

Commissioner has been given the same status so far as removability is concerned as has been given to the Judges of the Supreme Court (vide page 906 of Volume VIII of the Constituent Assembly Debates Official Report).

8. In the light of the above said discussions we may now examine the provisions of Article 243K of the Constitution. Article 243K reads as

follows:

243K. Elections to the Panchayats:

(1) The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayats shall be

vested in a State Election Commission consisting of a State Election Commissioner to be appointed by the Governor.

(2) Subject to the provisions of any law made by the Legislature of a State, the conditions of service and tenure of office of the State Election

Commissioner shall be such as the Governor may by rule determine;

Provided that the State Election Commissioner shall not be removed from his office except in like manner and on the like ground as a Judge of a

High Court and the conditions of service of the State Election Commissioner shall not be varied to his disadvantage after his appointment.

(3) The Governor of a State shall, when so requested by the State Election Commission, make available to the State Election Commission such

staff as may be necessary for the discharge of the functions conferred on the State Election Commission by Clause (1).

(4) Subject to the provisions of this Constitution, the Legislature of a State may, by law, make provision with respect to all matters relating to, or in

connection with, elections to the Panchayats.

9. Clause (1) of Article 243K vests vast functions including powers and duties in the matter of conduct of all elections to panchayats in the State

Election Commissioner. Clause (2) in terms provides that the State Election Commissioner cannot be removed except by the process of

impeachment, in like manner and on the like ground as a Judge of a High Court and the conditions of service of the State Election Commissioner

shall not be varied to his disadvantage after his appointment. Clause (4) empowers the legislature of a State to make provision with respect to all

matters relating to or in connection with the elections to the panchayats subject to the provisions of the Constitution. Thus, whenever a State

Government intends to make a law with respect to matters relating to or in connection with the elections to the panchayats, such law must be consistent with the constitutional limits and the policies.

10. When all Constitutional posts like Supreme Court Judges, High Court Judges, Chief Election Commissioner, Members of the Election

Commission, Chairman and Members of the Union Public Service Commission and that of the State Public Service Commissions, Comptroller and

Auditor General of India, all Civil Servants, Government Servants, Public Servants, including the experienced military personnel right from chief of

Army Staff to Sepoy etc. have age limit and or specific number of terms, the impugned provision of Section 239(2)(b) providing the post of State

Election Commissioner without age limit is wholly arbitrary, and cannot be countenanced as it is in violation of basic structure of the Constitution

viz., free and fair elections which is the foundation of the Constitution.

11. In this connection, the observations of the Supreme Court in K. Nagaraj and Others Vs. State of Andhra Pradesh and Another, are extremely material.

7. ... Barring a few services in a few parts of the world as, for example, the American Supreme Court, the terms and conditions of every public

service provide for an age of retirement. Indeed, the proposition that there ought to be an age of retirement in public services is widely accepted as

reasonable and rational. The fact that the stipulation as to the age of retirement is a common feature of all of our public services establishes its

necessity, no less than its reasonableness. Public interest demands that there ought to be an age of retirement in public services. The point of the

peak level of efficiency is bound to differ from individual to individual but the age of retirement cannot obviously differ from individual to individual

for that reason. A common scheme of general application governing superannuation has therefore to be evolved in the light of experience regarding

performance levels of employees, the need to provide employment opportunities to the younger sections of society and the need to open up

promotional opportunities to employees at the lower levels early in their career. Inevitably, the public administrator has to counterbalance

conflicting claims while determining the age of superannuation. On the one hand, public services cannot be deprived of the benefit of the mature

experience of senior employees; on the other hand, a sense of frustration and stagnation cannot be allowed to generate in the minds of the junior

members of the services and the younger sections of the society. The balancing of these conflicting claims of the different segments of society

involves minute questions of policy which must, as far as possible, be left to the judgment of the executive and the legislature. These claims involve

considerations of varying vigour and applicability. Often, the Court has no satisfactory and effective means to decide which alternative, out of the

many competing ones, is the best in the circumstances of a given case. We do not suggest that every question of policy is outside the scope of

judicial review or that, necessarily, there are no manageable standards for reviewing any and every question of policy. Were it so, this Court would

have declined to entertain pricing disputes covering as wide a range as case to mustard-oil. If the age of retirement is fixed at an unreasonably low

level so as to make it arbitrary and irrational, the Court's interference would be called for, though not for fixing the age of retirement but for

mandating a closer consideration of the matter. "" Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and

constitutional law and is therefore violative of Article 14; E.P. Royappa Vs. State of Tamil Nadu and Another, . But, while resolving the validity of

policy issues like the age of retirement, it is not proper to put the conflicting claims in a sensitive judicial scale and decide the issue by finding out

which way the balance tilts. That is an exercise which the administrator and the legislature have to undertake. As stated in "The Supreme Court and

the Judicial Function" Edited by Philips B.Kurland, Oxford & IBH Publishing Co., Page 13. ""Judicial self-restraint is itself one of the factors to be

added to the balancing process, carrying more or less weight as the circumstances seem to require.

8. We must therefore approach the problem before us with a view to determining whether the age of retirement has been reduced from 58 to 55

unreasonably or arbitrarily. Such a fixation of age would be unreasonable or arbitrary if it does not accord with the principles which are relevant for

fixing the age of retirement or if it does not subserve any public interest. On the other hand, the Ordinance shall have to be held valid, if the

fundamental premise upon which it proceeds has been accepted as fair and reasonable in comparable situations, if its provisions bear nexus with

public interest and if it does not offend against the constitutional limitations either on legislative competence or on the legislative power to pass laws which bear on fundamental rights.

12. It is, thus, clearly laid down by the Supreme Court that the proposition that there ought to be an age of retirement in public services is widely

accepted as reasonable and rational, and public interest demands that there ought to be an age of retirement in public services. The impugned

provision which gives power to the State Government to re-appoint a State Election Commissioner without any age limit or without any specific

number of terms is totally unreasonable, as it does not accord with the principles that are relevant for fixing the age of retirement nor does it serve

any public interest. On the other hand, the provision would confer an unfettered power on the State Government to appoint a retired Civil Servant

of any age for any number of terms at the whims and fancies of the State Government. We also find considerable merit in the argument of Mr.

G.Masilamani that considering the fact that the position of the State Election Commissioner is equated by the Constitution makers with the High

Court Judges any legislation conferring power on the State Legislature to make reappointment to the post would be violative of the scheme and

policy of the Constitution. In fact, we are informed that barring the State of Tripura in no other State Legislation there is a power for reappointment

to the post of State Election Commissioner. It is, however, not necessary to express any final opinion on this aspect as, in our opinion, the

impugned amendment which prescribes reappointment without any age limit and without specific number of terms is per se violative of Article 14 of

the Constitution. The provision would defeat the very purpose of constituting the independent office of the Election Commissioner. It would be,

therefore, just and proper that while retaining the amended provision prescribing the tenure of the State Election Commissioner for a term of two

years, the latter part of the Section i.e., the words ""and shall be eligible for reappointment"" can be legally and validly severed and must be struck

down, and accordingly that part of the Section is hereby struck down.

13. The writ petitions stand disposed of. Consequently W.P.M.P. No. 42919 of 2005 is closed. No costs.

Learned Advocate General requests that the present incumbent may be allowed

to continue for some time in order to enable the State Government to take appropriate action to fill up the post of State Election Commissioner. We feel that the request of the learned Advocate General is reasonable, and we allow the third respondent-State Election Commissioner to continue in the post for a period of four weeks from to-day.